Three Matters Concerning Argentine Constitutional History

The Spanish constitutionalist Antonio Colomer Viadel, upon publishing his *Introducción al Constitucionalismo Iberoamericano* [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. 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. Soon afterwards, new causes developed, such as the organisation of political parties at a national level and, in the past decades,

---

1 Madrid 1990.
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 prov-
inces 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 nomi-
nal federalism, a situation which, rather than
being improved by the latest constitutional
amendment (1994), was reinforced. As a conse-
quence, Argentina’s federalism at present is dis-
gressingly 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 sys-
tem, 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 prom-
inent 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.« 4

Among the various types of presidential
systems created by the Ibero-American constitu-
tions, 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, com-
mander 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 consti-
tution 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 presi-
dent.

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 circum-
stances, 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 ex-
ist, that is, there can be no order, liberty, or
confederation [state].« 5

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. How-
ever, with the passing of time and the achieve-
ment of the referred goal, hyper-presidentialism,
once a virtue, turned into a vice. Such a presi-
dent, generally also the head of his political
party, is too heavy a burden on the republic,

4 Estudios sobre la constitución ar-
gentina 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.» 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.

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».

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.

Abelardo Levaggi

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