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Argentina's Supreme Court and the Covenant

Submission to the Committee on Economic, Social and Cultural Rights

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Summary

This report highlights a group of Argentina's Supreme Court decisions that omit, contradict or construe in a retrogressive way the Covenant or the applicable General Comments. The Court has upheld a differentiated recognition of labor stability in the public sector ["Ramos" (2010); "Chafala" (2016)]. The right to strike has been attributed by the Court exclusively to formally-registered unions ["Orellano" (2016)]. An Executive decree –according to the Court– is an adequate instrument to completely suppress the police officers' right to form trade unions ["Sindicato Policial" (2017)]. The Federal Government has no obligation to ensure proper employment injury benefits for people who work for local governments under federally-funded income transfer programs ["Pineda" (2016)]. Alternative housing has not been ensured to children before judicially ordered evictions ["Escobar" (2013); "Plusfratria SRL" (2015)]. Class actions against electricity prices hikes for residential users have been denied exclusively on retrogressive constructions of legal standing ["Abarca" (2016)]. Persons with disability must prove lack of health insurance and personal inability to afford healthcare costs as a condition to require State-funded medical care ["P., A" (2015)]. The Court has not yet established a formal mechanism to track the situation in different provinces regarding access to legally admitted abortions ["F., A. L." (2012)].

Introduction

GIDES, an academic research group based at the National University of Córdoba (Argentina), submits the present report to highlight decisions made by the Supreme Court of Argentina (SCA) -the highest court in the country- on rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1].

In its 2011 Concluding Observations on Argentina, the Committee requested the State party to provide "comprehensive information about the application of the Covenant rights by the judiciary" (parag. 6). This report intends to complement the response included in Argentina's 2016 report. In that document, the State party describes only a few judicial decisions from different courts in no clear, chronological order. This response remains inadequate for assessing any progress in the implementation of the Covenant.

This report describes SCA decisions that do not properly apply the Covenant for one or more of the following reasons:

1) *omission*: the decision does not apply a relevant Covenant clause, or a relevant interpretation included in the Committee's General Comments;

2) *retrogression*: the decision applies or admits a legal text, a policy or a construction that curtails a preexisting level of enjoyment of a certain Covenant right;

3) *contradiction*: the decision goes against Covenant clauses or the Committee's General Comments.

SCA is the head of the Judiciary, one of the three branches of federal government in the State party (Argentinian Constitution [AC], art. 108). Just like Congress and the Executive, the Court is legally bound to give effect to the Covenant in its area of competence.

Argentina has a decentralized system of judicial review, therefore, any lower court judge is entitled to rule on the constitutionality of acts of Congress (statutes) or Executive decisions (decrees) (AC, art. 43). SCA will have the final judicial decision on the matter if the case reaches its jurisdiction through an appeal process. The declaration of unconstitutionality has only an *inter partes* effect, except for certain collective cases that have broader effects (*e. g.*, art. 43 of AC)[2]. However, SCA decisions have an impact that goes far beyond the parties[3]. As the court of last resort, SCA rulings strongly influence the

[1] All Supreme Court decisions are cited in this report with an abridged name and its date. Annex I includes full information on resolutions in alphabetical order and a link to the official digital version.

[2] When a judge or the SCA declare the unconstitutionality of a law or of an Executive resolution, it means that the rule will not be applied to the specific case. The declaration of unconditionality does not abrogate the questioned law or the resolution.

[3] Currently, SCA is a five-judge tribunal. Justices are nominated by the President, and a two-thirds vote by the Senate is required for confirmation. Juan Carlos Maqueda joined the Court in 2002; Ricardo Lorenzetti (Chief Justice) and Elena Highton de Nolasco, in 2004; finally, Carlos Rosenkrantz and Horacio Rosatti became members in 2016. Justices have life tenure but at 75 they must retire, unless the President asks the Senate to approve by a two-thirds vote a new five-year appointment, that can be repeated indefinitely (AC, art. 99.4). Between 1999 and 2017, this procedure was not applied, because the Court held the age limit had been

decision of lower courts (even though Argentina belongs to the Continental legal tradition, and does not have a formal *stare decisis* rule). In 1994, the ICESCR was endowed with constitutional rank. Therefore, it has to be considered and analyzed –in addition to the Committee's materials and comments- in deciding the constitutionality of any given rule or policy.

SCA –just like the other branches of the Argentinian government– is bound by international responsibility. It has the highest rank in the constitutional review process. Its decisions deeply influence the rest of the judiciary. For those reasons, the Committee should be aware of those Court decisions that show omissions, retrogressions or contradictions in the application of the Covenant.

The Supreme Court of Argentina and the Committee on Economic, Social and Cultural Rights.

In the past few years, SCA has held that the Committee is to be recognized as the "authoritative interpreter" of the Covenant in the international legal sphere. The Court has also emphasized that the Committee's construction of the ICESCR "must be considered since it is part of the 'full force of [the Covenant's] provisions' under the terms of [AC] art. 75.22"[4].

However, this position may be starting to change, as it is shown by the SCA's decision in "Ministerio" (2017). The Court ruled that the Constitution's public law principles define a "sovereign reserve sphere", to which international treaties –and the construction of derived legal obligations– must adjust (parag. 16). This argument was used to bar the full execution of a decision made by the Inter-American Court of Human Rights about the violation of rights enshrined in the American Convention on Human Rights (ACHR). The SCA voted for a retrogressive solution, since it went against its own previous rulings related to the Inter-American human rights system5 and to global protection mechanisms. In light of the "Ministerio" (2017) decision, the Court may soon change its stance on the binding nature of the Committee's constructions.

The following paragraphs describe SCA decisions that –by omission, retrogression or contradiction– depart from the Covenant clauses and the Committee's General Comments.

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illegally incorporated into the AC. Although the Court reversed its position in 2017, the age limit was not applied to Justice Highton de Nolasco because she was benefited a few days before by a lower court resolution that the State did not appeal.

[4] "Q. C." (2012), majority opinion, parag. 10.

[5] *See, v. gr.* , "Simón" (2005); "Mazzeo" (2007); "Rodríguez Pereyra" (2012).

Art. 7. The right to just and favorable conditions of work.

Public servants stability. Since 1957, art. 14 *bis* of AC grants public servants the right to stability in their positions. In "Madorrán" (2007), the Court clarified that stability means that no public employee could be dismissed without proper cause. Furthermore, citing art. 7.c of the ICESCR, the Court's majority added that this right is part of the right to "just and favorable conditions of work" that States must guarantee. The majority decision made no distinctions among public employees: the right to stability belongs to all of them. On the contrary, a concurring vote (written by Justice Highton and Justice Maqueda) raised the possibility of a differentiated treatment for certain employees, *e. g.* based on their contracts (parag. 10).

A few years later, the Court made two distinctions. In "Ramos" (2010) –and more recently, in "Galeano Torres" (2016)–, the SCA held that stability was not to be recognized for public employees under fixed-term contracts, even if those contracts are repeatedly extended for long periods. Therefore, these public servants may be dismissed with no proper cause and are only entitled to severance pay, just like private-sector workers.

This first distinction (between permanent and repeated-fixed-term public employees) is used to deny the right to stability to a certain group. It appears to be a retrogression from the 2007 decision, which made no distinctions among public servants.

The SCA made a second distinction. In "Luque" (2015) –and more recently in "Chafala" (2016)–, the Court ruled that workers at State-owned enterprises[6] have no right to stability. In the case of dismissal with no proper cause, employees are only entitled to severance pay.

Again, this differential treatment seems unfounded, since the State is the employer. In General Comment (GC) No. 23 (2016), the Committee has underscored the State obligation to "respect" just and favorable conditions of work is "particularly important when the State is the employer, including in State-owned or State-controlled enterprises" (parags. 58 and 14).

Lastly, decisions in "Ramos" (2010) and "Luque" (2015) contradict the nondiscrimination principle, enshrined in ICESCR, art. 2.2. SCA made unfounded distinctions among State employees in order to restrict the enjoyment of certain conditions of work (such as stability) for a selected group, while keeping the benefit for other groups.

[6] State-owned enterprises (*Sociedades del Estado*), according to art. 1 of Law 20.705, are companies that "without any private capital participation, are created by the National State, provincial states, municipalities, State agencies legally authorized for that purpose or companies that are constituted according to the present law in order to carry out activities of an industrial and commercial nature or to exploit public services".

Art. 8. The right to strike.

In "Orellano" (2016), the SCA held that only formally organized unions are entitled to exercise the right to strike. "Informal groups of workers", on the other hand, are not (parag. 14). By reversing a lower court ruling, the SCA upheld the dismissal of a worker who had taken part in assemblies at the workplace that had not been convened by a formally-registered union.

The Court stated that, according to art. 8 of the ICESCR, the right to strike belongs to trade unions, not to individuals (parag. 12). This understanding goes against the language of art. 8. In sections b and c, the article explicitly includes rights "of trade unions". Section d recognizes "the right to strike". It does not attribute this right to trade unions.

To reach its conclusion, the Court did not cite or analyzed GC No. 23 (2016), released 45 days before the ruling. This GC mentions the right to strike, but it does not define it as a trade union right. This relevant material was not considered by the SCA. Instead, the Court cited the Concluding Observations on Burundi (2015) and the Concluding Observations on Kazakhstan (2010). These two documents are not sufficient to settle the question for the Argentinian case[7]. For this reason, the Court's omission of relevant, contemporary documents such as the GC No. 23 (2016) is cause for legitimate concern.

To sum up, the reasoning in "Orellano" (2016) includes a *contradiction* with art. 8 language and the *omission* to analyze a relevant GC.

Art. 8. The right to form trade unions.

In "Sindicato Policial" (2017), a 3-2 majority of the Court held that the right of police officers to form a trade union can be suppressed through an Executive decree. The Court upheld the decision by the Buenos Aires provincial government to deny official recognition to a police union. A Governor's decree forbids police officers from taking part in "union activities".

Art. 8.2 of the ICESCR allows the State party to establish "lawful restrictions", but not to completely eliminate this right. Yet the tribunal based its reasoning (parag. 14) on art. 16.3 of the ACHR, which not only allows "legal restrictions" but also actual "deprivation" of the right of association in the case of police officers or members of the armed forces. In addition to that, the SCA considered that Executive decrees are adequate instruments to legally regulate this right (parag. 19).

The Court majority based its decision on ACHR –which also has constitutional rank in Argentina– because this regional Convention admits a more restrictive regulation of the right at stake. The SCA ruled in *contradiction* to art. 8.2 of the ICESCR, which does not allow the complete elimination of the right to form trade unions.

[7] In the Concluding Observations on Burundi the right to strike is included among "trade union rights" (parag. 31), while the observations on Kazakhstan do not define it as such (parag. 22).

Art. 9. The right to social security.

Disability benefits for foreign residents. In "Reyes Aguilera" (2007), the Court majority held as unconstitutional the 20-year residence requirement imposed to foreign citizens as a condition to receive non-contributory disability benefits. Native Argentinians, on the other hand, are not subject to residence requirements to receive the same benefits. The decision included explicit references to art. 9 of the ICESCR and to GC No. 5 (1994).

A few years later, the Court applied the same holding to a new case, "Fernández Machaca" (2016). This time two of the Justices added a caveat: the rule may only be applied to this case, and it could not be extended to similar situations, because relevant circumstances may vary and lead to a different outcome. Since this is true for almost all SCA decisions, this explicit warning may be read as a sign that upcoming decisions may be different[8].

The Court in "Fernández Machaca" (2016) did not cite or analyzed GC No. 19[9]. A relevant section of this GC reads: "All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination on any of the grounds prohibited under article 2, paragraph 2, of the Covenant" (parag. 23). National origin is one of the prohibited grounds. In addition to this, GC No. 19 highlights the need for non-contributory schemes –such as the one discussed in this case– in order to achieve universal coverage.

To sum up, "Fernández Machaca" (2016) shows the *omission* of GC No. 19 (2007) as a relevant material that the Court should have discussed.

Employment injury benefits. The right to social security includes, according to GC No. 19 (2007), the coverage of "costs and loss of earnings" for workers who are injured "in the course of employment or other productive work", and benefits should not be subject to contribution payments (parag. 17).

In Argentina, many people perform "productive work" for various State agencies and departments as part of income transfer programs focused on the unemployed population. The SCA in "Pineda" (2016) considered the case of a person who suffered an employment injury while working for a local government as part of a federally-funded income transfer program. The Court held that the Federal Government, in spite of its involvement with the program, was not legally bound to provide employment injury benefits. The question was not framed as a social security issue. No reference was made to GC No. 19 (2007) in deciding the case. The analysis relied only on rules of civil law.

The Court's ruling exempts the Federal Government from any legal obligation regarding the injured worker. People included in income transfer programs are left without

[8] The Justices that signed the majority vote in "Reyes Aguilera" (2007) are no longer members of the Court.
[9] GC No. 19 was issued after "Reyes Aguilera" (2007).

the coverage required by art. 9 of the ICESCR in case local governments fail to ensure it.

Domestic law (federal system, civil code) is used to exclude the State party's international responsibility under art. 9 of the ICESCR. According to art. 2 of the Covenant and art. 27 of the Vienna Convention on the Law of Treaties, those arguments are not acceptable.

"Pineda" (2016) shows a *contradiction* with art. 2 of the Covenant and the *omission* of due consideration of a relevant GC.

Pension system. In "García, Guillermo" (2016), a retired person filed a claim against certain effects of the private pension plans nationalization. The Court dismissed the claim and held no one is entitled to a certain pension regime. Furthermore, the ruling acknowledged that Congress has a wide range of options in that area. No references to GC No. 19 (2007) were made in the decision. In particular, the non retrogression principle (GC No. 19, parag. 42) was not considered in reviewing the new nationalized system or in defining the scope of Congressional authority.

A similar objection may be made to "Deprati" (2016). In this case, the Court once again admitted –in an *obiter dictum*– Congress's ample powers in designing pension systems. It also made clear that there were no objections "in principle" to a privately run program (parag. 10). The SCA made no reference to GC No. 19 (2007) and it did not ponder the relevance of the non retrogression principle.

Art. 11. The right to adequate housing.

Justiciability. In "Q. C." (2012), the SCA acknowledged –citing art. 11 of the ICESCR and GC No. 4 (1991)– the right to adequate housing and the State obligation to protect especially vulnerable groups. The Court ordered the Government of the City of Buenos Aires to provide adequate housing to a homeless woman and her son, who is affected by a severe disability. Counseling and other social assistance measures were also ordered.

However, the majority vote underscored (parag. 11) that this right is not always judicially enforceable. Since it involves the use of public funds, it is up to Congress and the Executive to fulfill the right to adequate housing. Judicial intervention proceeds only when those two Government branches fail to ensure a "minimum guarantee". This happened in the case examined by the Court: there was "a grave threat to the very existence of the person", who was in a "desperate" situation (parag. 12).

This decision redefined the judicially enforceable minimum content of the right to housing. The Court indicated that it includes only the protection of the right to life ("existence"). In defining this core content, the Court did not analyze GC No. 3 (1990), GC No. 4 (1991) or GC No. 9 (1998). All of them are relevant to discuss the scope of the right to housing and its justiciability (*vid.* parags. 10 and 11, GC No. 9).

Forced evictions. In 2008, the Federal Public Defender instructed all public defense lawyers –through Resolution 1119/08– to intervene in eviction cases where children were involved to ensure the integral protection of children's rights.

In at least two cases, the SCA refused to admit the petitions filed by public defenders, who asked the Court to suspend evictions until alternative housing for the children was ensured.

In "Escobar" (2013), eviction was ordered as part of a criminal process against illegal occupiers. The public defender asked to intervene because there were children living in the house. The Court ruled children had no standing in the process since they did not have a legal right to live there. According to the ruling (parag. 1), the GC No. 4 (1991) only applies to lawful occupiers. The tribunal denied standing to the public defender and upheld the eviction order. It also instructed the lower court to issue a formal notice describing the children's situation to welfare agencies (parag. 3), without delaying the eviction.

Two years later, in "Plusfratria SRL" (2015) the SCA confirmed this stance for an eviction, this time in the context of a civil lawsuit. The public defender asked for a suspension of eviction because many children lived in the building. The lower court denied standing. The defender appealed to the SCA. Through a procedure known as "writ of certiorari", the Court dismissed the claim without discussing the merits. The eviction went on and the defender had no intervention in the process.

In both decisions, the SCA omitted any consideration of GC No. 7 (1997). A relevant passage of this GC reads: "Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing [...] is available" (parag. 16).

The Court rulings in "Escobar" (2013) and "Plusfratria SRL" (2015) not only denied standing to institutions that intended to represent affected children, but also failed to guarantee the rights of evicted people who were left homeless.

The SCA stance departs from GC No. 7 (1997) and from the criteria set by the Committee in its Communication 005/2015[10], issued on June 20th, 2017. According to this communication, the Spanish State violated a family's human rights because there was no alternative housing provided before eviction from a rented room in a flat. The Committee admitted the court decision was legal according to Spanish law, but highlighted that the State party had to ensure alternative housing, to the maximum of its available resources.

These findings confirm that the SCA rulings in "Escobar" (2013) and "Plusfratria SRL" (2015) *contradict* the Committee's construction on the right to adequate housing.

[10] Available at: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ESP/E_C-12_61_D_5_2015_26006_S.docx

Affordability of housing: energy services. In 2016, the Ministry of Energy and Mining established –through resolutions 28/2016 and 31/2016– new natural gas tariffs, without a previous public hearing. Various consumer organizations filed judicial actions on behalf of all affected users (according to art. 43 of AC), demanding the suspension of price hikes until a public hearing was held. The issue eventually reached the SCA.

In "CEPIS" (2016), the Court struck down the new prices, but only for residential users. The decision (parag. 33) cited GC No. 4 (1991) and linked the right to housing to the access to "safe drinking water, energy for cooking, heating and lighting". According to the SCA, household costs associated to these services should not threaten or compromise "the enjoyment of other basic needs". The decision reaffirmed that affordability of household costs is an element of the right to adequate housing. It should be taken into account by authorities in defining utility prices.

Nineteen days later, "Abarca" (2016) refused to consider a similar claim on new electricity tariffs. The Ministry had also –through resolutions 6/2016 and 7/2016– increased these prices with no public hearing. Consumer organizations, legislators and social organizations sought collective judicial relief just as it had been done with natural gas tariffs. Lower courts granted the suspension of the new prices.

The SCA reversed the suspension and denied standing to the plaintiffs[11], without considering the merits of the case. Legislators had also filed the claim as individual users (parag. 1), which in these cases may represent users as a whole (AC, art. 43). The Court omitted any discussion on this crucial issue. The approach to standing was narrower than the one adopted a few days before in "CEPIS" (2016), although the question was the same: affordability of household costs.

"Abarca" (2016) departs from the State duty to provide effective judicial protection. It also affects the principle of non discrimination developed in GC No. 9 (1998), since it treats differently natural gas users and electricity users. Finally, this decision does not include any reference to GC No. 4 (1991), which was an important foundation for the ruling in "CEPIS" (2016). Electricity is one of the services that provide "energy for cooking, heating and lighting". For that reason, access to electricity is crucial in ensuring that people have an effective enjoyment of the right to adequate housing.

Art. 12. Right to health.

The Court has issued a series of retrogressive decisions that go against the progressive realization (art. 2, ICESCR) of the right to health. The reference point is to be found in "Campodónico" (2000), one of the early rulings that clearly acknowledged a justiciable right to health. In that case, the SCA held the Federal Government was responsible for the life and good health of a child who had lost his health insurance.

[11] The SCA only admitted that one of the plaintiffs, a social sports club, may have standing to initiate a collective claim, but it remanded the question to the lower court (parag. 29).

According to that decision, the State had to ensure the right to health of a person with disabilities even through positive acts when that person is under extreme conditions. This does not eliminate the obligations of local governments, union-controlled health insurances and private providers.

Justiciability of the right to health. "Defensoría Pública" (2015) discussed a claim on health services delivered by Provincial providers under a federally-funded program. The Court ruled that the plaintiff, who was a person with disability, must file two different claims. One should be initiated against the Provincial Government, before a local judge, and another one, against the Federal Government before federal courts.

Invoking the federal nature of the Argentinian State, the Court assigned priority to competence issues over the effective enjoyment of the right to health. The affected person is forced to initiate two legal actions before two different courts.

This stance differs from the holding in "Campodónico" (2000), where the SCA focused on fulfilling the right to health and left the competence question temporarily aside. "Defensoría Pública" (2015) entails a retrogressive construction of the right to health: the debate over specific competences prevails over the need to ensure an effective enforcement of the right. The SCA has held this retrogressive position at least since 2012. In these cases, no reference to the GC No. 14 (2000) is made. This constitutes an *omission* of relevant materials in defining the right to health.

Right to health of persons with disability. The Court decision in "P., A." (2015) also appears to be retrogressive. In addition, it triggered the application of its holding to a series of cases. A person with disability required the full medical coverage necessary to improve her condition.

The Court, departing from the holding in "Campodónico" (2000), ruled that proving the infringement of the right to health was not enough to hold the Federal Government responsible. In a strict construction of applicable statutes, the Court concluded that the plaintiff also had to prove lack of health insurance and personal inability to afford the costs of treatment.

In a retrogressive position, the SCA added two new conditions to require State actions to fulfill the right to health. "P., A." (2015) includes no mention of GC No. 14 (2000). The decision marks a *retrogression* from previous rulings and *omits* a relevant material prepared by the Committee.

Right to sexual and reproductive health. Settling a long debate on the construction of a Criminal Code clause, in "F., A. L." (2012) the Court made clear that abortion cannot be criminalized when the woman becomes pregnant from rape. In the same decision, it urged local governments to take measures to eliminate restrictions on access to legally admitted abortions and to ensure health workers may properly exercise their right to conscientious objection.

Several obstacles are still in place: various provincial regulations embrace different constructions of the Criminal Code and adopt different definitions of conscientious objection. The Court has not established any follow-up procedure to track the situation in every province in order to fully enforce the right to sexual and reproductive health. This is a State duty, according to GC No. 14 (2000) and GC No. 22 (2016).

List of issues

In light of the information provided in this report, we suggest the Committee request answers from the State party to the following questions:

1) What actions will be taken to promote due consideration of General Comments, Concluding Observations and Optional Protocol Communications in Supreme Court rulings?

2) How will the State party ensure equal conditions of work –including the right to stability– to all public employees, including those working under repeated-fixed-term contracts and those working for State-owned enterprises?

3) What will the State party do in order to ensure a construction of the right to strike consistent with all applicable General Comments?

4) What is the State party's stance on police officers' right to form trade unions according to art. 8 of the ICESCR?

5) How will the State party ensure all policies and decisions on disability benefits for foreign residents are consistent with General Comments No. 5, 9 and 19?

6) What actions will the State party undertake to provide adequate employment injury benefits to people working under income transfer programs?

7) What measures will be taken to prevent retrogressive reforms in the pension system?

8) Are there any specific mechanisms to ensure that alternative, adequate housing is provided before evictions, specially when children are to be evicted?

9) What will the State party do to keep household costs affordable, especially in the case of energy costs?

10) Will the State party require persons with disability to prove lack of health insurance and personal inability to pay as conditions to obtain State-financed medical treatment?

11) What specific measures will the State party take in order to follow-up the effective implementation of the Court's ruling on legally admitted abortions?

Córdoba (Argentina), August 18th, 2017.

About GIDES

In 2012, GIDES [ˈxiðes] (*Grupo de Investigación en Derechos Sociales* / Research Group on Social Rights) started its work. The Group analyzes Argentina's social and labor policies from a human rights perspective, with emphasis on economic, social and cultural rights. Findings are published in scientific journals and submitted to conferences.

Currently, the Group has sixteen members, from advanced undergraduate students to tenured faculty to independent legal practitioners. It is based at the *Centro de Investigaciones Jurídicas y Sociales* (Center for Legal and Social Research) of the *Universidad Nacional de Córdoba* (National University of Córdoba). The Group does not represent the Center or the University. This report solely reflects the Group's findings and conclusions. More information about GIDES is available at:

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ANNEX I

SUPREME COURT DECISIONS

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