

Constitution-Making and Institutional Design
The Reform of Presidentialism in the Argentine Constitution of 1994

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Introduction

Once created, constitutions are supposed to shape the preferences of political actors in ways that make certain outcomes more likely than others. It is in this sense, for instance, that an abundant literature on constitutional design discusses the different effects of parliamentary, presidential or mixed forms of government on democratic stability and performance. The idea of “constitutional engineering”, however, obscures the fact that neither the selection nor the likely impact of different constitutional rules can be fully understood outside the process through which those rules are produced. Constitutions are political artifacts whose content and possible effects reflect the shared and conflictive preferences of the actors, the way they are able to resolve their differences and the constraints they face in particular historical contexts. It is from this perspective that I will consider the various mechanisms that explain the reform of presidentialism in the Argentine constitution of 1994.

Since the last decade, constitutional change in Latin America indicates the emergence of a relatively stable trend in the sense of reforming the presidentialist systems inherited from the revolutions of independence of the nineteenth century. One central issue at stake has been to limit the powers accumulated by Latin American presidents by virtue of both constitutional norms and para-constitutional practices. Many new constitutions, like that of Perú in 1978, Brazil in 1988, Chile in 1989, Colombia in 1991, Paraguay in 1992, and Bolivia in 1995, have strengthened legislative checks over the executive, sometimes introducing parliamentary-like institutions such as the responsibility of cabinet ministers before the legislative assembly. In many cases, the influence of the executive has also been limited by strengthening the independence of the judiciary and increasing the political and economic autonomy of provinces or regional units.

All these characteristics are present in the constitutional reform of 1994 in Argentina. I will argue that this outcome can be explained by the emergence of a new political scenario in which the legacy of a strongly centralized presidency has become the focus of the main political conflicts between government and opposition. In the case of Argentina, the constitutional reform was the result of a struggle between the incumbent president, who was seeking an immediate reelection forbidden by the existing constitution, and the main party of the opposition, which aimed at limiting the powers of the president. Two factors facilitated the resolution of this conflict by means of a negotiated agreement. On the one hand, the institutional preferences of the actors, though opposed, differed in intensity across different issues. This situation made possible a set of compromises between the interests and ideas of one actor with those of the others. On the other hand, the distribution of political and institutional resources among the actors was relatively even. In spite of certain asymmetry, none of the actors involved disposed of a majoritarian coalition able to impose its preferences without making concessions to the opponent. These two conditions, quite exceptional in Argentine political history, facilitated a consensual process of constitution-making from which emerged a new structure of checks and balances able to produce a more stable and legitimate practice of constitutional government than in the past.

In Section **I**, I provide some analytical tools to understand the constitution-making process as an independent unit of analysis. Section **II** offers a brief introduction to the history of constitution-

making and institutional design in Argentina. Section **III** analyzes the preferences and institutional conflicts that characterized the transition to democracy in Argentina. Section **IV** explains the actual bargaining process that preceded the reform of the constitution of 1853. I finally conclude by providing an evaluation of the process and the outcome from a long-term perspective.

I-The constitution-making process

I will define constitution-making as a temporarily limited process in which a group of political actors engage in the drafting, discussion and approval of a written document that intends to regulate the machinery of government, the relation between individuals and public authorities, states of exception and amendment procedures.¹ Lawyers and historians have extensively studied different episodes of this process in the past. More recently, constitution-making became a preeminent object of analysis among constitutional theorists with normative concerns about the foundational principles of a political regime.² There is also the abundant literature on constitutional design, which looks at the efficiency of different constitutional arrangements. The constitution-making process, however, has rarely been considered an object of study in its own right to explain the origins of major political institutions.³ This task supposes the identification of two elements: the structure of collective interaction that lies behind the various episodes of constitution-making and the general mechanisms that shape the behavior and choices of the framers.

A. Structure of interaction

In spite of its different historical variations, we can indicate the existence of three essential features in any process of constitution-making. First, the initiation of the process supposes the existence of a certain number of actors who want to create new rules about the distribution and exercise of political power in the community. Second, this process takes place in a political context divided by groups with different and conflictive views about how their interests and values can be best realized by different institutions. Third, the constitution cannot be created unless all the actors or an important majority among them find a way to resolve their differences. If we assume that almost all participants would ideally like to reach an agreement, we have then the structure of a “bargaining

¹ Since this definition is a narrow one, two comments are necessary. The first is that some constitutions consist almost entirely of unwritten conventions that emerge from a protracted evolutionary process (e.g, England or Israel). The second is that even in cases where a written document is produced, “constitution-making” exceeds the temporal limits of the process that brought it about. Constitutions may defer to ordinary legislatures the completion or regulation of some of their provisions. But apart from this particular case, the formal provisions of a constitution are always integrated (sometimes transformed) by constitutional conventions, judicial interpretation and, of course, the actual practices of executives and legislatures.

² On constitution-making and the foundation of political regimes, two recent important works are *We The People* (Cambridge: Harvard University Press, 1991) and *The Future of the Liberal Revolution* (New Haven: Yale University Press, 1992) by Bruce Ackerman. On a similar line of analysis, an excellent overview of historical types of constitution-making is provided by Andrew Arato, in “Forms of Constitution-Making and Theories of Democracy”, *Cardozo Law Review*, Vol. 17, No. 2, December 1995, pp. 191-231.

³ The only author that focuses on constitution-making in itself is Andrea Bonime-Blanc, in *Spain’s Transition to Democracy: the Politics of Constitution-Making* (New York: Westview Press, 1987). She restricts her analysis, however, the general importance of the process to understand a successful transition to democracy.

problem”: a situation in which the parties have a common interest in arriving at some agreement but a conflict of interest over which agreement that is to be.⁴ This characterization may help as a heuristic device to identify the different factors that contribute or hinder the possibility of the actors to coordinate on a cooperative outcome.⁵

The first factor is whether the actors are able to appeal to some shared principles or interests that could mitigate existing conflicts. Given the existence of different interests and views about alternative forms of institutional design, the actors usually find it difficult to coordinate their actions in the absence of a common background on which they can rely to resolve or defuse their conflicts. Sometimes, widely shared ideas or principles of political organization may be sufficient to constitute that common background. Often, however, it is the presence of some major event, like the threat of a war, fear of regime collapse, or a recent experience with civil war or dictatorship, which provide political actors with an ultimate incentive to forgo their differences.⁶ To use just one well known example, the existence of shared principles of republican government as well as a widespread sense of crisis with the existing regime were the most crucial factors for the prevalence of compromise in the Federal Convention of 1787.⁷

The second factor is whether institutional conflicts overlap or cross-cut the various issues that are usually at stake in the making of a constitution. Only when the actors have conflictive and separable preferences across multiple issues, they might be able to reach a compromise by means of mutual concessions and exchanges.⁸ In this situation, one actor may misrepresent his preferences on one issue to obtain support from other parties on another issue where his preferences are more intense. This is one of the explanations, for instance, of the success of the Spanish convention of 1978. While the main parties involved had important differences in areas such as institutions of government, territorial organization or socioeconomic principles, their conflicts did not concentrate along the same dimensions across all issues. This made possible to coordinate on some cooperative outcomes by using different forms of compensation and vote-trading.⁹

⁴ Elster, Jon, *The Cement of Society* (Cambridge: Cambridge University Press, 1989) p. 50

⁵ Among game-theorists, the idea of “impure” or “unequal” coordination has been used as the predominant model to understand the logic of constitution-making and constitutional stability. In this game, while the players prefer different coordination outcomes, these preferences are less strong than the general preference of coordination over non-coordination. The problem with this formulation, however, is that it assumes rather than explains the conditions under which the actors actually prefer coordination to non-coordination when they face important conflicts of interest. The best theoretical explanations along these lines can be found in Russell Hardin, “Why a Constitution?” , *The Federalist Papers and the New Institutionalism* (New York: Agathon Press, 1989), and Gregory Kavka, *Hobbesian Moral and Political Theory* (New Jersey: Princeton University Press, 1986), pp. 179-188

⁶ See Weingast, Barry, “The Political Foundations of Democracy and the Rule of Law”, in *American Political Science Review*, No. 91: 245-263.

⁷ See Jillson, Calvin, *Constitution-Making: Conflict and Consensus in the Federal Convention of 1787* (New York: Agathon Press, 1988) p. 21

⁸ See Raiffa, Howard, in *The Art and Science of Negotiation* (Cambridge: Harvard University Press, 1982) pp. 131-32

⁹ For this explanation, see Josep Colomer in *Game Theory and the Transition to Democracy* (Vermont: Elgar, 1995), Ch. 6.

Finally, we need to consider the problem of whether resources are evenly or unevenly distributed among the actors. Political contexts where there is an extreme asymmetry of institutional and political resources among the actors are usually unfavorable to lead to a consensual resolution of conflicts. In this situation, the stronger actor may be tempted to simply abandon the very possibility of compromise and proceed by an act of imposition. There are several cases in history of constitutional assemblies dominated by parties, which made use of a contingent majority to impose a constitution over the opposition. The Polish constitution of 1921, the Spanish constitution of 1931 or the Argentine constitution of 1949 are just a few among many examples of this possibility.¹⁰

B. Mechanisms of institutional selection.

While the general structure of the interaction may help to determine the consensual or dissensual character of constitution-making, we need further specification of the particular mechanisms that explain the institutions created through that process.¹¹ The main mechanisms are those that affect the formation of institutional preferences, the methods of collective decision and the constraints faced by the actors in order to formulate and realize their preferences.

1. Institutional preferences

Institutional preferences derive from a set of beliefs about the capacity of certain institutions to promote some fundamental interest or impartial concern of political actors. These beliefs may be grounded on different sources. In the first place, political actors may base their beliefs on information coming from their own experience with predecessor institutions. Alternatively or simultaneously, political actors may also resort to the advice of technical experts or examples provided by foreign constitutions. There is often a certain priority, however, in the use of predecessor institutions over the adoption of new constitutional models or imitation of foreign institutions. Whereas the wholesale adoption of foreign constitutions creates uncertainty about their effects in a different environment, experience with predecessor institutions usually provides a solid ground of reference from which political actors can obtain inspiration in the task of constitutional design.¹² This may explain why foreign constitutions and new models are usually adopted in a selective way.

Interests

¹⁰ See Pzeworski, Adam, *Democracy and the Market* (Cambridge: CUP, 1991) pp. 82-83

¹¹ I will take the concept of “mechanism” in its most general sense as the motivations, incentives and constraints that affect the behavior and choices of individuals. For a more specific definition, see Elster, Jon, *Political Psychology* (Cambridge: Cambridge University Press, 1993), Introduction, and *Nuts and Bolts for the Social Sciences* (Cambridge: Cambridge University Press, 1990), Ch. I.

¹² As Jon Elster observes, it seems to be a fairly robust generalization that constitution-makers are often influenced by the failure of pre-existing institutions because they serve as a guide to construct the worst-case scenario. See his “Constitutionalism in Eastern Europe: An Introduction”, in *The University of Chicago Law Review*, No 58 (1991): 477

With respect to the interests that political actors attempt to promote in the design of institutions, they may be classified in three categories: personal, group and institutional.¹³ Personal self-interest refers to the private benefit that an individual or group of individuals expect to derive from particular institutions. As such, this is not the most important motivation to explain the selection of constitutional rules. Constitutional provisions securing a particular privilege or immunity rarely have a place in documents that are supposed to be general in scope and universal in application.¹⁴ More pervasive is the influence of group interest, that is, the interest of parties, territorial subunits or social and economic corporations. Just as the states, regions or provinces were the main actors in the constitution-making processes of the XVIII and XIX century, political parties, at least in democratic contexts, have been the most important players influencing the design of electoral laws and institutions of government of contemporary constitutions.¹⁵

Institutional interest, finally, refers to the interests of executives and ordinary legislative bodies.¹⁶ In case of a constitutional change, actual or potential executives typically attempt to maintain or increase the independence of the executive from the legislative assembly as well as to defend or enlarge the sphere of autonomous powers of the former. Similarly, legislators may also attempt to balance the influence of the executive or enlarge the powers of the legislative assembly. As we will see, the relative influence of an incumbent president in the making of a constitution may crucially determine the extent of the reform of executive powers.

Ideas

Impartial reasons or ideas are a second important motive in institutional selection. They may be genuine or simply strategic. Formally, the justification of an institution by means of impartial reason can be either efficiency-based, like the promotion of governmental stability or economic growth, or rights-based, like the protection of minority rights or the rights of future generations.¹⁷ But it can also take mixed forms. The introduction of countermajoritarian devices, like judicial review, can be justified both as an instrument to provide stability to constitutions and as a mechanism to ensure the protection of minority rights against encroachments of legislative majorities.

From a substantive point of view, the selection of institutions by impartial reasons generally reflects the political ideology of the actors. Just like liberalism has been a powerful ideology in introducing individual rights and limitations to state authority, conservatism has been an influential factor in the promotion of values such as strong executive authority, effective government and

¹³ I am following here the classification of interests made by Jon Elster, in "Forces and Mechanisms in Constitution-Making", *Duke Law Review* 45 (1995)

¹⁴ See, however, examples provided by Elster about provisions of this type in some Eastern European constitutions, in "Forces and Mechanisms in Constitution-Making", art. cit., p. 377.

¹⁵ I will neglect in the analysis the role, sometimes important, played by corporations like the Church, unions, business associations and the military.

¹⁶ Although a Supreme Court or a Constitutional Court may intervene in the revision of the constitutionality of procedures, the judiciary is normally outside the constitution-making process and therefore it plays only a marginal role. The recent constitution-making process in South Africa is probably an exception to this rule.

¹⁷ See Jon Elster, in *Born to be Immortal: The Constitution-Making Process*, University of Michigan Law School, 1991, p.52

political stability. The same can be said of the role of democratic ideas in the expansion of political rights, the defense of parliamentary powers and the creation of institutional channels of popular participation.

2.Methods of collective decision

When political actors agree on the need of constitutional change but differ across different aspects of this change, they have to find a method to resolve their differences and arrive at a collective decision. These methods are usually three: bargaining, arguing and voting.¹⁸ Formally speaking, voting is the main method of decision in constitutional assemblies. In fact, however, it often comes after most issues have been already agreed by means of negotiation and deliberation. I will restrict my discussion to these two.¹⁹

Bargaining

As mentioned above, constitution-making usually presents the structure of a bargaining problem regarding the choice of several alternative institutional rules. In this context, the explanation of why some institutions are adopted instead of others often depends on the analysis of the relative bargaining power of the actors.²⁰ There are three interrelated indicators of this power: time preferences, risk aversion, and the capacity to make credible threats and commitments. Each of these indicators is in turn influenced by two types of resources: first, those resources that the actors can dispose of when negotiations are suspended, but still open; second, those resources available to the actors in case of a total breakdown of negotiations.

Time preferences refer to the capacity of the actors to hold out until they get a better agreement. In this situation, the level of resources the parties had or were able to build during the negotiations usually explains how much they get out of them. Among constitution-makers, the main resources of this type are: 1) the levels of popular support they enjoy at polls or elections, 2) the actual or expected command they have over the votes of legislators or delegates in a constitutional assembly, 3) the capacity to mobilize constituencies in support of their preferences, and, more exceptionally, 4) the capacity to command the support of armed forces or foreign allies.

¹⁸ See Elster, Jon, in *Deliberative Democracy* (Cambridge; Cambridge University Press, 1998) p. 5

¹⁹ On a simple description of the role of voting and its problems for arriving at collective decisions, see Raiffa, Howard, op. cit., pp. 327-334

²⁰ The general framework of non-cooperative bargaining theory that follows is mainly based on the work of Jon Elster, in *The Cement of Society* (Cambridge: Cambridge University Press, 1989), pp. 74-82 and Jack Knight, in *Institutions and Social Conflict* (Cambridge: Cambridge University Press, 1992), esp. Ch. 5, pp. 100-36. For the application of bargaining theory to constitution-making, see Elster, Jon, *Arguing and Bargaining in Two Constituent Assemblies* (Storr Lectures, Yale Law School, 1991). An analysis of constitution-making from the perspective of classic or cooperative game theory can be seen in Heckarthorn, Douglas, and Maser, Steven, in "Bargaining and Constitutional Contracts", *American Journal of Political Science* 31 (1987): 142-68

The situation is different with risk aversion, where the issue is not so much *when* but *whether* an agreement will be reached.²¹ In principle, this attitude is determined by the level of resources available to the parties in case of a failure of agreement. In constitutional bargaining, this situation may correspond to the case of a party which has enough votes in the legislature to pass a constitutional reform without the support of the opposition. In that event, one actor can credibly threaten that, should the opponent be intransigent, he would impose his most preferred alternative unilaterally.

We need to consider, finally, the problem of the credibility of threats and commitments. A threat is made credible either when its execution corresponds to the interests and resources available to the actor or when he finds a “pre-commitment” device that prevents himself to back down.²² When the parties are unable to make threats credible or simply find inconvenient to use this strategy, they might resort instead to a warning. For instance, party negotiators may warn their opponents that without such and such institution their constituents would reject the agreement, even if they were willing to compromise.²³ This strategy is particularly effective when the group represented by the negotiator is visibly divided upon the issues under discussion.²⁴

Arguing

Alternatively or simultaneously to resource-based bargaining, the outcome of constitution-making may also be influenced by the exchange of arguments and counterarguments among the framers. From a normative point of view, the goal of this process should be to coordinate social interaction by means of a rationally motivated agreement.²⁵ The actors engaged in this process are also supposed to be motivated by moral reasons rather than by strategic purposes. In actual political settings, however, arguing never takes this pure form. On the one hand, depending on the intensity of the conflicts at stake, political deliberation may actually sharpen rather than resolve existing disagreement among the participants. On the other hand, political deliberation is often affected by strategic purposes, as when political actors argue from principle to legitimate a partisan position in front of the public.

The use of deliberation, however, does matter in terms of the outcome. For one thing, the informative role of deliberation may help the actors to form a more complete set of preferences than

²¹ As Jack Knight puts it, while “attitudes toward risk relate to failures to achieve a successful resolution, time preferences relate to the timing of achieving that resolution.” See *Institutions and Social Conflict*, op. cit., p. 135.

²² On the notion of credible threat and commitment, see the classic work of Thomas Shelling, *The Strategy of Conflict* (Cambridge: Cambridge University Press, 1960). Also, for an excellent summary of the different technologies of precommitment, see B. Nalebuff and A. Dixit, “Making Strategies Credible,” in R. Zeckhauser (ed.), *Strategy and Choice* (Cambridge: MIT Press, 1991), pp. 161-84.

²³ The problem here is not so much what negotiators will do, as in a threat, but what will happen *regardless* of what they do. On the distinction between threats and warnings, see Elster, Jon, *Arguing and Bargaining*, art. cit., pp. 96-97

²⁴ Warnings, of course, may also be threats in disguise. A negotiator may have in fact some control over the reaction of his constituents and use a warning to let the other party decide about the truth of his statement.

²⁵ This is, for instance, the implicit goal that Habermas attributes to communicative practices. See his *Theory of Communicative Action* (Boston: Beacon Press, 1981), particularly his classification of different forms of action in Vol I, pp. 75-101

they originally had or even force them to change positions when they are exposed to the full consequences or incoherence of their original proposals.²⁶ For another, when political actors must justify their proposals in public, they may find that impartial arguments are not available or, if they are, they may be too obviously tied to a particular interest to be convincing.²⁷ In this situation, an actor may have no other alternative than change the original proposal for another that takes into account, even if minimally, the views and interests of others. Such a use of impartial argumentation may yield more equitable outcomes than pure bargaining and increase the overall legitimacy of the process among political actors and the public in general.²⁸

C. Constraints

Once we elucidate the distribution of preferences and the particular mechanisms of collective decision, it is crucial to analyze how these factors both affect and are themselves affected by the constraints and opportunities created by the particular conditions and procedures under which a constitution-making process takes place. I would like to consider two types of constraint: procedural and informational

Procedural

The most important procedural constraints are those that determine the nature, composition and work of the constitution-making body. The nature of the constitution-making body, for instance, is crucial to understand the possible influence that actual or potential executives and legislators may have on the outcome. The most blatant influence of the executive occurs when it directly assumes the role of a constitution-making body: Bonaparte in 1799, 1802 and 1804, the French Ministry of Justice in 1958 and Yeltsin's government in the fall of 1993.²⁹ These are, however, exceptional cases and more often than not, we should find the intervention of the executive in more informal means of influence and pressure. The influence of legislators, on the other hand, may occur when ordinary legislatures work as constituent assemblies. The extent of their influence, however, varies according to the interests of the party to which legislators belong and their dependence on the party to get nominated or reelected.

The most impartial constitution-making bodies are supposed to be those that adopt the form of special constitutional conventions. Given the unpredictability of these bodies, however, political actors typically try to adopt diverse procedures to control their work. While rules of selection may secure the predominance of certain regional, ideological or party interests, bound mandates can be used to restrict the liberty of delegates about how and what to vote.³⁰ Constraints over the internal work of the assembly, in turn, may introduce strict time limits to prevent long debates or

²⁶ See Manin, Bernard, "On Legitimacy and Political Deliberation", in *Political Theory*, No. 3, 1987: 349-50

²⁷ See this along other examples in Elster, Jon, "Strategic Uses of Argument", in Kenneth Arrow et al (eds) *Barriers to Conflict Resolution* (New York:Norton, 1992) pp. 236-257

²⁸ See Elster, Jon, in *Arguing and Bargaining in Two Constituent Assemblies*, op. cit., pp. 93-94,

²⁹ See, Arato, Andrew, "Forms of Constitution-Making and Theories of Democracy", art. cit., p. 198

³⁰ See Elster, Jon, "Constitutional Bootstrapping in Philadelphia and Paris", in *Cardozo Law Review*, Vol. 14, January 1993, p. 563.

negotiations, simple majority rules to avoid the opposition of minorities or the norm of secrecy to overcome the restrictions that publicity imposes on self-interested behavior. Ratification requirements, finally, may also limit the choices of the framers by forcing them to take into account the public opinion, or the interests of regional units or some special constituency.

Informational

Uncertainty about the impact of a new constitution is one of the main restrictions in the pursuance of distributive advantage by political actors.³¹ This uncertainty derives from two different situations. The first case occurs whenever the actors are unable to foresee the consequences of alternative rules. According to Buchanan, for instance, this situation applies to constitutional choice in general.³² More convincing, however, is the idea of distinguishing between different levels of design. Issues like the regime type or the separation of powers doctrine, too broad to discern their exact consequences, are usually decided by principled arguments. Rules with more definite consequences, like rules of apportionment, are instead more likely to be decided according to the interests and bargaining power of the actors.³³

The second source of uncertainty refers not so much to inability of the actors to derive distributional consequences from the rules as to the lack of information about who will benefit from those rules in the future. In this situation, since the actors are unable to foresee their future positions, they opt for rules that protect the interests of those who end up in the least favorable positions.³⁴ In real constitutional settings, this may occur at times of deep political change, when the definite relation of forces between the actors is unknown or unclear. In such a situation, constitution-makers might agree, for instance, on institutions that introduce checks and balances and maximize the political influence of minorities.³⁵

II. Constitution-making and institutional design in Argentina

Two historical moments form the necessary background to analyze the recent constitutional reform in Argentina: the foundation of the liberal republic between 1853 and 1860 and the constitutional reform under the populist regime of Perón in 1949. While the first case reflects the institutional legacy of a constitution that was still in place in 1994, the second helps to understand the conflicts that until then affected the attempt of political actors to adapt the historical constitution to democratic conditions.

³¹ On the impact of uncertainty on the design of institutions, see Jack Knight, *op. cit.*, pp. 44-47, and George Tsebelis, in *Nested Games* (Berkeley: University of California Press, 1990), pp. 115-118.

³² For this position, see Geoffrey Brennan and James Buchanan, in *The Reason of Rules: Constitutional Political Economy*, *op. cit.*, pp. 28-31.

³³ See Calvin Jillson and Cecil Eubanks, in "The Political Structure of Constitution-Making: The Federal Convention of 1787", *American Journal of Political Science*, vol. 28, No 3, August 1984.

³⁴ I am referring, of course, to the situation hypothesized by Rawls about the conditions of choice that occur under a "veil of ignorance".

³⁵ See Przeworski, Adam, *Democracy and the Market*, *op. cit.* p. 87.

The struggle for the constitution since independence, in 1810, was a story of five decades of conflict between Buenos Aires, opposed to a federal form of government, and the rest of the provinces, which found in that system the best protection for their economic and political interests. Only in 1853, after the military defeat of Buenos Aires by the governor of Entre Ríos, a coalition of provincial governors managed to organize a convention that produced a federal constitution supported by the majority of the provinces. Although conflicts of interest remained and Buenos Aires resisted its integration until 1860, the constitution of 1853 was the expression of a deep political consensus about the institutions that could best fit the historical conditions of Argentina. This consensus was formed around a conservative version of liberalism, which saw in the creation of a strong executive the best remedy against the evils of territorial fragmentation and factional conflict that emerged after the fall of the Spanish Empire.

The delegates at the convention of 1853 found inspiration in the project of constitution submitted by the jurist Juan Bautista Alberdi, who proposed the founding of a presidential and federal republic substantially different from the American precedent.³⁶ The peculiar trait of his design was the rejection of the doctrine of checks and balances in favor of a strict model of separation of powers in which the president would be the central piece of government. The president did not require legislative approval to appoint cabinet ministers, had the power of legislative initiative, could sign international treaties without intervention of congress and was able to declare the state of siege during the recession of Congress. He could observe the whole or parts of a bill, subject to a two-thirds override majority in congress.³⁷ An Electoral College elected the president for a period of 6 years and, as a way to allow alternation in power, he could not run for immediate reelection.³⁸ Congress was composed of a senate, with two senators per state elected for 9 years by state legislatures, and a House of representatives, integrated by deputies directly elected by the people for periods of 4 years. Congress remained in session for only 5 months a year and could only initiate or extend its period upon the convocation of the president. Apart from the process of impeachment, the Congress could exercise some form of control over the executive by calling in person the ministers of cabinet to provide information about particular areas of policy.

The federal model adopted a centralized version of federalism that made the national government the dominant force over the provinces. While the provinces were allowed to elect their own authorities, create their constitutions and participate in national decisions through the senate, they had limited legislative and taxing powers. In addition, although the reform of 1860 removed some instruments of control of the central government over the provinces, it left the most important: the federal intervention. According to this institution, the central government could intervene the provinces to guarantee the republican form of government or, at the requisition of local authorities, to sustain the authorities threatened by internal sedition. It was not established the branch of government authorized to declare the intervention. But the short duration of congressional sessions made clear, as it soon happened, that the president would exercise that role.

³⁶ See his *Bases y Puntos de Para la Organización Nacional*, ed. by Jorge Mayer (Sudamericana; Buenos Aires, 1969), particularly Ch. XXVI

³⁷ Although the constitution seemed to allow the line-item veto, it was unclear whether the president could sign the bill for the non-observed parts.

³⁸ Another period of 6 years has to pass before the former president could be reelected.

After the final incorporation of Buenos Aires in 1860, the constitution of 1853 became the basic framework of reference of a new era of increased political stability, protection of civil rights and economic progress. Provincial rivalries for power were slowly eliminated, internal conflict reduced, and presidents succeeded one another observing the principle of no reelection. In addition, a relatively independent judiciary, particularly at the federal level, began to assert its presence as the guardian of individual rights and moderator of political conflict. The stability of the constitution, however, was too closely dependent on the conditions under which it was born: an implicit pact of mutual protection between the central government and provincial governors.³⁹ According to this pact, the government would protect the authority of provincial governors tolerating fraudulent electoral practices and abstaining from intervention as long as the governors collaborated in supporting a system of presidential succession controlled by the incumbent president.⁴⁰ This mechanism helped the observance of the proscription of presidential reelection and reduced the stakes of competition for a powerful presidency. But once free competition for power was allowed in 1912, the traditional parties of the liberal republic lost the presidency in 1916 and were unable to regain control of the government until a conservative coup put an end to the democratic experience in 1930.

After 1930, the constitution of 1853 persisted under conditions of electoral control until the election of Juan Perón, in 1946. In 1948, Perón proposed a constitutional reform whose public justification was the introduction of social rights in the liberal constitution. The radical party opposed the reform, not so much on ideological grounds as for the suspicion that Perón was determined to allow his indefinite reelection and increase the already hegemonic powers of the presidency. The radical party, however, was almost the only opposition party in congress and the government had the required two thirds majority to call a constitutional convention.⁴¹ Moreover, given his plebiscitarian appeal and the existence of a strongly majoritarian electoral system, Perón could easily rely on the idea of obtaining a “popular mandate” to dominate the convention. In this context, the government decided to pass the law of reform without discussing specific proposals and not even observing the formalities of amendment procedures.⁴²

As expected, the peronist party obtained an overwhelming majority in the convention and the reform was passed without any concessions to the opposition. An extensive list of social rights was included but also the possibility of the president, now directly elected by the people, to run unlimited re-elections for consecutive periods of 6 years. The president was authorized to use emergency powers without previous legislative authorization and acquired exclusive legislative initiative to present the budget and determine the number and organization of ministries. It was explicitly stated that the president could proceed to the partial promulgation of laws in case of a partial veto. In

³⁹ See Rivarola, Rodolfo, in *Del Regimen Federativo al Unitario* (Buenos Aires: Peuser, 1908)

⁴⁰ See Botana, Natalio, in *El Orden Conservador* (Buenos Aires, Sudamericana, 1987)

⁴¹ See Luna, Félix, *Perón y su Tiempo* (Buenos Aires: Sudamericana, 1984) pp. 326-332

⁴² Although the peronist party had in 1948 the two thirds of the vote in both Houses required by amendment procedures to pass the law declaring the necessity of reform, this law was passed in the House of Representatives by surprise and without the necessary majority.

addition, the power of congress to call cabinet ministers in person to its sessions as well as the obligation of the latter to provide annual reports to congress was eliminated.⁴³

The reelection of Perón in 1952, in the midst of growing authoritarianism and governmental control over all channels of institutional dissent, left little hope of legal alternation in power to the opposition. Perón was overthrown in 1955 by a military junta which, among its first measures, declared invalid the reform of 1949 and restored the constitution of 1853. A new constitutional convention was called in 1957, now with the proscription of the peronist party. Although the different parties presented proposals of reform including the strengthening of individual rights, guarantees of judicial independence and limitation of presidential powers, internal disagreements reduced the reform to the inclusion of a brief declaration of social rights.⁴⁴ Since then, and with the exception of a provisional amendment introduced in 1972, the constitution of 1853 remained through successive cycles of dictatorship and restricted democracy, as the only valid legal document in the country.

III. Preferences and institutional conflicts during the democratic transition

At the fall of the last military dictatorship, in the early 80s, democratic parties in Argentina were unable to afford an extended and predictably divisive negotiation over a new constitution. On the one hand, the conflicts created by the constitutional reforms of 1949 and 1957 were still alive in the memories of the participants. While the radical party still resented the imposition of the 1949 constitution by a peronist majority, the latter recalled their proscription from the constitutional assembly of 1957. On the other hand, the military left too many problems whose solution seemed more urgent at the time than the creation of new constitutional norms. Most energies were needed to resolve the legacy of a deep economic crisis, the defeat in the Falkland war, and the reparation of human rights abuses.

In this context, the main parties decided the restoration of the constitution of 1853-60, with the partial reform of 1957. This decision, at times described as the product of a “negative consensus”, had a clear rational basis.⁴⁵ In spite of the frequent suspension and violation of its provisions, the constitution of 1853 still had the potential to serve as focal point to coordinate the actions of both the political elite and the citizenry in general. In contrast to the recent past of violence, arbitrariness and instability, the historical constitution emerged as the living memory of a golden era in Argentine history, a unique symbol of unity, liberal values and economic progress.

Raúl Alfonsín, the leader of the radical party elected president in 1982, rightly perceived this symbolic power of the constitution. Just as he won the election after making of the strict observance of the constitution one of the main banners of his electoral campaign, he also tried to build the legitimacy of the new democracy in the realization of a liberal legal order. It was with this general

⁴³ See Serrafiero, Mario Daniel, in *Momentos Institucionales y Modelos Constitucionales* (Buenos Aires: Centro Editor de América Latina, 1993)

⁴⁴ See Padilla, Alejandro Jorge, “Proyectos y Reformas a la Constitución Nacional”, in *Criterio*, No. 1975 (1986), pp. 577-89

⁴⁵ Natalio Botana y Ana María Mustapic, “La Reforma Constitucional Frente al Régimen Político Argentino,” in Diether Nohlen y Liliana de Riz (eds.), *Reforma Institucional y Cambio Político* (Buenos Aires: Legasa, 1991)

orientation that during its first years the new government removed authoritarian provisions from legal codes, initiated the trial of the military junta for human rights abuses, and restored the prestige of the judiciary as a protector of the constitution and individual rights. The most crucial element of this project, however, was a broad proposal of constitutional change aimed at reformulating the democratic foundations of the historical constitution.

The reform under Alfonsín: the semipresidential model

Alfonsín's proposal of constitutional reform was prepared by the *Consejo para la Consolidación de la Democracia*, a presidential commission appointed in 1985, which produced its conclusions in 1986 and 1987.⁴⁶ Although meant to be a partial reform that would preserve the continuity with the constitution of 1853, the project implied a deep change or revision of almost all its central institutions. I would like to concentrate here on the transformation of the presidentialist structure of government.

At different times since the first transition to democracy in 1916, various sectors in political society pointed out to the obstacles that a hegemonic presidency created to maintain an equilibrated relation between government and opposition. This was, for instance, one of the main criticisms that conservatives directed toward Yrigoyen and radicals to Perón after they were overthrown by military coups in 1930 and 1955, respectively. In no case, however, was the constitution itself blamed for that result. The culprit was always an abusive leader that either bypassed constitutional restraints, like Yrigoyen, or simply created an authoritarian constitution to perpetuate himself in power, like Perón. In this sense, the proposal of the *Consejo* was a novelty: it presented for the first time an elaborated argument indicating that the very design of the constitution of 1853 should be counted as one of the main factors leading to political instability in the country.

According to the members of the *Consejo*, the strong presidential power created by the constitution of 1853 only intensified the potential instability of any presidential system. The criticism coincided with the opinion of Juan Linz about the presidentialist system: its inherent tendency toward personalism, the absence of flexible mechanisms of governmental change in case of crisis, and the insufficient levels of collaboration between executive and legislature, particularly under divided government.⁴⁷ To these evils, the suggested solution was the creation of a mixed system, close to that of the French Constitution of 1958, which would gather the benefits of both parliamentary and presidentialist systems.⁴⁸ Essential aspects of this framework were as follows:

1-The president would be elected directly by the people by a system of majority run-off election with a threshold of absolute majority. Once elected, the president would last four years in office and could be reelected for one period.

⁴⁶ The content of the proposal could be consulted in *Reforma de la Constitución: dictámen Preliminar* (Buenos Aires: Eudeba, 1986) and *Reforma de la Constitución: segundo dictámen* (Buenos Aires: Eudeba, 1987).

⁴⁷ See *Reforma de la Constitución: segundo dictámen*, pp. 12-21. For a complete formulation of the views of Juan Linz about the perils of presidentialism, see his essay "Presidential or Parliamentary Democracy: Does it Make a Difference?," in *The Failure of Presidential Democracy* (Baltimore: John Hopkins University Press, 1994), pp. 3-87.

⁴⁸ For a detailed description of the new system, see *Reforma de la Constitución: segundo dictámen*, pp. 27-43.

2-The executive power would be divided between a president, chief of state, and a Prime Minister, chief of government. The latter would be appointed by the president, but could be removed by a vote of no confidence of the House of Representatives, which also had to provide a majority to support the appointment of a new Prime Minister. In this case, the president could also dissolve the House of Representatives and call new elections.

3-The bicameral structure of the legislature would be maintained, although the Senate would lose some of its previous powers. Legislative initiative would be now in hands of the Lower House, except in federal issues.

As part of the new system of division of powers, the *Consejo* proposed measures to protect judicial independence and strengthen the federal structures of government. It proposed to maintain the designation of members of the Supreme Court by the President with consent of the senate, but requiring publicity of the sessions, the formation of a special jury to remove federal judges, and the creation of a Constitutional Court to decide in conflicts between the different branches of government. Regarding the federal structure, it was proposed that the provinces should be able to sign international treaties, form economic regions, and acquire the right to exploit natural resources. The institution of federal intervention was maintained, but placing in hands of congress the right to declare it.

In order to facilitate dialogue with the opposition, Alfonsín decided to exclude himself from reelection in case the new system were established.⁴⁹ It seems clear the influence of impartial motivations in this decision, like Alfonsín's belief in the capacity of the new system to create a more legitimate and stable democratic order. At the same time, however, group interests, had their own weight in the support of the proposal by the radical party. If Alfonsín maintained the level of popular support enjoyed in 1986, the party could still keep the presidency. In case of decline of popular support, the party may lose the presidency but reserve for itself a degree of control over the government that never had under the previous constitution.

The main party of the opposition, the peronist party, rejected the proposal as a legal façade to allow the incumbent president to be reelected. The real obstacle, however, was the conflict between the institutional preferences of government and opposition. As a matter of identity with the idea of a strong president, the peronist party reacted against any change in the essence of a presidentialist system. Mainly through the role of their historical leader, the peronists tended to see the presidency as the key institution to sustain the process of democratization and economic development in the country. As a mere matter of group interest, however, the peronists rejected the proposed transformation of the senate, which they controlled at the time, into a mere instance of legislative revision. The senate, in their view, should maintain its current functions as a co-equal legislative branch and as the main institutional link between government and legislature.

⁴⁹ See the letter sent by Alfonsín to the *Consejo* in March of 1986, in *Reforma de la Constitución; Dictámen Preliminar*, op. cit., p. 13

The first formal negotiation did not take place until after the midterm elections of 1987, when the radical party suffered a large defeat in hands of the opposition.⁵⁰ In January of 1988, Alfonsín had a meeting with Antonio Cafiero, then the main leader and potential presidential candidate of the peronist party. The result of this meeting was a preliminary agreement on a set of very general guidelines of reform, which included the deconcentration of activities of the President, the adaptation of the administration to changing political and electoral circumstances, and a closer and more coordinated relation between executive and congress.⁵¹

The second meeting took place in September. By the time, there was a considerable change in the subjective and objective conditions of negotiation. On the one hand, the decline of the radical party in terms of popular support was now aggravated by an explosive inflationary situation and mounting social conflict. On the other hand, the presidential campaign for 1989 was already under way and Carlos Menem, who now displaced Cafiero as the candidate of the peronist party, had a clear possibility to win the presidency. It was obviously not in his interest nor in the interest of his party to negotiate a reform with a lame duck, much less a reform that would reduce the powers of the future president. On September 20, the commission of constitutional reform of the peronist party expressed its official position in favor of the maintenance of the presidentialist system, only accepting its flexibilization through the creation of a minister coordinator that would act as a delegate of the president in administrative matters. One week later, the government declared that negotiations were formally suspended.

In the May 1989 presidential election, Menem defeated the presidential candidate of the radical party, Eduardo Angeloz. The legal succession in the presidency implied that the historical constitution survived a crucial test. In spite of the economic crisis, military uprisings and social conflict that plagued the last three years of Alfonsín's government, constitutional order was upheld and, for the first time in the century, a democratic president was succeeded by the candidate of a different party. But there were also strains in the constitutional system.

As the economic situation worsened, Alfonsín increasingly relied on the use emergency decrees of legislative content. These decrees, not authorized by the constitution, were passed without either delegation or approval of congress. At the same time, the need to centralize the termination of judicial proceedings against military officers charged of human rights abuses, led to a frustrated attempt by the government to enlarge the composition and modify the jurisdiction of the Supreme Court. Finally, in the midst of an uncontrollable inflationary situation and growing social unrest, Alfonsín was forced to finish his period six months before the time established in the constitution.

IV. The reform under Menem

Whereas the end of Alfonsín's period showed a relative deterioration of what until then seemed to be a successful experience with constitutional democracy, the new government initiated a

⁵⁰ While the peronist party won the majority of the states and the senate, the radicals lost their majority in the Lower House.

⁵¹ See Comunicado de Prensa, Alfonsín-Cafiero, 14 de Enero de 1988, in *Revista del Centro de Estudios Constitucionales*, No. 19, Septiembre-Diciembre 1994, p. 133.

series of transformations in the use of presidential power that put the constitution at the limit of its logical possibilities. With the economic crisis as a background, Menem made of emergency decrees an almost regular instrument of government⁵², exceeded the limits under which he received delegation of legislative powers by Congress⁵³ and expanded the use of line-item vetoes.⁵⁴ He also managed to create an official majority in the Supreme Court and dismantled diverse organs of control over the activities of the administration.⁵⁵

The relatively high levels of economic efficiency soon achieved by the government in halting the inflationary situation and solving pending conflicts with the unions and the military, were initially used to justify this decisionist practice of government as a natural imposition of the circumstances. Through time, however, the government tried to obtain a more permanent advantage from this situation, particularly after it won the midterm elections of 1991.

Bargaining I: the reelection

In the first months of 1992, Menem launched the idea of a constitutional reform without hiding the intention of making possible his own reelection in 1995. This reelection was presented as the only guarantee to maintain inflation under control and continue the process of privatizations and structural reforms initiated by the government. In June of 1992, the lawyer's commission of the Peronist Party indicated the concrete aspects of this reform: direct election of the President for four years, with the possibility of one reelection, elimination of the constitutional provision that required the President to be catholic, direct election of senators for six years, extension of the ordinary sessions of Congress, and a system of constitutional amendments by Congress with ratification by popular referendum. No reform was intended to any of the areas of presidential power.

Soon after it was made public, the radical party refused to accept a reform that was purely instrumental to allow the reelection of the incumbent president. At the core of the conflict, however, was also the intention of the government to introduce the reelection without any basic change in the structure of presidential powers. On July 5, the National Convention of the radical party, by unanimity, repudiated the reform as one more step toward a greater concentration of power in the

⁵² According to a research made by Mateo Goretti and Delia Ferreira Rubio Menem issued, between 1989 and 1993, 308 emergency decrees, a number that contrast not only with the 10 decrees of this type issued during Alfonsín's presidency, but also with the 35 of the whole Argentine history. See their "Gobernar la Emergencia. Uso y Abuso de los Decretos de Necesidad y Urgencia," in *Agora*, No 3, Winter 1995

⁵³ By the end of 1989 two laws of economic reform were passed in Congress with the support of the opposition: the Law of Economic Emergency and the Law of Economic Reform. Both laws delegated legislative powers to the executive under temporal limitations and each renewal of the delegation required the intervention of Congress. Each time the delegations were about to expire, however, the president renewed them by executive decree rather than turning to the Congress for approval.

⁵⁴ According to Ana María Mustapic, between 1989 and 1993 Menem issued 38 line-item vetoes as against 12 of all the period of Alfonsín. See "Tribulaciones del Congreso en la Nueva Democracia Argentina. El Veto Presidencial Bajo Alfonsín y Menem," in *Agora*, No. 3, Winter 1995

⁵⁵ On the process that led to the expansion of the members of the court from 5 to 9, see Verbitsky, Horacio, *Hacer la Corte* (Buenos Aires: Planeta, 1993). On the dismantling of organs of control of the administration, see also of the same author, *Robo para la Corona* (Buenos Aires: Planeta, 1991).

executive. This was the starting point of an implicit negotiation between the government and the opposition whose main object will be, for the time being, the issue of reelection.

At this initial stage, the actors appeared as engaged in an interaction of pure conflict. While the peronist party preferred the maintenance of a presidential structure of government, allowing the reelection of the incumbent president, the radical party preferred the limitation of presidential powers through a dual executive, without reelection for the incumbent president. The distribution of preferences, in other words, looked as if both parties wanted a reform but each would rather maintain the status quo than having a reform according to the preferences of the opponent.⁵⁶

In spite of the appearances, however, nothing precluded an integrative negotiation. Reelection and presidential powers were separable issues and it was reasonable to think, depending on the intensity of the preferences, on exchanges across both dimensions. From a more contextual point of view, one could also see the possibility of a compromise in the recent transformations of party politics in Argentina. While in the past radicals and peronists formed social and political coalitions that excluded one another from power, in the early 1990s, after almost ten years of alternating and sharing power at different levels, both parties developed a common interest in the maintenance of negotiated solutions to political conflicts.⁵⁷ An ideological transformation of the peronist party also contributed to this possibility. In response to the emergence of a more pluralistic society, and in spite of its still strong antiliberal leanings, the peronist party had gradually abandoned the plebiscitary claim that democracy is the rule of the party voted by the majority.

Provided they had an objective possibility to coordinate on a cooperative outcome, we need to look at the distribution of political resources between the actors to understand their incentives to negotiate. Given its position in the legislature, the government did not have the option to get the reelection outside a negotiation with the radical party. According to the constitution, the law declaring the necessity of reform had to be passed in Congress by two thirds of the vote of the members of both houses. But, at least in the Lower House, the peronist party could not obtain that qualified majority without the support of the radical party.⁵⁸ In other words, in case of a failure to negotiate, no reform could be passed. Knowing that, the radical party could risk a breakdown of negotiations without fearing a constitutional reform according to the preferences of the government.

Time was not in favor of Menem either. For Menem to be reelected in 1995, the whole process of reform should be concluded early in 1994, before the peronist party started its own internal competition among presidential candidates. This was a crucial disadvantage. According to

⁵⁶ Carlos Nino, for instance, described in these terms the interaction between the radical and peronist party in a conference given in August of 1993. See, "Reforma Menemista: Signo de Degradación de la Democracia," in *Ciudad Futura*, No. 38, Fall 1994, p. 24.

⁵⁷ See Mora y Araujo, Manuel, in *Ensayo y Error: La Nueva Clase Política que Exige el Ciudadano Argentino* (Buenos Aires: Planeta, 1991) pp. 182-87

⁵⁸ The distribution of forces was as follows: 117 deputies for the peronists, 84 for the radicals, 38 for minor provincial parties and the center-right, 15 for the left and dissident peronists and 3 for the rightist party MODIN. Given that the two thirds amounted to 172 deputies, the peronists lacked exactly 55 votes. In other words, even with the support of all the provincial parties, the center right and the right (the more likely allies) the government could not get the necessary majority.

the existing amendment procedures, a constitutional convention had to be formed after a law declaring the necessity of reform was passed in Congress. This meant that the law had to be approved no later than December of 1993.⁵⁹ The leaders of the radical party, in turn, did not have a rush to reach an agreement. They knew that, no matter what they might obtain in exchange, any attempt to negotiate with the government required the acceptance of the reelection issue. For the time being, their best strategy was, then, to reject negotiations in the hope that that would frustrate Menem's aspiration to be reelected in 1995.

Given its disadvantage in terms of timing and breakdown values, the only way the government could tip the balance of power to its favor was to commit itself to an action that would constrain the opposition to accept the reelection. The main political resource the government had to back this action was its level popular support. Not only the government won the midterm elections of 1991, but also its rate of popular approval was growing in 1992, particularly with reference to economic management. The radical party, in turn, was still affected by the image left by the economic crisis of the last years of Alfonsín's government. In fact, the popular support of the radical party was in steady decline since at least 1987.

With this picture in mind, the peronist party announced in March of 1992 the project to call a plebiscite over the necessity of constitutional reform in case the radical party refused to accept a negotiation. The strategy attempted to show that there was enough support for the reelection of Menem to inflict a serious damage to the electoral interests of the radical party. The government, however, did not have at the time a clear indication of the level of popular support for Menem's reelection.⁶⁰ This is the reason why the plebiscite was finally postponed until the results of the midterm election of October 3 were known.⁶¹

In any case, however, the plebiscite was meant to be an instrument of pressure, not a substitute to negotiation. The results of the plebiscite could not be binding.⁶² For this reason, even if favorable to the government, there was still a chance that the radicals may decide to use their representatives in Congress to block the possibility of reform. In order to undermine the ability of the opposition to use this resource, the government decided to affect the risk attitudes and time preferences of the radicals by showing that it was willing to use all the necessary means of pressure to pass the reform. As a first step, the government sent a project of constitutional reform to the

⁵⁹ According to Eduardo Bauzá, General Secretary of the Presidency and one of the key strategists of the government, December was already too late for the government to approve the project of reform in Congress. "There is no next year" for the government, he said. See, *La Nación*, September 15, 1993.

⁶⁰ An important and negative precedent for the government about the risks entailed in a plebiscite over the constitutional reform was the defeat suffered by the peronist governor Antonio Cafiero in 1990, when he attempted to reform the constitution of the province of Buenos Aires. Although the polls indicated enough popular support for the reform before the plebiscite, the proposal of the government was finally defeated by almost a 70 percent of votes against it. The idea that the governor was promoting the reform only to allow his own reelection was at that time one of the main factors that undermined the popular support of the government.

⁶¹ Garcia Lema, Alberto M., *La Reforma por Dentro* (Buenos Aires: Planeta, 1994), p. 84

⁶² Since the constitution does not include the figure of the plebiscite as a mechanism of decision-making, the government had to rely on the precedent use of this instrument. The most immediate one was the non-binding plebiscite called during Alfonsín's government about the signature of a peace treaty with Chile.

senate, where it was close to obtain the required majority, somewhat different from the proposal of 1992. Along with presidential reelection, it included the legalization of emergency decrees, the partial promulgation of laws by the executive and the approval of laws initiated by the executive by the mere inaction of Congress.

Due to last-minute disagreements among peronist legislators and difficulties in the negotiations with provincial parties, the discussion of the project in the senate was suspended. It was considered that the whole process might be unnecessary if the radical party changed its position after the elections.⁶³ And this is exactly the reaction the government expected when it won with more than 40 percent of the vote.⁶⁴ Soon after the election, the government invited the main leaders of the radical party to negotiate the reform.

In exchange for accepting the reelection, the government offered to abandon the idea of a plebiscite, to appoint new judges in the Supreme Court with the approval of the radical party, and to promote the creation of organs of control of the administration with the participation of the opposition. The negotiations, however, failed. The radical party did not have at the time a unified leadership to define a clear strategy. The radicals were facing an internal competition over the presidency of the party, which had to be decided on November 12. Such definition was crucial, since any negotiation with the government required the reversal of an earlier decision of the party rejecting the constitutional reform proposed by Menem.

Once the radicals withdrew from the negotiation table, the government rushed the approval of the reform in the senate. On October 21, with all the radical senators against, the law declaring the necessity of reform was passed in this body by 31 to 16 votes. Thanks to the collaboration of provincial parties, the approval was made with the two-thirds of the totality of the members. At a cost, however, because as part of the negotiations the peronist party accepted to maintain, contrary to its traditional position on the issue, the system of indirect election of president and senators.

Few hours after the Senate passed the law of reform, Menem signed a decree calling a plebiscite to be held on November 21. Although the government was still taking a risk, it had now a reasonable expectation to win, based not only on the results of the October election but also on different opinion polls indicating a high rate of popular approval for Menem's reelection.⁶⁵ Whether or not these polls showed a firm trend, signing a decree with exact date prevented the president from backing down.

The key obstacle, however, was still in the House of Representatives. Even with the incorporation of new deputies, the peronist party would still need the support of a substantial number

⁶³ As radical leader Federico Storani admitted, a plebiscite over the reform might not be necessary after October 3. "The plebiscite", he said, "is on October 3." See *La Nación*, September 21, 1993

⁶⁴ The actual results were 42.3 percent for the peronist party and 30 percent for the radical party. Although the radical party did not decline in the level of popular support obtained in the midterm elections of 1991, the fact that the government increased in 2 points the support obtained in those elections, was considered an impressive victory. The reason is that after four years in power most presidents experience a sharp decline in electoral weight.

⁶⁵ See Garcia Lema, op. cit., p. 118.

of radical deputies to reach the two-thirds of the totality of the members of this body.⁶⁶ To overcome this obstacle, on November 3, the government made explicit the threat to reduce the required number of deputies by interpreting that the two-thirds of the vote should be counted over the present and not the totality of the members of the House.⁶⁷ What was exact meaning of this threat?

Assuming that all radical deputies would be present in the sessions, there was no chance that, even with this interpretation, the government would be able to pass the reform with an appearance of legality. For this reason, the real content of the threat seemed then to be that in case the radicals should be intransigent, the reform *might* even be passed in a fraudulent manner. This impression was reinforced when the Commission of Constitutional Affairs of the House of Representatives declared in an irregular session that the interpretation of the two thirds of the present members was the appropriate to pass the law declaring the necessity of reform. The words of deputy Alberto Natale (PDP) summarized well the impact that this event was expected to have in the minds of some radical legislators: “this (what happened in the commission) is the proof that the reform will be voted by surprise at three o’clock in the morning, as most the opposition suspects and the peronist party emphatically denies.”⁶⁸

These actions were the immediate background of the decision of Raúl Alfonsín, on November 4, to have a secret meeting with Menem. In that meeting, he anticipated that, as soon as he were elected president of the radical party, he would start a negotiation with the government if 1) it suspended the plebiscite and 2) withdrew the project of reform already approved by the senate.⁶⁹

In spite of his own statements justifying the decision to negotiate because of the threat of the government to violate the existing amendment procedures, it seems unlikely that this was the ultimate reason that led Alfonsín to negotiate. On the one hand, Alfonsín was aware that the block of radical deputies was still unified and alert to prevent any fraudulent maneuver of the government.⁷⁰ On the other hand, and more importantly, he had sufficient grounds to think that Menem preferred to negotiate than have no reform or make a reform without agreement with the opposition. Apart from the fact that Menem himself implicitly expressed this preference, it was evident that the president would rather avoid a reform of dubious legality. No matter how much popular approval the president managed to obtain in a plebiscite, a reform made in violation of the constitution might have put at risk both the tasks of the constitutional convention and his prospects to be reelected in 1995.

⁶⁶ After December 10 the distribution of forces would be as follows: 127 deputies for the peronist party, 83 for the radicals, 25 for provincial parties, 6 for MODIN, 4 for UCEDE, 5 for Unidad Socialista, 3 for the Frente Grande and 1 for the Partido Intransigente. See, *La Nación*, October 5. The favorable vote of 172 deputies was necessary to obtain a two thirds majority over the totality of the members of this body. Since according to observers of the process, only 17 deputies from the provincial and center-right parties could be sure allies of the justicialist party, it seemed that the remaining 28 votes could not be obtained without the support of the radicals. See Garcia Lema, Alberto, op. cit., p. 115.

⁶⁷ See the statements of Eduardo Duhalde in *La Nación*, November 3.

⁶⁸ See, *La Nación*, November 4, p. 10.

⁶⁹ See Garcia Lema, op. cit., p. 118

⁷⁰ See Vidal, Armando, *El Congreso en la Trampa* (Buenos Aires, Planeta, 1995) pp. 253-57

The situation was different with the plebiscite. Let us think what could have happened if the radicals decided to make a campaign against the reform and they lost. The party would then have to face two equally bad alternatives. The first would be to continue opposing the reform at the cost of alienating the party from the preferences of the majority; a high cost indeed, for a party that just lost its fourth consecutive election. The second alternative would be to agree to the reform, but then at the cost of negotiating from a very weak position in which in all likelihood the radicals would obtain very few concessions. In this sense, let us remember that the project already approved in the Senate, and ready to be discussed in the Lower House, not only established the reelection: it also increased the legislative powers of the president.

Unable to obtain a reform without reelection or maintain the status quo, Alfonsín decided to anticipate a negotiation in which he would accept the reelection if, in exchange, he obtained something close to the proposal made by the *Consejo para la Consolidación de la Democracia*.⁷¹ In other words, the very decision to negotiate meant that the radicals lost the tacit bargaining game over the reelection. From then on, a process of explicit negotiation began in which the central issue at stake would be not the reelection but what kind of reforms the radical party would obtain in exchange for it.

Bargaining II: the reform of presidentialism

Alfonsín decided to give up on the issue of reelection by looking forward to the possibility of losing the plebiscite. This put him in a weak bargaining position. Why did he expect, then, to obtain concessions from the government?

The most probable reason, already mentioned, was that Alfonsín knew or suspected that Menem preferred a negotiation to both the status quo and imposition. But there were two other additional factors. In the first place, Menem was still very impatient to get the reform as soon as possible. This created the reasonable expectation that the president might be willing to accept some demands in order to save time. Second, Alfonsín could visibly show to Menem that, as the most secure candidate for the presidency of the radical party, he was the only leader with the capacity to command the support of his party. This support, however, depended on what he would obtain in exchange for the reelection. Since the rest of the leaders of the party were either against or unwilling to pay the costs of a negotiation with the government, Alfonsín could validly issue the *warning* that without substantial concessions, the agreement would probably be rejected.⁷²

⁷¹ According to Alfonsín, he conceived this idea on October 13, during a meeting in Ranelagh with the main leaders of the radical party. See Alfonsín, Raúl, *Democracia y Consenso: A Proposito de la Reforma Constitucional* (Buenos Aires: Corregidor, 1995), p. 304.

⁷² It is not clear, however, whether this warning was initially made as a threat in disguise. According to Jorge Vannossi, the most important constitutional lawyer of the party, Alfonsín asked him after the secret meeting with Menem to make public declarations against the reform intended by the government. Alfonsín's intention was clearly to show the government that the opposition to the reform was growing within the radical party and unless he obtained something in exchange, it would never accept the reelection of Menem. Personal interview with Jorge Vannossi, June 21, 1996.

After accepting the reduction of the presidential mandate from 6 to 4 years with the possibility of one immediate reelection, Alfonsín demanded the introduction of a dual executive power. In this sense, the first proposal sent by Alfonsín right after the secret meeting of November 4, included the figure of a Prime Minister who would play the role of a chief of government subject to the vote of no confidence of Congress. The President, in turn, would remain as a chief of state, with the power to appoint and dismiss the government and the power to dissolve Congress in case of conflicts.⁷³ Such a reform of the presidentialist system, however, was not acceptable for Menem. As he stated soon after the meetings with the opposition became public, “I am not partisan of a Prime Minister with powers above the president.”⁷⁴ This was his position at least since 1988 and he would not give up on this issue, particularly now when he got the upper hand in the negotiations.

As an individual preference, the most that Menem was willing to accept regarding changes in the structure of government, was the deconcentration of presidential responsibilities through the creation of a minister coordinator that would act as his delegate in daily administrative matters.⁷⁵ Once the negotiation started, however, a more significant reform of presidential powers was necessary if Alfonsín were to justify before his party that the “attenuation” of presidentialism was the main motive of the negotiation.⁷⁶

On November 14, two days after Alfonsín was elected president of the radical party, he signed with Menem the so-called “Pacto de Olivos”, the general framework of the reform. As an important concession, the government accepted the introduction of a chief of cabinet or minister coordinator with dual responsibility before the president and the congress.⁷⁷ Other concessions were included as well: regulation of emergency decrees, popular election of the mayor of Buenos Aires (then appointed by the president), direct election of three senators per state, two for the majority and a third for the second most voted party, majority run-off election for president, strengthening of congressional powers of control of the administration, and guarantees of judicial independence. The pact also announced other important reforms like the strengthening of the federal system, establishing in advance the exclusive power of congress to declare federal interventions in the provinces.

One of the most difficult issues after the pact was the necessity to obtain the approval of the National Council of the radical party. The pact of Olivos produced a deep division within this party. At the time Alfonsín was elected president, all the rest of the main leaders sided with his competitor, Mario Losada. And either because Alfonsín negotiated behind the back of the party or because they were in outright opposition to any negotiation, the pact with the government was the main target of

⁷³ See Alfonsín, Raul, *Democracia y Consenso*, op. cit., p. 471.

⁷⁴ *La Nación*, November 10, 1993

⁷⁵ At the beginning of the process, Menem was so reluctant to any change in the presidentialist system that, in spite of the support it had among many constitutionalists of his party, he rejected the idea of a “minister coordinator” to relieve the President from some minor administrative tasks. See *La Nación*, 6/15/92

⁷⁶ See *La Nación*, November 9, 1993

⁷⁷ According to Ricardo Gil Lavedra, the main adviser of Alfonsín in the negotiations, as early as the week after the first secret meeting, Alfonsín decided to abandon the idea of a Prime Minister. Personal interview, July 18, 1996.

criticism of the dissenters. This situation, which predicted a fierce confrontation within the National Council, was probably favorable for Alfonsín. Before December 3, the day of the meeting of the National Council, he had to show what were the concrete advantages of the reforms negotiated with the government. And the government knew that a failure to do so would mean the frustration of the reform.

On December 1, a new agreement was signed containing a more concrete definition of the different aspects of the reform. Regarding the role of the chief of cabinet, it was agreed that he would be in charge of the general administration of the country. There was some ambiguity about whether this role was autonomous or a simple delegation of executive powers that the president could resume at any time.⁷⁸ In any case, it was understood that the powers of the chief of cabinet could always be expanded by delegation of the president. With respect to the parliamentary responsibility of this official, it was accepted that while the procedure could be initiated by an absolute majority in any of the Houses, the actual decision to remove the chief of cabinet would require an absolute majority in both Houses. The possibility that the President could dissolve the assembly in case of conflict was rejected.⁷⁹

Regarding the legislative powers of the president, the agreement incorporated three instruments until then excluded from the formal constitution: legislative delegation, emergency decrees and line-item vetoes. All them, however, already existed as unregulated *de facto* powers, often legitimized by the courts with few restrictions. While the delegation of legislative powers to the executive was initially restricted to matters of detail in the execution of the laws and subject to a clear legislative framework, the Supreme Court was gradually relaxing those restrictions to the point of permitting an almost plain delegation of legislative powers.⁸⁰ With respect to emergency decrees, the Supreme Court under Menem, in case “Peralta”, declared that the president is authorized to issue decrees of legislative content in cases of emergency without requiring the explicit ratification of congress.⁸¹ Finally, the validity of partial promulgation of laws in case of a partial veto was also admitted by the Supreme Court in different opportunities with the only requirement (later included in the agreement) that the partial promulgation does not affect the unity of the law.⁸²

According to the agreement, legislative delegation was admitted only for administrative issues or emergencies and subject to termination in a fix term. Emergency decrees, in turn, were excluded for certain matters and subject to the explicit approval or rejection of a congressional bicameral commission integrated with members of all parties. The same commission has to intervene in the case of partial vetoes. The effect of this legislative intervention, however, was left undefined.

⁷⁸ According to the agreement, the chief of cabinet had the authority to appoint all the employees of the administration except those that were reserved to the President.

⁷⁹ According to Garcia Lema, the fact that this power of dissolution was used by President Fujimori in Perú to suspend the activities of the legislature and rule by decree in a circumstance of extreme conflict was considered a convincing argument to reject the instrument. Personal interview, June 30, 1996.

⁸⁰ See Nino, Carlos, *Fundamentos de Derecho Constitucional* (Buenos Aires: Astrea, 1992) pp. 527-28

⁸¹ See *El Derecho*, Vol. 141: 519-48

⁸² See, Gelli, María Angelica, “Implicancias Jurídicas y Políticas de la Promulgación Parcial de las Leyes”, in *La Ley*, Vol. 1992-E: 533-48.

Whereas no agreement was reached about the percentage of votes required for the election of president, the pact of December 1 presented concrete definitions on other important issues. It was agreed, for instance, the creation of an impartial body for the selection of federal judges, the confirmation of presidential nominations for the Supreme Court in public sessions and by an absolute majority of the members of the senate, and the creation of an organ of control of the administration presided by a member of the opposition. Compared to the status quo, these reforms implied an improvement in the institutional position of the opposition in general and the radical party in particular. A final issue, crucial to convince the leaders of the radical party about the convenience of the pact, concerned the guarantees of its enforcement.

The possibility of defection worried radicals more than peronists, since they expected a large majority of the latter in the constitutional convention. As a suggested mechanism for the enforcement of mutual promises, the agreement of December 1 included Alfonsín's proposal that the law declaring the necessity of reform should bind the convention to vote the basic amendments agreed by both parties as a "package", for yes or for no. This mechanism would preclude practices of vote trading and alliances across parties in the assembly.

Given these conditions, and with the crucial support of the radical leader Eduardo Angeloz, Alfonsín finally obtained the approval of the agreement by the National Council of the radical party on December 3. Knowing that the radical party could not then back down from the decision, Menem made public his opposition to some aspects of the agreement of December 1. He was against the potential role of the chief of cabinet as a chief of government and the system of majority run-off election with the threshold of absolute majority proposed by the radical party.⁸³

The final agreement of December 13 reflected this last exercise of power on part of the president. On the one hand, it would be explicitly stated in the constitution that the president was not only the chief of government but also responsible for the general administration of country.⁸⁴ On the other hand, it was established that a presidential candidate could win in the first run with either a 45 percent or a 40 percent of the vote with a difference of 10 points over the second most voted candidate. The absolute majority required by the radical party was rejected and, with it, the possibility that the peronist party faced a second round in the coming presidential elections.

The agreement of December 13 also included the reduction of senatorial terms from 9 to 4 years, and a more clear distinction between the so called "basic coincidences"--the reforms that the convention was bind to vote as a package, and other reforms that could be discussed and voted separately. Along with some reforms mentioned in previous agreements, the document of December 13 included a larger set of issues where the convention was free to decide, like the strengthening of the federalist system, municipal autonomy, mechanisms of direct democracy, ombudsman, autonomy of the public ministry, protection of the environment, creation of a social and economic council, rights of the consumer, habeas corpus and amparo.

⁸³ Upon his return from Japan, where he stayed since November 22, he stated that he will not accept any reduction to his powers: "this is a presidential, not a parliamentary system". See *La Nación*, December 5.

⁸⁴ The actual wording of the agreement is "responsable político de la administración", a quite unusual term that implicitly alludes to the fact that even if the chief of cabinet appears as being in charge of the administration, it is in fact the president who has the final authority and responsibility over it.

The debate in the House of Representatives took place between the 20 and 22 of December. Due to the mechanisms of party discipline of both major parties, the project of reform reproduced, without modifications, the contents of the agreement of December 13. On December 29, the pact was finally converted into law as the Senate voted in favor of the new project by 38 against 7 votes. Only one aspect of the law was altered: instead of including the reduction of the mandate of senators from 9 to 4 years within the basic coincidences, the senators managed to leave the final decision on this issue to the constitutional assembly. This is perhaps the most visible influence of legislative interests as such (since it included members of both parties) that we can trace in the process.

The role of the convention

The general results of the election of delegates on April 10 were somehow surprising in a party system traditionally dominated by two major parties. Peronists and Radicals obtained together a 57 % of the vote, which meant more than 200 hundred delegates in an assembly of 305 members.⁸⁵ The distribution of the vote, however, brought an unexpected political scenario. On the one hand, the peronist party did not obtain, as it was originally feared, an absolute majority in the convention. On the other hand, a recently formed center-left coalition, the *Frente Grande*, emerged for the first time as a third political force, followed by a growing rightist movement, *Modin*. Both groups were expected to be in opposition to the mechanisms as well as to important aspects of the reform.⁸⁶

Part of this result can be attributed to the system of proportional representation, which since the beginning of the transition to democracy was providing some room for the emergence of third parties. It is undeniable, however, that the election also showed the desire of the population to check the decisions of the majority parties in a more pluralistic assembly. In any case, the immediate consequence of these events was the formation of an assembly in which no single party could behave as a dominant force. This worked as a further reassurance of the implementation of the pact: in the absence of a single majoritarian party, the peronist needed the radicals as much as the radicals needed the peronists to obtain their share of the agreement.⁸⁷

Accordingly, the first action of the major parties in the convention was to design the rules of organization and procedure that would grant the enforcement of the agreements and the rapid adoption of the reforms. Among the 12 commissions divided according to the different issues to be discussed, there was one commission (Comisión de Redacción), dominated by radical and peronist

⁸⁵ With a 37.68 % of the vote the justicialist party obtained 136 conventional delegates and the radicals 75 delegates with a 19.90 % of the vote.

⁸⁶ The Frente Grande, with a 12.50% of the vote, obtained 31 conventional delegates while the MODIN got 20 delegates with 9.10 % of the vote. In the electoral campaign, both parties rejected the possibility of reelection of Menem although they accepted for the future, like in the original preference of the radicals, the possibility of one reelection after one period. They also rejected the figure of the chief of cabinet because it did not mean a real balance to limit the excessive powers of the president. The Frente Grande proposed instead the figure of a Prime Minister with functions and roles similar to those proposed originally by the radical party. The MODIN did not make any concrete proposal in this respect. Neither party rejected the whole pact. But they claimed for a free and independent discussion and voting of each of the issues it contained.

⁸⁷ See De Riz, Liliana, "Reforma Constitucional y Consolidación Democrática," in *Sociedad*, No. 6, April 1995, p. 69.

delegates, that would act as “filter” of the final text of the reforms. In addition, the convention could only vote for yes or no, as “a package”, the so-called basic coincidences between radicals and peronists.

After an extensive debate, the rules of procedure proposed by the majority were approved without major modifications on June 9. Although the parties that formed the minority in the convention either voted against or abstained from voting these rules, the possibility that they might abandon the convention as a sign of protest never materialized. Only two delegates from the *Frente Grande* resigned. In addition, there were no significant acts of indiscipline within the radical party. Almost all its delegates voted according to the guidelines of the party. Before the final voting, two delegates of the minority appealed to the judiciary in an attempt to promote a declaration of unconstitutionality of the mechanisms established by the law declaring the necessity of reform. These cases, however, were dismissed by the Supreme Court without deciding on the merits.⁸⁸

The decision of third parties to remain in the convention depended in part on their expected participation in areas where the convention was free to decide. In this sense, it was very important the initial agreement reached between the two major parties and the minorities to delay the vote of the provisions included in the basic coincidences until other issues were discussed and decided first. This averted the fear of the minority that the convention could be closed after a decision on the core was reached or, at least, that the discussion of the rest of the issues would be severely restricted. Just as the *Frente Grande* was interested in the discussion of issues like the new constitutional guarantees and mechanisms of direct popular participation, minor provincial parties wanted to influence decisions on federal issues.

In fact, it was the disposition of the major parties to reach compromises and accept different points of view on issues outside the pact between Menem and Alfonsín, what created a new atmosphere in the assembly. In this sense, the inclusion of issues affecting the structure of powers in the chapter on popular participation, was a significant event. With the support of not only radicals and peronists but also the *Frente Grande*, the convention gave the House of Representatives the power to subject controversial laws to a binding referendum without the president being able to veto either the convocation or the bill, in case of approval. The president, instead, was only authorized to call non-binding referenda.

Also important was the role of provincial parties and provincial representatives that acted beyond party lines to strengthen the federal structures of government. Provincial interests achieved important reforms that have the potential to reduce the fiscal dependence and therefore increase the political autonomy of the provinces vis-a-vis the central government. It was agreed, for instance, an automatic system of distribution of federal funds between the nation and the provinces as well as the capacity of the latter to create economic regions and enter international agreements. Added to the autonomous status of the city of Buenos Aires and the establishment of the exclusive authority of

⁸⁸ See Gelli, Ana Maria, in “Reforma Constitucional, Control Judicial y Proceso Democrático”, LA LEY, 1994-C: 291-301 and “Relación de Poderes en la Reforma Constitucional de 1994”, LA LEY 1994-D: 1087-1094.

Congress to declare federal interventions, these measures introduced an element of vertical checks on the executive that was absent from both the norms and practice of the previous constitution.⁸⁹

In spite of the tensions caused by the impossibility to change the contents of the pact between Alfonsín and Menem, it was possible to detect the emergence of a gradual climate of collaboration between the representatives of the majority and the minority. Part of this attitude was due to the open process of deliberation that took place in the different internal commissions and in the plenary sessions in general. Different participants, both those who were against and for the restrictions imposed by the pact, recognized the growing importance of dialogue in the consensual resolution of various issues.⁹⁰ As the convention moved to the last period of sessions, we can see the result of this process in the reaction of the assembly against outside pressures. Through the ministry of economy, for instance, the government exercised influence to prevent a decision on the issue of federal coparticipation and ownership of natural resources by the provinces. Menem himself, also put pressure to include issues outside the agenda, such as the extension of his first period as president (given that it was initiated six months in advance), a provision that would allow the reelection of all state governors, and a provision penalizing abortion. These maneuvers, however, were preempted not only by an alliance between the radical party and the *Frente Grande*, but also by the opposition of some peronist delegates who were either against those measures or did not want to risk the level of consensus achieved so far with the other parties.

On August 22, 89 days after its official opening, the constitutional assembly approved the final text of the constitution by unanimous vote. All the parties represented in the assembly, including those that originally criticized the pact, decided to accept a new constitutional framework as the conclusion of a collective effort. The attitude of the *Frente Grande* came at no surprise, since this party joined the radicals and peronists in most issues outside the pact. But even the rightist *Modin*, which until the end remained in the opposition in most areas, decided to join the approval of the constitution at the last minute, probably as a way to moderate its public image as an “anti-system” party. As the press and some observers later pointed out, a process originated in mutual distrust, ended up with an appearance of general consensus unknown in Argentine constitutional history.

Conclusions

In 1949, Perón imposed a new constitution without concessions to the opposition. He had enough votes in Congress to pass the reform, a strong electoral support to dominate a constitutional convention and a plebiscitarian claim to legitimacy that denied the necessity to deliberate or negotiate with the opposition. The result of this process was a constitution that behind its supposed social character permitted the indefinite reelection of the president and strengthened his powers in terms of legislative intervention, government responsibility and emergency powers. After only six years the

⁸⁹See Jones, Mark, “Evaluating Argentina’s Presidential Democracy: 1983-1995”, in Scott Mainwaring and Matthew Soberg Shugart (editors), *Presidentialism and Democracy in Latin America* (Cambridge: Cambridge University Press, 1997) p. 294

⁹⁰ For an account of this process from the perspective of an actor, see María del Carmen Feijoo, “Una Mirada Sobre la Convención Nacional Constituyente”, in *Revista de Ciencias Sociales*, No. 1, 1995: 71-98. A more favorable attitude toward dialogue as the convention moved on was also emphasized by Carlos Auyero, one of the main leaders of the *Frente Grande*. Personal interview, July 10, 1996

new constitution was abrogated by a military coup. The process of 1994 presented a somewhat different scenario. Just like Perón, Menem wanted to use a contingent popular support to obtain the possibility of reelection, perhaps also strengthening presidential powers. However, an interest in having a legitimate reform and a more balanced distribution of institutional and political resources among political actors, led him to accept a compromise in which he was unable to realize the former preference without resigning part of the latter.

The chief of cabinet created is certainly not the Prime Minister envisioned by the radical party. The president remained as chief of state and chief of government. The letter of the constitution, however, neither allows nor precludes the delegation of more extensive powers of government on the chief of cabinet, such as the appointment and dismissal of ministers. The parliamentary responsibility of the chief of cabinet is limited because, in case of dismissal, the president is not forced to appoint a new one with the support of the legislative majority. The congress, however, gained an instrument of negotiation with the president that was absent from the previous system. After his reelection in 1995, Menem appointed a chief of cabinet who has been effectively reduced to a mere subordinate of the president. In a more divided government, however, this obscure official may be transformed, albeit temporarily, into an authentic chief of government responsible to the legislative majority.

Instruments like emergency decrees or the partial promulgation of laws provide a considerable advantage to the president vis-à-vis the legislature. As a matter of historical practice, however, not only the president has *de facto* exercised these powers before the reform, but also the courts legitimated them with fewer limitations than in the present constitution. In this sense, while in the past the president used emergency decrees and the partial promulgation of laws without legislative intervention, now, the validity of these powers requires their explicit treatment by a congressional bicameral commission with plural representation. This may very well raise the costs of unilateral action by the executive.⁹¹ Something similar could be said of the delegation of legislative powers, which in the immediate past has been used with very few constraints in terms of content or time limits.

Many other institutions introduced by the reform have also the potential to transform a system of division of powers that both by design and historical practice reduced to a minimum the existence of checks on the accumulation of power in hands of the president. We can mention the greater guarantees for the impartial selection and nomination of judges, the creation of organs for congressional control of the administration, or the introduction of a mechanism of referenda that provides congress with the capacity to bypass the presidential veto. Also important has been the strengthening federal structures, like the authority of congress to declare federal intervention, the

⁹¹ According to Ana María Mustapic, there has been since the reform at least two cases of line-item veto in which the president did not proceed to the partial promulgation of the law. See, "Tribulaciones del Congreso en la Nueva Democracia Argentina: El veto presidencial bajo Alfonsín y Menem," art. cit., p. 74, note 18. With respect to emergency decrees, an interesting case was the declaration of unconstitutionality by a federal judge of the decree of emergency 2302/94 issued by president Menem after the approval of the new constitution. The court considered invalid the decree because it did not fulfill the requirements of article 99 of the new constitution, in particular, the explicit intervention of congress. Whether or not this interpretation will prevail, however, depends on decisions adopted by the Supreme Court in these cases. See, "Rivero, Manuel Ismael c/Anses s/Ejecución de Sentencia", in *El Derecho*, Vol. 162: 393-94.

political autonomy of the city of Buenos Aires or the different institutions that may increase the financial independence of the provinces vis-à-vis the central government.

All these measures have the potential to reduce the extraordinary premium placed on winning the presidency, improve the role of the opposition and create a system in the whole more adaptable to changing political circumstances. In this institutional context, the reduction of the presidential mandate from 6 to 4 years with the possibility of one immediate reelection, is also likely to have a salutary effect. While it permits a more rapid alternation in case of governmental failure, it allows for the continuity of a good administration in case the voters deem it desirable. The traditional proscription of presidential reelection, after all, was never thought so much as a check on the power of the president as a mechanism to allow alternation in power.

To be sure, whether or not the reform would help to consolidate a constitutional practice of government in Argentina cannot be predicted just from the existence of agreement among elites and a set of norms that have the potential to distribute political power in a more efficient and fair way. Part of the incentives of state actors to comply with constitutional norms come from the existence of a citizenry willing to punish the violation of constitutional rights and procedures through the vote or public opinion. This requires, in turn, some sort of internalization of the values of constitutional norms and the importance of its defence. Unfortunately, a constitution that is still perceived as a mere bargain among self-interested actors has yet to fill this void.

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