

Universidad Estatal de San Petersburgo

El sistema constitucional argentino, los rasgos relevantes

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The Argentine Constitutional System

Living Constitution

- **Constitutions do not govern by text alone.**
- **Constant dialogue among political institutions.**
- **Constitutions draw their life from sources outside the law:**
 - 1. IDEAS**
 - 2. CUSTOMS**
 - 3. VALUE SYSTEM**
 - 4. SOCIETY**

Constitutional dialogue and decision making process

- **Constitutional Law is a complex, subtle and dynamic process in which all three branches converge and interact with their separate functions and interpretation.**
- **The Constitution undergoes constant interpretation and re-interpretation by legislators and executive officials, being the opinion of the Judiciary in a given conflict the final one.**

THE ARGENTINE CONSTITUTION



The Argentine Constitution

- **The Argentine Constitution was enacted in 1853, and our Founding Fathers drafted it essentially along the lines of the American Constitution (1787).**
- **Like its model, it provides for a strict separation of powers between the three branches of government, the Executive, Legislative and the Judiciary.**
- **Argentina is organized as a “strong” Presidential system.**
- **The Legislative power of the Nation is vested in a bicameral Congress, while it grants to the Judiciary, formed by a Supreme Court and those inferior tribunals as Congress may establish, the power to “to hear and decide all cases arising under the Constitution and the laws of the Nation”. Based on this clause, it has been held that courts are not allowed to render any decision or opinion outside the boundaries of a specific case.**

The division of competences

Norms and guiding principles

- The Argentine Constitution, Article 1 declares that
- "The Argentine Nation adopts the federal republican representative form of government, as this Constitution establishes."
- Article 5, for its part, orders 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."*

Argentina a Federal country

- The adoption of the federal system of government implies that the exercise of sovereign power rests with the federal government, and the autonomous power retain by the provinces, within their respective authorities.
- According to this system of government there is a distribution of political power between a central government and local governments, with a coordinated and harmonious interaction within a common territorial environment.
- In their capacity of being preexisting entities of the Nation, endowed with political autonomy and economic autarky, the Argentine provinces retain all original attributes not delegated to the federal government.
- The provinces have legislative powers which are exercised by the provincial legislatures, and jurisdictional powers done so through the local judicial power. It should also be noted that our system of judicial review is diffuse, which means that any national or provincial judge may declare the unconstitutionality of a law, as long as it opposite to the Constitution.

The Federal Government

The functioning of the branches

- Based on a system of division of power, essential aspects of Argentine Constitution are as follows:
- The Executive power is vested in a President who would be elected directly by the people by a system of majority run-off election with a threshold of absolute majority. Once elected, the president would last four years in office and could be reelected for one period.
- The Legislative power is vested in a Congress, based on a bicameral structure: the Senate that holds the representation of the Provinces, and the Lower House, represents the people and keep legislative initiative in its hands, except in federal issues.
- The Judiciary is vested in a Supreme Court and inferior courts of justice. Justices are nominated by the President with consent of the Senate, but requiring publicity of the sessions. Federal judges could be removed by impeachment. As part of the system of division of powers, judicial independence is an essential feature.

The Supreme Court

- **The Argentine Supreme Court, through its original and appellate jurisdiction (both ordinary and extraordinary), has risen to become the final interpreter of the Constitution in all cases that come for its review.**
- **Although the Argentine Supreme Court powers are formally different from that of European constitutional courts, as one of the most prominent Argentine Constitutional Law scholars has said: “the Supreme Court is frequently called ‘Court of Constitutional Guaranties’ since it has been granted the power to defend the Constitution in its entirety, but essentially in those parts where it touches the intimate essence of the human dignity, of its freedom, of its rights”.**

- **According to the Constitution, the Argentine Supreme Court has limited original jurisdiction in cases involving the Provinces, foreign ministers and other diplomats, while its appellate jurisdiction is regulated by law within the constitutional boundaries of federal jurisdiction.**
- **Since its inception in 1862, the Argentine Supreme Court, following U.S. Supreme Court Justice John Marshall's reasoning in *Marbury v. Madison*, has adopted the American model of judicial review, according to which all courts, federal or provincial and of all levels, have the power to strike down an act of Congress, or an action of the Executive, as unconstitutional, and therefore making it inapplicable for the particular case.**
- **One of the oldest acts still in effect, Law No. 48 enacted in 1863 sets down the requirements for access to Supreme Court's review. A more recent reform to the National Procedural Code in 1990 grants the Supreme Court ultimate discretionary decision as to whether to hear or not a case.**

Judicial decisions effects

- Judicial decisions, in principle, only have inter parte effects, since no constitutionally-mandated stare decisis principle exist.
- In Argentina, judges do not consider themselves bound to follow Supreme Court's precedents . As a consequence, law schools in Argentina do not generally train prospective lawyers in identifying the holding and various dicta of a case.
- However, Argentine courts, in deciding cases, tend to follow the reasoning of other tribunals (even of their same level) in similar cases, and particularly those decisions of the Supreme Court, as a support tool –not as a mandatory rule– together with other sources of law, for interpretation of legal and constitutional provisions.
- Nowadays, it is almost impossible to find a judicial decision in our country which does not cite other cases in support of its ruling. Distinguishing is also customary. It can be said, using common-law terms, that Argentine courts, in general, consider other courts' decisions as pure dictum.

The 1994 Amendment to the Constitution

- 1. Creation of a Chief of Cabinet of Ministers who exercises the general administration of the country, while the president has political responsibility.
- 2. Direct election of the president and vice president (derogation of the Electoral College system). Shortening of the presidency term (from 6 to 4 years) with the possibility of presidential re-election for a more consecutive period.
- 3. Direct election of the Mayor and legal reform of the State of Buenos Aires (later appointed as Head of Government by the Constituent Convention of the City of Buenos Aires in 1996).
- 4. Regulation of the presidential faculty to issue decrees of necessity and urgency. .
- 5 Extension of ordinary sessions of the Congress from March 1 to November 30 of each year. Increase of members in the composition of the Senate, at the rate of three senators for each province and three for the Federal Capital; two for the majority, one for the minority, in direct election.
- 6. Creation of the Council of the Magistracy.
- 8. Creation of the figure of the Ombudsman.
- 9. Preservation of the environment.
- 11. Express consecration of the Habeas Corpus and the "amparo". and of the Habeas Data.

Hierarchy of the norms

Article 31

"This Constitution, the laws of the Nation that as a consequence are dictated by Congress and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each province are obliged to conform to them, notwithstanding any provision to the contrary that may be found in provincial laws or constitutions..."

Under the provisions of the Argentine Constitution of 1853/60, the Supreme Court always maintained the doctrine of the supremacy of the Constitution over international treaties, and the status of these as equal to Congress' laws, until the Supreme Court gave precedence to treaties on human rights over national laws in 1992.

- **By the provisions of article 75 subsection 22, ten treaties were given constitutional status, and treaties were granted precedence over national laws;**
- **Article 75 section 24 authorizes the delegation of power and jurisdiction to supranational organizations under the provisions of integration treaties;**
- **The Supreme Court has accepted the jurisdiction of the Inter-American Court of Human Rights over the interpretation and application of the American Convention and has declared that its own decisions must serve as guidelines for the interpretation of the conventions.**

Argentina Legal system

Dialogue of sources

- The Constitutional Law recognizes the American system as a relevant source .
- Private Law is based upon continental system, the Argentine Civil Code followed the Napoleon Code.
- The French Law is a source also of the Administrative Law.

The Codes's clause

- **Art. 75, section 12.-**

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.

- Since the mid-twentieth century, and particularly after the return to democracy in 1983, in most matters the Argentine Supreme Court has adopted an activist role regarding human rights issues and environmental protection, and due to that more and more issues are judicialized.
- And a “living constitution” approach to Constitutional Law, particularly in interpreting the international treaties and conventions on human rights, among other issues, has made the judiciary, and specifically the Supreme Court, a key player in the political arena and regarding the regulation of certain affairs.
- Dialogue between branches of government is crucial in the dynamic of the Constitution.