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Normative Pluralism in Argentina and its Repercussions on Jurisdiction

by

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Abstract

In Argentina the repercussions on the judicial system deriving from the territorial allocation of power are marked by peculiar features that make this experience not fully ascribable to what can be defined as 'classic models' of 'judicial federalism', namely the United States and Germany. This is related to the particularities of Latin American constitutionalism in general, and Argentine constitutionalism in particular. For this reason, it is more appropriate to discuss the main features of the federal model established in Argentina first, and then extend the analysis to profiles related to judicial power.

In so doing, this essay tries to identify the essential features of judicial federalism in Argentina: i) organization of the judiciary at the two levels; ii) competences of federated entities in defining the status of judges; iii) participation of federated entities in issues related to the 'self-government of judges'; iv) definition of a coherent system which allows jurisdictional disputes to be resolved. Point iv) is examined with reference to constitutional justice.

Key-words

Argentina, judicial federalism, Latin American federalism, distribution of powers, constitutional justice

1. Premise

In Argentina the repercussions on the judicial system deriving from the territorial allocation of power are marked by peculiar features that make this experience not fully ascribable to what can be defined as 'classic models' of 'judicial federalism', namely the United States and Germany.

This is related to the particularities of Latin American constitutionalism in general, and Argentine constitutionalism in particular. For this reason, it is more appropriate to discuss the main features of the federal model established in Argentina first, and then extend the analysis to profiles related to judicial power.

With regard to the latter, the approach defined in the research project on 'Jurisdiction and Pluralisms' will be used as a framework to identify the essential features of judicial federalism: i) organization of the judiciary at the two levels; ii) competences of federated entities in defining the status of judges; iii) participation of federated entities in issues related to the 'self-government of judges'; iv) definition of a coherent system which allows jurisdictional disputes to be resolved. Note that point iv) will be examined with reference to constitutional justice.[I]

2. Argentine federalism in the context of the study of Latin American systems

For comparative law scholars, the study of Latin American legal orders offers numerous elements of interest, especially in terms of classification and circulation of legal models. In fact, many scholars have already explored the issue of 'the existence of an Ibero-American legal system' by considering the peculiarities that distinguish the Latin American experience.[II] Any study on this topic should be developed on different levels: on the one hand, it implies the identification of common elements that allow us to identify a regional model regardless of the specific peculiarities that may characterize different countries in the area; on the other, it implies the identification of innovative aspects that may distinguish it with respect to the European legal tradition which it historically originated from.[III] Moreover, in more recent years, studies concerning on the rights of

indigenous peoples have added further levels of complexity, thus rendering it very difficult to put all the countries in Latin America in the same category developed by comparative law scholars.[IV]

A lot of the research that has been carried out on these issues has been within the field of private law therefore it is connected to the codification that started in 19th century with the European model in mind. Research in the field of public law has usually had the United States in mind given the influence of the latter on the form of government, the system of constitutional justice and the vertical allocation of power (which is what interests us in the context of this research).[V] Nonetheless, even in this case the peculiarities of Latin America's constitutional history should be considered because it was influenced, on the one hand, by the colonies in North America becoming independent, but on the other, it was also marked by the participation in the complex phase of 'liberal revolutions' which occurred in both civil law and common law countries in Europe and beyond at the end of the 18th century.[VI] Albeit limited, the involvement of South American MPs in the drafting of the 1812 Constitution of Cadiz was undoubtedly important, as was the participation of academics from the region in the debates on a series of important constitutional issues.[VII] Certainly, each country has its own institutional evolution, however it is possible to pinpoint certain elements of similarity which allow us to identify the particularities of Latin America in comparison to other regions of the world. In this regard, the Italian comparatist Lucio Pegoraro has stressed that: 'The originality of Latin American constitutionalism – which should induce European and US scholars to reflect on the assumed supremacy of their models – is of great importance not only for the institutional history of the continent, but also for the rest of the world' (see Pegoraro 2010: 571). Examples include the protection of fundamental rights and constitutional justice,[VIII] where both the hybridization of classical models and innovative solutions have emerged,[IX] as well as – more generally – Latin America's well known 'new constitutionalism.'[X]

With respect to the topic of this study, it should be noted that with the 1853 Constitution[XI] Argentina introduced a federal system which, although inspired by the United States, also includes some important innovations, connected to the country's history.[XII] In fact, the choices of the framers of the Constitution should be read within the complex process of decolonization and the formation of the new Argentine state. This all started in the territories of the Viceroyalty of Río de la Plata as of May 1810. In this long

phase, both centralist and federalist visions were debate and these were largely related to the difficult relations with the Province of Buenos Aires, which only became part of the Federation in 1860. On the one hand, the *unitarios* or *porteños* – referring to Buenos Aires' inhabitants – were in favour of creating a strong central power; on the other, the *federales* or *provincianos* – members of other Provinces – considered the federal system a way to preserve their distinguishing features and the autonomy obtained under Spanish rule.[XIII] The incorporation of the Province of Buenos Aires into the Federation only took place after its defeat in the *Batalla de Cepeda* of 1859 through an amendment to the Constitution approved in 1860. This amendment strengthened provincial autonomy and was supported by the Province of Buenos Aires itself, which in the meantime had evidently shifted its position on the issue.[XIV] However, the political and economic power of the Province of Buenos Aires produced greater centralization and in 1880 the Constitution was amended so as to provide the federal capital with a special status.

A reconstruction of the federal system cannot be separated from an analysis of the form of government, a presidential system, borrowed from the United States (see Hernández 2010: 10 ff). From the outset, however, the President was given a greater range of powers and this is a trend we find in most of the countries of South America.[XV] This inevitably led to a succession of authoritarian regimes especially in the 20th century, which were characterized by strong centralization of power, limitation of the autonomy of the Provinces and a weak system of check and balances. All of this occurred without these regimes needing to amend the Constitution.

With respect to the vertical allocation of powers, it should be noted that several authors have discussed the concept of 'unitary federalism' or a 'mixed system', – using the terms employed by Juan Bautista Alberdi[XVI] – aimed at reconciling different and opposing trends present in the country. While the federal option, inspired by the US model, was seen as a tool for preserving the peculiarities of the different Provinces, at the same time, however, the conditions for a strong centralization of power were established. In addition to the broad powers of the Federal President mentioned above, a wide set of competencies were allocated to the Federation – including the adoption of codes – and the substitutive powers in cases of inaction on the part of the Provinces.

Within this framework, the federal system that was adopted has proved to be incapable of ensuring a viable system of check and balances and that is why many scholars talk of a

'hegemonic hyper-presidency'.[XVII] Even the well-known constitutional amendment of 1994 did not manage to rebalance the form of government and strengthen the federal system.[XVIII] For example, tax reforms have all had a 'centripetal footprint'. Relevant to this study is the attempt to limit presidential powers through the establishment, at the federal level, of the *Consejo de la Magistratura*, which plays a role in the appointment of judges, with the exception of the justices of the Supreme Court.[XIX]

3. Repercussions on jurisdiction deriving from the allocation of power territorially

As mentioned above, the federal system established in Argentina does not resemble the North American prototype entirely, and this emerges quite clearly from its repercussions on judicial power. Indeed, again one can note the influence and hybridization with European models. This is the case not only from a historical perspective (with the role that the codification of law had at the federal level), but also in relation to the more recent evolution of the safeguards for independence of the judiciary, which resembles the European example of Councils for the Judiciary.[XX] In addition, the system of constitutional review also deserves greater attention, given that the US diffused/decentralized model that was adopted in Argentina has been integrated with other elements which we could define as 'autochthonous'. This has led several authors to observe that Argentina system of constitutional review is actually similar to the concentrated/centralized model, typically found in Europe.

3.1 Structure and organization of the judicial system

In analyzing the judicial system in Argentina, one must take into consideration the solutions adopted in the United States – already qualified as one of the classic models – so as to identify similarities and differences.[XXI]

The essential elements of Argentina's judicial system were established in the original 1853 Constitution, which contained many similarities with the US Constitution of 1787. These constitutional provisions have not been amended and will be cited below.

Argentina's judicial system is 'dualist' meaning that the Federal Constitution establishes and guarantees two levels of judicial power: at the federal level and at the provincial level.[XXII]

Art. 108, which opens the Third Division of the Constitution, is dedicated to the judicial power, and establishes that 'The Judicial Power of the Nation shall be vested in a Supreme Court and in such lower courts as Congress may constitute in the territory of the Nation.'[XXIII]

The similarity with the Art. III Section 1 of the US Constitution is striking: 'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'

The first part of the Constitution of Argentina, entitled 'Declarations, Rights, Guarantees,' defines the powers of the Provinces by including the judicial function. In this sense, Art. 5 specifies that: 'Each Province shall enact its own constitution under the republican, representative system, in accordance with the principles, declarations, and guarantees of the National Constitution, *ensuring its administration of justice*, municipal regime, and elementary education. Under these conditions, the Federal Government shall guarantee each Province the full exercise of its institutions' (italics added).[XXIV]

These constitutional provisions establish a judicial system organized at two levels, the federal and provincial ones, to which the unique status of the city of Buenos Aires is added. The latter benefits from prerogatives that make it similar to a Province.[XXV]

A more detailed analysis of the judicial system reveals that the same framework is substantially present at both the federal and provincial level and, alongside the two degrees of justice, it includes the Supreme Court (which at the provincial level has various names: *Corte Suprema de Justicia, Superior Tribunal* o *Tribunal Superior de Justicia*). The latter is a final degree judge which also acts as a single judge in relation to certain subject matters. The single Provinces have some distinguishing features with regard to the types of judicial bodies – for example, some of them have introduced justices of the peace – and the status of the judges, which can be different in relation to the appointments system, or the term of office.[XXVI]

As far as the structure established at the federal level is concerned,[XXVII] the judicial bodies of first instance are represented by Federal first instance courts, which were created by President Mitre with the *Ley sobre el Poder Judicial de la Nación* of 1862 n. 27, and are

located in the federal capital and principal cities of the Provinces. The Federal appellate courts were established only in 1902, and have jurisdiction over civil, criminal and commercial matters, but may also have jurisdiction over other fields indicated in specific laws. Finally, the Supreme Court of Justice of the Nation – regulated, as already indicated, by Art. 102 of the Constitution – is a court which decides in the final instance at federal level, and also has original jurisdiction and exclusive jurisdiction over certain subject matters.[XXVIII]

Bearing in mind that we will address this topic later, it should be noted there is also the possibility to reach the Supreme Court through the *recurso extraordinario federal*,[XXIX] *recurso de amparo*, *habeas corpus* and *habeas data*[XXX] – as well as through *acción declarativa de incostitucionalidad* prescribed by Art. 322 of the National Code of Civil and Commercial Procedure (Haro 2003: 247 ff).

As for the definition of competencies of federal courts, one should refer to Articles 116 and 117 of the Constitution. According to Art. 116:

> The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, *with the exception made in Section 75, subsection 12*, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more Provinces, between one Province and the inhabitants of another Province, between the inhabitants of different Provinces, and between one Province or the inhabitants thereof against a foreign state or citizen (italics added).

In these cases, according to Art. 117

> the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a Province shall be a party, the Court shall have original and exclusive jurisdiction.

Considering these constitutional provisions, one can affirm –using the words of Antonio M. Hernández – that 'La justicia "federal" es limitada, de excepción y exclusive' (Hernández 2009: 93).

Additionally, the reference made in Art. 116 to Art. 75 (12) – which deals with the competences of the Congress – should not be neglected. It represents one of the peculiarities of Argentine federalism as it provides that codes should be adopted at federal level. It, in fact, establishes that Congress is empowered to

> *enact the Civil, Commercial, Criminal, Mining, Labor and Social Security Codes, in unified or separate bodies, provided that such codes do not alter local jurisdictions, and their enforcement shall correspond to the federal or provincial courts depending on the respective jurisdictions for persons or things*; and particularly to enact general laws of naturalization and nationality for the whole nation, based on the principle of nationality by birth or by option for the benefit of Argentina; as well as laws on bankruptcy, counterfeiting of currency and public documents of the State, and those laws that may be required to establish trial by jury (italics added).

There is thus a significant degree of difference with the US model where the legislation on substantial matters is largely established at state level. This difference is due to specific historical events and the influence of European codification (Lugones 1985). In this way, in terms of exercise of normative power, several subject matters are drawn towards the federal level. However, the codes (so-called *derecho común*), as indicated by the Art. 75, should not alter judicial power at provincial level and should also be applied by the provincial courts when they have jurisdiction. The rules of procedure, on the other hand, fall under the competence of the Provinces. This implies that an identical provision (contained in the federal code) will be applied in a different way due to the different rules of procedure of each Province. It should be noted, however, that the final decision on compliance with the Federal Constitution, including the application of codes, is vested in the Supreme Court of the Nation. As a consequence, this conditions application of the provisions at provincial level thus confirming the centripetal effect of the codes.[XXXI]

3.2 Competencies of Provinces in defining the status of judges

The Constitution of Argentina safeguards judicial independence at federal level, while the definition of the status of provincial judges falls within the scope of autonomy of the Provinces. Under the already invoked Art. 5 of the Constitution, Provinces should 'ensure the administration of justice' and are therefore free to choose the structure they deem appropriate (see Vergara 2008: 425 ff). In most cases, however, the federal and provincial levels are very similar from a substantive point of view. Moreover, provincial autonomy,

recognized under Art. 5, does not call into question the respect for fundamental principles of judicial independence, which is part of the tradition of democratic states.

With regard to judicial independence, we will examine the following issues: the appointment of judges; the term of office; the irremovability and responsibility; the guarantee of remuneration.

a) The appointment of judges. The solution originally adopted at federal level was inspired by the US model. The appointment of federal judges was vested in the President, with the approval of the Senate, namely the representative Chamber of the Provinces. Currently, this procedure is applied exclusively for the appointment of justices to the Supreme Court, while in the case of federal lower court judges the 1994 constitutional reform provided for the involvement of the *Consejo de la Magistratura*. More precisely, the latter proposes a closed list of three candidates to the President and then subsequently her/his appointee has to be approved by the Senate.[XXXII]

Up until the 1980s, the provision established by the Federal Constitution was applied, with one or two exceptions, at provincial level too. These exceptions included the Province of Chaco, which at the end of 50s set up a Council for the Judiciary with the competence to propose three candidates for appointment of judges to the Executive, and the Province of Neuquén which, during the same period, created an advisory body, the *Junta Calificadora*, with a mixed composition (see Vergara 2008: 435). As of 1986 – under what has been defined as the 'provincial constitutional cycle' – a progressive differentiation of the appointments procedure took place. A common element to almost all Provinces, however, was the introduction, at constitutional or legislative level, of Councils for the Judiciary with jurisdiction over the appointment procedures of lower court judges (thus excluding the Supreme Court). The aim was to avoid the politicization of these courts.[XXXIII] As already mentioned, the same body was established at federal level with the 1994 constitutional reform, thus realigning the systems with a circulation of models that initially started as an experiment at provincial level.[XXXIV]

Thus, both the federal and provincial level are marked by different appointments procedures in relation to judges of higher courts, which in the case of federal judges is an Executive responsibility, but also needs the approval of the representative Assembly – namely the Senate – while in the appointment of lower court judges the Council for the

Judiciary acts has primary jurisdiction.[XXXV] Let us now examine the Council for the Judiciary in more detail.[XXXVI]

A European observer would be struck by composition of the Council for the Judiciary at federal level (similar solutions could be also found at the provincial level) because the majority of the members are political appointees, thus clearly contradicting the objective of strengthening the independence of the judiciary with respect to other branches of government.[XXXVII] In actual fact, Art. 114 of the Constitution merely offers some indications of general character: it provides for a mixed composition of the body which is thus composed of professional judges and ungowned members. Still according to Art. 114, the ungowned members may be politicians or legal experts and requires that a balance must be assured between the two different components. The detailed discipline, on the other hand, is deferred to the ordinary legislation. As provided by Art. 2 of the Law on the Council for the Judiciary, the latter is currently composed of thirteen members, of which only three are judges elected by their colleagues; six are members of Parliament, respectively three senators and three deputies, chosen by Presidents of the two Chambers on recommendation of political groups (two of the three are indicated by the majority and one by the opposition). In addition to these members there are two representatives of the bar association, one representative of the executive and one representative of the university professors.[XXXVIII]

The creation of the *Consejo de la Magistratura* appears to have been inspired by the European model, which assigns a key role to the presence of bodies with a mixed composition vested with the power to appoint judges. These bodies are generally referred to as 'Councils for the Judiciary'. However, various documents adopted in this regard – both by magistrates' associations and by the Council of Europe – insist on a body composed mainly of magistrates, or at least a number of magistrates equal to that of other ungowned members.[XXXIX] The solution adopted in Argentina is problematic because the majority of members are political appointees and the number of professional judges is limited. If the objective was to reduce the powers of the Executive, and in particular of the President, the solution adopted in Argentina certainly does not draw the federal judges away from the 'political game'.[XL] Despite this, it should be noted that in 2013 President Fernández de Kirchner proposed an amendment to the composition of the Council aimed at further strengthening the political component. This amendment provided that the

academics (whose number was increased), judges and representatives of the bar association would all be elected directly by voters through a mechanism of competing lists. As has been rightly pointed out, in this way all components would have 'directly or indirectly a political extraction, in line with the presidential intention of realigning the judiciary to the political choices of the governing party.'[XLI] The provision was, however, declared unconstitutional by the Supreme Court in the decision *Rizzo, Jorge v. Estado Nacional* of 18 June 2013, which contains an interesting reconstruction of the constitutional principles involved in this case.[XLII]

(b) Term of office. Let us again start from the federal level where the 1853 Constitution echoed the US model of life tenure: 'los jueces de la Corte Suprema y de los tribunales inferiores de la Confederación conserván sus empleos mientre dure su buena conducta (…)' (Art. 92, Constitution of 1853). The 1994 constitutional reform introduced a retirement age of 75 (Art. 99). Once it has been reached, the judge may ask to remain in office, but in this case, the term is renewed for five years and needs prior approval of the Senate. The 1994 reform led to a lively debate, as it was supposed to apply to judges already in office, originally appointed for life.[XLIII] In particular, the new provisions were read as an *ad hoc* measure aimed at questioning the irremovability of a specific judge – Justice Fayt – who had clashed with President de Kirchner on several occasions.[XLIV] The reform was thus brought to the Supreme Court, which in its decision of 24 August 1999 declared that the new provisions were not applicable to the case of the Judge Fayt, thus affirming that it was null and void on the grounds that it has exceeded the limits established by the Constitution to the constitutional amendment procedure.[XLV]

The case opened an extensive debate on what in comparative constitutional law is known as the unconstitutional constitutional amendments doctrine,[XLVI] and involved more generally the relationships between branches of government.[XLVII] The provisions introduced in 1994 opens two distinct issues, even leaving aside the question of its applicability to judges already in office. On the one hand, the choice to introduce an age limit for judges appears legitimate, as this solution has been adopted in many other legal orders and can also be found in Argentina at provincial level. On the other, the renewal process appears more problematic as the powers attributed to the Assembly do not appear in line with the guarantees of judicial independence, which was ensured, on the contrary, by life tenure. In fact, the judge might be conditioned in her/his decisions by seeking the

necessary political support for confirmation in office. Nonetheless, it should be noted that with the subsequent decision of 28 March 2017, the Supreme Court has changed its previous orientation by recognizing the legitimacy of the 1994 constitutional reform.[XLVIII]

The provisions adopted at provincial level appear to be much more articulated. In fact, a diachronic analysis reveals the following: life tenure (e.g. Córdoba 1923; Entre Ríos 1933; Mendoza 1965); life tenure after a trial period (i.e. after the first renewal: after a 1 year La Rioja 1933; after 6 years San Juan 1927); renewable term of office (e.g. Jujuy 1935; Skip 1929; La Rioja 1986); non-renewable term of office (e.g. 10 years Tucumán 1907). In more recent years, several Provinces have amended the rules and opted for life tenure (e.g., La Rioja 1998; Tucumán 1991; San Juan 1996). However, in a large-scale study Andrea Castagnola points out that, regardless of these provisions, in most cases, judges do not remain in office for the full term and when re-election was admitted, it was a rare occurence, thus implying that 'estabilidad or inestabilidad de los jueces en el cargo non puede ser explicada por las reglas institucionales'.[XLIX]

c/d) The irremovability and responsibility. The irremovability represents the first guarantee of independence that historically judges have obtained. In Argentina, it is recognized both at the federal and provincial level. Following the United States model, Art. 110 of the Constitution establishes that judges shall remain in office as long as they maintain good behavior. Irremovability concerns both the office and the function, so as to allow judges to perform their functions with maximum independence 'sine spe ac metu.' However, the examples cited in the previous paragraph should not be forgotten. as changes to the term of office, or the introduction of an age limit, may affect the principle of irremovability of judges.

The US is also a source of inspiration for provisions on the responsibility of Supreme Court judges, as the decision is attributed to political bodies: in particular, at the federal level it is up to the Chamber of Deputies to take disciplinary action, while the Senate is involved in cases of 'mal desempeño o por delito en el ejercicio de sus funciones; o per crímenes communes' (Art. 53 of the Constitution). Similar solutions can be found in the majority of the Provinces, with the necessary adjustments when the form of government provides for a unicameral parliament.[L] For lower court judges, the constitutional reform of 1994 introduced the involvement of the *Jurado de Enjuciamento* regulated by the Art. 115 of the Constitution, at the request of the Council for the Judiciary. Again it is interesting to

note that the *Jurado de Enjuciamento* is a body that was first introduced at provincial level, in some cases with a power of oversight also over judges of the Supreme Court.[LI] At the federal level, the body is composed of two judges, four members of Parliament, and one lawyer, who are drawn by lot every six months.[LII] These provisions can be traced back to different models: the political decision of Congress is necessary for taking disciplinary mesure against the of the Supreme Court judges, whereas for other judges the participation of new bodies with a mixed composition is expected for initiating both the procedure and adopting the subsequent decision. In addition, Art. 114 of the Constitution empowers the Council for the Judiciary with the competence to 'Ejecer facultades disciplinairas sobre magistratos.'[LIII] These solutions are aimed at strengthening the independence of judges, although the predominance of the political appointees in the Council for the Judiciary raises several concerns about its effective independence from political power.

e) The guarantee of remuneration. It is common knowledge that adequate and stable remuneration is also an essential condition for affirming the dignity of the judicial function and ensuring that judges have serenity and independence in performing their duties. This guarantee is specified under Art. 110 of the Federal Constitution and it has been reproduced in the Constitutions of the Provinces, which in some cases have provided for a set of rules to determine the remuneration of judges by linking it to that of members of the Government. The most serious problem that emerged in Argentina was that of the effectiveness of the formally established prohibition to decrease the salary set by law. The serious inflation that hit the country, leading to the collapse of the currency, also had an impact on this guarantee. In this respect, the Supreme Court has recognized in *Bonorino Però v. Estado Nacional* of 1985 that the maintenance of the nominal value meant in that situation a substantial reduction in salary and has, therefore, declared 'la incostitucionalidad de las normas que fijan or mantienen los emolumentos desactualizados.'[LIV] The subsequent case law, however, in implementing the constitutional guarantee, took the principle of solidarity involving all citizens into consideration.[LV]

From this short overview of the discipline related to the status of judges, a widespread similarity between the provisions adopted at federal and provincial levels emerges, with a circulation of models that, in some cases, seems to render the Provinces a testing ground for reform (such as the introduction of Councils for the Judiciary) which were then accepted also at federal level. Furthermore, the hybridization of models also emerges in this

context: if the primary source of inspiration is undoubtedly the US system, more recent reforms seem to be inspired by provisions adopted in Europe. Reference to the European tradition, which has already been mentioned in connection to federal codification, brings with it a different vision also of the role of judges, leading to a more complex process of affirming their independence vis-a-vis other branches of government. This applies *a fortiori* in a context characterized by a form of hyper-presidentialism, which tends to pervade all the other branches of government. The establishment of Councils for the Judiciary at federal and provincial level is certainly an attempt to strengthen the independence of judges, although the results are not satisfactory due to the complexity of the context and the weakness of the provisions that have been adopted.[LVI]

3.3. Participation of Provinces in issues related to the 'self-government of the judiciary'

Following again the US model, the involvement of Provinces in issues related to the 'self-government of the judiciary' passes through the Senate as it has the competence to approve the appointments of federal judges decided by the President.

The Art. 99(4) of the Constitution vests the President with the power to appoint judges with the approval of the Senate. As already mentioned, following the 1994 constitutional reform, the appointments procedure has been differentiated. The justices of the Supreme Court are appointed by the President and approved by the Senate with a majority of 2/3 of the members present in the public session. In the case of federal lower court judges, the Council for the Judiciary proposes three candidates to the President; however, the President's power of appointment is subjected to the approval of the Senate which needs a simple majority of those present in a public session in which 'the suitability of the candidates will be examined'.

As far as the appointment of Supreme Court judges is concerned, the Constitution provides for a limited number of requirements: lawyer of the Nation with eight years of experience and eligible as a senator. This leaves the President with an ample margin of discretion which has led to very different observations. In some cases, the choice made by the President has led to the creation of pluralistic and independent bodies, as was the case under President Mitre when the first Court was appointed in 1863 or, more recently, under President Alfonsin in 1983. However, it has also been underlined that most of the judges

come from Buenos Aires and that, therefore, they are not very sensitive to the problems and peculiarities of the Provinces (see Hernández 2009: 93, note 2).

More precise criteria for the selection of judges is certainly needed, both in relation to the professional experience in the judicial sphere, and with respect to representing the complexity of the country.[LVII] The decree approved by President Nestor Kirchner in 2003 goes in this direction given that it was aimed at regulating the procedure for exercising presidential power in accordance to Art. 99(4).[LVIII] In addition to setting rules for publishing the names that the President intends to take into consideration (accompanied by a corresponding possibility for any interested person to express her/his evaluation) some parameters have also been established so as to guide the choice. On the one hand, with reference to the candidates' qualifications, in addition to moral integrity, emphasis is put on their technical expertise, and their commitment (trayectoria y compromiso) to the protection of human rights and democratic values; on the other, the new appointments should ensure diversity on the Court, with particular reference to 'las diversidades de género, especialidad y procedencia regional en el marco del ideal de representación de un país federal' (Art. 3). The decree thus takes into consideration the importance of involving the Provinces in the appointments to the Court, so as to take into account the federal structure of the country.

A final observation can be made on the role of the Senate in approving the appointments of the judges of the Supreme Court. The 1994 constitutional reform has increased the required majority to two thirds of members of Parliament. This change would appear to strengthen the overseeing powers of the Provinces, but one should be cautious and also take into account the overall context of the reform. Indeed, let us not forget that the very same reform has changed the number of senators, bringing it from two to three for each Province. They are elected directly by the voters, with the requirement that two of them should be an expression of the majority and one of the opposition. This solution seems to emphasize the political representation of the Senate, to the detriment of territorial representation. The latter is also an element that might adversely affect the balancing role with respect to the President's powers.

The 1994 constitutional reform introduced a more complex appointments procedure for federal lower court judges, which requires the *Consejo de la Magistratura* to the present closed lists of three candidates to the President. We have already examined the

composition of this body and expressed our reservations on the prevalence of political appointees, which could adversely affect the choice of candidates to put to the President. Again, the Senate is required to approve the presidential appointees in a public session, although only a simple majority is needed. The publicity of the procedure should contribute to the accountability of both the Council for the Judiciary and the senators.

3.4. Definition of a coherent system to overcome jurisdictional disputes

Following the description of the essential features of the organization of judicial power at both federal and provincial levels, one must askes oneself whether a coherent system of overcoming jurisdictional disputes exists. Once again, Argentina has some interesting distinguishing features, which can be identified through an analysis of the system of constitutional review. Indeed, it has a system that links the provincial and federal judicial systems together. Let us not forget that, as mentioned above, Argentina has a dualist structure of the judiciary.

The constitutional provision that one should refer to is Art. 31 which establishes the principle of supremacy of the federal legislation:

> This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each Province are bound thereby, notwithstanding any provision to the contrary included in the provincial laws or constitutions, except for the Province of Buenos Aires, the treaties ratified after the Pact of November 11, 1859.

The original text of the Constitution did not expressly establish any form of constitutional review nonetheless, it was developed very early on inspired by the US model of diffused review through the famous case *Agustín de Vedia* of 1865 (see Dalla Via 1997). Accordingly, all judges, both federal and provincial, can exercise constitutional review of legislation and disapply laws that encroach the Constitution.

Both federal and provincial Supreme Courts are obviously courts of final instance under their respective jurisdictions. In particular, the Supreme Court of the Nation is qualified as 'la cabeza del Poder Judicial Federal y la intérprete final e irrevocable de la Constitucion Nacional'(see Hernández 2009: 94).

Again, the Argentine system of constitutional justice has some important distinguishing features, which in several respects brings it closer to the concentrated European model. In fact, both at federal and provincial level, the diffused concrete review coexists with various forms of abstract review, which imply that there is a direct gateway to the highest Courts.[LIX] For reasons of brevity we cannot specifically address herein the system of constitutional review at provincial level, but one should note that it offers numerous and interesting elements to be reflected upon (see Díaz Ricci 2009). Instead, our focus will be on constitutional review carried out by the Supreme Court of Justice at federal level with the aim of verifying its impact on the allocation of judicial power between the Federation and the Provinces.

In this regard, the most interesting direct gateway to the Supreme Court is the *Recurso extraordinario federal*, as it can jeopardize the balanced functioning of the two levels. It is regulated by Art. 14 of Law n. 48 of 1863, which contemplates three hypotheses in which final decisions of higher courts of the Provinces can be challenged before the Federal Supreme Court: a) when the validity of a treaty, a law of the Congress or an authority exercised on behalf of the nation has been denied; b) when the validity of a law, or a decree of an authority of the Province was challenged for contrasts with the national Constitution, treaties and laws of the Congress and the decision was in favour of their validity; c) when the interpretation of a clause of the Constitution, a treaty or a law of Congress is contested and the decision is against the validity of the title, right, privilege or exemption which is based on this clause and it is the subject of the dispute. One should note that the subsequent Art. 15 excludes the possibility of promoting an appeal in relation to the interpretation and application of codes for the sole fact that they are, as already mentioned, laws of Congress.

Scholars have elaborated a series of classifications in relation to the *Recurso extraordinario federal*, distinguishing between simple and complex issues, depending on whether they concern the interpretation of the Constitution, of a treaty or federal law, rather than a conflict between a norm and the Constitution (conflict which in turn can be direct or indirect) (see Bidart Campos 2008: 432 ff.).

In its case law, the Supreme Court has introduced two further hypotheses for advancing an extraordinary appeal: in the case of an arbitrary judgment (*sentencia arbitraria*), and in the case of institutional gravity (*gravedad istitucional*). Antonio M. Hernández has

pointed out that the first hypothesis – arbitrary judgment – is the one which determines the greatest number of cases submitted to the Supreme Court (see Hernández 2009: 108). This represents a problematic situation, as the intervention of the Supreme Court risks becoming a further instance of judgment with respect to decisions taken at provincial level, instead of functioning as an instrument aimed to ensure the primacy of federal law. This obviously affects the model of judicial federalism too because it could lead to an overlap and a prevalence of federal jurisdiction over provincial jurisdiction.

In order to find a balance, Law 23.774 of 1990 introduced within Art. 280 of the National Code of Civil and Commercial Procedure a kind of *writ of certiorari* that allows the Court to reject extraordinary appeals when there is no relevant federal offense, or when the issues raised are unsustainable or unimportant (lack of *transcendencia*).[LX] The latter has been subject to criticism as it limits the areas of protection, also for individuals; however, it allows the Court to rationalize its docket, reduce its workload and concentrate on the most relevant issues. A better organization of the Court's work is also important for defining the relations between the federal and provincial levels. In its role of guardian of the Federal Constitution, the Court also has to safeguard the allocation of competences established by the constitutional act, with inevitable repercussions on the provincial level of the judiciary. Moreover, the Supreme Court has recognized that

> No todas las leyes de la Nación, por el simple hecho de ser tales, tendrán supremacía sobre las de las provincias; la tendrán, si han sido dictadas en consecuencia de la Constitución, es decir, en consecuencia, o en virtud de los poderes que de modo expreso o por conveniente implicancia ha otorgado aquella al Congreso. Una ley nacional puede no ser constitucional frente a una ley provincial, que sí lo es; en este supuesto, tiene supremacía la segunda. La supremacía final, en tal caso, es como siempre la de la Constitución, porque ambos órdenes de gobierno, el nacional y el provincial, actúan dentro del marco de poderes que le está señalado por dicha ley fundamental.[LXI]

In finding the right balance between the two systems, the Supreme Court has further specified that when a federal question arises in an ongoing trial at provincial level, a decision must be taken first by the provincial Supreme Court.[LXII] Regardless of the procedural implications, this is in line with the dualist model and functional to its better implementation.

Without going into further detail on these gateways to the Federal Supreme Court, there is no doubt that they allow for a broad intervention of the latter in deciding on issues that arise at provincial level. At the same time, however, the Court can exercise self-restraint if it believes the case does have federal significance. In any case, even when there is a clash with the Constitution (and with federal law), the provincial supreme judges must hand down a judgment first. It is self-evident that all these gateways put the judiciary at the centre of the stage, especially the Supreme Court, and therefore, once again, the independence of the judiciary is essential.

4. Concluding remarks

In this examination of judicial federalism, we have to stress the peculiarities of the Argentine system which make it difficult to trace back to more consolidated models elsewhere in the world.

Returning to what we said in the Introduction one must emphasize that the influence exercised by the US Constitution is undeniable as we can see from the textual assonances that we highlighted. At the same time, however, elements of differentiation have emerged and, indeed, these elements have been strengthened by most recent reforms, thus suggesting that the country is still looking for a definite and balanced system to regulate its judicial system.

We can see this, first of all, in relation to the principle of independence. Although part of a common constitutional development at global level, the establishment of the Council for the Judiciary (see Garoupa and Ginsburg 2008) does not seem to have strengthened the protection of judges from political interference. Moreover, the Council is an institution that has developed, in particular, in Europe (and especially in France and Italy) and is based on the concept of what we might call a 'career judiciary' aimed at avoiding adverse influence of the executive. In Argentina, there is a mix: on one hand, the model of the judiciary is more similar to the Anglo-American model based on professional judges, on the other, some of the powers that are exercised in Europe by the Minister of Justice, belong to higher courts (and a similar situation exists in other Latin American countries). As a consequence, the reforms we have mentioned have been much more difficult to interpret and apply. The reason for this is also due to the fact that the composition of the new bodies appears to

have strengthened rather than weakened political interference. And, of course, let us not forget a context characterized by a form of hyper-presidentialism, and frequent attempts by the President to condition the judiciary.

With regard, more specifically, to the relationship between the allocation of power between the Federation and the Province and the structure of the judiciary, the typical characteristics of a federal system clearly emerge. Compared to the United States, however, Argentina is characterized by greater centralization, which also affects the judiciary. First of all, the main codes are adopted at the federal level, with the consequent presence of uniform legislation in all the Provinces. In addition, as underlined in the previous paragraph, there are numerous gateways though which decisions taken at a provincial level can be submitted to the review of the Supreme Court of the Nation. Finally, at an organizational level, despite the dualist structure of the judiciary, there is substantive uniformity between the provisions adopted at provincial and federal level. In this case, however, the comparison reveals what one could define as a 'circularity of models' where, in some cases, the Provinces have anticipated the choices adopted at federal level.

Finally, the federal structure, the regulation of the judiciary and the system of constitutional justice have all found a source of inspiration in the United States and Europe, but they have been shaped and moulded by the historical, political and geographical peculiarities of the country. With reference to the extraordinary appeal to the Federal Supreme Court, Narciso Lugones observes that '... only asumiendo la mezcla de amba tradiciones - que por otra parte es una realidad histórica - es que podremos mejorarlas y superarlas' (Lugones 1985: 714-715).

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[I] The reference is to the PRIN project (2010-2011) on 'Jurisdiction and Pluralisms' (JPs), coordinated by prof. Roberto Toniatti from the University of Trento. The summary of the research group meeting in Turin on January 2014, drafted by Anna Mastromarino is available on the project website at: http://www.jupls.eu/.
Another aspect of increasing significance, which cannot be addressed here, is that of relations with international and supranational systems. In fact, different profiles relating to 'justice' are subjected to external regulations or control, with repercussions that can also affect judicial federalism: for instance, the Inter-American Court of Human Rights has condemned Argentina for the situation in its prison system which is regulated at provincial level. This represents just one example that emphasizes the elements of 'interconnection' between different 'types' of pluralism, in this case normative and integrative, which renders the reflections on the relative repercussions on the jurisdiction even more complex.

[II] This is the title of a 2007 article written by Marzia Rosti, who refers to the studies of Mario Losano, and reflects upon reconstructions proposed by both European and non-European scholars. For more see Rosti 2007. Also see the following works written by the same author: Rosti 1999 and Rosti 2011.

[III] See Marini 2011, in particular 163-164; see also Marini 2010 and Somma 2015. For an analysis of different profiles of constitutionalism in the area see Dixon and Ginsburg 2017.

[IV] On the role of indigenous law in Latin American legal experience see Somma 2015: 30 ff.
[V] See, for example, Merryman and Clark (1978: 207): «This feature of Latin America legal system can be simply, with only partial accuracy, summarized by saying that Latin America public law is more North American than European in character». See also Losano 2000: 177; Pegoraro 2010: 569 ff.
[VI] On Latin America's involvement in liberal revolutions see Brewer-Carias 2008 (with particular reference to the cases of Venezuela and Colombia), and Langley 1996.
[VII] See Fernández Segado 2003: 13 ff.; Gros Espiell 2002: 143 ff. For a reconstruction of the circulation of North American and European legal thought, as well as the principal contributions of a Latin American scholars see Rosti 1999.
[VIII] See Frosini and. Pegoraro 2009.
[IX] See, for example, Rolla 2012: 329 ff.; Carbonnel 2009: 35 ff.
[X] See, for example, Nolte and Schilling-Vacaflor 2012.
[XI] It should be noted that the Constitution has been amended various times. The current text is based on the 1994 constitutional reform.
[XII] On the evolution of a federal system see Hernández 2008: Chapter. III, *El Federalismo Argentino*, 55 ff.; on the reconstruction of historical events see Ramos Mejía 1889. For a comparison of different federal experiences in the Americas see Rosenn 1994.
[XIII] It is interesting to note that the liberals, mostly present in the cities and in Buenos Aires in particular, were contrary to the federal solution, which was supported, on the contrary, by the largely conservative Provinces, as it was seen by the latter as an instrument to preserve their privileges. For a reconstruction of the various steps that led to the 1853 constitutional amendment see Rosti *1999passim*; see also Pisarello 2006: 403 ff.
[XIV] The defeat in the *Batalla de Cepeda* was followed by the *Pacto de San José de Flores*, o *Pacto de Unión* of 10 November 1859, according to which the Province of Buenos Aires became part of the Federation, with the power to propose changes to the 1853 Constitution, which were then approved on 23 September 1860. The 1860 amendment played an important role in defining the Argentine institutional system, so much so that several authors refer to the Constitution of 1853-1860: see, for example, Bidart Campos 1992: 37 ff. See also Rosti 1999, *passim*.
[XV] See, among others, Cheibub, Elkins, and Ginsburg 2011.
[XVI] Juan Bautista Alberdi (1810-1884) was one of the most important constitutional law scholars in Argentina. His book – *Bases y puntos de partida para la Organización Política de la República Argentina* (eds F. Cruz, Buenos Aires, 1914, 1st edition 1852) – had an enormous impact on the drafting of the first Constitution of Argentina. He adapting the US model to the peculiarities of the country by strengthening the powers of the federal level of government and, in particular, the President: see Hernández (undated) and Ferreyra 2012, with parallel text.
[XVII] See Dalla Vía 2015: 161 ff.; see also Rose-Ackerman, Desierto, and Volosin 2011; Hernández 2015: 141 ff.
[XVIII] See, among others, Hernández 1997; Bazán 2013: 37 ff.; Hernández, Rezk, and Capello 2015.
[XIX] As better explained below, the introduction of Councils for the Judiciary took place first at provincial level and was only accepted at federal level at a later stage.
[XX] It can be noted that in Europe, a common model of guarantees of the independence of the judiciary is gradually emerging, and that its fundamental element is given by Councils for the Judiciary: see Montanari 2011: 103 ff. For the use of the term 'Council for the Judiciary' see, *inter alia*, the Recommendation CM/Rec (2010)12 of the Committee of Ministers [of the Council of Europe] to member states on judges: independence, efficiency and responsibilities, 17 November 2010.
[XXI] For the US solutions see Comba (2017: 1-11, and in this symposium).
[XXII] For an exam of the judicial power at the provincial level see Vigo and Gattinoni de Mujía 2013; Hernández 2009: 91 ff.; Vergara 2008: 425 ff.; Castagnola 2010b: 161 ff. and Castagnola 2010a.
[XXIII] Art. 91 of the original text stated that 'El Poder Judicial de la Confederación será ejercido por una Corte Suprema de Justicia, compuesta de nueve jueces y dos fiscales, que residirá en la Capital, y por los demás tribunales inferiores que el Congreso estableciere en el territorio de la Confederación;' the latter has been changed in 1860 by erasing indications on the number of judges, which has been subsequently established by ordinary legislation. The number has thus changed over the years several times, from five judges established by the Law n. 27 of 1863 to the current nine, in accordance with the Law n. 23.774 of 1991 (the Law 15.271 of 1958 established seven judges, while the Law 16.895 of 1962 diminished this number to five). The lack of constitutional guarantees has thus facilitated changes in relation to the composition of the Court and

favoured the interference of political power: for an analysis of the discipline established at provincial level see Castagnola 2010a: 17 ff.

[XXIV] In this case the number of the article remained unchanged, but the content was amended by erasing the provision that established the power of the Congress to exercise a preventive review over provincial Constitutions.

[XXV] The 1994 constitutional amendment recognized the special status of the city of Buenos Aires, the federal capital and the economic and political centre of the country. See, in particular, Art. 129 of the Constitution, and – with specific reference to the powers in the jurisdictional sphere – the Law 24.588 and Law 26.288. For a critical overview of this new discipline, see Palacio 2002; Di Pietromica 2013: 1263 ff.

[XXVI] See note 22.

[XXVII] On these aspects see, among others, Midón 2013: 973 ff.; Bidart Campos 2008, in particular, Capítulo XLIII, *El poder judicial*; Sagüés 2012:337 ff.; Vigo and Gattinoni de Mujía 2013.

[XXVIII] It should be added that in 1992 the National Criminal Cassation Chamber has been established and located in the federal capital (its denomination has been then changed in Federal Criminal Cassation Chamber: see Law 24.121 of 1992, and Law 26.371 of 2008). The latter has jurisdiction over all national territory, and according the Code of Criminal Procedure and other complementary legislation it deals with specific subject matters in the event of non-compliance or incorrect application of substantive or procedural rules in the processes that take place before national jurisdiction. It is positioned at an intermediate level between appellate courts and the Supreme Court.

[XXIX] Once all other legal remedies which exist at provincial level have been exhausted, as established by Law n. 48 of 1863. See Art. 14 of *Ley sobre la jurisdiccion y competencia de los Tribunales nacionales* of 1863, n. 48: see Bidart Campos 2008, in particular Capítulo L, *El recurso extraordinario*.

[XXX] Introduced in the Constitution with the 1994 reform. These institutes had first developed as a matter of practice and were then regulated by ordinary legislation, and finally inserted in the Constitution thanks to the 1994 reform: see Dalla Via 1997: 42 ff.

[XXXI] Among other things, it should be not forgotten that under the Constitution the federal jurisdiction includes disputes involving citizens of different Provinces, with the possibility that in these cases federal judges apply codes directly.

[XXXII] See in particular Articles 99(4), and 114 of the Constitution.

[XXXIII] Only six Provinces have not established the Council for the Judiciary, thus maintaining the original procedure of appointment the executive and parliamentary approval: see Vergara (2008: 436), who proposes a classification of competences of the different provincial Councils in the appointments procedure, *ivi*, at 439. For a different analysis of provincial experiences see Vigo and Gattinoni de Mujía 2013. Finally, some interesting indications can be found in Castagnola 2010b, *passim*. On the circulation of Councils for the Judiciary in Latin America and related problems see, generally, Hammergren 2002.

[XXXIV] It has been pointed out that the federal framers of the Constitution were able to take as a reference the European experiences, in particular Spain and Italy, but also the provincial ones: see Midón 2013: 988.

[XXXV] In some Provinces the appointment of Supreme Court judges falls under the competence of the legislature, which proposes three candidates to the executive, while in two Provinces (Chaco and Tierra del Fuego) the executive decides on the basis of a proposal put forward by the Council for the Judiciary: see Castagnola 2010a: 57 ff.

[XXXVI] The appointments procedure for the Federal Supreme Court will be explored further in the next paragraph so as to investigate the role assigned to Provinces.

[XXXVII] It is recalled that the creation of the Council for the Judiciary had the purpose to limit the '*amiguismo*' and the '*partitismo*' that affected the appointments of judges: *Ibidem*.

[XXXVIII] The solution indicated in the text is the result of the amendment introduced by Law 26.080 of 2006. It changed the original provisions introduced by Law 24.937 of 1997, which ensured a better balance between the political and expert members, although it also established the presence of only five judges out of twenty members.

[XXXIX] See the recommendation of the Committee of Ministers of the Council of Europe: Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, op. cit.

[XL] The composition of the Council for the Judiciary and its inability to strengthen judicial independence has been criticized by several Argentine scholars: Midón 2013: 995; Hernández 2009: 100; J. Horacio Gentile 2014.

[XLI] The reform was introduced through Law n. 26855, in B.O. 27.05.2013, for a comment see Cassetti 2013:

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[XLII] Fallos: 336:760. See also Cassetti 2013: 7; Sanabria 2013.

In reflecting on the guarantees of the independence of judges, the issue of substitute judges ('subrogantes') also deserves to be mentioned given that in recent years they have assumed an increasingly important role in Argentina, considering their number and functions. In fact, substitute judges do not enjoy the same guarantees of tenured judges and for this reason the Supreme Court has recognized the unconstitutionality of Law 27145 of 2015: see decision *Uriarte Rodolfo Marcelo y otro c/ Consejo de la Magistratura de la Nación s/ acción mere declarativa de inconstitucionalidad* of 4 November 2015, Fallo FLP 9116/2015. See also Van Zyl Smit 2016; Fuentes 2016: 499 ff.

[XLIII] See the transitional clause 11, which provided for the entry into force after 5 years since 1999.

[XLIV] The Justice Carlos Fayt, born in 1918, was appointed to the Supreme Court in 1983 by President Alfonsin. In more recent years, several strong clashes between Justice Fayt and the President de Kirchner emerged, leading the President to ask for his resignation on several occasions by contesting his ability to carry out the professional activity. The resignation arrived only in 2015; Justice Fayt died on 23 November 2016.

[XLV] The case started as administrative proceedings and then arrived to the Supreme Court through an extraordinary appeal of the attorney general: see Fallos 322:1616. As a result of the ruling of the Supreme Court, all judges who reached the age limit were able to appeal to the Court by asking for the disapplication of the provision.

[XLVI] See Dixon and Landau 2015; Harding 2000.

[XLVII] For a reconstruction and critical evaluation of the decision of the Supreme Court see Hernández 2001, which contains in appendix also the decision of the Supreme Court.

[XLVIII] See the decision *Schiffrin Leopoldo Héctor c/ Poder Ejecutivo Nacional,* Fallo CSJ 159/2012.

[XLIX] Castagnola 2010b: 7. Also, for the analysis of the various solutions see Castagnola 2010a: 45 ff.

[L] For the analysis of the provisions adopted at the provincial level see again Castagnola 2010a: 71 ff.; Vigo and Gattinoni de Mujía 2013, *passim*.

[LI] Such provisions can be found today in the Provinces of San Luis and Tierra del Fuego: Castagnola 2010a: 75-76.

[LII] Please refer for details to provisions contained in the Law on the Council for the Judiciary: see Law 24.937 as amended by the Law 26.080 of 2006, Articles 22 and 23.

[LIII] The Law on the Council for the Judiciary specifies which behaviors give rise to disciplinary responsibility and the applicable sanctions: *Ibidem*, Art. 14.

[LIV] See the decision of 15 November 1985, *Bonorino but v. Estado Nacional Fallo*s, 307:3174, in particular p.to 5, the decision also recalls the reasons of the guarantee of the intangibility of remuneration; on this issue see Jiménez (undated: 15 ff.).

[LV] See on these aspects Sagüés 2012: 356 ff.

[LVI] Among the many critical observations see Antonio M. Hernández, who – highlighting the distance that in many cases exists between the law in the books and law in action in a lot of Latin American countries – points out an increasing political influence on the judiciary following the reform: Hernández 2009: 98 ff. More generally, on the limited effectiveness of judicial reforms in this area see Hammergren 2002, *passim*.

[LVII] The reference is to a *reflective judiciary*, which assumes particular importance in federal systems and, in general, in those countries with a particularly complex social structure. The appointments system to the US Supreme Court represents a paradigmatic example, see Caielli and Mastromarino 2018.

[LVIII] Decree 222/2003 on *Procedimiento para el ejercicio de la facultad que el inciso 4 del artículo 99 de la Constitución de la Nación Argentina le confiere al Presidente de la Nación para el nombramiento de los magistrados de la Corte Suprema de Justicia de la Nación. Marco normativo para la preselección de candidatos para la cobertura de vacantes*, Bs. As., 19/6/2003; it has been recently modified by the Decree 491/2018, *Atribuciones del poder ejecutivo nacional*, 30/05/2018. See Van Zyl Smit 2016: 27 ff.

[LIX] The reference is to the development of different forms of *amparo*, which emerged firstly in the case law, and has been then recognized by the 1994 constitutional reform that changed the Art. 43 of the Constitution: see for all Fernández Segado 2009: 215 ff.

[LX] The text of the Art. 280 can be cited: 'Cuando la Corte Suprema conociere por recurso extraordinario, la recepción de la causa implicará el llamamiento de autos. La Corte, según su sana discreción, y con la sola invocación de esta norma, podrá rechazar el recurso extraordinario, por falta de agravio federal suficiente o cuando las cuestiones planteadas resultaren insustanciales o carentes de trascendencia.'

[LXI] See Dumon 2016, who cites *Banco de la Provincia de Buenos Aires c. Nación Argentina* (Fallos, 186: 201).

[LXII] Cases *Strada* of 1986 (Fallos, 308:490), and *Di Mascio* of 1988 (Fallos, 311:2478).

References

- Bazán V., 2013, 'El federalismo argentino: situación actual, cuestiones conflictivas y perspectivas', *Estudios Constitucionales*, 1/2013, 37-88.
- Bidart Campos G.J., 1992, 'El sistema constitucional argentino', in D. Belaunde, F. Fernández Segado, R. Hernandez Valle (eds), *Los sistema constitucionales iberoamecanos*, Dykinson, Madrid, 37 ff.
- Bidart Campos G.J., 2008, *Compendio de derecho constitucional*, Ediar, Buenos Aires.
- Brewer-Carias A. R., 2008, *Reflexiones sobre la revolución norteamericana (1776), la revolucion francesa (1789) y la revolucion ispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno*, 2nd edition, Series Derecho Administrativo Nº 2, Universidad Externado de Colombia, Editorial Jurídica Venezolana, Bogotá.
- Caielli M. and A. Mastromarino, 2018, 'Jurisdiction and Pluralisms: the Temptations of a Reflective Judiciary', *Federalismi.it*, special number, 5/2018, available at: www.federalismi.it.
- Carbonnel M., 2009, 'Los derechos funamentales en América Latina: apuntes para una discusión', in M. Carbonnel, J. Carpizo, D. Zovatto, *Tendencias del constitucionalismo en Ibero América*, Unam-Instituto de investigaciones jurídicas, México, 35 ff.
- Cassetti L., 2013, 'La Corte Suprema di giustizia della Nazione argentina dichiara incostituzionale la riforma del Consejo de la Magistratura: un punto a favore dell'indipendenza del potere giudiziario e del valore della Costituzione nel conflitto tra l'esecutivo e la magistratura', *Federalismi.it*, n. 18/2013: 1-16, available at: www.federalismi.it.
- Castagnola A., 2010a, *¿Cómo evolucionan nuestras instituciones? Un estudio comparado de la normativa de las Cortes Supremas provinciales y de la Corte Suprema de Justicia de la Nación desde 1984 hasta 2008*, Asociación por los Derechos Civiles, Buenos Aires.
- Castagnola A., 2010b, 'La diversidad institucional de los Poderes Judiciales provinciales en Argentina desde una perspectiva histórica', *POSTData 15 (2*), 161 ff.
- Cheibub J.A., Z. Elkins, and T. Ginsburg, 2011, 'Latin American Presidentialism in Comparative and Historical Perspective, Public Law and Legal Theory', Working Paper n. 361, Chicago, available at: http://www.law.uchicago.edu/academics/publiclaw/index.html.
- Comba Mario, 2017, 'Le declinazioni del pluralismo normativo nella forma di Stato multilivello: il Judicial Federalism degli Stati Uniti. Un modello (incompiuto?) di tutela pluralista dei diritti', *Federalismi.it*, 11/2017, 1-11, available at www.federalismi.it.
- Dalla Via A.R., 1997, 'La justicia constitucional en Argentina', *Anuario Iberoamericano de Justicia Constitucional*, 35-48.
- Dalla Vía A.-R., 2015, 'Ensayo sobre la situación actual del hiperpresidencialismo', in *REVISTA de la Facultad de Ciencias Jurídicas y Sociales*, 161 ff.
- Díaz Ricci S., 2009, 'Panorama y evolución del control de constitucionalidad en los estados provinciales de Argentina', *Revista Iberoamericana de Derecho Procesal Constitucional*, n. 11, 149-190.
- Dixon R. and T. Ginsburg, 2017, *Comparative constitutional law in Latin America*, Edward Elgar Publishing, Cheltenham.
- Dixon R. and D. Landau, 2015, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', *I•CON*, XIII(3): 606-638.
- Di Pietromica V., 2013, 'El poder judicial de la Ciudad de Buenos Aires', in Vigo and Gattinoni de Mujía 2013, 1263 ff.
- Dumon A., 2016, 'La justicia constitucional en el federalismo', in *Revista Argentina de Justicia Constitucional*, n. 2, November 2016, available at: https://ar.ijeditores.com/articulos.php?Hash=5e430a36bfde4ded08b9c41f7b3d81cf&hash_t=c01415b111d69f8211145f6d3701c65c.
- Fernández Segado F., 2003, 'España e Iberoamérica: una recíproca permeabilidad constitucional', in F. Fernández Segado, *La Constitución de 1978 y el Constitucionalismo Iberoamericano*, Ministerio de la Presidencia: Secretaría General Técnica. Centro de Publicaciones. Centro de Estudios Políticos y Constitucionales, Madrid, 13-28.

- Fernández Segado F., 2009, 'La creación jurisprudencial del amparo y los grandes aportes a la configuración de este instituto de garantía llevados a cabo por la Corte Suprema de Justicia de la Nación Argentina', in F. Fernández Segado, *La justicia constitucional: una visión de derecho comparado*, Dykinson, Madrid, 215-258.
- Ferreyra R.G., 2012, 'Orígenes, sobres las Bases de Juan Bautista Alberdi y la Constitución federal de su tiempo', *Academia. Revista sobre enseñanza del Derecho de Buenos Aires*, 2012, 10(19): 143-228.
- Frosini J.O. and L. Pegoraro, 2009, 'Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?' *Journal of Comparative Law*, 3:2, 39-63.
- Fuentes G., 2016, 'Independencia del Poder Judicial. Punto final al peligroso mecanismo de designación de jueces subrogantes', *Revista Anales de la Facultad de Ciencias Jurídicas y Sociales*, n. 46, 499 ff.
- Garoupa N. and T. Ginsburg, 2008, 'Guarding the Guardians: Judicial Councils and Judicial Independence', John M. Olin Program in Law and Economics Working Paper No. 444.
- Gros Espiell H., 2002, 'El constitucionalismo latinoamericano y la codificación en el siglo XIX', *Anuario Iberoamericano de Justicia Constitucional*, 143 ff.
- Hammergren L., 2002, 'Do Judicial Council Further Judicial reform? Lessons from Latin America', Carnegie Endowment for International Peace, Working Papers, n. 28/2002, available at: http://law.wisc.edu/gls/lhdjc.pdf.
- Harding A.J., 2000, 'The Creation and Amendment of Constitutional Norms: a Comparison', in M. Andenas (ed), *The Creation and Amendment of Constitutional Norms*, British Institute of International and Comparative Law, London, chapter 17.
- Haro R., 2003, 'La acción declarativa de inconstitucionalidad en el derecho federal argentino', *Anuario Iberoamericano de Justicia Constitucional*, 247-275.
- Hernández A.M., 1997, *Federalismo, autonomía municipal y la ciudad de Buenos Aires en la reforma constitucional de 1994*, Depalma, Buenos Aires.
- Hernández A.M., 2001, *El caso 'Fayt' y sus implicancias constitucionales*, Academia Nacional de Derecho y ciencias sociales de Córdoba, Córdoba.
- Hernández A.M., 2008, *Derecho Público Provincial*, LexisNexis.
- Hernández A.M., 2009, 'El federalismo judicial y la protección de los derechos fundamentales en la República Argentina', *Revista d'Estudis Autonòmics i Federals*, n. 9, October 2009, 91-128.
- Hernández A.M., 2010, 'Presidencialismo y Federalismo en Argentina', *Federalismi.it*, 1/2010, 1-32, available at: www.federalismi.it.
- Hernández A.M., 2015, 'Hiperpresidencialismo y presupuesto', *Cuaderno de Federalismo XXVIII*, Academia Nacional de Derecho y Ciencias Sociales de Córdoba, Cordoba, 2015, 141 ff.
- Hernández A.M., undated, *El federalismo en Alberdi y la Constitucion Nacional de 1853 y 1860*, Academia Nacional de Derecho y Ciencias Sociales de Córdoba (República Argentina), available at: http://www.acader.unc.edu.ar.
- Hernández A.M., E. Rezk, and M. Capello (eds), 2015, *Propuestas para fortalecer el federalismo argentino*, Academia Nacional de Derecho y Ciencias Sociales de Córdoba, Córdoba.
- Horacio Gentile J., 2014, 'El Poder Judicial de la Constitución reformada en 1994', paper presented at the XXI Encuentro de Profesores de Derecho Constitucional de Santa Fe, available at: http://www.profesorgentile.com/n/ponencia-presentada-al-xxi-encuentro-de-profesores-de-derecho constitucional-de-santa-fe.htm.
- Jiménez E.P., undated, *Derecho Constitucional Argentino*, chapter 34, El poder judicial de la Nación, available at: http://www.profesorjimenez.com.ar/derecho-constitucional-argentino/.
- Langley L.D., 1996, *The Americas in the age of revolution, 1750-1850*, Yale University Press, New Haven.
- Losano M., 2000, *I grandi sistemi giuridici. Introduzione ai diritti europei ed extraeuropei*, Laterza, Roma-Bari.
- Lugones N., 1985, 'Antecedentes Históricos, crisis y replanteo de la cuestión federal', in *La Ley*, C1236.
- Marini G., 2001, 'La costruzione delle tradizioni giuridiche ed il diritto latinoamericano', *Rivista critica di diritto privato*, 2/2011, 163 ff.
- Marini G., 2010, 'Diritto e politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione', *Pólemos*, 1/2010, 31 ff.

- Merryman J.H. and D.S. Clark, 1978, *Comparative Law: Western European and Latin American Legal System*, The Bobbs-Merrill Company, Inc., Indianapolis, Indiana.
- Midón M.A.R., 2013, *Manual de derecho constitucional argentino*, La Ley, Buenos Aires.
- Montanari L., 2011, 'L'indipendenza della magistratura in Europa: verso un modello comune di garanzie?', in R. Toniatti and M. Magrassi (eds), *Magistratura, giurisdizione ed equilibri istituzionali. Dinamiche e confronti europei e comparati*, Università degli studi di Trento, Trento, 103 ff.
- Nolte D. and A. Schilling-Vacaflor, 2012, *New Constitutionalism in Latin America. Promise and Practices*, Ashgate, Farnham.
- Palacio L.E., 2002, 'La justicia de la Ciudad de Buenos Aires', *La Ley*, March 2002, 356.
- Pegoraro L., 2010, 'Brevi riflessioni su alcuni profili comparatistici del costituzionalismo latino-americano', *Studi Urbinati, A Scienze giuridiche, politiche e economiche*, vol. 6, n. 4/2010, 569 ff.
- Pisarello G., 2006, 'The Argentinian Senado', in J. Luther, P. Passaglia and R. Tarchi, *A World of Second Chambers*, Giuffrè, Milano, 403 ff.
- Ramos Mejía F., 1889, *El Federalismo*, Félix Lajouane Editor, Buenos Aires.
- Rolla G., 2012, 'La Evolución del constitucionalismo en América Latina y la originalidad de las experiencias de justicia constitucional', *Anuario Iberoamericano de Justicia Constitucional*, 329-351.
- Rose-Ackerman S., D.A. Desierto, and N. Volosin, 2011, 'Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines', *Berkeley Journal of International Law*, 29, 246-333, available at: http://scholarship.law.berkeley.edu/bjil/vol29/iss1/8.
- Rosenn K.S., 1994, 'Federalism in the Americas in Comparative Perspective', *University of Miami Inter-American Law Review*, 26, 1-50, available at: http://repository.law.miami.edu/umialr/vol26/iss1/2.
- Rosti Marzia, 1999, *Modelli giuridici nell'Argentina indipendente 1810-1910*, Giuffrè, Milano.
- Rosti Marzia, 2007, 'Sull'esistenza di un sistema giuridico ibero-americano. La ricostruzione di un dibattito e le prospettive di ricerca', *The Cardozo Electronic Law Bulletin*, vol. 13/2007, available at: http://www.jus.unitn.it/cardozo/Review/2007/rosti1.pdf.
- Rosti Marzia, 2011, *Argentina*, il Mulino, Bologna.
- Sagüés N.A., 2012, *Manual de derecho constitucional*, Astera, Buenos Aires-Bogotà.
- Sanabria P.D., 2013, 'Una sentencia ejemplar de la Corte Suprema de Justicia de la Nación Argentina. Comentario al fallo "Rizzo, Jorge G. (Apoderado Lista 3 Gente de Derecho) s/Acción Amparo c/Poder Ejecutivo Nacional"', *Revista Iberoamericana de Derecho Administrativo y Regulación Económica*, n. 5, available at: http://www.ijeditores.com.ar/articulos.php?idarticulo=65925&pri.
- Somma A., 2015, 'Le parole della modernizzazione latinoamericana. Centro, periferia, individuo e ordine', in M.R. Polotto, T. Keiser, T. Duve (eds), *Derecho privado y modernización. América Latina y Europa en la primera mitad del siglo XX, Global Perspectives on Legal History*, Max Planck Institute for European Legal History Open Access Publication, Frankfurt am Main, 11-46, available at: http://dx.doi.org/10.12946/gplh2.
- Van Zyl Smit Jan, 2016, 'Judicial Appointments in Latin America: The Implications of Tenure and Appointment Processes', Bingham Centre for the Rule of Law, available at: www.binghamcentre.biicl.org.
- Vergara R.A., 2008, 'El poder judicial provincial', in Hernández 2008, 425 ff.
- Vigo R.L. and M. Gattinoni de Mujía (eds), 2013, *Tratado de Derecho judicial*, Tome II, *Derecho Judicial Argentino*, Abeledo Perrot, Ciudad Autonoma de Buenos Aires.