

## A Departure from the Rationale behind the American System in the Argentine Constitution

It is a well-known fact that, 43 years after the revolution of May 1810 we commemorate today, Argentina used the Constitution of the United States as a model for its own fundamental law.

Another well-known fact is that Argentina deviated from this model regarding some matters of significance.

It is not so well-known, however, that a crucial matter where the Constitution drafted in 1853 deviated from the American text is the distribution of powers to make and apply the Law.

Pursuant to the American model of 1787/1789, the powers not delegated to the Federal Government are reserved to the states. This general principle of federalism, which permeates the whole constitutional design, is embodied in the Tenth Amendment.<sup>1</sup> The Argentine text of 1853 embraced the general principle of federalism and also laid it down expressly in Article 101 of the Federal Constitution (currently, Article 121).<sup>2</sup>

Nevertheless, a power that the framers of the U.S. Constitution did *not* delegate to the Federal Government – and which, therefore, was retained by the states – was indeed delegated by the Argentine drafters to the Federal Government: the general legislative power (if I may call it so on this occasion, using a hopefully justified simplification<sup>3</sup>).

In fact, rather limited legislative powers have been vested in the United States Congress (at least in theory<sup>4</sup>): those delegated by various articles of the Constitution.<sup>5</sup> Most legislative powers have been retained by the states, and exercised by their legislatures and, in addition, by their local courts, in their capacity as common law keepers and appliers.<sup>6</sup>

By way of contrast, the Argentine Constitution vested in the Federal Congress the power to make and subsequently develop what in our country is termed *»derecho común«* or substantive law, i.e., legislation on civil, commercial, criminal and other matters<sup>7</sup> – in our legal system, *derecho común* has a similar standing to common law in the United States, even though they differ considerably in other aspects. Thus, the Argentine provinces – unlike the American states – delegated to the Federal Government the enactment of *»general«* Law.

Objections were raised when this criterion was put forward at the Constitutional Convention of 1853. Delegate Zavallía asserted the idea entailed an undue encroachment on the powers of local legislatures, to the detriment of each province's sovereignty. And as source of authority he brought up the American model, where *»each of them [in reference to the states] enacts its own laws«*.<sup>8</sup>

On the other hand, endorsing the proposed rule, delegate Gorostiaga replied that if every

1 *»The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.«* Constitution of the United States of America, Amendment X.

2 *»The Provinces retain all powers not delegated by this Constitution to the Federal Government.«* In the case of older texts, I follow Ma. LAURA SAN MARTINO DE DROMI's compilation, *Documentos constitucionales argentinos*, Buenos Aires 1994.

3 In the United States the adjective *»general«* is used to describe the power of each state. Thus: *»power*

is shared between state governments of *general* jurisdiction and a federal government of delegated and enumerated powers«. ROBERT P. GEORGE, *The Concept of Public Morality*, in: 45 *American Journal of Jurisprudence* 17 (2000) 20, emphasis added.

4 Questions have been raised, rightly, as to the extent of this limited delegation in practise. GEORGE (Fn. 3) 22–23.

5 Cf. the different clauses of Art I, Section 8 of the U.S. Constitution, and their interpretation by the U.S. Supreme Court in *United States v. Lopez*, 514 U.S. 549, 552 (1995). The foregoing is without

prejudice to open rules allowing for a limited extension of enumerated powers. Cf. particularly Art. I, Section 8, Clause 18.

6 See on this topic in general, EDGAR ALLEN FARNSWORTH, *Una introducción al sistema legal de los Estados Unidos*, Buenos Aires 1990.

7 Cf. Fn. 13 below.

8 EMILIO RAVIGNANI, *Asambleas Constituyentes Argentinas*, Buenos Aires 1937, T. IV, 528.

province were to retain this power, the country's legislation would become a baffling maze of legal rules leading to inconceivable evils. In addition, he pointed out the need for new legislation to replace Spanish laws, which were confusing – on account of their number – and inconsistent.<sup>9</sup>

Delegate Zenteno tried to mediate in this debate. The Federal Congress being »a meeting of men from all the provinces«<sup>10</sup> – representatives of provincial sovereignty and interests – this amounted to sufficient local element, he explained in an attempt to ease delegate Zavalía's concerns in this regard.

The reason why Argentine drafters deviated from their source of inspiration concerning this essential matter lies, then, in an attempt to unify the law. As a matter of fact, this attempt responds to the convenience of putting an end to the chaos brought about by Spanish legislation, for which purpose a centralizing legislative movement was deemed suitable.<sup>11</sup> »Inconceivable evils« would, thus, be avoided.

But the delegation of the mass of legislative powers to the Federal Congress left the provincial judiciaries with little law to apply. If the Federal Congress was to enact *derecho común*, then this law would naturally be federal and, therefore, applied by the Federal Judiciary, pursuant to the predominant federalist principle, as enshrined in the constitutions of countries such as the United States, Argentina's source of inspiration.<sup>12</sup>

In 1860, the Constitutional Convention of the Province of Buenos Aires, charged with reviewing the Federal Constitution of 1853 with a view to the incorporation of the province of Buenos Aires into the Argentine Republic, no-

ticed the problem alluded to in the preceding paragraph. For reasons that are not germane here, Buenos Aires did not want to join the newly born Argentine Republic in 1853. When this province changed its mind seven years later, it established as a condition precedent that a provincial Constitutional Convention would review the original text of the Federal Constitution.

In order to prevent the aforesaid implications of the centralizing movement, the Buenos Aires Province Convention proposed – and federal drafters accepted, soon afterwards, at a new *ad hoc* Constitutional Convention convened that same year 1860 – the so-called »reservation« in favour of provincial jurisdictions. By means of a rule rather cryptically worded,<sup>13</sup> provincial judiciaries were granted the application of *derecho común*, despite being federal in nature. Thus, an exception to the aforementioned federalist principle was established, a principle that maintains, as we know, that federal rules are to be applied by federal courts.

This explains the occurrence of what Felipe Espil shrewdly termed in 1910, a time equally distant between the bicentennial and the 1810 revolution, a departure from the rationale behind the U.S. system.<sup>14</sup>

This eminent jurist captured the very essence of the problem I want to raise awareness about in this brief essay. In fact, the original effort at unification had resulted in the possibility – perhaps unnoticed in 1853? – of »depriving [provincial courts] of their power to hear and resolve cases on matters already under their jurisdiction«. <sup>15</sup> In 1860, in order to remedy an anomaly – according to American federal terms –, a new anomaly came into being: pursuant to the new

9 RAVIGNANI (Fn. 8) 528–529.

10 RAVIGNANI (Fn. 8) 529.

11 Centralization was not complete, since – by virtue of the principle laid down in the current Article 121 of the Constitution (see Fn. 2 above) – the provinces retained legislative power to enact legislation on local procedure and public law.

12 Cf. Art. III, Section 2, Clause 1, of the U.S. Constitution.

13 The original wording – of 1853 – of Article 64, paragraph 11, included among the powers of the

Federal Congress: »[t]o lay down the civil, commercial, criminal and mining Codes«; but in 1860 an addition was made: »those codes shall not alter local jurisdiction, and [...] shall be applied by provincial courts«. Accordingly, Article 100 was amended that year as well, so the original text: »the Supreme Court and the lower courts of the Nation shall hear and decide all cases concerning issues governed [...] by the federal laws« was completed with the phrase »except for the reservation of Ar-

ticle 67 [former 64], paragraph 11.« The latter article is precisely where the term »reservation« is used to describe the spirit of this amendment. At present, these provisions are included in Articles 75, paragraph 12, and 116, respectively.

14 FELIPE ESPIL, La Suprema Corte Federal, Buenos Aires 1915, 193: »we have, for compelling reasons, departed from that rationale [behind the U.S. system].«

15 ESPIL (Fn. 14) 193–194.

article 67 paragraph 11, each Provincial Judiciary would be qualified to render an *actually different interpretation* of the same federal rule, be it the Civil, Commercial, Criminal Code, or the like. This explains why 100 years ago Espil complained that »there were fourteen interpretations of just one code across the nation«. <sup>16</sup> His

complaint, amplified by the greater number of provincial jurisdictions existing today, still seems to ring in our ears; all of the attempts to cure the problem have failed so far ... <sup>17</sup>

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<sup>16</sup> ESPIL (Fn. 14) 194.

<sup>17</sup> For the various attempts to unify law – Federal Court of *Cassation*, grant of jurisdictional authority to the Argentine Supreme Court of Justice to decide on substantial matters concerning *derecho común*, etc. – see, SANTIAGO LEGARRE, El requisito de la trascendencia en el recurso extraordinario, Buenos Aires 1994, 44-71.