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Understandings of the Rule of Law in various Legal Orders of the World
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The Case of the Argentine Republic

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I. Argentine Constitutional and Legal system: Prelude

Argentina has a long constitutional tradition that goes back to the early XIX century. In 1853, after almost forty years of external and internal wars, the country enacted the Constitution that, with amendments, is still in force today. Although Argentina's basic law was inspired by the US Constitution, political, institutional and historical circumstances -along with other more specific cultural reasons-, have brought about substantial differences with the original model.

A presidential system, based upon the doctrine of separation of powers -and the idea of "checks and balances"-, was deployed by the framers to work out both the thick and the thin Constitution. Although the political leadership of Congress was undisputable, some practicalities have nevertheless outweighed this balance in favor of the executive power. In addition, judicial review -not always convincingly strived by different Courts- has faltered in its task of controlling legislative, executive and judiciary acts as well. In a summary: this wide array of particular features is very telling of how constitutional "dynamics" have led to the departure of Argentina's model from several of its former constitutional promises.

Having noticed that during concrete historical episodes, liberal and republican instincts were together developed, a rather blurred composite of constitutional expectations is still hovering over ordinary people's conscience. Accordingly, the collision of legal cultures must be born in mind when trying to understand the current development of the "rule of law" in the country. All things considered, from 1930 to 1983, a long series of institutional disruptions with *coup d'etats*, had also yielded devastating results in

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Argentina's democratic culture. Therefore, a "formally" avowed Constitution has usually been toyed through a manipulated legal discourse, whereas "substantially", to ordinary people's minds, the Constitution has become more like a luxurious device. This long process of overlooking the "rule of law", both in "form" and in "substance", led the country to its last military government (1976/1983). As the country underwent massive violations of human righst, lingering secondary effects such as mourn and pain are still assailing people's feelings.

Yet, in October 1983, Argentina recovered democracy. Argentina was at the end of a dark and dreadful tunnel, and as taking part in an offspring of hope, in 1994 the Constitution endured a major reform with an ample base of political agreements. Many innovations were tried, some of them aiming at moving the system closer to a *semi*-presidential model. Unfortunately and beyond this effort, the hyper-presidential tendencies are still untamed. Another legacy of this "constitutional moment" refers to new rights and guarantees incorporated as a daring openness toward international human rights treaties. By granting "constitutional hierarchy" to a number of international human rights covenants, these amendments have definitively remodeled the meaning of several civil relations. On this trend, by opening Argentina's legal order to an ever-increasing influence of international law, a great upheaval is still operating *vis à vis* the old system of sources and the "supremacy rule" of the historic Constitution.

II. Thin and Thick Constitution: "Cross-cutting" Parallels

A "principle" based understanding following a rather dogmatic taking of the rule of law, is what legal operators construe when dealing with the idea of the "rule of law". Yet, a few remarks are worth noticing. Old and new sources of legitimacy are now converging in the current Argentine constitutional landscape. Some of them have lost their former importance, while others are still potent forces within the system. This is somehow awkward for sure. The interplay between both kinds of sources and their impact on the present understanding of the "rule of law" is at random puzzling. Special attention to cross-cultural influences in the design of public and private law systems is overridingly necessary to spell out what Argentine legal system really looks like. Looking inwardly for example, there is a "tale of two different traditions" within Argentine legal order. On the one hand, though there is a high premium impact from French administrative law influence, there is a US background of constitutional law dominating public law main insights as well. On the other hand, there is a private Law system based upon the continental tradition. Argentina has followed a "Napoleonic" idea of codifying its substantive law.

Although the Argentine Constitution is typically classified among those constitutions that are «rigid», Argentina has somehow developed a rather «flexible» approach to adapt its Higher Law through ordinary politics or even by judicial constructions. This circumstance, "*tout a court*", has an impact on the constitutional understanding of the "thin constitution". Be this as it may, the tension between the republican-democratic principle and the liberal tradition, also plays a major role in shaping current political and academic debates on constitutional theory, which surprisingly, in previous years have received little attention to topics such as the so-called "*countermajoritarian* difficulty" and to judicial review's thrust for broadening its own scope. We should bear in mind that as stated above, today's constitutional law goes beyond the frontier of the constitutional text, opening up its terms to certain international norms and forming, together with the text, a so-called "block of constitutionality".

III. Argentine Polity: Jeopardizing the Law

Argentina's polity is a result of complex historical and political grounds: fourteen pre-existing provinces gave birth to the federal state. Argentina has a multi-layered system of government, encompassing three different levels (the federal government, the provinces, and municipalities). Today there are twenty-four sub-national entities: twenty-three Provinces and the City of Buenos Aires, which is the Federal Capital of the Country, and in terms of its competences and powers is rather like a Province. Argentine federalism is consequently a historically based political circumstance, very complex in its multilevel relations, and very poorly run in its practicalities. Though the legal framework was intended as to foster a strongly decentralized country, a "federative unit" with intense centralist elements, has finally developed a very awkward model where presidential hegemony thwarts its ordained logics.

After the democratic restoration in 1983, a new trend towards decentralization gained momentum, and the 1994 Constitutional Convention took important steps in this direction. However, the control of tax resources by the federal government is a major obstacle, which by the way, allows to unfasten different sort of "agonistic" political pressures on lower units of government. Recent national crises, as the one that took place between the federal government and farmers have triggered federal instincts among people's conscience elsewhere in the country. The lack of fiscal federalism unveiled during this conflict has brought into the political agenda how Provincial autonomies coupled with individual economic rights involved are both undermined values when expansive powers of central government are unfettered.

IV. Argentine "Hyper-presidentialism"

The notion of state of emergency has always had a prominent place in Argentina's constitutional history. For example, in 1930, the Supreme Court validated a *coup d'etat* based upon an obscure doctrine of "legitimacy by force". This notorious precedent would find its way, in different shapes, into new jurisprudential developments. As a token of this trend, the device of "*Etat of Siege*" has repeatedly been implemented in the country. This was so although "wishy-washy" standards of legitimacy would barely accept a few of them. Naturally, other sorts of emergencies of all kinds and colors have usually been upheld by an also very flimsy judicial doctrine. The notion of "emergency police power", especially in its shape of "economic emergency", gained preeminence after the demise of military governments as well. Currently, it seems that the Supreme Court has decided to prune this doctrine while scaling it back to manageable terms. Whether this is a steady intend is not very clear yet.

A traditional "US style of separation of powers" was designed within the Argentine Constitution. Due to institutional disruptions and a leadership culture centered by Presidential messianic impulses, Congress has notwithstanding been enduring a persistent waning of its authority. Not surprisingly, the Argentine polity has consolidated its hyper-presidential tendencies, and courts have not done much to hamper this tendency. The Judiciary enjoyed little or no credibility as an independent player in national politics, which in turn, further eroded Congress political capital as a major constitutional interpreter. After the last ballot however, when the Government Party lost the election (June 2009), the role of Congress as an effective controlling and decision-making center seems to have been rediscovered. To build up Argentina's rule of law, the key question is whether political deliberation and dialogue by both Congress and an independent judiciary is likely to redress the imbalance of power proposed by unbound executives.

V. A "dispersed" Constitutional Review, but .....

Fundamental rights and liberties have gone through ups-and-downs in Argentina's recent history. However, after democratic restoration, there has been a strong commitment to the full protection of human rights. As stated, Congress approved a number of international human rights treaties, many of which were later given "constitutional hierarchy" by the 1994 Constitutional Convention. In addition, the Supreme Court (especially between 1983 and 1990 and after 2005), adopted a very "redemptive" style of judicial review, and at least at the rhetorical level, constitutional promises are being translated in ways that ordinary men and women can harmonize with em-

pathy. Reality, however, is somehow more complex than what legal language purports. Social and economic rights, for example, are mostly in the wake of implementation. Regarding these issues, when the judiciary is involved in constitutional dialogue with other branches of government, the lack of compliance usually brings about stronger cycles of distrust and pessimism among the people. Moreover, judicial vindication of certain rights allegedly created by international treaties, at random, may result in the violation of other equally important rights established at the domestic level.

VI. "Principle" Arguments Involved

Along with federal statutes and international treaties, the Constitution is said to be the "supreme law of the land". The clause that establishes such supremacy over the rest of the legal order is still in force today. However, later additions to the power of Congress, together with glosses written by courts, have given rise to some competitive understandings of what it means to be the "supreme law of the land". It is still unclear which conception of supremacy will prevail. Meanwhile, the Constitution tries to foster popular sovereignty and civic direct involvement through means such as popular consultation and popular initiative. In sum, there is a tension between democratic and liberal principles not always ready to break in. Accordingly, on behalf of the liberal tradition, notorious rights claims saddled with a broad "judicial review" of some international judicial bodies such as the Inter American Court of Human Rights are opening new perspectives in this cleavage. Meantime, a "not yet accomplished" debate on how strong national and international Courts' authority actually should be, is what is at stake in coming political and academic discussions.

VII. Epilogue

To understand the "state of affairs" of the "rule of law" in Argentina, it is fundamental to explore the historical underpinnings of Argentine constitutional history. Otherwise, any attempt may result in a very disappointing experience. It will also be so, unless another important caveat is considered. Among other difficulties, such as daunting figures reporting ordinary crimes and street violence, Argentina is currently enduring extended levels of corruption within the State. Once a massive well-educated country proud of its booming economy and its high-ranked standards of social development, is nevertheless today a severely disoriented nation striving to get rid of many of its unpredictable conundrums.

Acknowledging the sway of both normative and factual interplay of factors is a healthy attitude to be aware of. In the light of complex historical, political, and social elements, the actual meaning of constitutional values, principles, and rules can pop up through unimpressive subtleties. However, far beyond this concern, there is an enduring reluctance in the country to give up major civic hope as well. A once vividly republican tradition coupled with a rich history of constitutional awareness is pervasively present in some institutions and some civic practices. Despite its efforts and past traditions, Argentina is nevertheless a rather "unaccomplished republic" where the "rule of law" still looks very feeble. To grasp what the constitution of Argentina was, is, and will be, could be a sortilege ready to be deciphered, which all things considered, ultimately depends on the observer's willingness to dig into those underlying forces that have both undermined and enshrined the idea of the "rule of law" as a collective undertaking of self-government.

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