JUDICIAL FEDERALISM AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN ARGENTINA.[1]

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I. Judicial Federalism in Argentina

I.1. The Judicial Power in our Federation.

Argentina has a federal, republican and presidential form of state and government. There are 4 orders of government in our federal organization: the federal level, the provinces, the Autonomous City of Buenos Aires (a form of city-state) and the municipalities. There is also the possibility of creating regions (by the provinces) for achieving economic and social development.

The provinces reproduce the same model of government in their constitutions, following the norms set by article 5 of the National Constitution: *"Each province shall dictate its own Constitution under the representative republican system, in accordance with the principles, declarations and guarantees of the National Constitution, and which ensures its administration of justice, its municipal regime, and primary education. "*

Article 122 of the National Constitution provides that the provinces "*Provide their own local institutions and are governed by them. They elect their governors,*

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their legislators and other provincial officials, without interference from the Federal Government." According to article 121, the Provinces keep "all the power not delegated by this Constitution to the Federal Government...", but must respect the principle of federal supremacy of art. 31 of the National Constitution and the requirements of the above-mentioned art. 5.

The Provinces and the Autonomous City of Buenos Aires make up "federal" Argentina and enjoy autonomy, covering their institutional, political, financial and administrative aspects, according to arts. 5, 122, 123 and 129 of the National Constitution. Municipalities also enjoy constitutional autonomy, in virtue of art. 123.

In the Argentine Federation there is a Federal Judicial Branch and also a Judicial Branch for each of the Provinces and the Autonomous City of Buenos Aires[3]. The Judicial Branch of the Nation is made up of the Supreme Court of Justice of the Nation and the other lower courts, as provided by the Constitution in art. 108. The last federal constitutional reform of 1994 incorporated new institutions: the Magistrates' Council, the Magistrates' Impeachment Jury and the Public Ministry, in arts. 114, 115 and 120.

"Federal" jurisdiction is limited, with its competence established in arts. 116 and 117 of the National Constitution and in the respective regulatory statutes. The first norm declares: "The Supreme Court and to the lower courts of the Nation may consider and decide in all the cases related to points governed by the Constitution

[3] The Federal Judicial Branch has 890 magistrates and prosecutors in all areas, while this number reaches approximately 4,500 in the Judicial Branches of the provinces and of the Autonomous City of Buenos Aires, but these figures do not sufficiently show the exceptional character of Federal Justice, since the magistrates and prosecutors are included there who will be transferred to the Judicial Branch of the Autonomous City of Buenos Aires.
For a more detailed analysis on the Autonomous City of Buenos Aires and in general on the decentralization of power in the Argentine Federation, see our study: "Federalismo, autonomía municipal y ciudad de Buenos Aires en la reforma constitutional de 1994", Depalma, Buenos Aires, 1997, with Prolog by Germán J. Bidart Campos and "Federalismo y Constitucionalismo Provincial", Abeledo Perrot, Buenos Aires, 2009.

and by the laws of the Nation, with the reservation made in sec. 12 of art. 75; and by treaties with foreign nations; of cases concerning ambassadors, public ministers and foreign consuls; of Admiralty and maritime jurisdiction cases; of matters in which the Nation is party; of cases arising between two or more provinces; between one province and the neighbors of another; between neighbors of different provinces; and between a province or its neighbors against a State or foreign citizen". Art. 117, in turn, establishes the original and exclusive competence of the National Supreme Court of Justice, restricted only to cases concerning ambassadors, ministers and foreign consuls and those in which a province is a party[4].

The highest court also has competence through appeal – ordinary and extraordinary – to ensure the constitutional supremacy embedded in art. 31 of the National Constitution, and in consequence, can review all the acts or laws that fail to recognize it, whether from federal, provincial or municipal authorities, executive as well as legislative or judicial.

By virtue of art. 75 sec. 12 of the Constitution, "provincial" justice covers cases of "common" law, and the underlying Codes (Civil, Commercial, Penal, Labor, Mining, etc.), which, in our constitutional order, are enacted by the National

[4] From a federal perspective, the provinces take part in the appointment of the members of the Supreme Court through the national Senate, since the latter are named by the national president with the agreement of the Senate, given in pubic session and with two thirds of the votes of the members present, according to the provisions of art. 99 sec. 4 of the national Constitution. But the will of the President has taken precedence also in this issue and most of the members of the Court have been from the Federal Capital, with scant representation of the provinces. We are also critical of the case-law of the Supreme Court in federal matters, since in most of the cases of conflicts of competence, it has tended towards the primacy of the powers and duties of the federal government above those of the provinces and municipalities. Only in the early times of its installation as a branch of state did the Court develop better case-law around these issues. But from then its case-law has steadily confirmed the centralization process in the country. This means that the Supreme Court, like the Senate, have not behaved appropriately as guarantors of federalism. For a fuller analysis of Argentine federalism, see our books: "Federalismo, autonomía municipal y ciudad de Buenos Aires en la reforma constitutional de 1994" and "Federalismo y Constitucionalismo Provincial", mentioned above.

or Federal Congress, in contrast to the US situation, where the States enact such laws.

Not only the Supreme Court of Justice or the Higher Courts of the Provinces exercise control over constitutionality, but also all the federal or provincial judges have such power, as in the US case[5]. It derives from this that the most important function that the judges have is that of exercising this control, which presents different issues in the federal and provincial orders.

In the control of federal constitutionality, a judgment declaring unconstitutionality is limited to the concrete case, since the law continues in force. The usual procedural route is indirect or incidental, although as from 1985 the Supreme Court declared that there are also direct actions of unconstitutionality such as the injunction (amparo), habeas corpus, habeas data and the declarative action of certainty of art. 322 of the Code of Civil and Commercial Procedures of the Nation. After the constitutional reform of 1994, the Ombudsman and other associations have been added to the direct possessor of a right or legitimate interest, in defence of collective or diffuse interests, as determined in art. 43 of the

[5] See Alberto J. Bianchi, "El control de constitucionalidad, 2ª. Ed. In two volumes, Editorial Abaco, Buenos Aires, 2002.

National Constitution.[6] [Still need to work on this ¶. Still not clear. (I add the article in the foodnote because I think is enough)]

The National Supreme Court of Justice is the head of the Federal Judicial Branch and the final and irrevocable interpreter of the National Constitution. Nonetheless, Argentina is subject to the judicial system of the Inter-American Commission and Court of Human Rights, as the American Convention on Human Rights (Pact of San José de Costa Rica) has constitutional standing in Argentina, according to art. 75, sec. 22 in its current conditions.

Thus, in virtue of art. 64.2 of this international instrument, the Inter-American Court, in exercise of its consultative competence when requested by a member state of the Organization of American States (OAS), can issue opinions about the compatibility between any of its domestic laws - for example, a provincial constitution - and the interpretation of this Pact or other treaties concerning the protection of human rights in the OAS. It can likewise require that resolutions by the member states be modified.

It is interesting to note that art. 28 of the Pact deals with the problem of Federal States. This provision, titled "federal clause", prescribes as follows: “1. Where a State Party is constituted as a federal state, the national government of

[6] (The Supreme Law sets up:
“Section 43.- Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule.
This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms”…..”)
We will see later how the control of constitutionality of some provinces and of the Autonomous City of Buenos Aires present differences with the federal system.

such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction. 2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention. 3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized".

The following norm of the Pact of San José de Costa Rica should also be noted in relation to this topic: “Art. 29: (Restrictions Regarding Interpretation) No provision of this Convention shall be interpreted as:

a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

It is a matter then of the "pro homine" principle, from international law on human rights, that one of the principles of interpretation for widening the protection of personal rights and guarantees must recognize that they have two sources: domestic (national and provincial constitution) and external (international treaties on human rights).

I.2. The Provincial Judicial Branch

Each Provincial Constitution organizes its respective Judicial Branch, normally made up of the provincial High Court of Justice and the lower courts. Art. 5 of the National Constitution imposes on the provinces the duty of ensuring the administration of justice and a republican regime. But it does not mandate any specific organization and structure of the Judicial Branch. For this reason, the provincial constitutive bodies have a broad freedom to institute the system that they consider most appropriate for the suitable exercise of this function.

The provincial constitutions contain norms relative to the composition of the Judicial Branch. The highest provincial jurisdictional bodies are mentioned (higher courts). Some also refer to Chambers – collegiate lower courts – judges, justices of the peace, or simply use the formula "and other courts that the law may establish".

In the same way as the Federal Congress has the power to enact legislative standards for the administration of federal justice, the provincial legislative

branches are given power in the provincial constitutions to enact the respective norms for organizing provincial justice.

There is the so-called Justice of the Peace, exercised by educated or qualified people appointed for a limited time and with certain personal prestige in small communities to which they belong, to fulfil a conciliatory function in matters between neighbors of lesser legal complexity and limited economic value. [7]

In Argentina, jurisdiction in electoral matters has been entrusted to the Judicial Branch. In accordance with the federal regime of government, each province establishes its own local institutions and is governed by these, electing its governors, legislators and other officials accordingly, without interference from the federal government (arts. 122 and associated provisions of the Federal Constitution), and for these purposes sets up its respective electoral courts. In the province of Córdoba, this is provided for in art. 170 of its Constitution.

A Public Ministry is also organized in the context of provincial justice. In Córdoba, art. 171 of the Constitution establishes: "*The Public Ministry is in the charge of a General Prosecutor and of the prosecutors under his/her direction, as established by the respective organic law. It exercises it functions in accordance with the principles of legality, impartiality, unity of action and hierarchical dependency in all the territory of the Province. The General Prosecutor sets the policies for criminal prosecution and instructs the lower prosecutors on the*

[7] "The law determines the number of justices of the peace, the period of their function, the salary they enjoy, their territorial competence, in accordance with the principle of decentralization of their offices, and material competence, in the solution of minor or neighborhood issues and provincial misdemenours and offences. The procedure is verbal, brief, free and with arbitration characteristics". [CITE?] (Constitution of Province of Córdoba, art. 167).

fulfillment of their functions as in the foregoing paragraph, in accordance with the laws".

I.3. Mode of selection of the members of the Provincial Judicial Branch

The nomination procedure results to a great extent in the functional independence of those who are finally appointed, and consequently their performance as members of the Judicial Branch[8]. The subject involves the day-to-day effectiveness of the separation and balance of powers as distinctive elements of the republican principle of government. It should be noted that in our institutional system every judge may exercise "judicial power" and therefore may review constitutionality.

The form of selecting and nominating those responsible for administering justice has been a topic of interest since ancient times. Aristotle, in his *Politics*, presented the elements on which the good legislator should consider appropriate for each political regime, among which he mentioned the one "*who is in charge of the administration of justice*"[9]; he declared that the assessment of this aspect in the various kinds of regimes is based on three factors: *"...the people among whom they are formed, the matters on which they decide and* ***the method by which they are named****..."*[10].

[8] We are talking about judicial independence in relation to the political powers, i.e., the most usual meaning of the term. As political powers of the province we are referring only to the executive and legislature (without ignoring the political function exercised by the Judicial Branch in some circumstances, as ultimate interpreter of the Constitution). Cf. Roberto Gargarella: "La justicia frente al gobierno", Barcelona, Ariel, 1996, pp. 231-232.

[9] Book Four, Ch. XIV. Translated by Carlos García Gual and Aurelio Pérez Jiménez, Barcelona, Ediciones Altaya, 1997, p. 174.

[10] Book Four, Chapter XVI, Ibid., p. 182, stress added. As is known, Book Four analyses the different kinds of political regimes, divided into normal – monarchy, aristocracy and republic – and abnormal – tyranny, oligarchy and democracy – respectively.

In some Argentine provinces, such as Córdoba, the appointment of judges by the Executive Branch with the agreement of the legislature follows the model of the Argentine Constitution of 1853, taken in turn from the US system (Section 2, Art. II of the US Constitution) supported by Hamilton[11].

The provincial Constitution establishes this system for the members of the High Court of Justice and for the other lower courts (arts. 144 sec. 9 and 104 sec. 42). The judges and officials of the Public Ministry are named as established in the Constitution (arts. 157 and 173). Any procedures followed or judgments and resolutions dictated by persons not thus appointed are null and void. Moreover, the law sets the procedure that favors equality of opportunities and selection by fitness in the appointment of lower magistrates (art. 157).

Nevertheless, in most of the Provinces[12] and in the Autonomous City of Buenos Aires, Magistrates Councils have been created, generally made up of representatives of lawyers, judges, the Legislative Branch and the Executive Branch, with methods to select judicial officers by merit, in the same way as occurs at federal level since the constitutional reform of 1994 for the appointment of lower judges.

Among other functions, these Councils propose binding lists of three candidates to the Executive Branch (Governor). They also decide, when

[11] El Federalista, LXXVI, trans. by Gustavo Velazco, México, Fondo de Cultura Económica, 1st edition in Spanish, 6th reprint., 1998, pp. 322-325.

[12] Magistrates Councils have been established in the provincial constitutions of the provinces of Buenos Aires, (art 175); Chaco (arts. 166/171); Chubut (arts. 187/193); La Pampa (art. 92); La Rioja (art. 136 Bis); Misiones (art. 116 inc.10); Neuquén (arts. 249/251); Río Negro (arts. 220/222); San Juan (arts. 214/218); San Luis (arts. 197/200); Salta (arts. 157/159); Santa Cruz (art. 128 Bis); Santiago del Estero (art. 201) and Tierra del Fuego (arts. 160/162) and the Autonomous City of Buenos Aires (arts. 115/117). It has also been incorporated by Laws 2153 and 9051 in the provinces of Corrientes and Córdoba and by Decrees 3053/98, 5299/87 and 750/94 in the provinces of Entre Ríos, Mendoza and Santa Fé.

appropriate, the opening of proceedings to remove judges. In this way, the incorporation of these institutions in almost all the provinces, as at federal level, has moved to limit political influence on appointments in the Judicial Branches, to try to ensure their independence. We feel that, even though the aims have been constructive, and in some cases improvements have been seen, this is another of the fields in which a huge gap can be seen between the norm and the reality, which is characteristic of our constitutionalism.

I.4. Tenure and Removal of magistrates

The judges enjoy a guarantee of independence for their work, since they keep their posts as long as their conduct is good. They can be removed only for malfeasance, grave negligence, delays in exercising their functions, inexcusable lack of knowledge of the law, alleged commission of offences or physical or psychological incapacity. They enjoy the same immunity from arrest as the legislators. They receive a monthly salary for their services set by law, which cannot be reduced except for pension or benefit purposes.

Magistrates and legal officials are obliged to attend their offices during the times for serving the public. They must resolve cases within the set periods established by the laws of procedure, with logical and legal bases.

They are also expressly forbidden from taking part in politics, exercising a profession or being employed except in teaching or research, and performing acts that may compromise the impartiality of their function.

Judges in the provincial Higher Courts are generally removed by means of impeachment, through the Legislature. Magistrates in lower courts, however, can

be charged by any member of the public before a Jury for their conduct, based on justifications. The Jury is generally made up of members of the Higher Court, of the Legislature and of the lawyers, but the composition varies between provinces.

I.5. The judicial function and the control of constitutionality.

The constitutions of the provinces and of the Autonomous City of Buenos Aires determine the range of functional competence and of the powers and duties of each Judicial Branch. That is, how they exercise their jurisdiction, and which is their exclusive competence. However, trials with people's juries are used in several provinces.

Most of the constitutions contain provisions to ensure access to justice of all citizens. In Córdoba, article 49 of the Constitution establishes a guarantee to all citizens to call on the State for protection (right to jurisdiction), which involves the State's duty to provide the Judicial Branch with the means and infrastructure necessary to enable the exercise of this guarantee.

An important function of the judges is to control constitutionality. In the case of the provincial judges, the provincial Constitution itself and also that of the Nation must be applied first. For this, they can declare the unconstitutionality of any law or act of the Legislative or Executive Branch, both at the provincial and federal level.

Art. 75 sec. 12 of the Federal Constitution provides that the application of the underlying Codes (Civil, Penal, Commercial, Mining and Social Security) is the responsibility of the federal or provincial courts, “as the matters or persons fall under their respective jurisdictions...”. One of the main competences of the provinces is also to apply the respective Procedural Codes, and, although the

details are beyond the scope of this article, we mention only that in the procedures and in the control of constitutionality, similar criteria have been followed as those at federal level.[13]

But it must be noted that there are some differences from the federal model to control constitutionality, as, in some provinces (Chaco, Chubut, Neuquén, Río Negro and Tierra del Fuego) and in the Autonomous City of Buenos Aires, it has been established that the declaration of unconstitutionality can have effects “erga omnes” [translate(not only for the concrete case)] and that it [immediately? yes] derogates the law in question.

However, there is still the possibility of final review by the National Supreme Court, by means of the extraordinary federal review, as we will describe later.

I.6. Other competences and judicial powers and duties

The Constitution of Córdoba, for example, distinguishes between powers and duties, and competences. Powers and duties are granted to the Judicial Branch for its governance. For instance, this means that they manage their own budgets. The higher courts of the province can also intervene in "conflicts of power", i.e. in disputes or controversies generated between two or more official bodies for the exercise of their respective powers and duties and competences.

[13] In contrast [do you mean in contrast, or similar to? I mean in contrast] to the federal level, there can be a declaration of unconstitutionality in the provinces, which is a concentrated control under the highest courts which are the provincial Supreme Courts or Higher Courts of Justice. For example, the Constitution of the Province of Córdoba, in article 165, section 1, subsection a) enables the direct control of constitutionality through "...declarations of unconstitutionality of the laws, decrees, regulations, resolutions, charters and bylaws, which govern matters within the ruled by this Constitution, and are disputed in a concrete case by an interested party...".

The National Constitution of 1853 had assigned jurisdiction to the federal courts to deal with "*conflicts between the different public powers of the same Province*". The reform of 1860 eliminated this clause which "...*contradicted the fundamental principle of national unity...*"[14], i.e. federalism. In Córdoba, therefore, art. 165, sec. 1 b) of its Constitution gives *original and exclusive* competence to the Higher Court to *deal with and resolve* "*...Questions of competence between public authorities of the Province...*".

I.7. The extraordinary federal review.

It should be remembered that the National Supreme Court is the highest court of our federation and the final and irrevocable interpreter of the National Constitution, so it is even able to control the constitutionality of laws or acts of the provinces or municipalities. The most commonly used means for doing this is the extraordinary federal review, which is based on this Court's power of extraordinary appeal.

This review proceeds in the cases regulated by art. 14 of Law Nº 48, through three sections: "1) when the case raises the issue of the validity of a treaty, a law of Congress or of an authority exercised in the name of the Nation and the judgment has been against its validity; 2) when the validity of a provincial law, decree or authority has been questioned as being opposed to the national Constitution, to treaties or laws of Congress, and the judgment has been in favor of the validity of the provincial law or authority; 3) when the understanding of any clause of the Constitution, or of a treaty, law of Congress or a commission exercised in the name of a national authority has been questioned and the

[14] Cf. González, Joaquín V.: Manual de la Constitución Argentina, Angel Estrada y Cía. S.A., Buenos Aires, 1st Edition, 1907, p. 613.

judgment is against the validity of the title, right, privilege or exemption based on said clause and is subject of the dispute".

This means that for the appeal to proceed there must be an "issue" or "federal case or question." These can be divided into "simple" or "complex", depending on whether it is a case of pure and simple interpretation of the Constitution or a treaty or of a federal law or of a conflict between norms of whatever kind with the Constitution. Complex federal issues have, in turn, been classified into "direct" or "indirect", depending if the conflict directly arises between an infra-constitutional standard or act with the federal Constitution, or when the conflict arises between infra-constitutional standards or acts which, "within their hierarchical level, "indirectly" infringe on the federal Constitution which establishes the precedence of the higher standard or act over the lower ones"[15]. [need to work on this ¶](I add the explanation in the foodnote)

II. Fundamental rights and liberties

II.1. The national and international sources of rights.

In Argentine constitutional law, at both the federal and provincial levels, there are 3 clear stages: 1) liberal or classic constitutionalism, the basis of the liberal state, recognising first generation (civil and political) human rights; 2) social constitutionalism, that establishes a social state and recognizes second generation

[15] Cf. Germán J. Bidart Campos, "Compendio de derecho constitucional", Ediar, Buenos Aires, 2004, p. 432 y sgts.. The author gave these examples regarding "indirect" complex federal issues: a) conflict between norms or acts of federal authorities. b) conflict between federal and local norms. c) conflict between national Codes and local Constitutions or laws.d) conflict between federal norms and local acts. e) conflict between federal acts and local norms and f) conflict between federal and local acts.

human rights (social rights) and 3) the constitutionalism of international human rights, that gives constitutional status to particular international treaties on human rights and now recognizes third generation human rights.

At federal level, the 1st stage began in 1853 and 1860, the 2nd stage in the reforms of 1949 and 1957 and the 3rd stage in the reform of 1994. In general, the provincial constitutions can be seen to have been adapting to these changes. However, in the passage towards social constitutionalism, some provincial constitutions moved ahead of the National Constitution, as in the case of the provinces of Mendoza (1915), San Juan (1927), Entre Ríos (1933) and Buenos Aires (1934), which recognized the social rights of workers, or women's suffrage, while this only occurred at federal level in 1949 and 1957.

The same happened in relation to the 3rd stage, since the provincial constitutions of Neuquén (1957), San Juan (1986) and Córdoba (1987) included some international treaties on human rights among their complementary provisions, as well as recognizing so-called "third generation" human rights, such as those related to the environment within the 1987 Constitution of Córdoba, while this only took place in the National Constitution with the reform of 1994.

In consequence, after adopting the international law on human rights[16], the fundamental rights have a double source in our constitutionalism: national and international. The former source is divided in turn between the various levels of government: federal, provincial, of the Autonomous City of Buenos Aires and

[16] Especially in art. 75 sec. 22 of the National Constitution, product of the constitutional reform of 1994 – in which I had the honor of acting as Vicepresident of the Drafting Commission – which reognised the constitutional hierarchy of 11 international instruments on human rights.

municipal, since all of these exercise constituent power (although of varying degree) and have adopted their respective constitutions recognizing these rights.[17]

Referring to rights in the National Constitution, Germán J. Bidart Campos[18] after noting the variety of rights, values and principles of the Constitution, points out that there is a relationship between the dogmatic and organic parts[19] of the Constitution as well as of the Preamble and the Transitory Provisions. He likewise contends that there are principles that have constitutional roots such as the "pro homine" (in favor of the person, so that the most favorable standard is chosen when national and international sources are used); the "pro actione" (in favor of the action, so that the judges using criteria of guarantees indicate to the defendant the best means to effective legal protection) and the "favor debilis", (so that the inferiority of conditions of the weaker party in a dispute is taken into account).

The Provinces and the Autonomous City of Buenos Aires, exercising their constituent powers when adopting their respective constitutions, include declarations of rights and guarantees in their dogmatic parts. In most cases, through applying art. 5 of the National Constitution which provides for the application of individual rights and guarantees in the Provinces, the statements of the National Constitution are unnecessarily repeated.

Nonetheless, in provincial constitutions a notable development of rights and guarantees can be seen, showing the wealth of our provincial public law. However,

[17] We consider Municipal Charters as true local constitutions, since they deal with the exercise of a constituent power. See: Antonio M. Hernández, "Derecho Municipal-Parte General", Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Méjico, 2003.

[18] Cf. Germán J. Bidart Campos, op. cit., p. 65/6.

[19] Note that in the constitutional reform of 1994, as the reform of the first 35 articles of the Constitution was not permitted, new fundamental rights were incorporated in a new Chapter in this First (dogmatic) Part, comprising arts. 36 to 43, and also in the Second (organic) Part, especially in art. 75 on powers and duties of the Congress, in various sections.

it should be noted that many of these provincial norms do not have full and sufficient force in reality[20]. We have noted that there is not sufficient compliance with the law in our country, motivated by cultural underdevelopment in legal, political and democratic affairs. We also note that emergencies of every kind, institutional, political, economic and social, have contributed to eroding the rule of law, the republican system and the full force of individual rights and guarantees[21].

The provincial constitutions initially had the characteristics of the first, liberal or classic, stage of constitutionalism which recognized the so-called first generation human rights. But later most of them settled within the forms of social constitutionalism. As mentioned above, provincial constitutional law had gone ahead of federal constitutionalism in this matter, making very important precedents, in recognising the rights of workers and the voting rights of women.

This change was confirmed with the adoption of the constitutions of new provinces from 1957 and with the reforms made up to 1966, as well as those subsequently made as from 1986, after the re-establishment of democracy in 1983.

These principles and rights unfortunately have very little force, as they require a political, economic and social development in these provinces and in the Republic that we do not have. They are merely "offerings" that the constituent members made to the people of their respective provinces, which implies a commitment to produce change.

[20] See: "Encuesta de cultura constitutional. Argentina: una sociedad anómica", Antonio María Hernández, Daniel Zovatto y Manuel Mora y Araujo, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Méjico, Mexico, 2005.

[21] See: "Las emergencias y el orden constitutional", by Antonio María Hernández, 1st ed. Rubinzal-Culzoni Editores, Buenos Aires, 2002 and extended 2nd ed., Instituto de Investigaciones Jurídicas y Rubinzal-Culzoni Editores, Mexico, 2003.

II.2. Civil and political rights and guarantees of due process in the provincial constitutions

The provincial constitutions show a common humanist philosophy in terms of their breadth and depth in their recognition of human rights. This is expressed in their statements that "all the inhabitants" or "all persons" enjoy the rights, which prevents any discrimination[22]. Rights and guarantees protect civil liberty - conscience, physical integrity, defense in trial, correspondence and private papers, communications, exercise of job or profession, equality, freedom of religion, of expression, of right to meet, of petition, of association, of teaching and learning, of property, among other rights proper to classical constitutionalism.

The provincial Constitution which shows the best organization regarding rights is that of Córdoba. It classifies the "Rights" section into four chapters: "Personal rights", "Social rights", "Political rights" and "Intermediate associations and societies".[23]

Within personal rights it spells out rights listed in art. 19: "All persons in the Province enjoy the following rights in accordance with the laws that regulate their exercise: 1) to life from conception, to health, to psycho-physical and moral integrity and personal security; 2) to honor, privacy and one's own image; 3) to freedom and equality of opportunities; 4) to learn and teach, to intellectual freedom, to research, to artistic creation and to participate in the benefits of culture; 5) to

[22] Constitutions of Córdoba, art. 18; Jujuy, art. 16; La Rioja, art. 19; Salta, art. 17; San Juan, art. 15; San Luis, art. 11; and Santiago del Estero, art. 17.

[23] See: Antonio María Hernández, Ch. on "Derechos", in the book "La Constitución de Córdoba comentada", by Frías et al., La Ley, Buenos Aires, 2001; Ch. on "Derechos", in the book "Las nuevas Constituciones Provinciales", by Frías et al., Depalma, Buenos Aires, 1989 and Ch. on "Los derechos y deberes en nuestro constitucionalismo subnacional", in the book "Federalismo y Constitucionalismo Provincial", Abeledo Perrot, Buenos Aires, 2009.

freedom of religion and religious or ideological profession; 6) to choose and exercise their profession, job or employment; 7) to constitute a family; 8) to associate and meet together for useful and peaceful purposes; 9) to petition the authorities and obtain responses and to have access to justice and to the defence of their rights; 10) to communicate, express and inform themselves; 11) to enter, remain, pass through and leave the territory; 12) to the secrecy of private papers, correspondence, telegraphic and telephone communications and those practiced by any other means; 13) to have free and equal access to the practice of sports".

Other constitutions also make similar recognitions of rights, although with their own particularities, ranging from one that is too brief, such as that of La Rioja, to an overly detailed one, like that of Jujuy. In the provincial constitutions, just as in article 33 of the National Constitution, non-enumerated rights are recognized, by virtue of different formulas[24].

The framework of all of these rights is in accord with the fundamental legal ordering emerging (including federal supremacy) from arts. 5 and 31 of the national Constitution. There are also explicit references to the rights and guarantees of the national Constitution in the provincial constitutions[25].

In terms of political rights, the provincial constitutions make an express democratic and republican profession of faith and declare the principle of the sovereignty of the people, matching the imperative mandate of art. 5 of the National Constitution. The characteristics of suffrage are established. Córdoba, in

[24] For example, that of Córdoba, in its art. 20, prescribes those "deriving from the democratic form of government and from the natural condition of man"; Jujuy, in its art. 17, "... that contribute to the freedom, dignity and security of the human person, to the essence of democracy and to the republican system of government";

[25] Córdoba, art. 18; Jujuy, art. 16, inc. 1; La Rioja, art. 28; Salta, art. 84; San Juan, art. 40; San Luis, art. 11; and Santiago del Estero, art. 38.

its art. 30, says: "All the citizens have the right and duty to take part in political life. The universal, equal, secret and obligatory vote for electing the authorities is the basis of democracy and the only mode of expression of the political will of the people of the Province, except for the exceptions provided for in this Constitution ... ".

The possibility is provided for the exercise of the mechanisms of direct or semi-direct democracy, such as the popular initiative, the popular consultation, referendum and in some cases, the popular revocation. The various constitutions set the bases of the electoral regime, some of which authorize the vote of foreigners, not merely at municipal level, but also at the provincial level, as in Córdoba, as provided for in the regulatory law.

The political parties are constitutionalized, as fundamental instruments of the democratic system. Norms are incorporated regulating positive gender-oriented actions to guarantee the entry of women into the elective public bodies[26].

The 1927 Constitution of the Province of San Juan had recognized the right of women to vote, which shows a remarkably advanced provincial constitutionalism on the subject. Political rights of women were recognized at federal level in this country only as from 1947 with the passing of Law Nº 13010 on female suffrage[27].

[26] Positive gender-related actions extend to other assumptions, such as the labor market. On this topic, Calandrino Alberto et al.: El caso "Freddo" y las conductas patronales como "categorías sospechosas", Revista AADC, N° 192, 2003, p. 112

[27] The recognition of the rights of women evolved steadily over time, firstly with the sanction of law 11.357 on the civil rights of women (1926), as they were considered "incapable" in the original Civil Code; and then it moved out into other fields, with the incorporation of international instruments reinforcing that legislation, such as the Convention on the Political Rights of Women (Law 15.786, 1960), and later the Convention on the Elimination of All Forms of Discrimination Against Women (Law 23.179, of June 3, 85). The latter (arts. 2, 3, 4 and 7) imposes on the States the obligation to establish "appropriate measures", including legislation, to make the provisions and rights embedded in it effectively feasible. These temporary measures should cease when the equal treatment and opportunities proposed are achieved. Finally, Law 23.592 punishes discriminatory acts or omissions determined by motives of gender, among various other assumptions.

Art. 37 of the national Constitution, incorporated in the constitutional reform of 1994, declares that real equality of opportunities between men and women for access to elective and party posts will be guaranteed by positive actions in the regulation of political parties and in the electoral regime.

One special case is that of Law Nº 8901 of 2000, sanctioned in the province of Córdoba, which decreed as a general rule the principle of "equivalent participation of genders" for the choice of candidates, not only to elective public posts, but broadening its scope of application to every list corresponding to collegiate, executive, deliberative, control, selection, professional or disciplinary bodies[28]. There are no precedents of this nature in other parts of the country, and even at international level the only similar experience that can be pointed out is the so-called "parity movement" in France[29], which obtained the sanction of similar norms.

II.3 Economic, social and cultural rights in the provincial constitutions

Almost all the provincial constitutions recognise this class of rights, indicating that these texts are within social constitutionalism. As well as providing for these rights in articles that include sections or chapters dealing with the subject, some constitutions also have other complementary norms on these matters.

[28] The constitutionality of this law has been questioned by Pablo Riberi, "Acciones afirmativas, igualdad y representación femenina: ¿cupo o tarifa en los cuerpos legislativos?, in Foro de Córdoba N° 71, Córdoba (Argentina), p. 107-130, 2001.

[29] Mossuz-Lavau, Janine et al.: Pouvoir et représentation politique: vers la parité, en An 2000 quel bilan pour les femmes?, Problémes politiques et sociaux N° 835, París, 2000, p. 55-83; Scott, Joan W. La querelle de las mujeres a finales del siglo XX, New Left Review (ed. Castellana) N° 3, Madrid, 2000, p. 97-116.

In the constitution of Córdoba, for example, there are "Special policies of the State", which cover "work, social security and welfare", "culture and education", "economy and finances". The Constitution of Jujuy deals with "Culture, education and public health" and has a section on "Economic and financial regime".

The social rights declared are related with the protection of the family; the rights of workers; and especially: 1) dignified and equitable conditions for developing their activities; 2) working day limited for reasons of age, sex or the nature of the activity; 3) rest and paid vacations, and ordinary or special leave; 4) fair payment; 5) adjustable minimum living wage; 6) equal pay for equal work; 7) protection against arbitrary dismissal; 8) professional training in step with the progress of science and technology; 9) health and safety at work, medical and pharmaceutical assistance, so that health is duly maintained. Pregnant women will be granted paid leave in the period before and after childbirth, and the time necessary for nursing during working hours; 10) prohibition of measures that lead to an increase of effort to the detriment of health or through work conditioned by incentives that determine wages; II) suitable dwelling, clothing and food, as the law prescribes; 12) family benefits; 13) economic improvement; 14) participation in activities that help to defend their professional interests; 15) complementary annual wage; 16) reservation of the post or job when provided for by national or provincial law; 17) free, democratically based union organization based on the periodic election of its authorities by vote. They likewise recognize the rights of women; the protection of childhood; the rights of young people; the rights of disabled and of the elderly.[30]

[30] Note 23, *supra*.

III. The protection of rights with special reference to the local injunction (amparo) hearing

III.1. The injunction at federal level.

Joaquín V. González spoke eloquently about this in his celebrated "Manual of Constitutional Law": "The declarations, rights and guarantees are not, as might be believed, simple theoretical formulas: each of the articles and clauses they contain have obligatory force for individuals, for the authorities and for all the Nation. The judges must apply them in the fullness of their sense, without altering or weakening the express significance of their text with vague interpretations or ambiguities, because they are the personal defense, the unchangeable patrimony that makes each person, citizen or otherwise, a free and independent being within the Argentine Nation".[31]

For this reason, respect for the independence of the judicial branches is fundamental for the full effectiveness of our rule of law and of human rights, and this is a cardinal principle of the republican, democratic system, along with the firm conviction of the judges about their exalted mission. It is in this framework that we must stress the importance of the injunction within the guarantees provided for, to ensure the full effect of fundamental rights.

In our law, just as habeas corpus is the guarantee with the greatest historical lineage, aimed at preserving physical freedom, the injunction is the most important generic guarantee in relation to other fundamental rights. At federal level, three stages can be pointed out in this respect: a) its creation in a "pretorian"

[31] Joaquín V. González, "Manual de la Constitución Argentina (1853-1860)", Estrada Editores, Buenos Aires, 1951, pág. 102.[Can you fill in?]

manner, by the Supreme Court in the decisions “Siri Angel” of 1957 and “Kot SRL” of 1958, which authorized the injunction hearing against acts that harm fundamental rights arising from the State or from private persons, respectively; b) the legislation on injunctions in Law Ley Nº 16.986 of 1966, which restricted its scope, and c) the constitutionalization of the injunction in art. 43, incorporated in the constitutional reform of 1994.

This provision of the federal Constitution declares: "Every person may present an open, rapid injunction plea, as long as there is no other more suitable legal means, against any act or omission of public authorities or private persons, which currently or imminently harms, restricts, alters or threatens, arbitrarily or clearly illegally, rights or guarantees recognized by this Constitution, a treaty or a law. In the case, the judge may declare the unconstitutionality of the norm on which the harmful act or omission is based".

"This action may be brought against any form of discrimination and in matters relating to the rights protecting the environment, competition, the user and the consumer, as well as the rights of collective incidence in general, by the affected party, the ombudsman and the associations dedicated to these purposes, registered in accordance with the law, which shall determine the requirements and forms of their organization".

That means that the National Constitution authorizes the classic injunction against the acts both of the State and of private persons and has expressly recognized that the judges have the power of declaring the unconstitutionality of norms violating fundamental rights, both currently and in the near future. Likewise, the second paragraph recognizes the so-called collective injunction, which has also

meant a significant broadening of the active litigation for the defence of rights indicated and those of "collective incidence"[32].

Néstor Pedro Sagüés[33] notes that there is a wide range of injunction pleas at federal level. He also mentions the “inter-American” injunction, provided for in art. 25 of the American Convention on Human Rights or Pact of San José de Costa Rica, which, as mentioned, has constitutional rank in this country.

We must not omit the extraordinary importance that the injunction achieved as from the last emergency that took place in the country at the end of 2001, when the establishment of the economic and financial so-called "corralito" led to the presentation of more than 400,000 legal actions of this kind, to deal with the confiscation produced by the federal government and the banks of some 70,000 million dollars in fixed term deposits[34].

Lastly, art. 43 also has full force as to the laws of provinces and of the Autonomous City of Buenos Aires, in virtue of art. 5 of the federal constitution.

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[32] See: Germán J. Bidart Campos, op. cit., p. 210/3.

[33] Cf. Néstor Pedro Sagüés, “El derecho de amparo en Argentina”, in the book: “El derecho de amparo en el mundo", coordinated by the Mexican professors Héctor Fix Zamudio and Eduardo Ferrer Mac-Gregor, published jointly by the Universidad Nacional Autónoma de Méjico, Porrúa and the Konrad Adenauer Stiftung, in Mexico, 2006, pp. 44/46. We also refer to this article for a detailed analysis of injunction law in our federal legislation.

[34] We have analyzed this issue extensively in our books: “Las emergencias y el orden constitucional”, in its 2 editions, mentioned in note 21, under the title “La inconstitucionalidad del corralito financiero y bancario”. There we stressed the importance of the popular reaction and the fight of the lawyers in defence of the violated constitutional rights, using injunctions, as well as the suitable response of the Judicial Branch of the Nation through the precautionary measures and judgments of the examining magistrates and appelant judges throughout the country, who declared the unconstitutionality of that emergency legislation. The Supreme Court, first in the “Smith” ruling of 2002 and then in “Provincia de San Luis” in 2003, ratified the case-law of the lower magistrates, in a correct exercise of control of constitutionality, which even modified the traditional position convalidating every kind of economic emergency. But subsequently, with its current membership, the Court in the “Massa” case of 2006, ratifying the precedents “Cabrera” and “Bustos”, has gone back to the previous case-law, which we have judged harmful to the rule of law, the republican system and the full force of fundamental rights. On this matter, see also our comment “El caso “Massa” y el regreso a la case-law convalidatoria de la emergencia económica”, Suplemento Especial de La Ley, “La emergencia y el caso Massa”, February 2007, Buenos Aires, pp. 70/79.

III.2. The injunction in the provinces and in the Autonomous City of Buenos Aires.

In the list of subjects where the constitutions of the provinces have been more advanced than the federal must also be included the recognition of this fundamental guarantee. In fact, the injunction was introduced by the constitutions of the provinces of Santa Fé of 1921, that of Entre Ríos of 1933, of Santiago del Estero of 1939, of Mendoza of 1949 and those of the new provinces of Chaco, Chubut, Formosa, La Pampa, Misiones, Neuquén, Río Negro and Santa Cruz in the constituent process starting in 1957[35]. The Autonomous City of Buenos Aires did the same in art. 14 of its Constitution of 1996, with a text that was very similar to art. 43 of the Federal Constitution[36].

It should be pointed out that the injunction in provincial jurisdiction, just as any other court case, must be dealt with entirely in that sphere and according to provincial procedure. It may ultimately reach, through extraordinary review, the High Court or Supreme Court of the respective province or that of the Autonomous City of Buenos Aires. Only when there is a federal "issue" or "case" can recourse be made to the Supreme Court of the Nation, as explained in the section on Extraordinary Federal Review. But, as we explained, the requirement of the "definitive judgment" must always be met, which, since the "Strada" case, obliges the intervention of the highest court of the respective province or of the Autonomous City of Buenos Aires.[37]

[35] Cf. Néstor Pedro Sagüés, "El derecho de injunction en Argentina", op. cit., p. 41.

[36] Art. 14 of the Constitution of the Autonomous City of Buenos Aires.

[37] The objective of the change of the jurisprudence was to add a new judicial step with the intervention of the highest provincial tribunal for reducing the enormous number of cases before the Supreme Court of Justice. (Need a footnote here]

IV. Final conclusions.

1. With the special cure that is appropriate when expressing opinions in subjects of comparative law, we consider that our country should aim at a stricter compliance with its constitutions, which designed a federal model which has in reality been distorted by the respective centralization processes.
2. There is a clear need to grant greater competences and resources to the judicial branches of the states in other federal countries, as can be seen from a simple comparison of the number of state magistrates and officers with the federal ones, and in the light of comparing the US and Argentine experiences.
3. The injunction in Argentina, in this aspect, presents two distinctive characteristics: a) it does not operate against acts of the Judicial Branch, and b) federal judicial review concerning an injunction presented to provincial courts can only be made by means of extraordinary federal review to the national Supreme Court, which has established as one of its requirements that the “definitive judgment” be that of the Higher Court or Supreme Court of the respective province or of the Autonomous City of Buenos Aires.
4. To ensure the greatest protection of the fundamental rights and of judicial federalism, it is fundamental to maintain a "diffuse" system of control of constitutionality in both countries. For reasons of brevity, we will argue this

only with these reasons: a) because our deficient constitutional culture[38] requires this, and b) because a concentrated system would deepen the damage to the judicial federalism established in our Constitutions.

[38] See the respective Constitutional Culture Surveys, held in our countries: "Cultura de la Constitution en Méjico", by Hugo A. Concha Cantú, Héctor Fix Fierro, Julia Flores and Diego Valadés, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Méjico, Mexico, 2004 and "Encuesta de Cultura constitutional. Argentina, una sociedad anómica" by Hernández, Zovatto and Mora y Araujo, cited above. Although this topic deserves much greater debate, we consider that the geographical size, history and culture of our countries, as well as the quality of the political and democratic insititutions, popular education, etc. do not favor a concentration of control of constitutionality through a constitutional court as in the concentrated European system, which has been followed by some countries in Latin America. In our case, we have lived through the concrete experience as a result of the "corralito", which brought about a historic change in the subject of control of constitutionality of the economic emergencies, which was made possible, among other reasons, because the political branch could not control the behavior of hundreds of judges and appellate judges throughout the whole country. With the threats existing in Latin America for the full force of the republican system and the independence of the judicial branches, what might happen with a concentrated constitutional court? It is easy to imagine the answer... That is why we fiercely insist on defending our current systems.