



Argentina: Constitutional Provisions on the President

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ARGENTINA

CONSTITUTIONAL PROVISIONS ON THE PRESIDENT

Executive Summary

Since its first constitution in 1853, Argentina has had a presidentialist form of government with a strong executive power. The 1994 constitutional reform adopted norms aimed at limiting the powers of the president. However, in the actual interaction of the three branches of government, the executive has acquired and continues to acquire more powers than were designed and intended by the National Constitution.¹

I. Introduction

Argentina has adopted a presidentialist form of government that concentrates the executive power in an organ separated from the legislative and judicial powers.² The National Constitution (CN)³ has established a delicate and strict balance between the three branches of government. However, in the actual interaction of the three branches of government, the executive has acquired and continues to acquire more powers than were designed and intended by the CN.⁴

II. Presidentialism

Under the first constitution adopted in 1853, the founding fathers designed a strong president to contain the chaos in the country at that time. The political model was planned to concentrate power, create a State, and establish a capitalist economy.⁵

This idea continued to be held throughout the political history of the country. The concentration of power in the executive was very frequently related to the almost chronic

¹ M.A. EKMEKDJIAN, *MANUAL DE LA CONSTITUCION ARGENTINA* 467 (Lexis Nexis, Buenos Aires, 2007).

² G. BADENI, *II TRATADO DE DERECHO CONSTITUCIONAL 1644-1645* (2nd ed., La Ley, Buenos Aires, 2006).

³ CONSTITUCIÓN DE LA NACIÓN ARGENTINA (CN), 1994, *BOLETIN OFICIAL (BO)*, Aug. 23, 1994, special issue. English text, Argentine government website, http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf (last visited Apr. 28, 2010).

⁴ M.A. EKMEKDJIAN, *supra* note 1, at 467.

⁵ R. FERRARO & L. RAPPOPORT, *PRESIDENCIALISMO ABSOLUTO Y OTRAS VERDADES INCOMODAS* 28-29 (Editorial Ateneo, Buenos Aires, 2008).

political and economic crises in the country. Once a crisis was over, the president who led at the time and overcame the crisis became more powerful and would not subsequently relinquish any part of that power.⁶

The 1994 constitutional reform adopted norms that, at least on paper, tried to limit the president's power,⁷ such as:

- the restrictions as to times and subjects on exercising delegated legislative powers from Congress, through regulations;⁸
- the creation of the office of the Chief of Cabinet within the Executive,⁹ which has to report to Congress periodically and be subject to possible congressional removal;¹⁰
- the prohibition against legislating through decrees, except for extraordinary circumstances through emergency decrees when it is not possible to follow the regular legislative process established in the CN and when the issues involved do not relate to specific subject matters; and
- the required ministerial signature on presidential decrees.¹¹

In real application, these norms function quite differently. In practice, the political style with which the executive power has exercised its authority shows a very strong concentration of power, with an ostensible pretension of preeminence over the legislative power. The exceptions or restrictions based on “exceptional circumstances” or “emergency” situations are very broad concepts that have created a high degree of uncertainty and allowed for an exception to become the rule and viceversa. This is combined with very negative public opinion on the judiciary, especially the Supreme Court.¹²

II. Constitutional Provisions on the Presidency

The relevant constitutional provisions on the president are found under articles 76 and articles 87 through 99.¹³ The National Constitution provides that the president is the head of the executive power.¹⁴ A vice president will serve in case of the illness or absence of the president.¹⁵

⁶ *Id.* at 25.

⁷ G.J. BIDART CAMPOS, II-B TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO 252-253 (Ediar, Buenos Aires, 2005).

⁸ CN, art. 76.

⁹ CN, art. 101.

¹⁰ *Id.*

¹¹ CN, art. 99.3.

¹² BIDART CAMPOS, *supra* note 7, at 253.

¹³ CN, arts. 76 & 87-99.

¹⁴ CN, art. 87.

¹⁵ CN, art. 88.

The president is the head of state and of the government. Both the president and the vice president are elected by the people.¹⁶

The president is assisted by a Chief of the Cabinet of Ministers; the cabinet itself contains ministers who are collaborators or advisors to the president and who are in charge of executing the president's policies.¹⁷ The Chief of the Cabinet of Ministers has to appear before Congress on a monthly basis to account for the administration of the government. He may be questioned and subjected to a censure vote by Congress, by an absolute majority vote in each of the two chambers. The president, however, has the authority to appoint and remove him.¹⁸

The CN further lists the powers of the president¹⁹ as follows:

1. Typical executive functions, reserved only to the president,²⁰ including: as serving as head of the armed forces; enforcement of the laws; appointment of ambassadors, Supreme Court justices, and lower court judges upon the proposal of the Council of the Magistrates with the Senate's consent; granting of pensions; etc.
2. "Co-legislative" powers, including: participation in the law-making process, the promulgation of laws, the issuance of decrees to regulate how laws are applied,²¹ veto power, calling Congress into extraordinary sessions and calling for sessions to be extended, issuance of emergency decrees (*decretos de necesidad y urgencia*); etc. A strict reading of the constitution indicates that, in the matters of vetos and emergency decrees, after the 1994 constitutional amendment, the legislative powers of the president have increased. The constitution now expressly grants the president the restricted power to issue emergency decrees as well as the authority to issue partial vetoes.²²

The new article 99.3 begins with a forceful assertion, that the executive power cannot issue legislation in any case under penalty of nullity, but immediately in the text this prohibition was transformed by additional language, and it ended up with more grounds under which the powers are allowed than those under which they are not.²³ Indeed, there are only two limits: 1) decrees should be issued in exceptional circumstances, and 2) they cannot regulate criminal, tax, or electoral issues. Law 26122 of July 28, 2006,²⁴ regulates the issuance of emergency decrees, providing for the process and scope of congressional intervention on emergency decrees.²⁵ Emergency decrees provide the president with a very powerful instrument to influence the

¹⁶ CN, arts. 94-98.

¹⁷ CN, art. 100.

¹⁸ CN, arts. 101 & 99.7.

¹⁹ CN, art. 99.

²⁰ CN, arts. 99.1-99.2, 99.7 & 99.10-99.20.

²¹ CN, art. 99.2, 99.3, 99.8 & 99.9.

²² CN, art. 99.3 & 83.

²³ M.A. EKMEKDJIAN, *supra* note 1, at 333.

²⁴ Law 26122 of July 28, 2006, B.O. July 28, 2006.

²⁵ M.A. EKMEKDJIAN, *supra* note 1, at 334.

legislative process in two ways. First, the decrees empower the president to legislate without congressional intervention, and second, the president may use the threat of an emergency decree to pressure Congress to pass legislation.²⁶

Very recently, this presidential power was challenged in a high profile case involving the emergency decrees issued by President Cristina Kirchner to remove the President of the Central Bank and to order the payment of external debt with national reserves during a congressional recess. This case is palpable evidence of the intricacies and complexities of the interaction between the presidential powers and those of the other two branches of government.²⁷

The Constitution also provides for certain judicial powers of the executive, such as the authority to pardon a sentence or issue a commutation of a criminal sanction.²⁸

The provision on presidential reelection was one of the key amendments adopted in the 1994 constitutional reform. Before 1994, immediate presidential reelection was prohibited. President Carlos Menem, in power at that time, wanted to be reelected. To amend the constitution, he needed: 1) a call for the reform by two-thirds of the members of Congress and 2) the election of a constitutional assembly. In order to secure the minimum votes needed to call for the constitutional reform, he sought the support of the head of the opposition party, Raul Alfonsin, who wanted to limit the presidential powers in order to strengthen democracy in the country.²⁹ The two politicians ended up with an agreement (*Pacto de Olivos*) by which Menem got his reelection reform in exchange for a number of reforms that Alfonsin expected would limit the presidential powers, strengthening democracy and restoring his political image. Those reforms included the regulation and restriction of the power to legislate through emergency decrees, the creation of the Chief of the Cabinet of Ministers, and other measures.³⁰

The reelection provision was adopted, although the presidential term was reduced from six years to four. The presidential powers, however, not only were not limited in practice, but ended up expanded, as has been argued can be seen in the recent past of the political life of the country.³¹

Conclusion

The Argentine presidentialist form of government has been, since its inception 1852, the most immediate and efficient response to anarchy and to the need to have a strong central

²⁶ M Jones, *Evaluating Argentina's Democracy*, in S. MAINWARING & M. SOBERG SHUGART, *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 288 (Cambridge University Press, 1997).

²⁷ See G. Rodriguez-Ferrand, *Argentina: Constitutional law - Emergency Decrees on President of the Central Bank, Payment of External Debt*, *WORLD LAW BULLETIN*, Jan. 27, 2010, available at http://www.loc.gov/lawweb/servlet/WLB?disp3_1802_text.

²⁸ CN, art. 99.5.

²⁹ Jones, *supra* note 26, at 291-292.

³⁰ *Id.* at 291.

³¹ *Id.* at 293.

authority that would have the power to govern. The frequent political and economic crises the country has suffered in the last decades, including military coups and the early resignations of presidents due to chaos and civil unrest, caused the the president to become a stronger figure. Moreover, there has been a constant increase in the types of matters under the authority of the president and the government, as well as their complexity, augmenting his powers. The strenghtening of the presidential powers has been of such magnitude that some political analysts have called for a characterization of the Argentine presidential system as a “hyper-presidentialist” one.³²

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³² H. QUIROGA LAVIE, *II DERECHO CONSTITUTCIONAL ARGENTINO* 1087 (Rubinzal-Culzoni, Buenos Aires, 2001).