SUB-NATIONAL CONSTITUTIONAL LAW IN ARGENTINA

ANTONIO MARÍA HERNANDEZ

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Antonio María Hernandez

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The Author

Antonio María Hernandez is Professor of Constitutional Law and Professor of Public Provincial Law and Municipal Law at the National University of Córdoba, Argentina. He received his PhD in Law and Social Sciences from the National University of Córdoba, and Director of the Institute of Federalism of the National Academy of Law and Social Sciences of Córdoba. He is Honorary President of the National Association of Constitutional Law of Argentina and Member of the Executive Committee of the Board of Directors of the International Association of Centers for Federal Studies. He is Member of the National Academies of Law and Social Sciences of Córdoba and Moral and Political Sciences of Buenos Aires and of the International Academy of Comparative Law.

He is the author and co-author of twenty five books on constitutional law, state constitutional law and municipal law, including:

Reforma Constitucional de 1994. Work of the Member of the National Constitutional Convention Antonio María Hernández, Argentine Congress Press, Buenos Aires, 1995.

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Argentina Constitutional Law. International Encyclopaedia of Laws, Constitutional Law, Supl. 81, Kluwer Law International, 2009.

He was Member of the Drafting Commission of the National Constitutional Convention (1994), of the Drafting Commission of the Constitutional Convention of the Province of Córdoba (1987) and President of the Municipal Constitutional Convention of the City of Córdoba (1995).

He served as Member of the Legislature of the Province of Córdoba (1987–1991) and of the Federal Congress (1991–1995).

He was Member of the Executive Committee of the International Association of Constitutional Law in 2 periods from 2004 to 2010.

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General Introduction

§1. Sub-national Units: Names and Territory

1. The Republic of Argentina is located in South America, at the southernmost extremity of the continent, with a total population of approximately 37.5 million people (according to the projection of the latest census). Its continental area is 2,791,810 km^2, which, added to the islands of the southern Atlantic Ocean (Malvinas, Georgias del Sur, Sandwich del Sur, Orcadas del Sur and Shetland del Sur)[1] and an Antarctic sector from 60 to 90 degrees southern latitude, makes a total of 3,761,274 km^2.[2]

1. The First Temporary Provision of the National Constitution, incorporated in 1994, establishes: 'The Argentine Nation ratifies its legitimate, and not time-barred sovereignty over the islands of Malvinas, Georgias del Sur and Sandwich del Sur, and the corresponding maritime and inter-island spaces, since they are a part of the national territory. The recoupment of such territories and the full exercise of sovereignty, respecting the way of life of its inhabitants, and according to the principles of international law, are a permanent and non-waivable objective of the Argentine people.'
2. Geographic areas and populations are specified in the chart of Annex 1.

2. Argentina is a federal state composed of twenty-four sub-national entities: twenty-three provinces and the Autonomous City of Buenos Aires, which is the Federal Capital. Argentina's Federal Constitution, passed in 1853, established a representative, republican and federal form of government in its Article 1, based on the model of the 1787 United States constitution.

As in that case, fourteen historical provinces created the Federal State, delegating part of their powers in the Federal Government and keeping the residual ones. It is an integrative federalism, which differs from devolutive federalism in which the central government gives back powers to the sub-national entities. New provinces became a part of the Federation and the 1994 constitutional reform created the Autonomous City of Buenos Aires as another member. The following chart shows the years of passing of their first constitution and the constitutional reforms that such entities underwent:

Provinces	Year of the First Constitution	Total Constitutional Reforms	Year of the reform in force
City of Buenos Aires and Federal Capital	1996	0	1996
1. Buenos Aires	1854	6	1994
2. Catamarca	1855	4	1988
3. Córdoba	1855	8	2001
4. Corrientes	1855	7	2007
5. Chaco	1951	2	1994
6. Chubut	1957	4	1994
7. Entre Ríos	1860	6	2008
8. Formosa	1957	2	2003
9. Jujuy	1855	6	1986
10. La Pampa	1952	3	1998
11. La Rioja	1855	8	2008
12. Mendoza	1854	10	1965
13. Misiones	1958	1	1964
14. Neuquén	1957	2	2006
15. Río Negro	1957	1	1988
16. Salta	1855	9	2003
17. San Juan	1856	6	1986
18. San Luis	1855	7	1987
19. Santa Cruz	1957	2	1998
20. Santa Fe	1856	8	1962
21. Santiago del Estero	1856	11	2002
22. Tierra del Fuego, Antártica e Islas del Atlántico Sur	1991	0	1991
23. Tucumán	1856	5	2006

§2. Method of Formation of the Sub-national Units

3. Argentina had its first national government in 1810 and declared its independence from Spain in 1816, but only in 1853 was it able to pass its Federal Constitution. The adoption of federalism and a decentralized system which included the

municipal régime – mentioned in the Federal Constitution under its Article 5 – was the result of Argentine civil wars fought between 1820 and 1853, which created this form of government as the only way in which to solve the political, economic and social conflicts of a country with a large territorial extension.

4. The fourteen provinces that existed before the Federal State were created between 1815 and 1834 (Buenos Aires, Córdoba, Santa Fe, Entre Ríos, Corrientes, Mendoza, San Luis, San Juan, Santiago del Estero, La Rioja, Catamarca, Tucumán, Salta and Jujuy), and through inter-provincial pacts they established the foundations of Argentine federalism which was adopted in the Federal Constitution in 1853 with an important amendment in 1860 after the inclusion of the province of Buenos Aires.

5. In connection with the admission of new provinces, Article 13 of the Federal Constitution establishes that: 'New provinces can be admitted to the Nation; but a province cannot be created in the territory of one or more other provinces, nor can various provinces become one without the consent of the Legislative Branch of the provinces involved and of Congress'.

The Federal Constitution in its Article 67, paragraph 14, which was later awarded in 1994, established that Congress had among its powers: 'to determine by a special law the organization, administration and government of the national territories, which are left outside of the limits of the provinces'.

Consequently, Territories, which depended on the Federal Government, were organized in the remaining national territory. Those national territories, which gave place to nine new and current provinces, covered vast extensions in north-eastern and southern Argentina.[1] Currently, there are no National Territories.[2]

1. Such territories, according to Law No. 1532 (of 1884), were divided into the following governorships: La Pampa, Neuquén, Río Negro, Chubut, Santa Cruz, Tierra del Fuego, Misiones, Formosa and Chaco. Art. 4 of said law established than when any of those governorships reached 60,000 inhabitants, it would have the right to be declared a province. The Executive branch of government was in charge of an officer appointed by the President of the Republic under the name of Governor. When population reached 30,000 inhabitants, the people had the right to vote for a Legislative branch of government. The territories had judges for its jurisdictional service. As for municipal government, towns of over 10,000 people would have a Municipal Council of five members elected by the people.
2. The National Territory of Chaco became a province by Law No. 14037, of 1951. The first Provincial Constitution was passed on 22 Dec. 1951 and adopted the name of 'President Perón'. After that, such constitution was abrogated by the 1955 Revolution, and took the name of Province of Chaco. Later, the 1957 Constitution was passed. This same Law No. 14037 transformed the National Territory of La Pampa into a province. Its first Provincial Constitution, passed in 1952, adopted the name of 'Eva Perón'. Such constitution was abrogated for the same reasons indicated above, and the historical name was adopted again. The new provincial constitution was passed in 1960.
   The National Territory of Misiones was converted into a province by Law No. 14294 of 1953. The National Territory of Neuquén, the National Territory of Río Negro, the National Territory of Chubut, the National Territory of Santa Cruz and the National Territory of Formosa became provinces by the enactment of Law No. 14408 of 1955.
   Lastly, the National Territory of Tierra del Fuego was transformed into a province by Law No. 23775 of 1990.

§3. Characteristics of Argentine Federalism

6. Given that federalism is a process rather than a political stereotype, we can point out the following stages in its legislative development in Argentina.

7. First stage: Federalism in the original 1853 Constitution. Between 1810 and 1853, federalism was adopted as a form of state, which was thus established in the Federal Constitution passed in 1853. This was the result of the blood-soaked civil unrests between Unitarians and Federalists, in a process of several decades.

The Unitarians were a cultured minority mostly settled in the cities and particularly in the City of Buenos Aires, from where they intended to rule the whole country and they proposed centralization. Contrarily, the federalists found their support in the popular masses called 'montoneras' of the interior of Argentina, who were led by the '*caudillos*' of the provinces. The implementing forces of federalism were the inter-provincial pacts, of which there were almost one hundred.[1]

The 1853 Constitutional Convention met in the city of Santa Fe, with representatives for thirteen provinces and in the absence of the province of Buenos Aires. As we have discussed, the Convention had as a precedent the text of the 1787 Philadelphia Constitution, although it took certain differentiating characteristics that had been sustained by Juan Bautista Alberdi, father of Argentine public law, in his book *Bases y Puntos de Partida para la Organización de la Confederación Argentina* (Foundations and starting points for the organization of the Argentine Confederation).

The influence of Alberdi meant that the original 1853 constitutional text adopted a more centralized federation than the American one, since, for example, substantive legislation (civil, commercial, criminal, etc.) was attributed as a legislative power of the Congress, as was the review of the Provincial Constitutions and the impeachment of provincial governors (Article 67).

In other matters, it established the same organization as that of the American federation: a Federal State that allows for the co-existence of various state and governmental orders, with an allotment of competencies that grant to the federal government only the powers expressly or implicitly delegated, while the provinces have the residual powers, on top of their own autonomy in institutional (constituent powers), political, financial and administrative matters (Articles 1, 5, 104, 105 and 106).[2]

Moreover, concurring competencies were established for the federation and the provinces (Article 107). The Senate was established as a federal organ *par excellence*, with an equal representation for each province (state), of two Senators who were appointed by the relevant provincial legislative branches of government, and the same representation for the Federal Capital (Article 46, currently modified as Article 54). In the text of 1853 it was also established that the Federal Capital was to be the City of Buenos Aires, and that the Federal Government had the authority to federally intervene in the territory of the provinces (Articles 3 and 6).

1. The main pacts were: (a) the Agreement of San Nicolás, signed in 1852, after the victory of General Urquiza over General Rosas in the Battle of Caseros, between the governors of the provinces and that established the foundations of the definitive constitutional organization under the federal system; and (b) its precedent, the Federal Pact of 1831, that organized the 'Argentine

Confederation', which existed from that year until 1853 and that had established the idea of passing a federal constitution. This is why the Preamble of the National Constitution refers to the fact that the General Constitutional Convention meets 'by the will and election of the provinces that are part of it, in compliance with pre-existing pacts'.

2. Article 1 established: 'The Argentine Nation adopts for its government the representative, republican and federal form, as is established in the present Constitution.' Art. 5 provided that: 'Each province shall enact its own Constitution under the republican, representative system, in accordance with the principles, statements, and guarantees of the Federal 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.' Art. 104 set forth the basic provision for the distribution of competence in the following manner: 'The provinces reserve to themselves all the powers not delegated to the Federal Government by this Constitution, as well as those powers expressly reserved to themselves by special pacts at the time of their incorporation.' Art. 105 (currently Art. 122) established that: 'They determine their own local institutions and are governed by them. They elect their governors, legislators, and other provincial officers, without intervention of the Federal Government,' and Art. 106 ordered: 'Each province enacts its own Constitution as stated in Article 5' (The latter provision, which today is Art. 123 was amended by 1994 reform precisely so as to convey a sense of municipal autonomy).

8. Second stage: Federalism in the 1860 constitutional reform. After the secession of the province of Buenos Aires, which occurred in 1853, problems continued with the Argentine Federation, until the battle of Cepeda of 1859 took place, where the Chief of the Argentine Federation General Urquiza won and as a consequence of such victory the Pact of San José de Flores, or Union Pact (11 November 1859) was executed; which meant the integration of the province of Buenos Aires into the Federation coupled with amendments to the 1853 Federal Constitution.

The constitutional reform of 1860 was made through a special procedure, different from that established in the 1853 text, which makes certain Argentine constitutional scholars consider that this was the exercise of an original, rather than a derived, constitutional power, and they consequently view our Supreme Law as that of 1853 together with that of 1860.

It is important to highlight the fact that the said reform caused important changes in the Federation, since it modified certain articles of the 1853 text with the purpose of establishing a greater decentralization of power. To that effect, it is evident that such was the purpose of the abrogation of the rules that established the system whereby the Congress conducted reviews of the Provincial Constitutions, as well as the carrying out of impeachments of provincial governors before such organ.

Additionally, it modified the wording of two important articles: Article 3 about the Federal Capital and Article 6 about federal intervention. In the first case, it established the same principle as Article 13, of territorial integrity in the creation of new provinces, which meant that the territory of the Federal Capital needed to be established by a law of Congress with the prior assignment of the relevant territories by the Legislative branch of the one or more provinces involved (Article 3).

As for Article 6 on federal intervention, the wording of the causes for intervening was refined so as to reduce the free determination of the federal authorities, establishing the requirement for a prior request on the part of the provincial authorities to the Federal Government for support in case of insurrection, sedition or invasion by other provinces.

A very important matter such as the federal property of the income derived from customs, which had separated the province of Buenos Aires from the rest of the Federation since the former benefited of such income due to the massive collection of the port of the City of Buenos Aires, was definitively settled only in the 1866 constitutional reform.

In all, in spite of the significance of this 1860 reform, the problems between the province and the Federal Government continued, and after the battle of Pavón, where General Mitre won, the first de facto government in Argentina's history was created, and from 1862 such victorious commander of the province of Buenos Aires was elected President, which led to the national organization being led by the said province.

9. Third stage: Towards a 'consensus' federalism (from 1950 onwards). During this stage, called as such by Frías (1985: 389), a trend from 'dual' or competitive federalism towards a 'cooperative' or 'consensus' federalism began, since the powers of Article 107 of the 1853–1860 text (currently Article 125) started to be exercised, as it provided that 'The provinces may enter into partial treaties for the administration of justice, of economic interests and works of common interest, with the knowledge of the Congress.'

Thus, provincial pacts that had stopped being made after 1853 started to appear shyly from 1948 onwards, to become firmer at the beginning of the 1950s, and continue up to this day, with different purposes and denomination, that allowed the construction of bridges and an inter-provincial tunnel, the treating of inter-provincial rivers as a watershed unit, the creation of hydric committees, the creation of the Federal Investments Council and other Federal Councils for diverse matters, as well as for the solving of problems and the analysis of projects.

10. Fourth stage: The deepening of federalism in the 1994 constitutional reform. The constitutional reform of 1994, a result of the Federal Constitutional Convention that met in the cities of Santa Fe and Paraná during that year, had as one of its driving ideas: the deepening of power decentralization in Argentina.

The debate over this issue[1] – in which we had the honour of participating in our capacity as Vice-President of the Drafting Committee – covered three big chapters: federalism, municipal autonomy – that was included in Article 123 of the Federal Constitution – and the autonomy of the City of Buenos Aires, which was recognized in its category of city-state – in our view – with an institutional standing very similar to that of the provinces, as stems from Article 129 of the Federal Constitution now in effect.

Specifically relating to federalism, such constitutional reform covered various aspects: (1) Institutional and political; (2) Financial; (3) Economic and Social. In connection with point 1, the constitutional reform established the following amendments:

(a) The four levels of government in the Argentine federation; In effect, there are currently the following levels. the Federal Government (Articles 44 to 120), Provincial Governments (Articles 121 to 128), Government of the Autonomous City of Buenos Aires (Article 129) and Municipal Governments (Article 123),