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# Sub-National Constitutionalism in Argentina. An Overview

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## Abstract

Argentine federalism and sub-national constitutionalism is a very interesting case study for anybody trying to establish a federal system in any country around the world. Not because of its success, but precisely because of its failure.

A federation on paper, Argentina is a highly centralized country, in which economic dependence of the Provinces from the central government has destroyed any kind of autonomy of the sub-national entities.

This article aims to investigate the most important features and contradictions of the Argentinean federalism

## Key-words

Argentina, federalism, subnational constitutionalism



## 1. Historical Background

Argentina has one of the oldest federal systems in the world. The original framework was established in the Constitution in 1853. Although the Constitution has been amended 5 times<sup>I</sup>, the basic structure adopted in the original Constitution remains unaltered. It was created as a sort of compromise between two opposing forces that had fought a long civil war: the centralists or *unitarios* and the federalists or *federales*. The tension between both forces surfaced almost at the very beginning of our independent life, when the country cut its ties with Spain on May 25, 1810<sup>II</sup>.

The old Spanish colonial administration was highly centralized. Almost all authority, saved for purely municipal matters, was in the hands of the Viceroy in Buenos Aires. In addition, the Spanish authorities imposed a strict control over foreign trade, which could only be carried through the port of Buenos Aires. This provoked stagnation of the economies of the provinces and favoured an unequal development between Buenos Aires and its sisters. The problem would eventually become more acute in the future and is currently one of the main factors of distortion of the federal system.

On the other hand, the disappearance of the central authority of the Viceroy brought a greater degree of autonomy to the provinces, which slowly started to develop their own political institutions<sup>III</sup>. Thus, the tradition of centralization, inherited from Spain, was counterbalanced by the decentralization experienced during the period between the May Revolution and the enactment of the Federal Constitution in 1853.

From the very beginning, some of the founders of the country regarded the United States federation as a model, whose principles should be followed in the constitutional organization of the country<sup>IV</sup>. Mariano Moreno, one of the main actors of the May Revolution, even prepared a draft constitution based on the United States Constitution<sup>V</sup>. However, strong forces opposed this vision and its mentor was forced into exile<sup>VI</sup>.

The confrontation continued for over 40 years, becoming at times a bloody civil war. In that period, two attempts were made to enact a national constitution: in 1819 and in 1826. Both constitutions created a centralized government sitting in Buenos Aires, the former



quasi monarchical with the expectation of inviting a European prince to become king of the country.

Both constitutions were roundly rejected by the majority of the provinces. After the rejection of the 1826 Constitution, the national authority was dissolved and the provinces were left to govern themselves. But already after the rejection of the Constitution of 1819, some provinces had started to enact constitutional documents. The first of those documents was the Provisional Statute of the Province of Santa Fe of 1819<sup>VII</sup>, followed by the Constitution of the Federal Republic of Tucumán in 1820 and the Constitution of the Federal Republic of the Province of Córdoba in 1821<sup>VIII</sup>. Other constitutional documents were enacted in most of the provinces until the enactment of the Federal Constitution in 1853.

The importance of those early documents does not rest in their particular provisions or structures, which in most cases were extremely elementary. In fact, none of those documents inspired any provision of the Federal Constitution<sup>IX</sup>. However, they are evidence of the high degree of autonomy enjoyed by the provinces during the period 1810-1853 and they mark the date of birth of sub-national constitutionalism in Argentina. It predates national constitutionalism.

As we stated above, the federal constitution was adopted in 1853, creating the Argentine Confederation, which in fact was a federal state, rather than a confederation of states. However, at that time, the Province of Buenos Aires seceded and remained separated from the rest of the country until 1860, when, after a short war between Buenos Aires and the Confederation<sup>X</sup>, the former was allowed to propose amendments to the Constitution and the country was reunited. The importance of those amendments, in particular regarding federalism, has led many authors to refer to the original constitution as the Constitution of 1853/60.

This historical evolution has great importance for understanding Argentine federalism. Argentina is not a centralized country which underwent a devolution process, by which the central government assigns some of its powers to the local governments. In Argentina, the provinces predated the federal government and in fact created it, by delegating some of their powers to a common government. But, in doing so, they reserved for themselves the vast majority of the governmental powers.



## 2. The Argentine Federal System

When a new attempt was made to enact a Constitution at national level in 1852, its drafters carefully tried to combine the opposing forces of centralization and federalism, creating a federal state, as opposed to both, a confederation or a unitary state. In a sense, this process is very similar to the one experienced by the United States of America when, after the failure of the Articles of Confederation, a strong federal government was created.

Our founders used the Constitution of the United States as a model. This influence has been discussed a great deal, with many authors denying the fact that it occurred. But as we have proven with great amount of evidence, such denial is based on political reasons (what we have called the “anti-American obsession”) and not on facts. Of course, there are differences between both constitutional systems, but those differences have been greatly exaggerated.

The basic principles on which both systems are based remain identical:

- (i) A written constitution which is a legal instrument with supremacy over the rest of the legal system and not a mere political document without legal value;
- (ii) A government of enumerated and limited powers;
- (iii) The separation of powers with its checks and balances;
- (iv) Presidentialism, with the popular election of the President, whose term of office is independent from that of the Legislature;
- (v) Federalism, with two distinct levels of authorities and jurisdictions, which are autonomous each in its respective area of competence;
- (vi) The distinction between constitution making power and constituted powers;
- (vii) Judicial review of the constitutionality of laws; and
- (viii) A bill of rights directly enforceable by the courts which works as a limit for the government.

This undeniable fact has been forgotten and our Constitution has been wrongly construed, and European doctrines, which are alien to our system, have been applied. French administrative law, which denied judicial review and established a hierarchical and centralized system, has been consistently applied in Argentina to justify powers not conferred to the Federal Government. More recently, the Spanish Constitution has been



used as a model, ignoring the fact that Spain is a centralized country that has been decentralized in autonomous regions, a procedure exactly opposite to what occurred in Argentina, where the provinces concurred in creating the federal authority. This fact is of great importance and should not to be overlooked. The basic constitutional principle regarding federalism in Argentina is that, like in the United States, the provinces retain all powers not delegated to the federal government. Article 41 of the Argentine Constitution, which regulates environmental protection and was incorporated in the 1994 Constitutional Amendment, is based in article 149.1.23 of the Spanish Constitution and attributes to the Federal Government the power to enact legislation containing the minimum protection standards applicable throughout the entire country. The provinces may enact legislation complementing those minimum standards. This system of distribution of competences is alien to Argentine federalism. It is a consequence of the Spanish system, in which the distribution of competences is not fixed in the Constitution but may be determined by the *Cortes Generales* when approving the *Estatutos Autonómicos*. In Argentina, the distribution of competences is fixed in the Constitution and both the Federal Government and the Provincial Governments have little or no leeway (at least theoretically) for modifying it. Section 41 of the Argentina Constitution introduces a different type of distribution of competences, one that is not determined by the Constitution and may be modified by the Federal Congress.

The Constitution acknowledges the pre-existence of the provinces and creates a federal government with enumerated and limited powers. In our system, two different authorities coexist: the federal government and the provincial governments<sup>XI</sup>. Each government has its own area of authority, which, theoretically, may not be curtailed by the other. Section 121 of the Constitution establishes the main principle of Argentine federalism:

*The Provinces retain all powers not delegated by this Constitution to the Federal Government, and those they have expressly reserved by special covenant at the time of their incorporation.*

This section was adopted in the original Constitution in 1853 and has remained unaltered until today. It makes clear that the residual power remains with the provinces. Unlike the devolution process of certain European countries, the powers of the federal



government come from the provinces through the Constitution. In case of doubt, the interpretation must be in favour of the authority of the provinces.

Gorostiaga, the main drafter of the Constitution, explained this feature in the following words: “The authority delegated by the Argentine people in the Constitution has been conferred upon two entirely different governments: the national and the provincial governments. Since the national government has been created to respond to great general needs and to care certain common interests, its powers have been defined and are small in number. On the contrary, since the provincial government reaches all parts of society, its powers are undefined and great in number, extending to all matters of business and affect the life, liberty and prosperity of the citizens. The provinces retain all the power not delegated to the federal government. The government of the provinces is the rule and shapes the common law of the land. Federal law is the exception”.

As we anticipated above, this key principle has been neglected in practice and, consequently, its foundations have been corroded. Federal law has become the rule and provincial law is the exception.

### 3. The Basic Rules on Federalism in the Argentine Constitution

Federalism appears from the very beginning in the Argentine Constitution. The preamble makes clear that the delegates to the Constitutional Convention had been appointed by the provinces. Section 1 states that Argentina adopts a republican representative and federal system of government. Section 5 of the Constitution introduces what has been called the “federal guarantee”. Pursuant to such provision, the provinces shall enact a provincial constitution pursuant to the republican representative system of government, in which they shall abide by the principles, declarations and guarantees contained in the Federal Constitution and shall organize the judicial system, the municipal government and basic education. Under these conditions, the federal government warrants the Provinces the free exercise of their institutions.

Pursuant to the original Constitution of 1853, the Provincial Constitutions had to be submitted to the Federal Senate for approval. However, this requirement was eliminated in the 1860 constitutional amendment, thus reinforcing the autonomy of the Provinces.



Sections 122 and 123 of the Federal Constitution reassert the principle stated in Section 5: the former provides that the Provinces create their own local institutions and elect their own authorities, without any intervention of the Federal Government. The latter repeats the requirement for the Provinces to enact their own constitutions.

Section 31 of the Federal Constitution contains the supremacy clause, pursuant to which federal legislation (including the Federal Constitution, federal laws and international treaties entered into by the Federal Government) have priority over provincial legislation. However, this provision must be construed in accordance with the principle that all powers not delegated to the Federal Government are retained by the Provinces. Thus, not all legislation passed by the Federal Government has a higher rank than provincial legislation. Only legislation enacted in accordance with the Federal Constitution, i.e. dealing with matters under federal jurisdiction, is supreme. Otherwise, the supremacy clause would destroy federalism by authorizing the Federal Government to regulate matters not delegated to it by the Provinces.

As we stated above, the general principle is that the provinces retain all powers not delegated to the Federal Government. Following such principle, the Constitution enumerates the exclusive powers of the Federal Government, which may not be exercised by the Provinces. In addition, there are powers retained by the Provinces, powers that can be exercised both by the Provinces and the Federal Government, powers that have to be exercised jointly by the Federal Government and the Provinces and powers that can be exercised exceptionally either by the Federal Government or by the Provinces.

Mainly, following the United States example, the exclusive powers of the Federal Government are related to foreign and military affairs and interprovincial matters. However, there are matters which, unlike in the US system, have been delegated by the Provinces to the Federal Government. For example, the Federal Congress is empowered to enact the Civil, Commercial, Criminal, Mining and Labour Codes which shall be applicable in the entire country. Notwithstanding, the Constitution makes clear that, although enacted by Congress, the codes do not constitute federal legislation. They are considered common legislation, to be applied and construed by the provincial courts. Their application does not give jurisdiction to the federal courts.



The Provinces are autonomous and deal with their matters independently from the Federal Government. However, section 6 of the Constitution entitles the Federal Government to intervene in a Province to guarantee the republican form of government or in case of foreign invasion and, at the request of the provincial authorities to reinstate them had they been deposed. This procedure, called “federal intervention” was viciously used by the Federal Government throughout Argentine history, as an excuse to replace duly elected provincial governments which the Federal Government disliked. The misuse of such procedure is one of the causes of the failure of federalism in Argentina. In addition, the Supreme Court ruled that the decision to intervene a Province is a political question and not subject to judicial review, a doctrine which in fact gave the Federal Government a blank check to use such procedure discretionally. The 1994 Constitutional Amendment made it clear that Congress is the only one entitled to decide a federal intervention and that the President is not allowed to intervene a Province by decree.

Federalism is also combined with judicial review of the constitutionality of laws, decrees and other types of legislation. This combination means that any court, whether provincial or federal, is entitled to review the constitutionality of any piece of legislation or action by the Government (both Federal and Provincial) in any given case. Like in the United States, an actual case is required, in which a party invokes a damage caused by the challenged legislation. But the challenge must be incidental and may not be abstract. In other words, the case brought before a court must not have as its main purpose the declaration of unconstitutionality. Cases started in a provincial court must be finally decided in those provincial courts, and only after a judgment is issued by the relevant Provincial Supreme Court, can appeal be made to the Federal Supreme Court. As it is easily recognizable, the system described above followed the US example very closely.

Another important feature of Argentine federalism is the Senate, which has also been modelled following the US example. In the Senate, all Provinces have equal representation. Until the 1994 constitutional amendment, each Province appointed 2 senators. The referred amendment increased such representation to 3. Originally, the senators were elected by the Provincial legislatures. Since 1994, senators have been popularly elected, two of them corresponding to the most voted list of candidates and the remaining to the second most voted list of candidates. This system reflects the fact that the senators no



longer represent the interests of their Provinces, but the political parties to which they belong.

As in the United States and unlike the European systems, the Senate has equal standing to the House of Deputies. Although each chamber has distinct powers in certain matters, the consent of both Houses is required for the approval of any kind of legislation. The distinct powers referred to above are only with respect to bills of attainder, which have to be initiated in the Lower House, and certain consents for the appointment of judges and other officers, which are exclusive of the Senate. Additionally, the impeachment process has to be initiated in the House of Deputies, but it is the Senate that acts as tribunal. There are no matters of legislation reserved for approval by only one of the Houses.

#### 4. Provincial Constitutionalism in Argentina

Argentina is composed of 23 Provinces and the City of Buenos Aires. Although the City of Buenos Aires is not a Province, it has a special status under the Federal Constitution which allows it to be considered a sub-national entity for the purpose of the study of sub-national constitutionalism in Argentina. In fact, the Federal Constitution, after its amendment in 1994, gave the City of Buenos Aires much broader powers than any other city or municipality in Argentina<sup>XII</sup>. The City of Buenos Aires even elects senators for the Federal Senate and representatives to the House of Deputies, which have exactly the same rights as those appointed by the people of the other 23 provinces.

Usually, the provincial constitutions have been drafted, enacted and amended by conventions specially elected for such purpose. One notable exception occurred in 1949 as a consequence of the amendment of the Federal Constitution. The Federal Convention which approved such amendment, known as the Peronist Constitution, granted a one-time authorization to the Provincial Legislatures to amend the Constitutions of their respective Provinces to reflect the changes made to the Federal Constitution. This authorization was part of the effort of a fascist government<sup>XIII</sup> to impose a model of constitution tailored to perpetuate its authoritarian rule.

In some Provinces, legislatures are entitled to make amendments to one or two articles of the Constitution without having to convene a convention, but such amendments need to be approved on a referendum by the people of the Province.



The system of government adopted at federal level greatly influenced the Provincial Constitutions that were enacted after the Federal Constitution entered in force in 1853. They all adopted a system of separation of powers that resembles the American system of separation of powers, although they are not required to do so. The obligation set forth in section 5 of the Federal Constitution, that the Provinces enact their constitutions pursuant to the republican representative form of government, doesn't mean that they have to exactly replicate the provisions of the Federal Constitution.

Following the system separation of powers of the Federal Constitution (and also the examples of the States' Constitutions in the United States of America, the Provincial Constitutions created three separate branches with mutual checks and balances: the legislative, executive and judicial branches.

The majority of the Provinces (15) and the City of Buenos Aires have unicameral legislatures, although 8 Provinces have bicameral legislatures, which replicate the Federal Congress with a Senate as upper house and a House of Deputies or Representatives as the lower house.

Professor Hernández has stated that a federal system does not require the existence of bicameral provincial legislatures, as shown by the example of Germany and Brazil<sup>XIV</sup>, an opinion with which we concur. It is a matter of constitutional design that does not affect the foundations of a federal system. In fact, a provincial senate in small sub-national entities does not make much sense, although that does not mean that a unicameral legislature should be the rule. Other reasons, besides territorial representation, may justify the existence of bicameral legislatures<sup>XV</sup>.

Where a provincial senate does exist, it usually has similar powers to those of the Federal Senate. For example, they are required to give consent to appointments of judges. In addition, they act as tribunals in the impeachment process.

A Governor is entrusted with the executive power in all the Provinces, except in the City of Buenos Aires where the head of government receives the title of chief of government. The Governor is the highest officer in the Province and has powers very similar to those given to the President of the Republic to exercise the executive power. Governors are heads of government and the top ranking officer in the provincial administration. As the President, they have the right to submit bills to the Legislature for



discussion and approval and have veto right over any legislation approved by the Legislature.

They also have the power to issue decrees implementing legislation duly enacted by the Legislature and, in certain Provinces, to issue legislative decrees in cases of emergency, a power which has been extremely abused both at federal and provincial level. This abuse has led to the Governors becoming the main legislator at provincial level, which completely subverts the system of separation of powers. This may not raise concerns in a parliamentary system, at least from a theoretical point of view. In such type of government, the issuance of legislative decrees by the cabinet, which in the end is a committee of the parliament, doesn't create much tension in the system, provided there is no abuse. In addition, the system provides a solution in case of a fundamental disagreement between the cabinet and the parliament by way of a vote of no confidence or the dissolution of the parliament. In a system of separation of powers, the exercise by the executive branch of powers that belong to the legislative branch creates a tension with no escape. The legislature is not entitled to remove the executive, except through impeachment which is an extremely cumbersome procedure. On the other hand, the executive is not entitled to dissolve the legislature. Thus, such a tension has no gateway. In practice, it has led to the President and the Governors becoming quasi absolute rulers and Congress and Provincial Legislatures being mere registrars with no real power to counterbalance the executive.

Governors are popularly elected. In a few cases, notably the City of Buenos Aires, an absolute majority is required to be elected governor. Failure to obtain such a majority, leads to a second voting or *ballotage* (to use the French word) between the two most voted candidates. But the general rule is that, in most of the Provinces, a simple majority suffices to be elected governor. In all cases, together with the Governor, a Deputy Governor is elected, who replaces the Governor in case of temporary or permanent vacancy.

Term of office is always 4 years, with the majority of the Provinces allowing re-election at least for one consecutive period. Only two Provinces do not allow consecutive re-election: Mendoza and Santa Fe. A notable case is the Province of Salta, which allows three consecutive terms. Other Provinces allow indefinite re-election<sup>XVI</sup>.

Governors are assisted by ministers, who are freely appointed by them and removed at will. The constitutional importance of ministers is secondary. They are completely subordinated to the Governors and do not represent any kind of limitation to their powers.



One of the main requirements with which the Provinces have to comply is the organization of the court system. Section 5 of the Federal Constitution expressly imposes such obligation on the Provinces when enacting their Constitutions. In compliance with such requirement, all Provinces have organized their judicial branches following the model of the Federal Judiciary which in turn followed almost to the letter the United States Constitution. All Provincial Constitutions create a Supreme Court of Justice, which receives different names depending on the Province.

Judges are generally appointed by the Governor with the consent either of the Senate (in the Provinces with bicameral legislatures) or of the unicameral legislature. Since the reinstatement of constitutional government in Argentina in 1983, many Provinces incorporated into their Constitutions a Judicial Committee<sup>XVII</sup>, following the example of Spain and Italy. This Committee selects candidates to be appointed judges of the lower courts (i.e. all courts except the Supreme Court) and submits lists of three candidates from which the Governor selects those to be appointed as judges. The Committee performs other less important administrative functions related to the Judiciary.

Judges are usually removed by impeachment, although the procedure is generally no longer done by the Legislature, but by a special jury composed by judges, lawyers and politicians.

The organization of the Judiciary is a power that has not been delegated by the Provinces to the Federal Government. Thus, it is the prerogative of each Provincial Legislature to create courts and determine their jurisdiction and to enact rules of procedure. Each Province has enacted its own code of procedure, both in criminal and civil and commercial matters.

The main constitutional role of the Judiciary in Argentina, both at Federal and Provincial level is judicial review. Also in this subject, the Provinces have followed the pattern of the Federal Constitution and have adopted the US model of judicial review. This fact is not diminished by the existence of certain procedures in the Provinces that allow petitions to be directly filed for judicial review to be decided only by the Supreme Courts (*acción directa de inconstitucionalidad*). These procedures still retain the basic features of judicial review.



## 5. The Flaws of Argentine Sub-national Constitutionalism

With all its fundamental importance, provincial constitutionalism has been unable to escape from the tendency of decline that affects Argentine constitutionalism in general. The process of deconstitutionalization experienced by Argentina started in 1930, with the first military coup. Such coup was inspired by a corporatist movement, which in turn found its model in the fascist movements in vogue in Europe at that time. Such movements were extremely critical of liberal constitutionalism, the ideology that inspired the Argentine Federal Constitution. Those corporatist movements later developed into the Peronist Movement which was elected to government in 1945 and took office at the beginning of 1946. The 1949 Constitutional Amendment was the first attempt to reflect those tendencies in the Constitution.

However, anti-liberal tendencies did not care very much about constitutional provisions. The deconstitutionalization process had greater success in altering the constitutional framework through interpretation and borrowing of legal doctrines notoriously alien to our system, without changing a single word of the constitutional text. Legislative decrees issued by the President, which were mentioned above, are just an example. Although clearly unconstitutional, administrative scholars justified their use quoting the authority of Italian authors of the fascist era.

Provincial constitutionalism was a particularly fertile soil for those incompatible transplants. For example, the direct petition of unconstitutionality, to be decided only by the Supreme Court of the Province is a good example of such improper borrowings. The direct petition was inspired by French administrative law. The codes of administrative procedure of the Provinces of Córdoba and Santa Fe were inspired in the *recours pour excès de pouvoir* and the *recours de pleine juridiction*, taking these two remedies and providing that they could only be filed with the Supreme Court of the Province. They evolved into the direct petition mentioned above, with the result that the lowest courts of those Provinces are entitled to decide upon the constitutionality of a law of the Federal Congress, but they are prevented from deciding if an action of the Governor of the Province is unconstitutional.



Another incompatible borrowing which first took place at provincial level and was later adopted in the Federal Constitution is the Judicial Committee or *Consejo de la Magistratura*. The Committee is entrusted in the different Provinces with the power to select the candidates to be appointed as judges for the lower courts by the Governor, but in many cases also with the power to manage the budget of the Judiciary, exercise disciplinary powers over judges and to decide which judges should be accused before the impeachment jury to be removed. This Committee was created with the purported intention of reducing political involvement in the Judiciary. However, the practice has shown that it was a tremendous failure and provincial judiciaries are, with few exceptions, controlled by the political branches, in particular by the Governor.

The failure at provincial level was not enough to convince the framers of the 1994 Constitutional Amendment to refrain from making the same mistake at federal level, and the Judicial Committee was incorporated to the Federal Constitution. Of course, it also failed. These constitutional borrowings forget that compatibility is a key feature in order for those transplants to be able to work properly.

But the decay of sub-national constitutionalism in Argentina and of federalism as a whole should not be attributed only to wrong constitutional design. A recent survey of *Poder Ciudadano*, a non governmental organization, shows that, in 8 of the 24 sub-national entities, the same party has remained in power since 1983. Clientelism is a major feature in Argentine Provinces.

## 6. Closing Remarks

Argentine federalism and sub-national constitutionalism is a very interesting case study for anybody trying to establish a federal system in any country around the world. Not because of its success, but precisely because of its failure. The first study of sub-national constitutionalism was published in Argentina in 1853 by Juan Bautista Alberdi<sup>XVIII</sup>, an influential figure in the framing of the Federal Constitution. More than 100 years have passed since the School of Law of the University of Cordoba created a chair for the study of provincial constitutionalism. However, all these years of hard work and profound studies by bright scholars have not been able to help us create a functional federation.



A federation on paper, Argentina is a highly centralized country, in which economic dependence of the Provinces from the central government has destroyed any kind of autonomy of the sub-national entities. Governors are in many cases little more than puppets controlled by the President with the power of the purse.

Administrative law has played an important role in the process of centralization. Inspired by French administrative law, a highly centralized country, such example, transplanted without caution, paved the way for the courts to accept violations of provincial autonomy.

The result is a deadly combination of the worse of federalism and none of its great advantages. Enormous provincial bureaucracies have been created, to help build an evil system of clientelism. But important decisions are all made by the Federal Government. Anybody daring to disobey presidential orders, faces the risk of losing all financial support from the Federal Government.

The trend is very difficult to change. However, the fact that Argentine federalism has failed, does not diminish the importance of studies on federalism and sub-national constitutionalism in Argentina. On the contrary, careful study of Argentine federalism and sub-national constitutional law would give any serious scholar on those subjects a clear view of the difficulties faced in order to bring a federal system into operation, in a country with important economic imbalances between the different regions. In addition, the Argentine example shows that a clear distribution of competences between the federal and provincial governments is a key factor for a federal system to work properly. In particular, a balanced distribution of economic resources must be achieved, to guarantee the chance of development by all regions.

A large number of studies in sub-national constitutional law have been produced in Argentina. Such vast literature covers all aspects of both federalism and provincial constitutionalism. Comparative scholars, particularly those from countries in which a decentralization process is being conducted, would certainly benefit from it, in order to anticipate the troubles that decentralization faces. But the lessons of Argentine sub-national constitutionalism extend also to national constitutionalism. For instance, the issue of unlimited re-election in a system of separation of powers and the continuing modification of electoral systems find numerous examples in Argentine provinces.



In the end, as judge Learned Hand said “liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it”. This is exactly what happened with federalism (and constitutionalism) in Argentina. But at least the failure of our federal system may help others to avoid the mistakes we made.

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<sup>I</sup> We refer here only to those amendments still in force today, i.e. the amendments of 1860, 1866, 1898, 1957 and 1994. Two other amendments are no longer in force: the reform of 1949, known as the Peronist Constitution because it was inspired by the authoritarian government of General Perón, and the amendment of 1972, imposed by the military government then in power. The former was abrogated after the Peronist regime had been overthrown and the latter lost validity when it was not ratified by a constitutional convention within the term provided therefore.

<sup>II</sup> On May 25, 1810 (the May Revolution), a meeting of the city council of Buenos Aires declared that the authority of the Viceroy of the River Plate, appointed by the King of Spain, had ceased. The members of the city council argued that, since the King of Spain and his entire family were in France in custody of Napoleon, who had appointed his brother José in his place, the Viceroy could no longer claim to represent the Government of the metropolis. Thus, so they argued, in absence of the legitimate King, the authority reverted to the people. The city council of Buenos Aires also claimed that, due to the emergency, it was entitled to act in the name of all the provinces of the Viceroyalty of the River Plate. Formal independence was not declared until July 9, 1816.

<sup>III</sup> Strictly speaking, the first provinces were created between 1814 and 1815.

<sup>IV</sup> See a lengthy discussion of this matter in García Mansilla and Ramírez Calvo 2006: 57 ff.

<sup>V</sup> Dürnhöfer 1973: 19.

<sup>VI</sup> Officially, Mariano Moreno left the country on a diplomatic mission to the United Kingdom but died during his journey in the middle of the Atlantic. In fact, the mission was just a façade to hide the fact that Moreno had lost the struggle for power and had been forced to leave.

<sup>VII</sup> General José Gervasio Artigas drafted a constitution for the Province of Uruguay, then part of United Provinces of the River Plate. This draft has been generally ignored by the great majority of the authors in Argentina (see Demicheli, 1955: 561 ff.).

<sup>VIII</sup> Prof. Hernández, the leading authority in federalism in Argentina today, has noticed that this first Constitution of the Province of Córdoba was strongly influenced by the draft constitution for Uruguay referred to in note VII above (Hernández 2005: 21).

<sup>IX</sup> García Mansilla and Ramírez Calvo 2008: 48 ff.

<sup>X</sup> The armies of the Confederation, led by General Urquiza, clashed with the forces of the Province of Buenos Aires, led by General Mitre in the Battle of Cepeda on October 23, 1859. As a consequence of this battle, the San José de Flores Pact (also known as the National Union Pact) was signed between the Confederation and the Province of Buenos Aires. Further military actions followed between both sides even after the amendment of the Constitution until the battle of Pavón on September 17, 1861.

<sup>XI</sup> The Constitution also recognizes the existence of municipalities. In addition, the constitutional amendment of 1994 granted a special status to the City of Buenos Aires, which is briefly discussed below. Hernández identifies 4 different types of authorities in Argentina: (i) the federal government, (ii) the provincial governments, (iii) the government of the City of Buenos Aires, and (iv) the municipal governments



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(Hernández 2004: 698 ff.).

<sup>XII</sup> Hernández 2005: 39.

<sup>XIII</sup> This statement, which may seem exaggerated, is based on undeniable facts. General Perón was a great admirer of Mussolini, the policies of which were imitated in many fields during his dictatorial regime.

<sup>XIV</sup> Hernández 2005: 58.

<sup>XV</sup> I.e. to give minorities a better chance to obtain representation in the legislature.

<sup>XVI</sup> An interesting study of re-election tendencies in Argentine Provinces is the one by Almaraz 2010.

<sup>XVII</sup> *Consejo de la Magistratura* in Spanish.

<sup>XVIII</sup> Alberdi 1853.

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