



UNIVERSIDAD
TORCUATO DI TELLA

Escuela de **DERECHO**

Revista Argentina de Teoría Jurídica
Vol. 3, N° 1 (Noviembre de 2001)

CONSTITUTIONAL GOVERNMENT AND LIBERAL FREEDOMS: LESSONS FROM ARGENTINA *

Guido Pincione

1. For purposes of this essay, I will understand “constitutionalism” as the practice of freely elected governments and separation of powers along the lines of the American Constitution. By “liberalism” I mean core civil liberties, especially those necessary to criticize government and to create and organize opposition parties. Liberal constitutionalism has been alive for a long time in Canada and the United States. Students of such regimes might therefore be tempted to conclude that constitutionalism and liberalism are somehow linked. But how exactly are those links to be analyzed in an interesting way? If we say, for example, that constitutions enjoining respect for liberal rights *must*, as a matter of definition of a “constitution,” safeguard such rights, then curtailments of such rights will have to be taken as suspensions, to that extent, of such constitutions. But, of course, this would be hardly informative to anyone interested in the problem of how to *design* constitutions whose chances of fostering liberal freedoms are highest. I shall argue that constitutional documents (such as the bill of rights) are largely ineffective in fostering liberal freedoms. These primarily depend on main political groups reaching an equilibrium favorable to liberal values. I use here the game-theoretical concept of “equilibrium,” which, roughly, points to a situation where interacting individuals have an incentive to keep behaving as they do. Equilibrium on liberal values, I shall also argue, is in turn the result of factors exogenous to the incentive structure that constitutional rules

impose on political actors. The procedural rules of a constitution, rather than its bill of rights, play a central role in promoting liberal freedoms once some such equilibrium is already in place. Or so I shall try to show. Some episodes in Argentine constitutional history will serve to illustrate these theses.

2. Here is an outline of the Argentine Constitution. Its first article defines Argentina's government as representative, republican, and federal. The executive branch is led by a president and a council of ministers who are responsible to the president. The president executes the laws enacted by Congress and participates in the legislative process through a veto power. The 1994 amendment expanded the legislative powers of the president by awarding him or her the power to enact urgent legislation, which remains valid unless Congress repeals it within six months. Such legislative powers cannot be used in matters concerning criminal law, tax law, and the budget. The 1994 amendment created a chief of cabinet, whose function is to coordinate the work of the ministers and to defend the executive's policies every month before the Congress. The president appoints the chief of cabinet, who can be removed by three-quarters of the members of Congress.

The Constitution invests legislative powers in a bicameral Congress. The Chamber of Deputies is elected by a proportional system, whereas each province elects three senators, two by the majority and one by the largest minority. Majorities in the two chambers are required to pass legislation. Congress may impeach the president. Impeachment is initiated by accusation by a two-third vote in the Chamber of Deputies. The Senate acts as jury; it may depose the president on the bases of infringement of his or her constitutional functions or common crimes, but it cannot impose punishments of any sort.

A Supreme Court and inferior courts compose the judicial branch. The President, with the consent of two-thirds of the Senate, appoints justices of the Supreme Court. Congress may impeach Supreme Court justices through a procedure similar to the presidential impeachment. Since the 1994 revision of the Constitution, a Council of Magistrates, composed by members of Congress, lawyers, and university professors, is in

* I delivered an earlier version of this essay to the Constitutional Roundtable at the University of Toronto Faculty of Law, January 25, 2002. I am grateful to that audience, and especially to Ernest Weinrib and Bruce Chapman, for useful comments.

charge of the impeachment and appointment of inferior judges.

Argentine federalism consists in a decentralized system of political decision making where provinces are the main units. The governmental structure of each province largely reproduces the federal government's separation of powers.

All of the above provisions are procedural, in the sense that they define political authorities and establish procedures for political decision making, including territorial jurisdictions. Congressional voting rules for the enactment of laws, rules for the appointment of congressmen, and federalism are procedural rules in this sense. They do not set substantive limits to legislation. The constitution defines such limits through a bill of rights that originally (i.e., 1853) resembled the American bill of rights. The 1957 amendment added some welfare rights to the classical liberal freedoms listed in the original constitution.

3. Argentine recent history suggests an important point about the relation between constitutionalism and liberal freedoms. Since the return to constitutional democracy in 1983, Argentina's freedoms rank with those of stable liberal democracies. It is tempting to believe that the Constitution played a major role in the restoration of such freedoms. I think, however, that this view is false. Successive administrations had electoral incentives to respect liberal freedoms because Argentines had strong memories of the massive violation of human rights perpetrated by the most recent military dictatorship. In order to test the role of the Argentine Constitution in protecting freedoms, we would have to ascertain how a constitutional regime would react in the face of *citizens'* demands to curtail liberal freedoms. The Peronist experience provides us with such a test.

Perón was elected President in 1946. While he built up a dictatorial regime, he arguably followed constitutional procedures. Laws regularly enacted by Congress shut down or expropriated opposition newspapers and magazines, from regulations against noise disturbance to customs laws affecting the publishing industry. Free speech in congressional debates remained largely untouched, with a few notorious exceptions. The most important of these was the eight-month arrest of Ricardo Balbín, the leader of the Radical Party opposition at the Chamber of Deputies. He was charged with "insulting" the President in a political meeting. But even here legislative procedures were followed: Balbín was dismissed and deprived of privilege against arrest by the constitutionally required two-third

vote at the Chamber of Deputies. Furthermore, elections were free, in the sense of legally unrestricted options at the pooling-booth, even though opposition parties were largely prevented from communicating their views to the electorate. A state of siege, also declared under constitutional provisions, allowed the executive to incarcerate opponents without due process of law. By 1955, at the end of the Peronist era, Perón had mounted a police state, with de facto obligatory affiliation of public employees to the Peronist Party and “civil block inspectors” to monitor and denounce the slightest signs of opposition activity. Perón was deposed in 1955 by a military coup, supported by around fifty-percent of the citizenry, in 1955.¹

How come Perón was legally able to do all those things, given that the Constitution explicitly upheld liberal freedoms? Well, Peronist congressional majorities impeached non-Peronist members of the Supreme Court (that is, four out of five), who were replaced by deferential justices. The Peronist case for impeachment had some strength. The impeached justices had upheld the validity of military takeovers in 1930 and 1943. Hipólito Yrigoyen, of the Radical Party, was overthrown in the 1930 by the military, who closed the Congress down. That was the first military interruption of constitutional government since the enactment of the Constitution in 1853. The new government, headed by General Uriburu, communicated the Supreme Court that it now held executive powers. In its response, the Court, whose membership had remained unchanged, laid down an ominous precedent for Argentine constitutionalism: it maintained that de facto executive and legislative powers enjoy provisional validity provided that the bill of rights and the judiciary were respected. The Court cited the work of a Canadian administrative lawyer called Constantineau, whose name appeared for the first time, as far as I can tell, in an opinion of an Argentine court. Apparently, Constantineau had defended the validity of administrative decisions issued by public officials who held only de facto authority. This view was known since as the “de facto doctrine,” and was going to be expansively used by successive Courts to uphold the increasing powers which several military governments claimed, including the most recent one, which as I said ended in 1983.

It might be worth mentioning that the complaint of the Peronist Congress against the Court was not that it had upheld military takeovers, but rather the way in which it did

¹ For a recent and detailed history of Peronism between 1943 and 1955, see Hugo Gambini, *Historia del Peronismo*, two vols. (Buenos Aires: Planeta, 2000 and 2001).

so. It was evident that Congress did not want to call into question the 1943 coup, also legitimized by the Supreme Court, since Perón (by then a Lieutenant General in the Army) participated in it and took advantage from it as its Secretary of Labor. From that position Perón began to organize labor unions on the Fascist model he could witness years before during a military mission in Italy. Most ironically, Congress' complaint against the Court was due to the latter's attempt at *limiting* the legislative powers of the military to those possessed by Congress under the Constitution. In short, the Peronist Congress, unlike the Court, held an across-the-board version of the *de facto* doctrine: might, according to the Peronist Congress, entailed right.²

Perón's illiberal regime lasted more than the term authorized by the 1853 Constitution, which was in force when Perón was elected in 1946. The Constitution provided that the president is elected to a six-year term and allowed no reelection. But the Peronist majority in Congress amended the Constitution in 1949 in order to allow indefinite reelection. The official rhetoric insisted that the main goal of the amendment was to award constitutional standing to a host of welfare rights—the 1853 Constitution was a classical liberal one, modeled on the American Constitution, and so it remained silent on welfare rights. Congress relied on a controversial interpretation of the procedures for constitutional amendment. Article 30 of the Constitution provided that it might be totally or partially revised by a convention elected *ad hoc*, provided that a two-thirds vote of members of the two chambers declared the need for constitutional revision. Such declaration was issued by two thirds of the members *present* in the Chamber of Deputies, which amounted to less than two thirds of the totality of deputies. The opposition argued that this fact invalidated the revision procedure, but the Supreme Court dismissed the charge. Perón was reelected in 1952 under the new Constitution. The military provisional government that deposed Perón in 1955 adduced that the 1949 Constitution was the upshot of an unconstitutional amendment procedure, and on these grounds enacted in 1956 a decree rescinding it and reinstating the 1853 Constitution. Elections to a constitutional assembly were held in 1957, leading to the incorporation of welfare rights into the Constitution. In 1958, presidential elections were held. The Peronist Party was banned from participating in these two

² See Cámara de Senadores, "Diario de Sesiones," October 31, 1946, in Jonathan Miller, María Angélica Gelli, Susana Cayuso (eds.), *Constitución y Poder Político*, vol. 2 (Buenos Aires: Astrea, 1992), esp. pp. 878 and 881. The Chamber of Deputies went as far as to argue that "there cannot be a *de facto* government because government, meaning a legal institution, must always be *de jure*." (p. 892)

elections on the grounds that it was a totalitarian party.

4. The Peronist era casts doubts on the prospects for procedural liberal constitutionalism to foster liberal freedoms. As we saw, it is plausible to maintain that Peron's curtailment of liberal freedoms followed constitutional procedural rules. Even if the 1949 revision of the Constitution was dubiously constitutional itself, the Supreme Court upheld it-and the Supreme Court was arguably the final arbiter in accordance with the Constitution. In any event, in 1949 civil liberties were already severely curtailed.

The Peronist experience suggests, then, that procedures that we tend to associate with liberal constitutionalism may yield illiberal regimes. This does not mean, however, that constitutional rules were entirely dormant. I suggest that Perón's regime would have lost public legitimacy, even among a substantial fraction of its supporters, if it had openly violated constitutional procedures. There is indirect evidence for this claim in the post-Peronist widely accepted description of Perón's regime as "constitutional." Since decades, no influential politician, including those severely persecuted before 1955, calls into question the constitutional legitimacy of Perón's regime. I submit that this view gains support from the fact that constitutional procedures are uncontestable and widely seen to be constitutive of democracy, understood in the minimal sense of majority rule. Indeed, procedural correctness and democratic legitimacy arguably reinforce each other. Politicians have an electoral incentive to respect democratic procedures: they want to enjoy democratic legitimacy. (Democratic conceptions of legitimacy were widespread when Perón burst into Argentine politics in 1943, given the experience of fraudulent elections in the Thirties.) In addition, politicians have an incentive to respect *liberal* constitutional procedures, in the minimal sense of allowing citizens the freedom to choose among different political parties. Such an incentive stems from a political culture that values pluralism. Indeed, Perón's incentive to respect electoral pluralism was especially strong, since, by the combined effect of massive redistributive policies and virtually absolute control of the media, he stood to run no electoral risks. He could safely profit from whatever sense of legitimacy people attached to such a thin, pooling-booth pluralism. His was a dictatorship that did not need to mount fake elections or formally proscribe opposition parties.

5. Since the restoration of democracy in 1983, Argentina had a good record in liberal

freedoms—this includes the Peronist administration between 1989 and 1999. If we take seriously the lesson of Peronism before 1955, this record cannot be attributed to constitutionalism, as here understood (i.e., freely elected governments plus separation of powers, in the American sense): we saw that constitutionalism had not prevented Perón from annulling liberal freedoms. I submit, however, that constitutionalism helps reinforce liberal freedoms when citizens already value such freedoms. Citizens committed to widely different fundamental political views may converge on valuing liberal freedoms, yet constitutionalism plays no causal role in bringing about such a convergence. Argentine politics after 1955 suggests the lines along which convergence on liberal values might have taken place in Argentina.

After the overthrow of Perón in 1955, there was an escalation of political violence. In 1956 the military leaders of a Peronist counterrevolution were shot. The Peronist party was proscribed until the 1973 elections. Peronist terrorist gangs had in the meantime increased their activity, each claiming to be the genuine heir of Perón's political legacy. Such gangs fought both against allegedly "oligarchic" and "imperialist" forces (mainly represented by the military and big business) and against each other, on charges of treason against the "genuine" Peronist cause. Violence was not appeased even after Perón returned from exile and was elected again president in 1973. Indeed, Perón had encouraged political violence during his exile in Spain, by declaring the major Peronist terrorist gang, called "Montoneros," a "special unit" of the Peronist "movement." After being elected again as president, Perón himself fired Montoneros from the Peronist "movement." So Montoneros returned to terrorism, this time against paramilitary forces of a Peronist administration. Fierce fights between, on the one hand, Montoneros and leftist guerrillas, and, on the other, paramilitary forces peaked after Perón died in 1974. In addition to economic crisis, widespread terrorism provided an excuse for the massive violation of human rights committed by the military dictatorship that took over in 1976. Aggression to basic civil liberties under military rule was so serious that the presidential candidate for the Radical Party in the 1983 election, Raúl Alfonsín, centered his campaign speeches on the restoration of constitutional liberties. Alfonsín won the elections. Since then, public opinion remained highly sensitive to aggressions to civil liberties, journalism playing a major role in denouncing the slightest signs of pressures against the press, police brutality, etc.

Crucially for present purposes, the unpopularity of the military dictatorship was not

mainly due to its human rights violations. The military enjoyed vast popularity in the early days of the Malvinas/Falklands war against the United Kingdom. Military defeat, coupled with economic crisis, were the main causes of the dictatorship's unpopularity. In my view, Argentines came to praise liberal freedoms only as a by-product of their hatred towards the dictatorship. It was not primarily a demand for civil liberties what politicians wanted to meet, but rather the civil unrest resulting from military defeat and economic crisis. Again, politicians of all parties benefited from stressing the illiberal aspects of the military. They stood to gain much from civil liberties, both because their activity required such liberties and because a liberal discourse allowed them to take advantage of widespread hostility to anything perceived as symbolic of a military dictatorship that led to a lost war and economic crisis.

So the relevant actors converged upon sustaining a rhetoric and practice of liberal freedoms. Indeed, both the rhetoric and the practice were self-enforcing-politicians competed for appearing as much distant from the dictatorship as possible. Thus, the liberal constitutional procedures that yielded an illiberal regime in the Forties yielded since 1983 fairly liberal administrations. This suggests that constitutionalism can reinforce an antecedent liberal culture, but, as Peronism before 1955 showed, constitutionalism cannot preserve, let alone generate, it. When constitutional procedures superimpose on widespread liberal convictions, these get reinforced and liberal democracy is rendered stable enough to overcome major crises (e.g., hyperinflation in 1989) and implement policies that are politically impossible in normal times (e.g., privatization and deregulation in the nineties). Peronism was in the forties and fifties the outgrowth of widespread authoritarian attitudes; widespread liberal attitudes sustain nowadays Argentina's liberal democracy. But, crucially, both kinds of attitudes originated in factors exogenous to constitutional provisions; Argentina's defeat in the Malvinas/Falklands war and economic crisis in the early 80s are examples of such factors.³ In short, Argentine recent history seems to substantiate the view that constitutionalism gives rise to multiple political equilibria, according to the exogenous factors at work. Just as car drivers are led, in the absence of explicit traffic rules, to either the left-hand or the right-hand equilibrium, constitutionalism generates either liberal or illiberal equilibria. In this picture, the bill of rights plays no

³ Space limits prevent me from hypothesizing about the exogenous factors contributing to widespread authoritarian attitudes in Argentina since at least the 1930s.

independent role in sustaining liberal freedoms.

6. The above explanation of the Argentine convergence upon liberal freedoms is consistent with the lesson of the Peronist era, i.e., that constitutionalism is not sufficient to block dictatorial impulses. Pre-Peronist Argentina displayed no such convergence on liberal freedoms, as distinct from (pooling-booth) pluralism. This was shown by the wide support enjoyed by Peronism itself. Constitutional procedures were then used by Perón to expand his power through illiberal measures.

We might speculate that constitutional procedures are themselves a salient convergence point of widely different political cultures. It is more likely to converge on procedures than on substance: procedures are less contestable than substantive provisions are. This suggests a procedural strategy for liberal constitutionalism: it should focus on procedures rather than on substantive protection of liberal freedoms. As I tried to show, such a strategy helps reinforce an antecedent liberal culture. But this is not the only reason to focus on procedures. Well-designed procedures help diminish the likelihood that exogenous factors undermine liberal freedoms. In particular, such procedures may help decrease the likelihood that economic crises spawn illiberal policies. Well-designed procedures can achieve this end by making such crises less likely. In the Argentine case, this is more than sheer speculation: substantial fractions of the population consented to several military takeovers out of a belief that they were the only means to counteract economic stagnation or chaos. A constitution that provides political actors with incentives to uphold a framework for mutually advantageous decisions (say, a regime of private property, including freedom to contract, and production of public goods) averts the danger of economic crises; at least, it enables people to take steps that no one sees as detrimental to his or her interests.⁴ In short, a constitution of that sort fosters political stability. The 1994 amendment made a few but significant steps in this direction. In mandating consent by two thirds of the Senate for the appointment of Supreme Court justices, it promoted both the independence of the judicial branch of government and the consensual basis of its decisions. In allowing the President to enact urgent legislation by decree at referendum of legislative approval, it helped counteract parliamentary stalemates that obstructed effective

policies to face economic crises. These constitutional improvements proved nevertheless to be far from preventing government from becoming a predatory tool in the hands of changing coalitions of politicians, bureaucrats, and special interests, as shown by the current (January of 2002) financial crisis. We can only hope that future opportunities for constitutional reform will be inspired by what I take to be the lessons of the early Peronist era in matters of constitutional design. First, liberal bills of rights can hardly discipline illiberal political cultures. Second, good constitutional procedures might deprive illiberal regimes from the sense of legitimacy attached to the observance of constitutional rules. Third and finally, good constitutional procedures might consolidate liberal cultures by making legislation work in mutually advantageous (as opposed to rent-seeking) ways.

⁴ I expand on the relationships between mutual advantage and procedural constitutional rules in “Market Rights and the Rule of Law: A Case for Procedural Constitutionalism,” unpublished.