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Constitutionalism and Spanish-American Bicentennial

Constitutional norms and social reality: Juan Bautista Alberdi's thoughts and Argentina's historical experience

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The purpose of this brief paper is to reflect on how, since its origins, constitutionalism has gone hand in hand with the history of Latin American countries; to analyse the manner in which the dialectical relation between constitutional norms and social normality was established throughout these two centuries; and to have a careful look at the constitutional thoughts of Juan Bautista Alberdi and their influence in the Argentine Constitution of 1853 and in the process of political transformation it triggered.

I. Introduction

The movement for national independence in Spanish-American countries, whose bicentennial is being celebrated these years, is perhaps the main event in the history of those peoples following the discovery of the Americas by Columbus in 1492. It is their most significant common historical achievement.

This process brought about the emergence of seventeen new independent States, after the viceroalties and captaincies in which the Spanish colonial structure was organized fell apart.

Firstly, it should be noted that the new States are young countries, of hardly two centuries of independent existence, with all the features that define nations growing to political maturity: vitality, utopia, Latin American magic realism – where reality seems to surpass fiction by far and where everything seems possible –, chronic political instability, absence of established institu-

tions, serious fragmentation and marked social differences, and so forth.

The movements for national independence brought about profound historical changes in all the political communities that underwent those changes: a colonial regime developed into an autonomous one; a monarchy evolved into republican models; vicerojal institutions were set aside and those proper to modern constitutionalist systems were gradually adopted; a new legal system emerged to replace Spanish legislation and the laws of the Indies (*derecho indiano*).

Dismemberment and territorial disintegration processes often take place in conjunction with certain negative occurrences: clashes between the new States, civil wars, increasing social conflicts, isolation and economic collapse. Such a state of affairs will continue to exist until a new political system is gradually set up and becomes established, setting in motion a process of development and growth. The first decades of the emergence of the new national states in the Americas witnessed these negative occurrences.

On the other hand, a constant element in Spanish-American history and politics until the present time is the dialectics between the affirmation of an independent national identity and an enduring sense of belonging to a supranational community, a Big Motherland.

The process of emergence of national States was accompanied by Constitutionalism, which these nations adopted as ideal and a paradigm of their political and legal organisation. The new

States longed for a political organisation that established modern constitutional institutions, mainly, a bill of rights and the separation of powers. Their initial dream was to have new legal rules governing the complex political process they were going through. The American experience was a point of reference and inspiration for the brightest minds of the new nations. It was intended that the new State would be organised under a Constitution, even though most times the real structure of power did not allow and even rejected the rule of constitutional norms. Throughout these two centuries of Latin American political life, the leadership of charismatic strongmen called *caudillos* has been a constant hindrance to the implementation of constitutional and republican institutions.

When referring to the starting point of Spanish-American constitutionalism, Luis Sánchez Agesta stated, »Nations which gain their independence believe that their first sovereign act is to adopt a Constitution. It is their first act of faith as a newly born nation; in other words, their birth certificate, or solemn notice to the world of their existence as an independent nation establishing the fundamental law that will govern them. It is possible, and even likely, that they do not abide by that Constitution and that it has no practical force or effect. But enacting it is a matter of national honour, a public demonstration of sovereignty (...). The fact that this public notice of their existence is given through a Constitution carries several meanings. But there is one that stands out. The publication of that written legal norm has a true vital significance. What constituted an unintelligible process involving determination, feelings and ideas developed down through history into rules that became law. This law represents the institutional manifestation of the mass of feelings and ideas

forming the subjective conscience of a people, in order for them to live on and bind future generations.«¹

In the Americas, constitutionalism was born under threat – still in place – from the dichotomy between norms and social reality; the gap between them has narrowed but it still exists. The ideals and aspirations of successive constitutional texts have often become mere catalogues of illusions. The dialectical relation between constitutional norms and social normality features strong and original elements in Latin American constitutionalism. Quite often, social normality was prioritized over constitutional norms; at times there was a gaping abyss between them; and sometimes, seldom in fact, the constitutional norm successfully transformed the social reality it regulated.

This is why I would like to discuss the epitome of transformation of social reality achieved through a Constitution. It is the case of the Argentine Constitution of 1853, inspired by Juan Bautista Alberdi's constitutional thought, masterly set out in his classic work *Bases y puntos de partida para la organización política de la República Argentina* [*Bases and Points of Departure for the Political Organization of the Argentine Republic*], and written while he was in exile in Valparaiso (Chile) in 1852.

II. Alberdi's constitutional vision

By 1830 most of the new nations that had declared their independence had also enacted their own Constitution, except for Argentina and Panama.

Argentina adopted its first Constitution to be brought into force only in 1853, four decades after becoming an independent nation. Those four decades witnessed major political conflicts

¹ LUIS SÁNCHEZ AGESTA, *La Democracia en Hispanoamérica*, Madrid 1987, 9.

and economic backwardness. In such a context, the Constitution of 1853 became a remarkable instrument for change and transformation of the Argentine political reality and it reached its zenith in 1910, precisely on the 100th anniversary of independent life.

In order to convey a basic idea of the transformation achieved through constitutional organisation, suffice it to say that in 1853 the Argentine Republic was composed of only fourteen provinces that had not yet established the institutions of federal government; it had a population of hardly one million and a territory covering two million square kilometres. Before 1853, Argentines were, in Alberdi's words, »poor, uneducated and few« and did not know for certain what we wanted for our future. In 1910, the year of the first centennial, Argentina's federal institutions had definitely become established, its population grew to seven and a half million and its territory increased by one million square kilometres. The political program set out by Alberdi in his *Bases* played a crucial role in the achievement of the formidable transformation that took place in only seven decades.

In the initial chapters of the work referred to, Alberdi conducts one of the first comparative analyses of Ibero-American constitutional texts and states that the texts were conceived mainly to assert the independence of these nations. However, according to Alberdi, this new stage is suited to prioritize the accomplishment of material prosperity within the political and constitutional structure of nations in the Americas. Hence, he believes, the main political challenge at the time for Argentina is to become a modern nation capable of overcoming the desert and backwardness, its worst and main enemies. It is his belief that there can be no State or Constitution without a population, for a desert can have

no Constitution.² »The Argentine question today is the question of South America, namely: to find a system of organisation that is convenient to settle its deserts with a population capable of industry and liberty, to educate its peoples, not on sciences, not on astronomy – this would be ridiculously advanced and premature –, but on industry and practical liberty.«³

To govern is to populate, according to the motto summarizing Alberdi's proposal to a great extent. Raising the number of and improving the population through active encouragement of immigration, mainly from Europe, should be the instrument for progress in every aspect: »Without large populations, no culture may develop, and no considerable progress may be made; primary and secondary schools as well as universities are, in themselves, ineffective means to advance without large production companies, a consequence of large populations.«

Alberdi views the Constitution as an instrument for social transformation and change. It serves as »scaffolding« that enables politicians to build the nation. The Constitution shall be the bearer of the political project that the nation has developed after collective decision-making and reflection: »A nation is not a nation but for the conscious awareness of the elements forming it. Only then is that nation civilised: before it was instinctive, spontaneous; it wandered fully unaware of itself, without knowing in what direction or for what purpose. A people is civilized only when self-sufficient, after having moved from the realm of theory into reality, ensuing the adoption of the law that will enable its development. Therefore a people is independent only when civilised.«⁴

Alberdi's vision is not materialistic or mercantilist; rather, he considers that prosperity, achieved mainly through work, is an effective

2 »The best Constitution for the Argentine Republic is the one causing the desert to disappear«, JUAN BAUTISTA ALBERDI, *Bases y puntos de partida para la organización política de la República Argentina*, Valparaiso 1852, Chapter XXI.

3 ALBERDI (Fn. 2) Chapter XXIII.

4 JUAN BAUTISTA ALBERDI, *Fragmento Preliminar para el estudio del derecho*, Buenos Aires 1837.

moralising agent. »The Constitution does not regard wealth as an end, but as the most effective means to change the present situation of Argentine men, one of economic hardship. (...) The Constitution does not intend to turn the country into a market or the government into a stock exchange. (...) It considers the nation as it is, a gift from God, with its physical and moral needs, since I do not expect morality to be forgotten. (...) It is illustrated spiritualism, and not materialism, that makes us place economic matters at the top of the ranking of Argentine Constitutional Law aims.«

Many people can explain the causes behind the historical past. Fewer people can observe, describe, and analyse the current situation thoroughly. But only very few, endowed with great intelligence, can foresee the future and shape it with their intellectual capacity. One of these remarkable people is Juan Bautista Alberdi. Thus, one may wonder, »how could Alberdi make the right proposal? How could he anticipate in his *Bases* the country's needs at that historical time, needs that were met with the passing of time? I dare suggest that one of the key factors in his success is how realistic and integral the social theory modelling his thought is. His proposal for transformation comprises – at the same time and in order – cultural, political, economic, and legal aspects. Alberdi was a good lawyer and a great jurist. Nevertheless, he resisted the temptation of juridicism, that is, to adapt reality to norms and the misconception that amending norms is the best way to bring about fundamental changes in social reality. As noted above, Alberdi's legal and political theory is very realistic and he envisages many developments that took place in the 20th century. He asserted, »We do not need to change laws but people, things. (...) While we do not

employ other blocks than the current ones to build or rebuild our political construction, while our political reforms are no more than new combinations of the same elements existing at present, nothing radical, serious or fruitful will be attained.« Using language proper to modern social theory, we would like to highlight Alberdi's affirmation that, in order to achieve long-awaited prosperity, together with economic capital, it was necessary to increase social capital, basically composed of population, cultural values, and the institutional framework of a specific political community.

During its infancy, between 1810 and 1853, Argentina led an eventful life marked by the absence of constitutional organisation, the strong leadership of *caudillos*, civil wars and economic backwardness. Between 1853 and 1930, Argentina experienced a flourishing youth of eight decades, characterized by constitutional continuity and economic, educational and cultural progress, albeit problems concerning social and political exclusion arose. Since 1930 to date, the nation's growth to maturity has been quite turbulent and marked by the disruption of constitutional order, absence of a clear and lasting political project, and violence as a means to settle social and political conflicts, economic stagnation, and growing social unrest. On the threshold of the Bicentennial, Argentina, as well as the other countries in the region, has to rise to the challenge of developing a new political project that will reinforce its political institutions, secure its inclusion in a global world, and set in motion an inclusive process for economic and social development. The constitutional thoughts of Juan Bautista Alberdi can prove an invaluable source of inspiration to achieve the desired results.

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