

CONSIDERATION OF SUBNATIONAL CONSTITUTIONS IN ARGENTINA

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1. Our federal system is integrative.. We think that federalism was the state form chosen to solve the serious political, economic and social conflicts that had arisen and the result of our historical evolution. In this regard, we briefly say that in 1810 the May Revolution broke out and in 1816 our country declared her independence from Spain, but only in 1853 was the National Constitution sanctioned. In 1820 it was decided we would have a Republican and not a monarchical form of government; after decades of hard and bloody civil wars, federalism was established in 1853 as the form of state in the National Constitution. The 14 Argentine historical provinces were constituted as independent political units between 1815 and 1834 and drew up their own constitutions.

Federalism was established through almost one hundred inter-provincial pacts among which the most remarkable ones were the Pacto del Pilar (23-2-1820) entered into by the provinces of Buenos Aires, Santa Fe and Entre Rios; the Tratado del Cuadrilátero (Quadrilateral Treaty) (15 to 25-1 and 7-4, 1822) entered into by the provinces of Buenos Aires, Santa Fe, Entre Rios and Corrientes; the Pacto Federal (Federal Pact) (4-1 to 15-2-1831) entered into by the provinces of Buenos Aires, Santa Fe and Entre Rios, later adhered to by the rest of the provinces; as an immediate precedent for the 1853 constitution, the Acuerdo de San Nicolás (San Nicolás Agreement) (31-5-1852) was signed; said agreement ratified the foundations for the federalist organization already set in the 1831 Federal Pact. To that end, the Preamble of the Supreme Law makes reference to the fulfillment of said pre-existing pacts.

During the process previous to the 1860 constitutional reform, the Acuerdo de San José de Flores (San José de Flores Agreement) was entered into and made it possible that the province of Buenos Aires be admitted into the Argentine Federation again.

As detailed above, the provinces created the Federal State through the delegation of competences to the Federal Government by the National Constitution.

All in all, the 1787 American Constitution was the direct antecedent of the federalism established in the 1853 and 1860 National Constitution.

However, as federalism is a “process” rather than a political and state “stereotype”- as Friedrich pointed out- since there is a permanent struggle between the center and the periphery with their respective converging and diverging forces, in our country we have faced serious and prolonged hard times that have made the gap between the formal and the material constitution wider. To the cultural problems arisen as a result of society’s lack of organization or the individual’s rejection of social norms we have added the lack of resolution of the most dramatic relation in history –that of Buenos Aires and the rest of the country- and which is closely linked to the fate of our federalism.

2. At present, in our federation, there are 23 provinces and the Autonomous City of Buenos Aires as sub-national units. There were 14 “historical” provinces: Buenos Aires, Córdoba, Santa Fe, Entre Ríos, Corrientes, Mendoza, San Luis, San Juan, Santiago del Estero, La Rioja, Catamarca, Tucumán, Salta and Jujuy.

During the decade of the 50's, the national territories were made into provinces and 8 new provinces were admitted: Chaco, Chubut, Formosa, La Pampa, Misiones, Neuquén, Río Negro and Santa Cruz. Lastly, the only national territory left was made into the Province of Tierra del Fuego in 1990.

The Autonomous City of Buenos Aires was created by the 1994 Federal Constitutional Reform.

3. All the provinces enjoy the same status and powers and have drawn up their own provincial constitutions. Regarding the Autonomous City of Buenos Aires, the National Constitution (art. 129) vests in it a special autonomy status which is almost the same as that of the provinces. In the debate that followed, we held that its nature is that of a city-state, like those of Berlin, Bremen and Hamburg within German Federalism. Its own constitution was drawn in 1996. Our federation is more complex since, after the 1994 federal constitutional reform, there exist 4 governmental spheres: that of the federal government, the provinces, the Autonomous City of Buenos Aires, and that of the municipalities.
4. The functions of the provincial constitutions are highly important since they are the supreme laws of the states composing the federation and consequently, they acknowledge the fundamental rights of the citizens, organize the powers within the Republican system and set the basis for the municipal regimes.

The provinces have residuary or conserved powers and powers concurring with the Federal Government. However, they are not authorized to exercise the powers that have been, either implicit or expressly, vested in the Federal Government. The Provincial Constitutions thus regulate the jurisdictions of the provinces as so ordered by the National Constitution and distribute them among the diverse legislative, executive and judiciary powers.

Although the Provincial Constitutions may be considered power-limiting, as in any lawful state, they are also the source of the powers within the jurisdictions assigned by the National Constitution.

5. The National Constitution recognizes the autonomy of each state which comprises institutional, political, financial and administrative aspects. The exercise of the provincial constituent power is prescribed by art.5 of the National Supreme Law that reads: "Each province shall draw up its own constitution under the Representative Republican system and in accordance with the principles, declarations and guaranties of the National Constitution, to insure the establishment of justice, its municipal regime and primary education. Under these conditions, the Federal Government shall guarantee each province the enjoyment and exercise of its institutions."

Furthermore, there are other provisions like art. 121 which reads as follows: "The provinces shall have all the power not vested in the Federal Government by this Constitution and expressly reserved for special pacts at the time of their admission"; art. 122: "The provinces create their own institutions and are governed thereby; they choose their governors, legislators and other authorities without any intervention on the part of the Federal Government"; art. 123: "Each province shall draw up its own constitution under the provisions of article 5, insuring municipal autonomy and regulating its scope and content within the institutional, political, administrative, economic and financial order", and art. 124: "The provinces may create regions for economic and social development and establish entities with the authority to fulfil their aims and objectives; they may enter into international agreements as long as these agreements are not against the foreign policy of the Nation and do not affect either the powers vested in the Federal Government or the national standing,

provided these matters have been brought to the knowledge of the National Congress. The City of Buenos Aires shall be ruled by the regulations set to that effect”.

6. Regarding the procedure for the enactment of the provincial constitutions, a method similar to that of the federal order is, in general terms, used: that of constituent conventions. The system of constituent conventions is further used for provincial constitutional reforms and, in some cases, for the amendment of certain articles by the Legislature as such and whose definite approval is subject to a public “referendum.”

Before the 1860 federal constitutional reform, the provincial constitutions were revised by the National Congress. After that year, the constitutionality of a provincial constitutional reform is to be judicially controlled and the Supreme Court of Justice of the Nation shall finally interpret the Federal Constitution in that respect. There is not at present any participation whatsoever of the Federal Government in the exercise of the constituent power on the part of the provinces.

The constitutionality control of a specially complex provincial constitutional reform has been considered in our work “The Fayt case and its constitutional implications,” National Academy of Law and Social Sciences of Córdoba, 2001, which, for brevity reasons, is only mentioned herein.

Besides judicial control, in theory, if a province does not respect the constitutional guidelines of the Argentine Federation, it may be subject to an extraordinary political intervention on the part of the Federal Government, as so stated by art. 5 “in fine” of the Supreme Law and made explicit in art 6 which reads: “The federal government may intervene in the territory of the provinces to guarantee the Republican form of government or repel foreign invasions and at the request of the elected authorities to keep them in or to bring them back into office in case of having been removed from office by reason of sedition or invasion of another province.”

The provinces shall respect the federal supremacy principle held by art. 31 of the National Constitution and specially the basis set by art. 5 above cited.

7. In general terms, the provincial constitutions have a similar structure: a Preamble, a Dogmatic Part containing the declarations, rights and guaranties and an Organic Part of the Legislative, Judicial, and Executive Powers, plus the Municipal Regime and the procedure to reform the constitutions.

There are differences between the most recently reformed constitutions – Córdoba (1987 and 2001), Buenos Aires (1994), San Juan (1986), Salta (1986), etc; Tierra del Fuego (first sanctioned in 1991), the Autonomous City of Buenos Aires (1996), and the oldest constitutions of Mendoza (1916), Entre Ríos (1933) and Santa Fe (1962) – with respect to the acknowledgment of 2nd and 3rd generation human rights and to new institutions such as the Judiciary Council, the Public Defender, among others.

8. In general terms it can be said that the National Constitution had an important influence on the sanction of the Provincial Constitutions since they were later drawn up according to the basis set by art. 5 thereof and revised by the National Congress. But afterwards, and mainly in the last 1994 federal constitutional reform, the opposite process was observed, that is, the manifest influence of provincial constitutionalism upon the Supreme Law of the Nation. This is so because the provinces had already incorporated new 2nd and 3rd generation rights and guaranties and new institutions in the provincial constitutional reforms made as from 1986, later to be federally adopted. There were even provincial constitutions, such as those

of Córdoba and San Juan, which moved ahead to acknowledge the international law of human rights, later adhered to by the 1994 National Constitution Reform whose art. 75 grants constitutional hierarchy to certain human rights treaties.

Furthermore, the remaining provincial constitutionalism can be considered as an important source of each provincial constitution since there is a horizontal federalism; however, the local history and characteristics have generally prevailed. In this respect, we mention once again the example of the acknowledgment of new rights and guaranties and new institutions in the last reforms made, as well as the special examples of the provinces which have regulated specific problems such as the irrigation in Mendoza and the property of resources in the maritime littoral, such being the case of Tierra del Fuego.

9. Generally speaking, the principles of power organization are similar in the National and Provincial Constitutions: a Republican system in which the legislative, executive and judicial powers are equally divided and balanced and a participating democracy which even implies the exercise of public initiative and referendum practices. There are, however, differences in the electoral systems and in the organization of the Legislative, Executive and Judicial Powers among the different provincial constitutions and with respect to the National Constitution. For example, not all the provinces have a bicameral system or a Judiciary Council, nor do all of them acknowledge their authorities' power to pass emergency laws.
10. All the Provincial Constitutions, in their first part, contain a wide acknowledgment of rights and guaranties. Besides, and under art 5 of the Federal Constitution, all the rights and guaranties acknowledged by the Supreme Law of the Nation are in force in the provinces. On such basis, the provinces may enlarge the acknowledgment of rights and guaranties as so done in different times of our institutional history when rights and guaranties were first incorporated into the provincial constitutions and then acknowledged by the National Constitution.
11. Each province has its own Judicial Power which exercises the constitutionality control which is vague and aims at ensuring the supremacy of the respective Provincial Constitution. It may further intervene the Supreme Court of Justice of the Nation to ensure the supremacy of the National Constitution. This system is similar to the American system for which the Legislative as well as the Executive Powers may also interpret the respective constitution with respect to the fulfillment of their duties.
12. In general terms, the provincial constitutions are amended more frequently than the National Constitution. For example, the National Constitution was originally sanctioned in 1853 and validly amended in 1860, 1866, 1898, 1957 and 1994 whereas the Constitution of Córdoba was originally sanctioned in 1855 (in the period after the sanction of the National Constitution since in the previous period the first Constitutional Rule was issued in 1821) and validly amended in 1870, 1883, 1900, 1912, 1923, 1987 and 2001. In any case, this situation can not be compared to that of American constitutionalism because our system is mainly based on conventions in which the public initiative is not given participation in this issue and in few cases amendments by the Legislature subject to public approval are allowed.
13. The provincial constitutions are longer and more detailed than the Federal Constitution but this does not mean that they look like statutes or common laws. For example, the National Constitution has 130 articles whereas the Constitution of Córdoba has 200 articles.
14. In my opinion, the strength and future of provincial constitutionalism is closely linked to the strengthening of federalism and power decentralization. When

democracy was restored – mainly as from 1983 – the provincial and municipal autonomies were again exercised and that meant a significant modernization of our Provincial Constitutions and the sanction of more than 110 Municipal Bye-Laws. This process was the main reform source for the 1994 National Constitution which reasserted power decentralization. On the contrary, the weakness of these reforms lies in the lack of a full enforcement of the sanctioned norms and principles within the different state levels. Argentina suffers from society's lack of organization and the individual's rejection of social norms as a consequence of an inadequate juridical and political culture. This is the fundamental change we should make to fulfil the norms of the constitutions in general and consolidate their transcendence in our society.