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Sub-national Constitutional Law in Argentina: Considerations on the nature and scope of provincial constitutions

by

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Abstract

Sub-national constitutional law constitutes a fundamental chapter of federal theory that, despite its diversity and richness, has been little explored. Recently, n all federal countries of the world, sub-national constitutional law and its importance in the constitutional order are being (re)discovered.

The main aim of this paper is to study the delimitation of the s*ub-national constitutional space*, through the bases and limits placed on local constituent power by the Argentine federal constitution. Another aim is to unravel the foundations of Argentine sub-national constitutional law, through analysing the principle of constitutional autonomy, the distribution of powers between levels of government and the co-sovereignty theory.

The article concludes with reflections on Argentina's "provincial margin of appreciation", and on the advantages and innovations of sub-national constitutional law.

Keywords

Sub-national constitutional law – comparative constitutional law – federalism – decentralisation

1. Sub-national Constitutional Law - Some basic concepts

Sub-national Constitutional Law (SCL) constitutes a fundamental chapter within federal theory which, despite its diversity and richness, has been little studied. Today it is possible to observe the discovery or the rediscovery of the SCL and its importance in the constitutional order in almost all federal states of the world.

It is surprising that countries with a long federal tradition did not produce scholarly works on the subject, at least until recently. Argentina, in this sense, boasts a long tradition of SCL or provincial constitutional law, dating back to the founder of our National Constitution, Juan Bautista Alberdi's pioneering book "*Elementos de Derecho Público Provincial*" ("Elements of Provincial Public Law") published in 1854 [1998]. This work established a critical foundation that continues to influence scholarship today. However, despite a century and a half of federalism, Argentina still lacks comprehensive studies encompassing all 24 federated units. While established regional schools like Córdoba, Mendoza, and Buenos Aires boast rich provincial law scholarship, most research remains focused on one provincial constitutional system, and in many provinces, the subject is not covered in the curricula of Law schools. This presents a vast field to be explored.

While the US defines SCL as "a set of rules (both formal and informal) that protect and define the authority of sub-national units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation" (Marshfiled, 2011:1157), in Argentina, there are multiple definitions of this branch of law[II]. Notably, Hernández (2011:5) views SCL as "the branch of legal sciences, which studies the organization of the autonomous government of provinces, within a federal state, determining at the same time, the scopes, forms and conditions of the exercise of local authority". The authors generally agree on two defining characteristics of SCL: firstly, it governs the autonomous organiation of federal entities, and secondly, it functions within a larger federal system, forming a partial legal order that is an integral part of the whole.

Though the label "Provincial Public Law" persists in Argentina, largely due to historical tradition, modern terminology favours "P*rovincial Constitutional Law"*. However, both curricula and textbooks still use the *traditional* name, in honour of its founder, Juan Bautista Alberdi (1810-1884).

To determine the nature and scope of this subject is an ardous task. We must determine how extensive (or narrow) SCL is, and how it has been (effectively) used by sub-national entities (that is, even if their space is large, whether they have been capable of truly innovating and creating or whether they have merely copied the federal design). This necessitates comparing constitutional texts horizontally (across sub-national states) and vertically, in a double comparative, that is, each province against both the national framework and international precedents of federal states.

This paper will seek, by way of generic considerations, some answers starting from the fundamental principles that govern SCL, focusing on the Argentine case with a comparative perspective (in particular with Latin American federations).

2. The principle of Constitutional Autonomy as SCL's foundation

One of the guiding principles and the foundation of SCL is the principle of autonomy, that is, the constitutional recognition of autonomy to federal units. As its etymology indicates, autonomy (auto nomos) implies the ability of an entity to create its own norms and institutions, and to be governed by them, without external interference.

The autonomy of the federative units translates into a capacity for *self-organisation* that manifests itself both in the power to draw up their own constitutions, establishing through them the regime of their superior governing bodies, and in *normative* autonomy (Fernández Segado 2003). This autonomy presupposes a power of public law by which, "by virtue of its own law and not of a mere delegation, it is possible to establish binding legal rules" (Fernández Segado 2003:58). In other words, public bodies or federated entities enjoy *political autonomy*, and not merely administrative autonomy, so that their provisions have the force of law – unlike what happens, for example, in the Colombian Departments or in the Chilean regions, whose provisions constitute mere administrative acts.

As Thorlakson (2003) has argued, it is the constitutional recognition of autonomy that ultimately distinguishes federal states from other types of decentralised systems (like federal-regional or unitary states):

> It is the *guarantee* of autonomy for each level of government that distinguishes a federal system from a unitary state and from other types of relationships between states. This captures the element that many writers have deemed to be of central importance – the contractual nature of federalism. What distinguishes

> federalism from a decentralised unitary state is whether the central government has the power unilaterally to alter the distribution of powers in the state. In federal systems, mutual consent is required before the political 'contract' between the federal government and the constituent units can be altered. Federalism should also be clearly distinguished from consociationalism, a non-territorial method of dividing power and autonomy between two or more groups. (2003:5).

Perhaps the Argentine Constitution best defines the autonomy of the federated entities. Article 122 clearly stipulates that "The Provinces make their own local institutions and are governed by them. They elect their governors, legislators, and other Provincial officials, without intervention by the Federal Government".

This autonomous capacity translates into the ability to establish own institutions, as enshrined in the Argentine constitution: "Each Province shall adopt for itself a constitution […]" (Article 5). Similarly, the Brazilian Constitution holds that "The States are organized and governed by the Constitutions and laws they adopt, observing the principles of this Constitution'" (Article 25) and the Venezuelan constitution recognises that "it is within the exclusive competence of the states", the power to "dictate their Constitution to organize the public powers, in accordance with the provisions of this Constitution" (Article 164, paragraph 1). In the Constitution of the United States, constitutional autonomy is contained in the *Guarantee Clause* of Article 4, section 4, which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government […]", and in the *Tenth Amendment* (1791), which establishes that "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".

As Astudillo Reyes argues, "the constitutional enunciation of the principle of autonomy in favor of the federative entities operates as a basis of validity for the existence of one or more legal systems within a national legal system" (2008:32), giving rise to a decentralised institutional context in which it is possible to clearly distinguish a central sphere of validity and a peripheral sphere. In turn, this principle of autonomy gives rise to the principle of "self-sufficiency" of local legal systems, a notion from which "the ultimate basis of validity of the norms that make up the local legal system is subordinated to the local constitution [...] true autonomous legal systems in which the local Constitution acts as the 'closing' norm of the system" (Astudillo Reyes 2008:34).

Argentine provincial constitutional texts stand out for explicitly recognising the principle of local constitutional supremacy over the entire provincial legal system. This sets them apart from Mexican federal states, where not all constitutions explicitly guarantee this principle.

Finally, these self-sufficient local constitutions must also be self-guaranteed:

> "The coexistence of a set of self-sufficient legal systems linked to the respect of the stipulations of the constitutional pact shows the mutual implication and nourishment that must exist between the theory of constitutional justice and the theory of the sources of law, to the extent that it becomes inexorable, on the one hand, the establishment of a system of guarantees of the general Constitution that protects the political unity of the State; and on the other hand, the existence of systems of local guarantees with the purpose of protecting the local Constitution. The first represents a jurisdiction of general constitutional "level" because it is directed to the immediate and direct "action" of the general constitutional norms; the others are raised as jurisdictions of particular constitutional "level" because they are destined to the direct and effective protection of the local constitutional norms, thus providing the first indications for a timely delimitation of competences" (Astudillo Reyes (2008:36).

The principle of local constitutional supremacy not only protects the local constitution but also lays the groundwork for a distinct set of mechanisms, institutes and functions forming the *local constitutional procedural law* (Brewer Carias 2003; Astudillo Reyes 2008; Suprema Corte de Justicia de la Nación 2005; Cienfuegos Salgado 2008). Furthermore, we can discern within the federal constitutional justice system a "*local constitutional justice*" sub-system. This sub-system focuses primarily on reviewing the constitutionality of the acts of the Federated States and of the Municipalities (Brewer-Carías 2003). Currently, Latin American constitutional doctrine (particularly in Mexico) has placed great emphasis on this new sector of SCL, which is directly connected to constitutional procedural law: "In our days we can affirm the configuration of a new sector of Constitutional Procedural Law that we can call local, which comprises the study of the different instruments aimed at protecting no longer the federal or national constitutions, but the ordinances, constitutions or statutes of the states, provinces or autonomous communities" (Ferrer Mac-Gregor Poisott, quoted by Cienfuegos Salgado, 2008:25).

3. Delimiting the sub-national constitutional space - the foundation and limits of local constituent power

Sub-national Constitutional space has been defined by Alan Tarr as a space or a margin left by a federal constitution to be filled by sub-national entities: "in most federal systems the national constitution is 'incomplete' as a governing constitutional document, in the sense that *it does not seek to prescribe all constitutional arrangements*. Rather, *it leaves 'space' in the federal nation's constitutional architecture to be filled by the constitutions of its subnational units*" (2007:2).

What does this sub-national constitutional space comprise? The answer will obviously depend on each institutional context. Tarr, however, in a comprehensive and comparative study, has identified the following items: (1) the power to draft a constitution; (2)the power to amend that constitution; (3) the power to replace that constitution; (4) the power to set goals of government; (5) the power to define the rights that the constituent unit will protect; (6) the power to structure governmental institutions of the constituent unit, including whether (7) the legislature shall be bicameral or unicameral; (8) the power to define the process by which law is enacted in the constituent unit; (9) the power to create offices; (10) the power to divide powers between governmental institutions of the constituent unit; (11) the power to determine the mode of selection for public officials of the constituent unit; (12) the power to determine the length of office and the methods and criteria for the removal of officials (13) of the constituent unit prior to the completion of their term of office; (14) the power to establish an official language; (15) the power to institute mechanisms of direct democracy; (16) the power to create and structure local government; (17) the power to determine who are the citizens of the constituent unit; (18) the power to establish voting qualifications for officials of the constituent unit (2011:1134).

Three types of limits demarcate this space: ***(a)*** *forbidden* subjects defined in the federal constitution, which states or provinces cannot regulate, and ***(b)*** the *basic principles* outlined in the federal constitution that provinces must follow when exercising their constituent power, and ***(c)***, *specific regulations* of the federal charter governing the internal organisation of provinces or states. While the first acts as a categorical *prohibition*, the latter two *impose* the *federal* order.

The degree or intensity of these limitations is inversely proportional to the space or margin of the SCL: the fewer limits contained in the federal constitution, the greater the sub-

national space or margin to create and innovate with new institutions. In this framework or space, the SCL develops, which is, in turn, a living expression of the principle of constitutional autonomy enjoyed by the federated states within a federal state structure that encompasses them.

The question of the extent of the powers of the sub-national constituent and the limits it possesses is crucial in this matter. One can begin with a broad understanding of the federal/national constitution as incomplete "in the sense that it relies extensively on the mechanisms established in state constitutions, and leaves almost all matters within the sphere of state power to be regulated by state constitutions and laws" (Williams, 1990:1). Although it might be assumed that the constitutions of all federal states should leave ample space to the federated entities to organise themselves, this is not always the case: "In some federal systems, the federal constitution also prescribes the political institutions and processes for the constituent units of the country, thus providing the constitutional architecture for the entire federal system" (Tarr 2011:1133), as in the case of Belgium and Canada, and the Brazilian, Venezuelan and Mexican federations in Latin America.

In other cases, "federal constitution is an 'incomplete' framework document in that it does not prescribe all constitutional processes and arrangements. Rather, it leaves 'space' in the federal system's constitutional architecture to be filled by the constitutions of its sub-national units, even while it sets parameters within which those units are permitted to act" (Tarr 2011:1133). Alberdi also adopted this broad conception, when he stated in *Elementos de Derecho Público Provincial*, that "the elements of the provincial law, in a federal state are all the power not expressly delegated by the constitution to the general government of the State".

The principle of autonomy – and within this, the principles of self-organisation and self-sufficiency – is not absolute; it is instead subject to limits, the extent and intensity of which varies in each federal design, since it must comply with the *principle of (legal) subordination*, on which the federal system is based (Bidart Campos 1998). Each federal system determines the extent of these powers and at the same time, places concrete limits (both *prohibitions* and *impositions*), although this will never be in a concrete or conclusive way, and thus sub-national space will always be diffuse.

As stated before, three types of limits can be identified: **(a)** *forbidden* subjects, **(b)** Constitutional *basis* to which the local constituent power must adhere, and **(c)** *specific regulations* of the federal charter.

For instance, Latin American constitutions often reflect a limited sub-national institutional capacity for innovation, echoing Fernández Segado's (2003) observation of a paternalistic or highly conditioned self-organising ability at the sub-national level. Latin American constitutions often reflect a limited sub-national institutional capacity for innovation, echoing Fernández Segado's (2003) observation of a paternalistic or highly conditioned self-organising ability at the sub-national level. A general observation of Latin American constitutions clearly shows that the sub-national institutional capacity to innovate is highly limited.

On the one hand, the constitution designates certain areas such as managing international relations, maintaining armed forces and issuing currency as the exclusive responsibility of the federal government and as *Prohibited subjects* for the states.

On the other hand, federal constitutions establish some guidelines in terms of basics that local constituents must follow. Regarding these *basics*, we can classify them into two groups: *general guidelines* (for example, respecting the republican form of government), as well as *regulations or specific indications* of the central constitution regarding the organisation of local powers (for example, how legislative branches must be composed, the time and form of elections, etc.).

In Mexico, for example, Article 115, states that "The states comprising the United Mexican States shall adopt a republican, representative, democratic, secular and popular form of government for their own organization. The states shall be divided into municipalities, which shall be the basis of the political and administrative organization", and Article 116 (reformed in 1987), reaffirms the principle of division of powers as an inviolable tenet in the organisation of state public power. In Brazil, Article 25 mandates the subordination of state constituent and normative power to the principles established in the federal constitution, including the republican form of government, the representative system, and the democratic regime, alongside the rights of human beings, municipal autonomy, and public administration accountability (Article 34).

The Venezuelan Constitution (1999), according to Article 159, establishes that states "are obligated to maintain the independence, sovereignty and integrity of the nation and to comply with and enforce the Constitution and the laws of the Republic". To this, Article 164, section 1 added the requirement that states' Constitutions shall be promulgated "in

accordance with the provisions of this Constitution", which requires for instance, the respect for the fundamental principles of Title I of the Constitution.

Finally, in Argentina, Article 5 lays the foundation for provincial constituent power, which must be subject to certain principles: "Each Province shall adopt for itself a constitution under the republican, representative system, in accordance with the principles, declarations, and guarantees of the National Constitution, ensuring its administration of justice, municipal government, and elementary education. Under these conditions, the Federal Government guarantees to each Province the enjoyment and exercise of its institutions".

In addition to these *generic* and rather *indicative* guidelines for how the federated entities should organise themselves, there are other more *specific regulations* or *indications* – which I have included in the third group. Here there is greater interference by the central state in local authorities. For example, in Mexico, the (very extensive) Article 116 of its federal constitutional text stipulates that the federal constituent regulate in great detail the political-state organisation of the Mexican federated states. The text outlines a series of questions to govern the organisation of the federated state. These include the duration of state public offices such as that of governor and legislators; the possibility (or impossibility) of re-election; the form of election; eligibility criteria for candidates; the number of representatives of the state legislature, establishing a minimum according to the state population; guidelines on budgets, public services, and the audit body of the federated entities; and rules on the composition and independence of the state judiciary department; on the selection procedure, on electoral processes, on the installation of Administrative Justice Courts, autonomous bodies, etc.

Brazil, for its part, regulates the organisation of the federal states in Chapter III (The Federated States") of Title III ("Organization of the State") and in Chapter IV ("organization of the municipalities"). It contains provisions regulating numerous aspects related to the organisation of the states, such as the number of members of the Legislative Assemblies, the term of office of State Deputies, the time of their election, their remuneration, the competence of the Assemblies, institutes of semi-direct democracy, such as the popular initiative, the election of the State Governor and Vice Governor, the term of the executive mandate – which is four years (Art. 28), as well as other provisions scattered in the Brazilian

constitutional text, such as the prohibition of immediate re-election for State Governors (Article 14, section 5).

Likewise, the Brazilian Constitution recognises the competence of the Superior Court of Justice to prosecute and judge, in the original jurisdiction, in cases of common crimes, officials inlcuding the Governors of the States and of the Federal District, the appellate judges of the Courts of Justice of Accounts of the States and of the Federal District, the members of the Councils or Courts of Accounts of the Municipalities (Article 105, section 1).

The Venezuelan constitution of 1999, although it establishes fewer requirements for the self-organisation of its states, regulates important aspects, such as the conditions for being elected governor, the term of office, the possibility of immediate re-election (and for a single term), the number of members of the state Legislative Councils ("Consejos Legislativos" is the new name given to the state legislatures in the 1999 Constitution), as well as their powers. It also makes reference to principles of national law regarding the organisation and operation of these Councils (Article 162); the main features of the mandatory state-level oversight body, the Comptroller General's Office.

The result of these *impositions* is that sub-national space is reduced (to a large extent), with little room for innovation and creation, and, furthermore, leads to a *homogenisation* and *equalisation* of local constitutions with each other and with the federal one. Ultimately, autonomy becomes a formal principle, at least as regards the capacity for self-organiation. Although it is argued that the basis of these impositions lies in the need to ensure that the political structures existing in the Federation and the states "be *minimally homogeneous*, and that these states be also homogeneous among themselves" (Fernández Segado 2003), excessive regulation can undermine local autonomy and call into question the federative organisation itself.

To that, we need to add that the 1999 constitutional reform eliminated the senate, a prerequisite for any federal system. That is why many authors and organisations (such as the Forum of Federation) have removed Venezuela from the list of federal countries.

In Argentina, Article 5 establishes the sole basis for provincial constituent power, without the federal constitutional text establishing any type of specific imposition, as is observed in other Latin American constitutions. While the American constitution exemplifies minimal federal regulation, with practically no reference to the organisation of the federated states,

Argentina's Article 5 mandates provincial constitutions to ensure the republican and representative system of government, the administration of justice, the municipal regime and primary education, broadly adhering to the principles, declarations and guarantees of the National Constitution. This Article is based on the *Guarantee Clause* of Article 4, Section 4 of the US Constitution, since it establishes that "Under these conditions, the Federal Government guarantees to each Province the enjoyment and exercise of its institutions".

Finally, in addition to these ***impositions***, there are also ***prohibitions***. Mexico contains a series of prohibitions in Articles 117 and 118 which, in general terms, align with the classic theory of federalism on powers typically belonging to central governments, such as minting money, taxing people or things who transit through and enter into or exit from the territory (Article 117), imposing tonnage taxes, deploying permanent troops or warships or waging war against any foreign power (Article 118). The Brazilian Constitution contains some prohibited powers scattered throughout its text. These include the power to establish religious cults or churches, to subsidise them, to restrict their operation or to maintain relations of dependence or alliance with them or their representatives. Collaboration in the public interest, through legislation is permitted, provided it does not discriminate on any grounds against any group of Brazilian citizens. Collaboration in the public interest, through legislation is permitted, provided it does not discriminate on any grounds against any group of Brazilian citizens. These prohibitions apply to both the states and the Union, the Federal District and the municipalities (Article 19). Furthermore, there are a series of constitutional limitations on imposing taxes (Article 150), such as the prohibition to create inter-state or inter-municipal taxes (Seijas Villadangos 2019).

Argentina also provides for a series of restrictions (mainly contained in Article 126), but these are much less detailed than the Mexican constitution and more permissive in several aspects (for example, the possibility of entering into international agreements, or the possibility of contracting loans from states or international organisations). Article 126 lists numerous areas prohibited to provinces. These include signing political treaties, regulating commerce and internal or foreign navigation, setting up Provincial customs offices, minting money, or establishing banks with the power to issue bank notes (without the authorisation of the Federal Congress). Provinces cannot pass Civil, Commercial, Penal, or Mining Codes (after the Congress has legislated on them); or enact special laws on citizenship and naturalisation, bankruptcy, or counterfeiting of currency or State documents. Provinces are

also prohibited from imposing tonnage duties; building warships or raising armies (except in the event of foreign invasion or of such imminent danger requiring prompt action, immediately communicating this to the Federal Government); and appointing or receiving foreign representatives. Furthermore, Article 127 forbids Provinces from declaring war on each other, since their *de facto* hostilities are considered acts of civil war, characterised as sedition or rebellion, and as such, suppressed and punished by the Federal Government in accordance with the law.From a comparison – albeit brief – of the constitutional texts, it is easy to see that the Argentine federation is an exceptional case in the Latin American context, where very detailed and regulatory constitutions predominate in the organisation of sub-national entities. The lack of regulation on the way sub-national states are organised expands the space of sub-national constitutional law available to them – space that the provinces have been able to take advantage of to a great extent, with the incorporation of new and modern institutions, rights and guarantees. In this sense, it can be affirmed that although Argentine federalism is quite decentralised politically compared to other federations, such as the Brazilian, Mexican, and Venezuelan ones, it is not decentralised in other aspects, such as fiscal matters, for example (Altavilla 2020).

4. The Residuary Clause and the thesis of Two Sovereignties

The "Residuary Clause" refers to a mechanism for the award of all those powers and functions that are not contemplated in the constitutional text, since the constituents cannot foresee, at a given moment, all the powers and functions that are or can be the responsibility of the State. The point is to determine which of the two orders of government will be responsible for those functions that are not listed. This point is important, because it significantly expands the power of the federated states:

> On its own, comparing enumerated exclusive state powers does not predict how the allocation of power in a federation may change over time. We must also consider the assignment of residual powers. For instance, the American and Australian constitutions were designed chiefly to enumerate a limited range of powers, clearly assigning federal powers and leaving the residual to the states. In Canada, the only federation of the six in which the constitution assigns residual powers to the federal level, the framers had the opposite task of enumerating a complete list of state tasks (Thorlakson 2003:9).

Returning to the concept of *incomplete constitutions*, when delimiting the sub-national space, it is crucial to determine which of the two powers holds this residual clause, that is, to which of the two levels all those competences that the constitution does not enumerate or foresee will correspond. This liminal principle of the system of distribution of powers between the central state and the member states, crucial in any federation, was not incorporated in the original text of the US constitution – the first modern federation in history – but was added two years after its entry into force, in December 1791 (along with the nine amendments known as the *Bill of Rights*). The Tenth Amendment states: "*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*" – although Madison itself considered that this amendment was superfluous and unnecessary, since the whole of the Constitution implied this principle (Dam 1977).

In Latin America, we can observe that in general, this clause plays in favour of the federated states: In Brazil, Article 25, section 1 provides that "Powers not forbidden to them [the states] by this Constitution are reserved to the States"; in the same sense the Mexican constitution, whose Article 124 declares that "The powers not expressly granted by this Constitution to federal officials, shall be understood to be reserved to the States". Argentina, in Article 121 (original 104, text incorporated in 1860 constitutional reform) provides that "The Provinces retain all powers not delegated by this Constitution to the Federal Government, and those they have expressly reserved by special covenants at the time of their incorporation".

The *Residuary Clause* is connected to the theory of co-sovereignty, or shared sovereignty between the two levels of government – a thesis elaborated and defended by the authors of *The Federalist Papers*, in particular, James Madison, who develops the point in Articles 39 to 51 of the Papers, and which would later have constitutional value with the incorporation of the *Tenth Amendment* in 1791, and Alexander Hamilton. Hamilton stated that "the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where

it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*" (No 32).

Madison, for his part, clearly differentiated this system of shared sovereignty from those of the unitary state, arguing that "But if the government be national, with regard to the *operation* of its powers, it changes its aspect again, when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states, a residuary and inviolable sovereignty over all other objects" (*The Federalist Papers*, No 39).

In federal theory, the power to dictate one's own laws is so broad that the federated states can be considered as true sovereign states. This is clearly established in Mexico's constitution, which states that Mexico is "composed of free and sovereign states in all matters concerning their internal regime" (Article 40). While Alberdi's draft of the Argentine National Constitution used the term "sovereignty" when referring to the provinces, the Convention of 1853 omitted it in the final text. However, although, unlike the Mexican Constitution, Argentina's lacks an explicit reference to provincial sovereignty, legal scholars and judicial rulings have, since the federation's inception, upheld this concept.

5. The Provincial margin of appreciation in SCL

It is no easy task to determine an intermediate or ideal point to delimit the space of sub-national constitutional law. The limitations imposed by the federal constitution are based on *the need to ensure that sub-national political structures are minimally homogeneous*, across states and with

the federation. But this homogenisation should not imply an imitation or replication of federal institutions – otherwise there would be no point in adopting a federal system.

In this sense, some federations have drafted certain principles or interpretative guidelines to make the requirement of homogeneity and internal coherence compatible with that of the *sub-national space*. Article 28 of the Bonn Basic Law establishes guidelines which bind the Länder to the constitutional principles contained in the German constitution. As Fernández Segado (2003) argues, the objective is to generate a certain homogeneity, but without demanding either full adequacy or uniformity.

German constitutional scholars developed the "*Hausgut*" principle. This term means *household*, *house*, and it refers to what is proper, to what belongs to the domestic domain. With this term, the literature refers to the existence of a certain nucleus of privative functions that is maintained by local authorities, of which the *Landers* cannot be deprived, and whatever such privative functions may be in particular, "the Land must retain in any case the free decision about its organization, including the fundamental organizational decisions contained in the Constitution of the Land" (Fernández Segado 2003:62).

In Argentina, local literature has identified this principle with the concept of "provincial margin of appreciation". The concept is taken from international law, where the expression "margin of appreciation" refers *to the space for manoeuvre that International organs and Tribunals are willing to grant national authorities*. The same can be said within federal countries, where local authorities and courts interpret and apply the law – especially the Constitution – considering their own history, culture and idiosyncrasy. According to this principle, it is possible for local authorities to give to a constitutional clause a different meaning from that assigned by the National Supreme courts, as long as it is consistent with local culture, history, traditions, etc.

Although it is true that interest in the study of sub-national constitutionalism has been relatively recent, Argentina has a long tradition of the study and interest in this branch of the legal system. This interest originated with the publication of Juan Bautista Alberdi's work, "*Elementos de Derecho Público Provincial*. Two doctrinal schools can be identified in Argentine constitutional history, one strictly constitutionalist, focused on the analysis and study of the national constitution but with particular attention to the political organisation of the provinces, exemplified by Manuel Estrada (1895), Segundo V. Linares Quintana (1956), and Germán Bidart Campos (1998). The second group meticulously analyses provincial public law itself. The main representatives of this group inlcude Juan A. González Calderón (1913),

Arturo M. Bas (1927), Juan P., Ramos (1914), Francisco Ramos Mejía (1915), and Clodomiro Zavalía (1941). Recently, three more schools can be identified: the Córdoba School, headed by Pedro J. Frías (1985) - followed by, among others, Iturrez (1985), Alfredo Mooney (1997), Antonio Hernández (2008), Antonio Hernández and Guillermo Barrera Buteler (2011); the Mendoza school with Dardo Pérez Guilhou (2003; 2004); and the Platense School with Ricardo Zuccherino (1976) as well as Mercado Luna (2000) from La Rioja.

Towards the end of the 19th century, Manuel Estrada, following classical American literature and, in particular, the authors of *The Federalist Papers*, adopted and interpreted the federal constitutional text from the broad viewpoint of provincial powers (1895: 326- 327). In the part on "Federal Law", he dealt with the "guarantee of local self-government" (1895: 347 et seq.), recognied by Articles 5, 105, 106, 107 of the constitutional text (in its 1853 original enumeration), referring to the "relative independence" of the provinces.

Joaquín V. González, with a very clear vision of the scope and extent of provincial public law, wrote, in 1897:

> Because the constitution of a province is a code that condenses, orders and gives imperative force to all the natural right that the social community possesses to govern itself, to all the original sum of inherent sovereignty, not ceded for the broader and more extensive purposes of founding the Nation.
>
> Then, within the juridical mold of the code of rights and powers of the Nation, there is room for the greatest variety, all that may arise from the diversity of physical, social and historical characters of each region or province or from its particular collective desires or aptitudes.
>
> Thus, they contribute to the development, vigor and improvement of national life, and reflect their influence on the progress of the public law of the entire Nation (1983:648/9).

These "local diversities" make up what has been called the *Provincial margin of appreciation*, which "reflects the peculiar manifestations of the particular and proper exercise of the constituent power of each province and of the City of Buenos Aires after the constitutional reception of its regime of autonomous government" (Ábalos, 2020). The expression is adopted by local doctrine from the concept developed in the field of international systems of human rights protection, where the doctrine of national margin of appreciation postulates the respect and deference of supra-national courts towards the interpretation made by the national States themselves of fundamental rights and their scope, especially on those points where there is no international consensus on sensitive issues (Barrera Buteler 2017). In this sense, what is sought is that the local constitutions and institutions receive and condense

regional particularities, and at this point, "respect for the local particularities that the different orders of government manifest in the exercise of their constituent power and in their own sphere of competence, is a key aspect" (Ábalos, 2020).

Barrera Buteler asks whether the concept of margin of appreciation can be transferred to the Argentine federation. He answers in the affirmative regarding the application and interpretation of Common Law (the different codes of private law, commerce, criminal law, whose regulation is centralised at the national level), since the Constitution itself has explicitly reserved to the provincial courts the power to apply these laws emanating from the Federal Congress, whenever things or persons fall under their jurisdiction (Article 75, section 12 and Article 116). This also implies the power to interpret it, from which it is "clear that the National Constitution has intended that the provincial courts interpret the contents of the substantive codes according to the local cultural reality and this may give rise to different interpretations of the same rule in one province and in another. But this cannot be a cause for scandal in a federation. In the United States there is diversity of substantive legislation among the states and not only diversity of interpretation" (Barrera Buteler 2017:503). This diversity is precisely the foundation of federalism, the idea that any community, state or province, can legislate, apply and/or interpret the law, according to their own particularities, and this will consequently give different outcomes in different states.

From this perspective, *"federalism is more compatible with diversity* than with *homogeneity* and this is the basis of the provision of the final part of section 15 of Law 48[III], which expressly excludes from the extraordinary appeal, on the grounds of Article 14, section 3, those cases in which is questioned 'the interpretation or application that the provincial courts make of the substantive codes'", according to Article 75, section 12, National Constitution) (Barrera Buteler 2017:503). This gives provincial judicial branches a great deal of autonomy and independence, since it means that both provincial legislation and the common national law (Civil, Commercial, Penal, Mining, and Labor and Social Security Codes) can be controlled neither by federal courts, nor the National Supreme Court – except when the norm or the interpretation expressly affect the National Constitution. In other words, the final judicial decision regarding provincial law and codified law rests with the Provincial Supreme Tribunals.

Assessing the provincial margin of appreciation for rights enshrined in the National Constitution or in treaties with constitutional hierarchy (Article 75, section 22) proves more

challenging, due to the Supreme Court's role as sole interpreter of this constitutional framework. However, this "does not prevent the interpretation of those rules that protect fundamental rights from being made by combining the single normative provision with the social and cultural reality that may be varied and diverse and, consequently, may admit differential nuances depending on whether they are applied in the context of one province or another. Above all, it is not possible to disregard the provisions of the local constitutions which, whenever possible, must be harmonized with those of the National Constitution and only set aside when there is total incompatibility between them" and, "in this task of harmonization, the role of the provincial courts is extremely important, opening a 'dialogue of courts'" (Barrera Buteler 2017:503).

The National Supreme Court of Justice has, throughout its history, laid down key jurisprudential guidelines. Most notable are: early precedents explicitly endorsing co-sovereignty, and more recent ones embracing the concept of "provincial margin of appreciation."

In one of the first rulings, "*Blanco, Julio v. Nazar, Laureano*" (1864), the Supreme Court held that, according to Article 105 (current Article 122), the provinces reserved the right to establish their own institutions for their internal regime, and that the federal government could not intervene, because if "the National Courts were to intervene in the internal government of the provinces, their magistrates would not be the agents of an *independent* and *sovereign* Power". It also held that "the provinces retain after the adoption of the general constitution, *all the powers they had before and to the same extent*, unless that the Constitution contains some express provision restricting or prohibiting their exercise" and with respect to federal justice, sustained that "its jurisdiction is *restrictive* by its nature, and in criminal matters can only be exercised by applying the laws of Congress"[IV].

A year later, in "*Mendoza Hermanos v. Province of San Luis*" (1865) the Court said that it is "the only final interpreter of the Constitution", that "the independence of the Provincial Governments is circumscribed to the exercise of the Powers not delegated to the National government, and that neither the latter, nor their dignity suffer any detriment by appearing before a Court that they themselves have created to settle their controversies, being so that the same *sovereignty*, taken in its highest expression, can consent without disrepute to be judged by a Court of its own choosing". In this case, the province of San Luis was sued directly before the Supreme Court for establishing import duties. The province argued that

"in no case can a Province be sued by private parties before the National Courts", since "the Provinces are *sovereign*, and their independence and dignity would be undermined if they could be forced to appear before a Court". Faced with this argument, the Court replied that "according to Article 100, all cases that deal with points covered by the Constitution are within the jurisdiction of the Supreme Court and the lower Courts of the Nation; a provision that embraces the universality of the cases of this nature, without any exception"[V].

In "*Plaza de Toros*" (1869) the Court reaffirmed that the provincial police power was considered as "included in the powers they have *reserved to themselves*, that of providing what is convenient for the safety, health and morality of their neighbors; and that, consequently, they may lawfully dictate laws and regulations for these purposes" and that, furthermore, since this was so, the "national justice would be incompetent to force the provinces" to permit an activity that it had previously prohibited, by virtue of that police power (in this case, bullfighting), "even if it [the bullring] could be qualified as an industrial establishment" [VI]. That same year, in "*Resoaglí v. Provincia de Corrientes*" (1869), it held that the National Constitution provisions were made to regulate the national government, "*and not for the particular government of the Provinces*, which according to the declaration of Article 105, *have the right to govern themselves by their own institutions*, and *to elect by themselves their governors*, *legislators and other employees*; that is, they retain their absolute sovereignty in all matters relating to the powers not delegated to the Nation, as recognized by rticle 104"[VII]. In the case "*Casiás, Raffo and Co.*" (1873), the Court stated that the provinces are "*sovereign* and *independent states* of each other" [VIII]; and in *"Sociedad Anónima Mataldi Simón Ltda. v. Prov. de Buenos Aires*" (1927) the Court referred to "the *two sovereignties*, national and provincial"[IX].

In the famous "*Bressani*" (1937) case – quoting the U.S. Supreme Court in the "*Texas v. White*" ruling of 1868 – the Argentine Supreme Court held that the National Constitution "... has intended to make one country for one people" but "has not set out to make one centralized Nation. The Constitution has founded an indestructible union of indestructible states". As regards the sub-national space, it is worth mentioning the passage in which the Court stated that "the constituent actors and eyewitnesses of the process that ended in the Constitution of 1853, established a unity not by suppressing the provinces – a path that had forced to evict a terrible experience – but by *conciliation* of the extreme diversity of situation, wealth, population and destiny of the fourteen states and the creation of an organ for that conciliation, for the protection and encouragement of local interests, whose whole is

confused with the Nation itself". Finally, with respect to the *principle of adequacy* and *homogeneity*[X].

Although it is true that in the following decades, the Court would abandon the expression "sovereign" to refer to the provinces – coinciding with a jurisprudence that validated federal advances and invasions of provincial competences[XI] – in recent rulings it again referred to the provinces as *sovereign states*. A notable case is that of "*Provincia de La Pampa v. Provincia de Mendoza*[XII][XIII], understanding that it should act, not as a judicial tribunal, but rather as an arbitrator, even applying, in an analogous manner, principles of international law. It held that the Court's jurisdiction is activated in those cases that are not a "civil case" in the concept developed by the regulatory laws of that competence (for example Law 48 or Decree-Law 1285/58) and as conceived by the jurisprudence of this Court. The original jurisdiction in those complaints requires only the existence of a conflict between different provinces produced as a consequence of the exercise of the non-delegated powers that are the result of the recognition of their autonomy. In short, "jurisdiction is limited to disputes which between entirely independent states could be the subject of a diplomatic settlement".

In the case "*Partido Justicialista de la Provincia de Santa Fe v. Santa Fe*" (1994), the Court established a series of very important guidelines regarding the provincial *margin*. It held that "Article 5 of National Constitution declares the union of the Argentine people around the republican ideal. But it is a particular union. It is the *union in diversity*. Diversity coming, precisely, from the federalist ideal embraced with the same fervour as the republican ideal". From this perspective, "federalism involves a recognition and respect for the identities of each province, which is a source of vitality for the republic, to the extent that it enables a plurality of trials and the search by the provinces of their own ways to design, maintain and improve local republican systems. This diversity does not entail any disintegrating force, but a source of fruitful dialectics, always framed by the supreme law of the Nation". Therefore, "the supremacy referred to in the National Constitution (Article 31) guarantees the provinces the establishment of their institutions and the election of their authorities without the intervention of the federal government (Articles 5 and 122), subjects them and the Nation to the representative and republican system of government (Articles 1 and 5) and entrusts this Court to ensure it (Article 116) in order to ensure the perfection of its functioning and compliance with those principles that the provinces agreed to respect when they concurred in the adoption of the National Constitution".

Finally, in the most recent precedent of the Court, "*Castillo v. Province of Salta*", the Supreme Court expressly includes the term "provincial margin of appreciation", in which it holds that "Article 5 of the National Constitution, in establishing the bases of provincial constituent power (which translate, at the same time, into a series of unrenounceable obligations for the provinces) expresses a 'provincial margin of appreciation' that does not conflict with the aforementioned Article 5 but, rather, sets forth a way of implementing educational competence [in this case] taking into account provincial particularities, in accordance with the weighting of their own constituents". Therefore, this "'provincial margin of appreciation' in educational matters makes it possible to understand (and validate) that certain jurisdictions of our federal State place emphasis, as happens in religious matters, on the teaching of subjects such as the promotion of the associative and cooperative spirit, the special knowledge of local history, culture and geography, productivity based on regional characteristics, among others", which allows (as the provincial constituent has concretely done) to include in the curricula specific contents linked to its own jurisdiction, "a characteristic aspect of the 'provincial margin of appreciation' which is connatural to the federal system established by Article 1 of the National Constitution"[XIV].

This margin includes a space of free development without interference from the federal powers (neither of Congress, nor of the President, nor the federal courts, including the Supreme Court), both in the conception and sanctioning of the norm, and in its subsequent application and exercise, since it takes place in a reserved area (powers reserved by the provinces – Article 121 National Constitution) where they act with *sovereign powers*. It also translates into the idea of respect for the particularity, individuality and peculiarity with which the provincial convention adopts and makes the fundamental principles of the fundamental legal system (the national constitution) compatible with the local reality and particularity.

Once the province enacts the constitution, no external authority can approve or review it. Instead, there are two mechanisms for review: on the one hand, an ordinary mechanism, the judicial review, which is exercised only by the local judicial power – and only exceptionally and definitively, by the Supreme Court, through Extraordinary Appeal, and on the other hand, an extraordinary mechanism, of a political nature, which is a federal intervention (Article 6), ordered by the federal Congress.

This margin also covers *normative interpretation*, whether carried out by the bodies that implement the regulations or activate the institutions, or by the doctrine and local courts. In

the case of Argentina, this judicial interpretation is not limited to local regulations, but has a significant impact on federal legislation; while the normative production of substantive legislation (civil, commercial, criminal, etc.) is concentrated in the federal legislative body, the National Congress (Article 75, section 12), its application (and therefore, its interpretation) falls under the jurisdiction of both the federal courts and the provincial courts: "The reservation made in section 12 of article 75 left a sufficient margin for the provincial courts to adapt, as necessary, the provisions of those acts of Congress to the local idiosyncrasy, because the power of 'application' of those norms brings implicitly that of their 'interpretation'" (Barrera Buteler 2017:497).

This is not the case in other Latin American federations, such as Mexico, where the system of mandatory jurisprudence of the federal courts on the interpretation "of the Constitution, federal or local laws and regulations and international treaties" (Article 94, paragraph 10, Constitution of Mexico) is in force, or in Venezuela, where there is no local judiciary at all.

In conclusion, it can be argued that the sub-national space is quite broad in Argentine federalism and that, in general terms, the provincial constituents have been able to take advantage of it.

6. Historical trajectory and current situation - Sub-national Constitutional Law as a laboratory of rights and institutions

There are some historical periods that represent real advances in sub-national constitutional law, bringing with them important *innovations*, and other moments in which processes of "*assimilation*" or "*homogenisation*" occur, making sub-national texts similar to the federal one.

For example, in Argentina, two moments of innovation, which have significantly advanced provincial constitutional law, can be identified: those experienced in the first three decades of the 20th century, and those experienced in the 1980s and 1990s. In both processes, sub-national innovations ended up being included in the federal text (both in the constitutional reforms of 1949 and of 1994, respectively).

Similarly, moments of assimilation or homogenisation can also be identified. For example, the constitutions sanctioned in the 1850s, immediately after the national

Constitution of 1853, and the constitutions of 1949, sanctioned as a consequence of (and under pressure from) the new federal text of 1949. In both cases, the federal government put pressure on the provincial governments to sanction their texts, although in 1853 it did so with the aim of "completing" the federal constitutional process, with the sanctioning of the respective provincial constitutions, without additional requirements on how to sanction the new provincial constitutional texts. In 1949, however, there was strong pressure for the provincial texts to "resemble" the federal charter, which ended up being mere copies of it – there were even written instructions from the Ministry of the Interior on how to draft the "new" provincial constitutions (see Altavilla 2018). Rather than dictating specific content, the federal government's main pressure on provincial constitutions in the 1850s stemmed from the urgency of establishing a cohesive Argentina. This haste, however, sometimes led provinces to simply imitate the federal text. Rather than dictating specific content, the federal government's main pressure on provincial constitutions in the 1850s stemmed from the urgency of establishing a cohesive Argentina. This haste, however, sometimes led provinces to simply imitate the federal text.

Despite *these similarities* with the federal text, Argentine sub-national law also showed some innovations, for example, the restoration of *Cabildos* (a traditional institution of local government), some issues related to education, etc. Around 1870, provincial constitutionalism would begin to detach itself from federal constitutionalism, making the exercise of local constituent power more effective and creative

In the German federation, despite the notable differences between the *landers*, the existence of a common historical background and a strong process of assimilation have resulted in a process of homogenisation between the local constitutional texts, both in structure and content (Niedobitek 2013).

In the United States, Robert F. Williams (1990) identifies a "constitutional revolution" that occurred in the 1970s, both in state constitutional texts and in the judicial interpretation of the individual rights contained therein, preceded by a period of state constitutional revisions and reforms between 1945 and 1970, which modernised state constitutions. This has allowed for a "rediscovery" of state constitutional law, in its use both by trial lawyers (to assert rights that the federal constitution does not contain, for example), and by judges and magistrates themselves through judicial interpretation of state constitutions, mainly with

regard to fundamental rights, with a true "'explosion' of the state Bill of Rights in recent decades" supplementing the scant list of Bi*lls of Rights* of the federal constitution.

In recent decades, Mexican sub-national constitutionalism has been immersed in a stage of profound renewal. The interest in this specific branch of political law is due to multiple factors, including the fact that the main issues of Mexican constitutional law are the subject of permanent discussion; the dynamism of local political processes, the absence of a dominant political force such as the PRI (Institutional Revolutionary Party / Partido Revolucionario Institucional) and the consolidation of the legal principle of constitutional autonomy (Astudillo Reyes, 2008). However, the development of sub-national law in Mexico has been very recent, and only eight states (Veracruz, Coahuila, Guanajuato, Tlaxcala, Chiapas, Quintana Roo, Nuevo León and the State of Mexico) out of a total of 32 states have so far taken the first step.

What is certain is that beyond this spasmodic movement between *diversity* and *assimilation*, it is possible to convincingly argue that sub-national constitutional law is an interesting laboratory of rights and institutions, and its existence and presence provides a series of *comparative advantages* within the federal institutional design.

This feature was described early on by Justice Louis Brandeis, in his famous sentence: "One of the happy incidents of the federal system is that a single brave State may, if its citizens choose, serve as a laboratory; and try new social and economic experiments without risk to the rest of the country"[XV]. And Justice Oliver Wendell Holmes similarly referred to this part of constitutional law, as "social experiments ... in the isolated chambers afforded by the several states..."[XVI].

Furthermore, *sub-national constitutional law is much broader than constitutional federal law*; it therefore provides for more rights and more guarantees, is more detailed and considers the particularities and peculiarities of the local community. It is also more extensive than the federal one. For example, while the Argentine National Constitution has one hundred and thirty articles, the constitutional text of the provinces exceeds 200 articles. In the American state constitutions, this breadth of local texts compared to the federal one can also be observed.

An intelligent, courageous and innovative use of this space brings important advantages:

- It enhances the ability of a federal system to *accommodate multiple political communities* within its constitutional regime;

- It duplicates the *mechanisms for protecting* individual rights (Carnota 2007);
- It strengthens the system of *checks and balances* between the branches of government;
- It can improve the *deliberative quality of democracy* within sub-national units and the federal system as a whole (Marshfield, 2011);
- It *expands* the rights established in the national Constitution;
- It refines them by incorporating local or regional elements and perspectives;
- It doubles (or triples) the spaces for *participation* and, therefore, for *control of citizens*;
- It doubles (or triples) the mechanisms of defence and protection of the constitutional order and fundamental rights;
- It implies a double guarantee for citizens: the *republican system* translates into a guarantee as it limits power, dividing it functionally. Federalism helps to strengthen this guarantee translated into the limitation of power, because it divides it again but from the territorial point of view (also functionally, because both provinces and municipalities must adopt republican and representative forms of government). Moreover, "state constitutions serve as limitations on the sovereign and plenary power of states to make laws and govern themselves" (Williams 1990:2);

In this way, sub-national constitutional law serves as a true *laboratory of rights* and *institutions* that allows (and encourages) innovation and the rapid and spontaneous creation of efficient constitutional responses to the problems that modern, constantly evolving societies pose to legal and political operators. Added to this is a greater "sensitivity" of the provincial constituent, being closer to the population to whom it provides legal-constitutional solutions to daily problems. This *immediacy* of the local constituent gives rise to very efficient solutions, as the history of provincial constitutionalism in Argentina has demonstrated.

Indeed, sub-national constitutional law has been an interesting precedent and antecedent of national or federal law: the *amparo* action [*Action of Constitutional Protection*] originated in the Mexican state of Yucatan in 1840, while the process of *amparo* was received only in the Reform Act of 1847, and in the Constitution of 1857, which would be the first to recognise

the *amparo* as a means of protection of human rights (Rodriguez 2017). In the United States, *judicial review*, the widespread jurisdictional control of constitutionality, was applied by the States before it was created by the Supreme Court in the famous *Marbury v. Madison* case of 1803: "Interestingly, several state courts had exercised this power long before 1803, and even before the federal constitution was ratified" (Williams 1990:265), citing as the first antecedent (in independent America), the case of *Holmes v. Walton* in the State of New Jersey in 1780.

In Argentina there are countless provincial constitutional antecedents that were later incorporated into the federal (constitutional and/or legal) order, a noteworthy one being the constituent cycles of the '50s and '60s, where the "new" provinces exercised their original constituent power (Chaco, La Pampa, Misiones, Santa Cruz, Chubut, Rio Negro, Neuquén) and the old provinces reformed their texts (San Luis, Santiago del Estero, Santa Fe), with innovations such as the constitutionalisation of political parties, municipal autonomy, supervisory bodies. Also significant is the constituent cycle of the 1980s and 1990s where nine provinces reformed their texts (La Rioja, Salta, Santiago del Estero, San Juan, Jujuy, Córdoba, San Luis, Catamarca and Río Negro). This was the immediate and most important antecedent for the federal constitutional reform of 1994, with significant contributions such as the incorporation of second and third generation rights, constitutionaliation of institutional guarantees for the defence of fundamental rights (amparo, habeas corpus and habeas data), supervisory bodies (such as the ombudsman), special state policies, municipal autonomy, among many others.

Despite this progress, the study of sub-national constitutional law still has many challenges ahead; in particular, its analysis and comparative study, both nationally and internationally. On this last point, Latin American dialogue is still lacking; the Mexican literature (which is very recent) does not draw much on American (North American or Latin American) literature, but is mainly based on European authors, which in many cases are old and outdated doctrines, especially regarding the concept of *autonomy*. The re*ference to the Italian and Spanish literature is striking. These start from an administrative* - rather than constitutional – sub-stratum and do not fully conceive the scope of the term *autonomy* nor develop a federal theory – since these are not federal countries, and beyond the great decentraliation fo their systems, they have resisted calling themselves federal countries, and their structure is ultimately not federal. Even in Brazil this point has not been significantly developed, and in Venezuela, after the 1999 reform, the sub-national space was severely limited. Therefore, it

is not a stretch to say that Argentina has not only a long tradition, but also that its doctrine and jurisprudence are at the forefront of federal issues in Latin America.

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[II] Confr. Mooney 2001, Hernández 2011, Montbrun 2003.

[III] Law 48, from 1863, stablishes the procedure of the Federal Extraordinary Appeal [*Recurso Extraordinario Federal*] before the National Supreme Court of Justice.

[IV] CSJN, "Blanco, Julio c/ Nazar, Laureano, por sustracción de mercaderías a fuerza armada" Fallos 1:170, May, 30th, 1864.

[V] CSJN, "Mendoza, Domingo y Hno. c/ Provincia de San Luis s/ derechos de exportación - cuestión de competencia", May, 3rd, 1865, Fallos 1:485.

[VI] CSJN, "Empresa 'Plaza de Toros' c/ Gobierno de Buenos Aires", April, 13th, 1869, Fallos 7:150.

[VII] CSJN, "D. Luis Resoaglí c. Provincia de Corrientes por cobro de pesos", July, 31st, 1869, Fallos 7:373, en Ábalos, 2020.

[VIII] CSJN, "Casiás, Raffo y Ca., y Casas y Ferrer C/ Don Tomás Armstrong", September, 6th, 1873, Fallos 14:18.

[IX] CSJN, "S.A. Mataldi Simón Limitada c/ Provincia de Buenos Aires", September 28th, 1927, Fallos: 149:260.

[X] CSJN, "Bressani, Carlos H. y otros c/ Prov. de Mendoza", June, 2nd, 1937, Fallos: 178:9.

[XI] The Court will begin to refer to the provinces no longer as sovereign but as autonomous – for example, in the cases "Berga", and "Cardillo", (Sagüés 2003:3).

[XII] CSJN, "La Pampa, Provincia de c/ Mendoza, Provincia de s/ acción posesoria de aguas y regulación de usos", Desembre, 3rd, 1987, Fallos: 310:3520 (see Altavilla 2009).

[XIII] Article 127 states that No Province may declare or wage war against another Province. Their complaints must be submitted to and settled by the Supreme Court of Justice. Their de facto hostilities are acts of civil war, characterized as sedition or rebellion, which the Federal Government must suppress and punish in accordance with the law".

[XIV] CSJN, "Castillo, Carina Viviana y otros el Provincia de Salta - Ministerio de Educación de la Prov. de Salta s/ amparo", sentencia del 12 de diciembre de 2017, Fallos: 340:1795, voto en disidencia parcial del Ministro Rosatti.

[XV] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), quoted by Williams 1990.

[XVI] Truax v. Corrigan, 257 U.S. 312, 344 (Holmes, J., dissenting), quoted by Williams 1990

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