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## Three Matters Concerning Argentine Constitutional History

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The Spanish constitutionalist Antonio Colomer Viadel, upon publishing his *Introducción al Constitucionalismo Iberoamericano*<sup>1</sup> [Introduction to Ibero-American Constitutionalism] in 1990, stated that his aim was to »draw some lines that could help us shape the irregular and almost contradictory contours of that constitutional reality«. Already in the preface he outlined the difficulty stemming from the fact that, without prejudice as to the common features that are inevitably shared by these constitutions, there are marked differences which render any attempt at explaining or interpreting the whole set an arduous task, or one doomed to failure from the start.

Two of the matters he deals with are what he called »pseudo-federalism« and »the myth of the executive«. I will discuss both herein, as well as the rights of indigenous peoples, absent from that work, by focusing on Argentine history given the aforementioned difficulty in simplifying such diverse and numerous systems to a common denominator.

From an outside perspective – and quite often from an inside perspective, too – Ibero-American federalism (Mexican, Brazilian, Argentine) is usually considered an imitation of United States federalism, even a bad imitation devoid of historical and sociological bases, that is to say, an artificial federalism.<sup>2</sup> It should be noted that in the case of Argentine federalism, such a diagnosis does not match the facts. There are three distinct periods in Argentine constitutionalism: the period leading to the framing of the constitution (1810–1853), the period of its enactment (1853–1860), and the period of its application up to the present time.

The first period witnessed the ideological battle that took place between the supporters of a confederation and the centralists. The former asserted, with good reason, that the sovereignty of the king of Spain had reverted to the provinces who, in order to remain united until the constitution was enacted, formed a confederation. On the contrary, the latter supported the theory – favourable to Buenos Aires – that such sovereignty reverted to the Argentine nation, created as a national state in 1810 with Buenos Aires as the seat of government.

The analysis of the second period comprises two points in time: 1853, the year of the enactment of the constitution, which was based on a pragmatic draft enshrining a federal nation but mitigated with unitarian features submitted by Juan Bautista Alberdi; and 1860, when, upon the initiative of Buenos Aires, the constitution was amended so that it bore a closer resemblance to the U.S. constitution, thus becoming more federal in nature.

The main feature of the third period is the progressive decline of federalism and its *de facto* transformation into a unitarian regime. One century ago, a bright observer, Rodolfo Rivarola, explained this historical phenomenon. Some causes for such transformation, which he believed plausible, were the location of the city of Buenos Aires, the layout of the railway net – with the aforementioned city as its hub –, economic progress through the direct action of the central government, and a strong sense of national identity.<sup>3</sup> Soon afterwards, new causes developed, such as the organisation of political parties at a national level and, in the past decades,

1 Madrid 1990.

2 See, MARCELLO CARMAGNANI (coord.), *Federalismos latinoamericanos: México/Brasil/Argentina*, México 1993. I discussed this matter in the book entitled *Confederación y federación en la génesis del Estado argentino*, Buenos Aires 2007.

3 *Del régimen federativo al unitario. Estudio sobre la organización*

*política de la Argentina*, Buenos Aires 1908.

the government's control of the economy and finance, which tied the development of provinces to the will of the central government.

The corollary of this process of decline is a relatively opulent national treasury supporting an omnipotent national government, and provinces with meagre fiscal resources that are bound to beg from this government what they need to survive. The true federalism existing at the country's inception has turned into mere nominal federalism, a situation which, rather than being improved by the latest constitutional amendment (1994), was reinforced. As a consequence, Argentina's federalism at present is distressingly fictitious.

The second matter at hand is the Argentine presidential system and its features in the text of the constitution and in practice. The fact that the U.S. constitution was the first fundamental law to avouch the presidential system does not mean that the Ibero-American presidential system, with all its variations, came into being as an imitation of the American model. In fact, it is directly rooted in viceroys and governors from the colonial period, and found its prolongation in the *caudillos*.

The »father« of the constitution of 1853, Alberdi, was categorical when asserting that »the Argentine executive branch, which is prominent in the constitution of 1853 and determines all of its features, is completely different from the executive branch of the United States. Placing one next to the other and counting their powers will suffice to show that they are as similar as an egg and a chestnut. And this is how it was meant to be. Our executive branch was, to a certain extent, a sort of reconstruction of the central government that had existed for two centuries. It is much more similar to Chile's executive branch than to that of the United States.«<sup>4</sup>

Among the various types of presidential systems created by the Ibero-American constitutions, the Argentine system, as well as its model – the Chilean constitution of 1833 –, is one of the strongest, and it is no exaggeration to define it as hyper-presidentialist. The president is the head of the government, of the administration, commander in chief of the armed forces (however not any more of the capital city); and, in addition he is, as was the case with the Chilean constitution and its precedent – the constitution of the Brazilian Empire of 1824 –, »supreme head of the nation« (Art. 99 par. 1). This paragraph, in its literal sense, breaks the balance that should exist between the branches of government by reinforcing the leading role played by the president.

Alberdi believed this supremacy was a *sine qua non* to reshape a society torn by a long-running civil war, such as that of Argentina, and to pave the way for the constitution to keep its full force and effect in that society. He wrote, »The executive branch shall have the authority required by the country's history and circumstances, and by the great end for which it is established. Otherwise, there will be government in name only, but not in reality; and in the absence of government, no constitution can exist, that is, there can be no order, liberty, or confederation [state].«<sup>5</sup>

At that point in history it was deemed essential to provide the state with a vigorous executive, capable of suppressing latent anarchy and chaos and of »achieving national unity«, as stated in the preamble to the constitution. However, with the passing of time and the achievement of the referred goal, hyper-presidentialism, once a virtue, turned into a vice. Such a president, generally also the head of his political party, is too heavy a burden on the republic,

4 Estudios sobre la constitución argentina de 1853, Buenos Aires 1929, 33–34.

5 Bases, chapter XXV, 5th reed., Buenos Aires 1933, 167.

with an excessive concentration of power impairing the free running of governmental institutions. According to the office holder's character and ambition, the president could prove a true dictator.

The constitutional amendment of 1994, which purportedly intended to limit presidential authority with the introduction of the Ministerial Cabinet Chief Officer into the executive, had the opposite effect and worsened the situation. As constitutional law expert Dardo Pérez Guilhou stated, »Greater authority was vested in the executive branch; or, even worse, the abuse of power that branch had been exerting was consolidated.«<sup>6</sup> Republican principles are, therefore, currently in mourning.

The third matter I will consider refers to the state's policy towards indigenous peoples. The original text of the constitution stipulated that the powers of congress included, besides encouraging their conversion to Catholicism, the »preservation of peaceful treatment« with them. This clause ratified the policy established in treaties with free indigenous communities in colonial times and also pursued by Argentine independent governments, and secured the full force and effect of those treaties.<sup>7</sup>

The constitutional amendment of 1994 ignorantly deleted that clause and, instead, acknowledged certain rights of indigenous »peoples« – rights which could have been added to that clause –, namely »to recognise the ethnic and cultural pre-existence of indigenous peoples of

Argentina. To guarantee respect for their identity and their right to bilingual and intercultural education; to recognise the legal capacity of their communities, and communal possession and ownership of the lands they have traditionally occupied [...] To ensure their participation in the management of their natural resources and in other matters affecting them.« (Art. 75, par. 17).

Among the foregoing rights, and with a paternalistic, anachronistic, and discriminatory attitude contrary to the principle of equal protection under the law, the amendment attached a condition to the grant of lands for the development of those communities: that »none of the lands shall be conveyed, transferred or subject to encumbrances«.<sup>8</sup>

It should be borne in mind that since the mid-20th century, most regulatory activity concerning indigenous matters took place in provinces with indigenous population (Chaco, Formosa, Misiones, Jujuy, Salta, Neuquén). The most relevant federal law enacted in this period is Law No. 23.302 on Indigenous Policy and Support for Indigenous Communities, somewhat more respectful of their rights than the constitution itself.

A different matter is the inadequate implementation of both statutory and constitutional provisions, as well as of international agreements adopted on the subject – such as ILO Convention No. 169 –, whose enforcement is still pending.

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6 Preface to *Constitución de la Nación Argentina*, 20th ed., Buenos Aires 1994, xxv.

7 ABELARDO LEVAGGI, *Paz en la frontera. Historia de las relaciones diplomáticas con las comunidades indígenas en la Argentina (Siglos XVI–XIX)*, Buenos Aires 2000.

8 For equal protection under the law applied to communities, see BARTOLOMÉ CLAVERO, *Derecho indí-*

*gena y cultura constitucional en América*, México 1994, 125–133.