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# An Introduction and Commentary to the Reform of the Argentine National Constitution

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# AN INTRODUCTION AND COMMENTARY TO THE REFORM OF THE ARGENTINE NATIONAL CONSTITUTION

NÉSTOR PEDRO SAGÜÉS\*

TRANSLATION BY KEITH S. ROSENN\*\*

I. THE ANTECEDENTS OF THE REFORM.....	43
II. THE OLIVOS PACT .....	44
III. LAW 24.309: CONSTITUTIONAL DEBATE.....	45
IV. ELECTION, INSTALLATION, AND FUNCTION OF THE CONVENTION.....	48
V. THE MISSING ARTICLE: LAW 24.430.....	49
VI. A CONSTITUTIONAL REFORM OR A NEW CONSTITUTION? .....	52
VII. MAKEUP OF THE CONSTITUTION: THE STATUTE OF POWER .....	53
<i>A. Autonomous Organs</i> .....	53
<i>B. Executive Branch</i> .....	54
<i>C. Legislative Branch</i> .....	55
<i>D. Judicial Branch</i> .....	56
<i>E. National, Provincial, and Municipal Relations</i> .....	57

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<i>F. International Relations</i> .....	59
VIII. THE STATUTE OF RIGHTS.....	59
<i>A. Political Rights</i> .....	60
1. The Right to Resist the Oppression From De Facto Governments .....	60
2. The Right to Vote .....	60
3. Real Equality of Opportunities for Men and Women in Candidacies-	
for Elective Office and Political Parties .....	60
4. Right to Form Political Parties .....	60
5. Right of Popular Initiative in Legislative Matters .....	61
6. Popular Consultation .....	61
<i>B. Civil Rights</i> .....	61
1. Ecological Rights .....	62
2. Rights of Consumers and Users .....	62
3. Rights to Equal Protection .....	62
4. Rights of Children and Mothers.....	62
5. Worker's Rights .....	63
6. Indigenous Rights.....	63
7. Rights to Education.....	63
8. Author's Rights.....	63
9. Emerging Rights of the International Convention.....	63
<i>C. Constitutional Guarantees</i> .....	64
1. Action of <i>Amparo</i> .....	64

2. Habeas Data.....	64
3. Habeas Corpus.....	64
IX. IDEOLOGICAL MARK OF THE CONSTITUTION.....	65
X. THE UNFINISHED CONSTITUTION.....	66

## I. THE ANTECEDENTS OF THE REFORM

There have been many proposals to modify Argentina's National Constitution of 1853/60, which is the fourth oldest constitution still in force. Many attempts were made in the Constitutional Convention of 1957 to modify the Constitution; however, those efforts were frustrated by the lack of a quorum. In 1972, the so-called Fundamental Statute, which was dictated by a de facto military government, introduced a series of constitutional amendments. These amendments are no longer in force, however, because of a curious self-destruction provision in Article 4 of the Fundamental Statute. After Argentina returned to democracy in 1983, the reform process was stimulated by various proposals presented in Congress by legislators from diverse political parties, such as the Justicialists (Peronistas), the Radicales, the Christian Democrats, and the Socialists.<sup>1</sup>

The Executive also strongly advanced constitutional reform by creating a special organization, the Council for the Consolidation of Democracy, to plan for constitutional change.<sup>2</sup> In 1986, the Council drafted a preliminary report, followed by a second report in 1987, which advanced concrete and essential suggestions, such as: transformation of the presidentialist system into a moderate parliamentary system headed by a prime minister; reducing the presidential term from six to four years, but permitting re-election; direct election of the president; constitutionalization of decrees of emergency and necessity; and reduction of

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1. See ALBERTO J. RODRÍGUEZ SAA, *REFORMA DE LA CONSTITUCIÓN NACIONAL: LEGITIMIDAD Y COHERENCIA* 19 (1994).

2. The Council for the Consolidation of Democracy was created by Decree 2446 of 1985.

the mandates of senators to six years. With the premature termination of Alfonsín's presidency in July of 1989, the Council's proposals were abandoned.

## II. THE OLIVOS PACT

A short time after the start of Menem's presidential term, diverse sectors linked to the governing party renewed the proposal of permitting the president's immediate re-election. This would require amendment of Article 77 of the National Constitution, as it only permits re-election after leaving the presidency for a term. Initially, this was the focus of the reform initiative, although subsequent objectives were added.

In 1989, an ad hoc commission of the Justicialist Party prepared a bill to initiate constitutional reform. On June 23, 1992, the entire National Council of the Justicialist Party adopted three decisions of its Committee of Jurists that while specifically rejecting changes in the dogmatic part of the Constitution of 1853/60, advocated changes in the organic sector. These changes included: direct election of senators and a reduction in their terms; extension of the legislative sessions; augmentation of the under officials subject to removal by impeachment proceedings; incorporation of duty-free zone; multi-year budgets; preservation of the environment; constitutional regulation of the parties; simplification of the legislative process; creation of the Comptroller General of the Republic and the defender of the people, known as Ombudsman; direct election of the president, with the possibility of an immediate re-election; increase in the number of ministers; an autarchy from the Judiciary; converting the Supreme Court of Justice into a tribunal of cassation; and municipal autonomy.<sup>3</sup>

In 1993, the reform process accelerated. On July 8, a majority of the Justicialist block in the Senate introduced another bill that declared the need for constitutional change. After certain failures and some retouching, the Senate approved the bill known as the Bravo Project, on October 21, 1993.<sup>4</sup> It was foreseeable, however, that the bill would not obtain the two-thirds favorable vote in the House of Representatives required by Arti-

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3. HÉCTOR MASNATTA, *HACIA LA REFORMA CONSTITUCIONAL* 200 et seq. (1993).

4. RODRÍGUEZ SAÁ, *supra* note 1, at 17, 77 et seq.

cle 30 of the National Constitution. Thus, the initiative remained blocked.

The Executive tried to overcome the problem by convoking a voluntary, nonbinding, popular consultation in order to allow citizens to express their respective opinions of the necessity and opportunity of the Constitution of 1853/60's modification.<sup>5</sup> The referendum was set for November 21, 1993. The opposition decided that the referendum was unconstitutional and put pressure on the legislators, making reform impossible.

In any event, this referendum became astonishingly unnecessary. Because of hidden contacts initiated on November 4, 1993, Carlos S. Menem and Raúl R. Alfonsín signed the Olivos Pact on November 14. This Pact resulted from a set of mutual concessions. One side agreed to permit presidential re-election while the other side agreed to a ministerial coordinator to reduce the powers of the Chief of State. The reform went to Congress.<sup>6</sup> Decree 2339 of November 15, 1993, suspended the date of the referendum. The same result occurred in the Senate.

On December 13, 1993, President Menem, acting in his role as President of the Justicialist Party, and ex-President Alfonsín, acting in his role as President of the National Committee of the Radical Civil Union, signed the Rosada Accord, which complemented the Olivos Pact. As the product of jurists from both parties, the Rosada Accord had three parts: the first established the Nucleus of Basic Understanding; the second provided the issues subject to free debate in the constituent convention; and the third dealt with the means that would be required to implement the agreement.<sup>7</sup>

### III. LAW 24.309: CONSTITUTIONAL DEBATE

The Executive presented the text of the Olivos Pact to the Chamber of Deputies which acted as the official chamber of origin and approved the Pact without change by the two-thirds vote as required by Article 30 of the National Constitution. From

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5. Decree of 2181 of Oct. 22, 1993, completed by Decree 2258 of Oct. 27, 1993.

6. LA NACIÓN, Nov. 15, 1993, at 11, 12.

7. LA NACIÓN, Dec. 14, 1993; ROBERTO DROMI, NUEVO ESTADO NUEVO DERECHO: CONSTITUCIÓN PARA TODOS, CONSOLIDACIÓN DE LAS LEYES, CODIGOS DE LA SOLIDARIDAD 271 et seq. (1994). For the text of the Olivos Pact and the Rosada Pact, see *El Príncipe*, REVISTA DE CIENCIA POLÍTICA, 1994, at 117 et seq.

there the Pact went to the Senate, which amended the bill to remove the proposal to reduce the senator's term to four years. On December 29, 1993, the Senate approved the bill by the necessary two-thirds vote.<sup>8</sup> The proposal, however, did not return to the Deputies as required by the legislative procedure prescribed by Article 71 of the Constitution. Instead, the bill was sent directly from the Senate to the Executive. The President promulgated the measure as Law 24.309 on December 29, 1993, and its publication in the Boletín Oficial occurred on the thirty-first of the same month.

This variation in legislative procedure produced the first challenge to the constitutionality of Law 24.309. Félix Lon, Florentino Izquierdo, and Alberto A. Spota took the position that the so-called Law 24.309 was simply not law.<sup>9</sup> This author questioned the constitutionality of Law 24.309 because two distinct texts were approved by the two chambers. The Senate's text differs from the one approved by the Chamber of Deputies, which never approved the final version sent to the Executive as required by Article 71 of the Constitution of 1853/60.

The argument used to refute the claim of unconstitutionality—that the bill's passage by two-thirds vote of the Senate implied a final and conclusive decision—is incorrect. It is well known that, pursuant to Article 71, the chamber in which a bill originated should have the last word if two-thirds of its members voted in favor of the original version of the bill. The Chamber of Deputies was never given this opportunity. Consequently, whenever there is a difference between the text approved by one chamber and the text approved by the other, the referral of the bill to the Executive should be a nullity under the constitutional principle of functionality and the subprinciple of efficiency. Nevertheless, in *Polino Héctor v. Executive Power*, the case that challenged the constitutionality of Law 24.309, the Supreme Court dismissed the case on the formal ground for lack of standing and, thus, did not settle the question of the law's constitutionality.

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8. HUMBERTO QUIROGA LAVIÉ, QUE PUEDE HACER LA CONVENCION CONSTITUYENTE 18 (1994).

9. See FÉLIX LON, *Reformas por unas monedas* [Reform of the Currency], LA NACIÓN, Feb. 18, 1994; ALBERTO A. SPOTA, *La reforma constitucional* [The Constitutional Reform], 16 REVISTA DEL PROFESIONAL 7 (1994).

Law 24.309 established two areas of reform. The first, called the "Nucleus of Basic Understandings," reproduced the following parts of the Olivos Pact: authorization of the immediate re-election of the president; creation of a chief for the president's Cabinet of Ministers; an increase in the number of senators to three per province; the ability to enact decrees of necessity and urgency; legislative delegation; and among other things, establishment of the Council of the National Judiciary as the organ for governance of the Judiciary. The peculiarity of this section was that it imposed the method of voting to be used at the Constitutional Convention, which required that reforms be voted on as a bloc and, thus, be approved or rejected as a closed package.<sup>10</sup>

The other section of Law 24.309 that called for constitutional reform resulted in open debate of each of the separate topics.<sup>11</sup> It referred to matters such as: relations between the Nation and the provinces; political parties; the electoral system; municipal autonomy; additional powers for the public ministry; powers of the Executive and Legislative; rights of aborigines; consumer rights; free competition; and an ombudsman.

The potential area for constitutional reform was quite large. If the two sectors set out in Law 24.309 were added together, it was possible for the constituent to change ninety clauses, which amounted to fifty-five percent of the 1853/60 text.<sup>12</sup>

Law 24.309 included other provisions. Article 6 prevented the Convention from changing matters whose reform was not called for under penalty of nullification. Article 7 prohibited modification of the declarations, rights, and guarantees contained in the First Part of the National Constitution. The Convention was to meet in the cities of Santa Fe and Paraná and finish its task in ninety days after the initial session.<sup>13</sup> The members of the Convention were to be elected by a system of proportional representation.<sup>14</sup>

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10. Ley 24.309 [Law 24.309], art. 285. See also ALFREDO E. MOONY, LA REFORMA CONSTITUCIONAL 1994: ANÁLISIS DEL PACTO DE OLIVAS 21 et seq. (1994).

11. Ley 24.309, art. 3.

12. Néstor P. Sagüés, *La superficie de la reforma constitucional* [The Area of the Constitutional Reform], LA NACIÓN, Apr. 11, 1994.

13. Ley 24.309, art. 12.

14. *Id.* art. 10.



Some considered Law 24.309 unconstitutional because of its imposition on the Convention of a regimen of voting on a closed package of reforms. Pedro J. Frías referred to the Convention as the "Closed Convention,"<sup>15</sup> while Miguel Padilla called it the "Imprisoned Convention."<sup>16</sup> The bulk of the specialists deemed Congress use of its convocatory power unconstitutional as an invasion of the constituent power of the Convention.<sup>17</sup> This was also our opinion as to the voting technique prescribed by Law 24.309, although with the clarification that the Constitutional Assembly could adopt on its own voting structure in which case the unconstitutionality would be purged. On the other hand, Roberto Dromi believed the procedure set out in Law 24.309 to be totally constitutional.<sup>18</sup>

#### IV. ELECTION, INSTALLATION, AND FUNCTION OF THE CONVENTION

The election of the delegates took place on April 10, 1994, in accordance with Decree 2754 of 1993. The two parties of the Olivos Pact obtained close to fifty-eight percent of the validly cast votes; however, because of a high degree of abstention and blank votes, this fifty-eight percent figure signified only forty percent of the registered electorate. The number of constitutional delegates, according to the National Electoral Directorate, was 303. The Justicialist Party received 136; the Radical Civil Union, 75; the Frente Grande, 32; the Modín, 20; and the remainder distributed among the rest of the parties.<sup>19</sup> No party, therefore, had

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15. Pedro J. Frías, *La convención-cerrojo* [The Closed Convention], LA LEY, 1993-E-1247.

16. Miguel M. Padilla, *Una convención Prisionera* [An Imprisoned Convention], LA NACIÓN, Jan. 22, 1994.

17. These specialists included Jorge R. Vanossi, Alberto A. Spota, Félix Lon, Bidegain, Pedro J. Frías, Miguel M. Padilla, Gregorio Badeni, Linares Quintana, Aja Espil, Iván J. Cullen. See Iván J. Cullen, *Es la Convención y no el Congreso la que hace la reforma* [It is the Convention and not the Congress which Makes the Reform], LA CAPITAL (Rosario), Jan. 14, 1994; ACADEMIA NACIONAL DE CIENCIAS MORALES Y POLÍTICAS, LA NATURALEZA JURÍDICO-POLÍTICA DE LA CONVENCIÓN REFORMADORA Y LAS RESTRICCIONES CONTENIDAS EN EL ART. 5 DE LA LEY DECLARATIVA NO. 24.309, 9 et seq. (1994); See Frías, *supra* note 15; Padilla, *supra* note 16; ALBERTO NATALE, COMENTARIOS SOBRE LA CONSTITUCIÓN: LA REFORMA DE 1994 at 8, 11 (Depalma ed., 1995).

18. Roberto Dromi, *La Reforma Constitucional: Más y Mejor República* [The Constitutional Reform: More and Better Republic], in REFORMA CONSTITUCIONAL 80 (Ciudad Argentina ed. 1994).

19. See LA NACIÓN, Apr. 12, 1994 (with respect to the distribution of the banks and the electoral result). See also Ministerio del Interior, Dirección Nacional Electoral, Apr.

by itself an absolute majority, nor could any produce its own quorum to hold a meeting.

The expenses of the reform were calculated at approximately one hundred million dollars. In rounded numbers, this amounted to \$25,000,000 for the election, \$38,500,000 in contributions to the parties, \$15,000,000 in municipality refractions, \$14,500,000 in salaries for the delegates and their advisors; \$1,200,000 for mobilizing expense, and \$4,500,000 for security.<sup>20</sup> This is, perhaps, the highest amount spent to modify a constitution.

The Assembly began its session on May 25, 1994, and concluded on August 22, 1994. For the most part, the Assembly operated with its own system of regulations for voting on the package as provided for in the convocatory law, in which the planned consensus was in the Olivos Pact. Senator Eduardo Menem, then interim president of the Senate, was elected president of the Assembly. Except for the initial meetings, the closure, and the committee meetings, the Convention operated practically in Santa Fe. The new text was published in the *Boletín Oficial* of August 23, 1994 and contained a correction of errors. The reform was sworn to on the Convention's last day in the Palace of San José in Concepción del Uruguay, Entre Ríos.

## V. THE MISSING ARTICLE: LAW 24.430

Although not of great consequence, one should note that in the first session of August the Constitutional Convention approved for incorporation into the continuation of Article 68 of the Constitution of 1853/60, the following text: "Bills that modify the electoral regime and the regime of political parties must be approved by an absolute majority of all members of the Chambers."<sup>21</sup>

This new rule, which originated in the section of the Olivos Pact designated for package treatment in Article 2(L) and Article 5 of Law 24.309, suffered slight modification by the Assembly. It was designed to secure that certain laws vital to democracy would have an extraordinary degree of agreement or consensus

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14, 1994, copia fotostatica (Minister of the Interior, National Electoral Directorate, Apr. 14, 1994, photocopy).

20. LA NACIÓN, Jan. 23, 1994.

21. See the text of the new rule, in the National Constitutional Convention, R-TC-6/94, 12 photocopied edition with the correspondent sanctions of Aug. 1, 1994.

from the political class and would not be the product of just one party.

This Article literally "disappeared" and was not included in the renumbered and harmonized text that the Convention definitively approved on August 22, 1994, as required by Article 5 of Law 24.309, nor did it appear in the edition of the Boletín Oficial of the next day or the version sworn to on August 24. Although some disagree, this omission apparently happened because of an error. As to the fate of the "lost Article," as it came to be called, different theories were formulated. Some considered the "lost Article" to be in force because it was approved on August 22 and never revoked. They viewed it as only a formal function of the arranging the text of August 22 to incorporate the approved rules. Others took the position that the "lost Article" was in force as a result of a resolution of the Convention on August 19 which provided for the validity of all that the Convention had approved up to the moment of its closure. Since nothing else had been provided for, the president of the Assembly had the responsibility for arranging for the Article's publication in the Boletín Oficial or through another channel.<sup>22</sup> This author believes that the seventeenth transitory clause of the Constitution is conclusive when it says: "The constitutional text voted upon and sanctioned by this Constitutional Convention replaces that in force up to now." This text does not include Article 68 bis, and, therefore, the "lost Article" is not integrated into this constitutional document. This transitory provision was approved about mid-day on August 22. If, however, one claims that Article 68 bis<sup>23</sup> is valid on the theory that it went into force at the moment

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22. See Iván J. Cullen, *Cartas al País* [Letters to the Country], DIARIO "CLARIN," Oct. 11, 1994; Rodolfo Ponce De Leon, *El Artículo Desaparecido de la Constitución* [The Disappeared Article of the Constitution], DIARIO RÍO NEGRO, Oct. 19, 1994; Miguel A. Ortiz Pellegrini, *Omisión del Texto Aprobado por la Convención Constituyente* [Omission of the Text Approved by the Constitutional Convention], in CONSTITUCIÓN DE LA NACIÓN ARGENTINA 47 (Córdoba, Lerner ed., 1994). For a further account of the lost Article 68 bis, see LA NACIÓN, 9/194. See also Miguel Padilla, *La Reforma de la Constitución Nacional* [The Reform of the National Constitution], in CONSTITUCIÓN DE LA NACIÓN ARGENTINA 27 (Abeledo-Perrot ed., 1994).

For those claiming that Article 68 bis kept its validity, the problem was to be resolved through distinct means, according to the diverse authors: decision to publish it (the Article) was of the president of the Constitutional Convention, of the president of the Nation as responsible of the Boletín Oficial, by way of the dictated law through Congress or decision of the office of judge, etc.

23. Others refer to it by different numbers. For example, see the edition of the Argentine Constitution published through the daily "Pagina 12," page 18 and 19 compiled by

of closure on the afternoon of August 22 in accordance with the resolution of August 19 and, thus, is not governed by the seventeenth transitory clause, the Article nevertheless failed to go through the entire legislative process as the President of the Convention never ordered its publication.

In any event, Congress passed Law 24.430,<sup>24</sup> whose first article ordered publication of the "official text" of the National Constitution, which is what transcribes the Constitution. This text now includes lost Article 68 bis, as Part 2(a) of Article 77.

In substance, the adopted solution is legitimate, given the intrinsic value of the precept in question and the original intention of the Constituent Assembly to approve it, but this is a dangerous practice for the future. In fact, the Constitution was reformed by a law<sup>25</sup> in which the Congress, with the help of the Executive who did not veto it, exercised constituent powers by re-touching the work of the Convention. The precedent established by Law 24.430 is therefore pragmatic but unfortunate because it provides an opportunity for Congress in the future, under the pretext of editing an "official text," to remodel the constitutional document through adding, removing, or altering subparagraphs or articles. This solution as customary rule, however, was valid with respect to the formal insertion of the "lost Article" into the body of the Constitution via a branch of government rather than by the Constituent Assembly, because it was provided for constitutionally.

Thus, Law 24.430 conflicts with the seventeenth transitory clause of the Constitution because what replaces the constitutional text previously in force is the text approved by the Convention, not what is provided for by Congress. Despite what has been said, the former Article 68 bis, now Article 77 Part 2(a), is obeyed by the operators of the Constitution and has generated a

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Guillermo R. Navarro, who estimated that the correct actual number would be Article 77 bis.

24. Sanctioned Dec. 15, 1994; promulgated Jan. 3, 1995; published, *Boletín Oficial*, Jan. 10, 1995.

25. See Editorial, *LA NACIÓN*, Dec. 24, 1994. See also Victor Bazán, *Qué Será del Artículo Que No Fue?* [What Will be of the Article That Was Not There?], in 1 *ENTRE ABOGADOS* 20 (San Juan 1995). In exchange, maintaining that "if the norm (article 68 bis) had not been included in the ordered text of the Constitution, someone ought to make up for the omission which the Commission committed—that when it was discovered it was already dissolved," and that this inclusion through law is an "act of administrative nature." ALBERTO NATALE, *COMENTARIOS SOBRE LA CONSTITUCIÓN* 28 (1995).

useful customary constitutional law.<sup>26</sup>

## VI. A CONSTITUTIONAL REFORM OR A NEW CONSTITUTION?

In comparison to the prior constitutional text, which numbered 110 articles, the new text has 129 articles and also includes seventeen complementary rules. This signifies an increase of thirty-three percent in the number of articles. Measuring the increase in the complete document, taking into account that the new articles commonly have been given an edit that is far broader than the brief and concise language of the Constitution of 1853/60, the Constitution increased quantitatively close to seventy percent.

The outward appearance of the Constitution remains similar. However, a second Chapter entitled "New Rights and Guarantees" was added to the First Part. In the Second Part, the section dealing with the Legislature added two chapters dedicated to the "Auditor General of the Nation" and an "Ombudsman." Another new section also emerged addressing the "Public Ministry" (a kind of fourth power or extra-power). In addition, the Convention produced a series of qualitative changes in the structure of the three branches of the State. It also made qualitative changes in the area of personal and social rights. In summary, the approved text of August 22, 1994, does not establish whether the text is a new Constitution, as many claim, or an amendment of the Constitution of 1853/60.

To be sure, the Constituent Assembly, itself, promoted such doubts. On the one hand, in the transitory provisions of the reform, the second clause speaks of the "time to sanction *this* Constitution" and the sixteenth clause speaks of provincial officials "swearing to *this* Constitution." To remove doubts, the fifteenth clause mentions issuance of a law "within a period of two hundred and seventy days from the entry into force of *this* Constitution." On the other hand, the ninth clause of same transitory clause uses the words "this reform," as do the eleventh, thirteen,

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26. See Néstor P. Sagüés, *Reflexiones Sobre un Fantasma Constitucional* [Reflections About a Constitutional Ghost], LA NACIÓN, Oct. 8 1994; La situación jurídica del artículo 68 bis de la Constitución nacional [The judicial situation of article 68 of the National Constitution], E.D., Nov. 8, 1994; Editorial, EL PAÍS (Montevideo), Dec. 26, 1994. Gregorio Badeni takes the position that Article 68 bis is invalid. See Gregorio Badeni, LA NACIÓN, Sept. 1, 1994.

and the sixteenth clauses.

This juridical schizophrenia is not merely academic. If the changes produced in 1994 signify merely a reform, those in charge of the Constitution ought to repaginate not only the letter, but also the spirit of the traditional Constitution of 1853/60. Moreover, the ideological dealing of the latter ought to influence the interpretation and functions of the recent norms. If, however, Argentina has a new constitution, the preceding is not relevant. It will be the recently created text and its philosophy that will illuminate the sections inherited from the old but prestigious constitution.

One datum that somewhat clarifies the problem was the formula for the oath rendered by the highest authorities of the country on August 24, 1994, to the Constitutional document. When the oath was rendered, they made explicit reference to the Constitution of 1853 with the reforms of 1860, 1866, 1898, 1957, and 1994. This would seem to put an end to this question. Moreover, Law 24.430 ordered publication of an "official text" of "the National Constitution (sanctioned in 1853 with the reforms of the years 1860, 1866, 1898, 1957, and 1994)."<sup>27</sup> Therefore, this is a constitutional reform and not a new Constitution.

## VII. MAKEUP OF THE CONSTITUTION: THE STATUTE OF POWER

The present Constitutional text has important changes relating to the design of power that deviate from the previous scheme. While the text maintains the representative republican and federal structure based upon a presidential regime, certain novelties have appeared.

### A. *Autonomous Organs*

In the first place, autonomous organs, such as the Public Ministry emerged. According to new Article 120, the Public Ministry is "independent with functional autonomy and financial self sufficiency". Its function is to promote the operation of justice in defense of legality and the general interests of society. The Procurator General and the General Defender head the

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27. Ley 24.430, art. 1.

Ministry. Further, the Council of the National Judiciary, whose authority is located inside the chapter concerning the nature and duration of the Judiciary<sup>28</sup> appears to be an autonomous entity, for it does not depend on the Supreme Court of Justice.

### *B. Executive Branch*

Secondly, changes emerged in the organization of each branch. One of the most promoted changes was the length of the presidential term. This change reduced the term to four years, but allows for the possibility of re-election for one consecutive term.<sup>29</sup> Another change modified the regime of electing the president and vice-president. Instead of using the electoral college, these offices are elected directly by citizens.<sup>30</sup> To reach the presidency, one must obtain more than forty-five percent of the validly cast votes.<sup>31</sup> Alternatively, a successful presidential candidate need obtain only forty percent of these votes, if a difference greater than ten percent of the total of validly cast votes exists, over the formula that follows the number of votes.<sup>32</sup> Otherwise, a second round of voting must occur with voters deciding between the two candidates who received the highest number of votes in the first round.<sup>33</sup> The reform of 1994 eliminated the requirement that the president be Catholic and permitted the presidential oath to respect the religious beliefs of the Chief of State.<sup>34</sup>

One of the showpieces of the reform was the creation of the position of the "Chief of the Cabinet of Ministers." The responsibilities of this position require overseeing the general administration of the country, issuing regulations, naming employees of the Administration, executing the budgetary law, among other things.<sup>35</sup> The Chief of the Cabinet is politically responsible to the National Congress,<sup>36</sup> which can remove him by an absolute ma-

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28. ARG. CONST. art. 114 (amended 1994).

29. *Id.* art. 90. To be re-elected to a new term of office, a president who had served two consecutive terms must leave office for another term. *Id.*

30. *Id.* art. 94.

31. *Id.* art. 97.

32. *Id.* art. 98.

33. *Id.* arts. 96-98.

34. *Id.* arts. 89 and 93.

35. *Id.* art. 100(1), (2), (3), (7).

36. *Id.* art. 100.

jority of the votes of the members of each chamber.<sup>37</sup> This brings Argentina closer to a parliamentary system. But the president, acting alone, has discretion to nominate and remove the Chief of the Cabinet.<sup>38</sup> In fact, the Chief of the Cabinet may acquire a strong political stature or may wind up becoming only an assistant to the president, as occurred in Perú, whose Constitution of 1979 appears to have started this institution. Considering the jurisdiction accorded to him by the Constitution, the Chief of the Cabinet may be depicted as a giant with feet of clay as his tenure depends on the president's discretion.

The Convention of 1994 also confronted the controversial themes of decrees of necessity and urgency, constitutionally regulating these measures. These measures were permitted, but not in matters involving crimes, taxes, elections, or political parties.<sup>39</sup> Such measures must be submitted within ten days for consideration by the Permanent Bicameral Commission of the Congress, which in turn must send a report as to how they should be treated to each chamber.<sup>40</sup> Then a law specially sanctioned by an absolute majority of all members of each chamber will decide what occurs.<sup>41</sup>

### C. *Legislative Branch*

In this area, the reform planned a third senator for each province and for the city of Buenos Aires, elected by popular vote for a period of six years.<sup>42</sup> Two senators are elected by the party with the greatest popular vote, and one senator by the party with the second highest vote.<sup>43</sup>

The legislative process was fortunately shortened through the possibility of approving the particulars in parliamentary committees, bills approved in general by a chamber,<sup>44</sup> or reducing the number of passes of a bill from one house of Congress to the other.<sup>45</sup> The reform also provided for the enlargement of the or-

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37. *Id.* art. 101.

38. *Id.* art. 99(7).

39. *Id.* art. 99(3).

40. *Id.*

41. *Id.*

42. *Id.* arts. 54 and 56.

43. *Id.*

44. *Id.* art. 79.

45. *Id.* art. 81.



dinary session, which now occurs from March first to November thirtieth,<sup>46</sup> and placed important restrictions on the delegation of legislative powers to the president, now solely viable in matters of administration or public emergency for a determined period.<sup>47</sup>

Two parallel organs for the control of the Executive were created: the Auditor General of the Nation and the Ombudsman.<sup>48</sup> The latter has an impressive array of functions that are difficult to perform such as the defense of human rights as well as defense of other such rights, guarantees, and interests protected by the Constitution and laws and against acts or omissions of the public administration.

#### *D. Judicial Branch*

In the area of the judiciary, fortunate modifications were made in the selection of judges beneath the Supreme Court. The reform establishes a preselection mechanism through public competition run by the Council of the National Judiciary.<sup>49</sup> The Council sends three candidates to the Executive, who chooses one and then forwards that name to the Senate for approval.<sup>50</sup>

The debut of the Council of the National Judiciary has been spectacular. It appears to be a super-council, whose members come from distinct sources such as the political powers, lawyers, academics, scientist, and judges. Besides the preselection of judges, the Council serves as the organ for the governance of the Judiciary. It administers its funds, exercises disciplinary powers over judges, and issues regulations relating to judicial organization.<sup>51</sup> The Supreme Court, in turn, is the big loser. It lost the power to direct the Judiciary, a measure almost unimaginable in the Argentine law, but which is understandable only on the basis of the vulnerable situation that afflicts it. The reform also made the Council of the National Judiciary the jury of impeachment, along with plural integration, for the removal of the subordinate federal judges of the court.<sup>52</sup>

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46. *Id.* art. 63.

47. *Id.* art. 76.

48. *Id.* arts. 85 and 86.

49. *Id.* art. 114.

50. *Id.*

51. *Id.*

52. *Id.* art. 115.

The Constitution leaves the specific structures of the Council of the National Judiciary and the jury of impeachment, as well as the determination of their powers, to the enactment of a special law.<sup>53</sup> This is, in actuality, the secret to the success or failure of these bodies and the key to their independence or indirect submission to Congress, the president, or the political parties. Only the future will tell what form these bodies will take.

The selection of the justices of the Supreme Court was slightly modified by the requirement that the senatorial confirmation be in a public session with two-thirds of the senators present.<sup>54</sup> This same clause provides for the loss of tenure of all federal judges after their seventy-fifth birthday, although they may continue in their functions if renominated for a five year renewable term.<sup>55</sup> This amendment, introduced surreptitiously at the end of the sessions of the Constitutional Assembly, had no clear or convincing explanation. The amendment has been the subject of commentary questioning its true intentions.

### *E. National, Provincial, and Municipal Relations*

The federal system was transformed by permitting the provinces to create regions for economic and social development and to welcome international agreements under certain conditions.<sup>56</sup> The city of Buenos Aires was granted governmental autonomy with both legislative and jurisdictional powers and an ability to directly elect its "chief of government,"<sup>57</sup> today a superintendent. The city of Buenos Aires can also promulgate its own charter or quasi-constitution, known as the reform of the "organizing statute." Nevertheless, Article 129 also provides that the federal government will guarantee by law "the interests of the National State," with Buenos Aires as the Capital of the Republic. This means the city will define itself as "a guided autonomous entity," a kind of third genre between a province and a common county.<sup>58</sup>

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53. *Id.* art. 114.

54. *Id.* art. 99(4).

55. *Id.*

56. *Id.* art. 124.

57. *Id.* art. 129.

58. The city of Buenos Aires approved its own Constitution on October 6, 1996. Previously, the National Congress enacted Law 24.558, which protects federal interests in the city of Buenos Aires. There is a significant problem in harmonizing their two legal norms.

This reform left a grave gap because it does not clarify *who* determines the legislative and jurisdictional powers that Article 129 recognizes for the city of Buenos Aires. It is not absurd to think that Convention dictates the "organizing statute" of the city as provided for in the last part of Article 129. But it could be the National Congress given that it is responsible for protecting "the interests of the Nation, while the city of Buenos Aires is the capital of the Nation," as Article 129 provides. Moreover, Article 75(30) empowers Congress with "exclusive legislation in the territory of the Nation's Capital."

The general controversy stems from the constitutional document, which is unclear in Article 129 and even contradictory in Article 75(30). The interpreters and the administrators of the Constitution must work out useful and just answers that will make compatible and more precise what the Constitution's rules are.

In the inevitable controversy of this subject, recognizing the requirement to protect the authentic and legitimate "interests of the Nation" and taking into account genuine circumstances of time and convenience, Congress is well suited to demarcate the legislative and jurisdictional powers of the city of Buenos Aires with the opportunity of judicial review if the regulation is clearly unreasonable. If there is doubt in this matter, in principle, the criterion of the federal state ought to prevail, consistent with Article 75(30). Finally, the organizing statute of the city ought to control the exercise of the city's own legislative and jurisdictional powers.<sup>59</sup>

Article 75(2), which deals with the powers of Congress, placed into the Constitution a fiscal regime of coparticipation for indirect and direct taxes, the latter for only a limited time. This regime is determined by the federal government, based upon a law establishing a compact between the Nation and the provinces, approved by an extraordinary majority; however, the precise rates of distribution are not set forth.<sup>60</sup> The Constitution sets out certain directives about how to diagram the coparticipation, such as objective criteria for division, equity, solidarity, and

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59. For discussion of this subject, see HORACIO D. CREO BAY, *AUTONOMÍA Y GOBIERNO DE LA CIUDAD DE BUENOS AIRES* (1995).

60. ARG. CONST. art 75(2) (amended 1994).

equivalent degree of development.<sup>61</sup> It also includes a draft of a federal fiscal organism to supervise the execution of jurisdictional transfers and reassignments of resources, along the lines of Article 75, subparagraph two.<sup>62</sup> All of them, however, depend on later implementation.

With respect to the rest of the municipalities of the country, the recent amendment guarantees their institutional, political, administrative, economic, and financial autonomy.<sup>63</sup> This is so emphatically enunciated that one expects each province will closely adhere to this proportion in concrete terms.

### *F. International Relations*

An important change has been the status of treaties, for the new text accords constitutional rank, under certain conditions, to certain human rights conventions.<sup>64</sup> This does not signify, however, that these conventions are formally integrated into the Constitution, even though they are *valued* like the Constitution. The Constitution authorizes compliance with certain treaties through transference of powers and jurisdiction to supranational organizations.<sup>65</sup> As a general rule, all treaties are superior to a law.<sup>66</sup>

## VIII. THE STATUTE OF RIGHTS

As previously mentioned, Article 7 of Law 24.309, which convoked the constitutional reform, prohibited the Convention "from modifying any of the declarations, rights and guarantees" of the First Part of the Constitution. Nevertheless, the same law proposed free debate in matters such as preservation of the environment, defense of the consumers and borrowers, habeas corpus and *amparo*, and other points that refer to theoretically untouchable rights and guarantees. Moreover, the convoking law provided for the enactment of a "Second Chapter to the First Part of the National Constitution."<sup>67</sup>

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61. *Id.*

62. *Id.*

63. *Id.* art. 123 (amended 1994).

64. *Id.* art. 75(22).

65. *Id.* art. 75(24).

66. *Id.* art. 75(22).

67. *Ley* 24.309, art. 3.

The only way to harmonize the internal directives of the law was to interpret it as dealing with themes concerning rights and guarantees, whose consideration invited *complementing* but not *prejudicing* the rights and guarantees provided for in Articles 1 through 35 of the Constitution of 1853/60. This is precisely how it was done. Below is a summary of the principal contributions following the traditional classification of rights and guarantees.

### A. *Political Rights*

In this section, the following new forms were declared:

#### 1. **The Right to Resist the Oppression From De Facto Governments**

This right is declared in new Article 36(4).

#### 2. **The Right to Vote**

Voting must be universal, equal, secret, and obligatory.<sup>68</sup>

#### 3. **Real Equality of Opportunities for Men and Women in Candidacies for Elective Office and Political Parties.**

This section also legitimizes "positive actions,"<sup>69</sup> to protect women against segregation and secondary positions, inviting what is sometimes called "reverse discrimination" or privileged treatment for marginalized groups. Norms like Law 24.012, which provide feminine quotas on the electoral ballots, now have an express constitutional basis.

#### 4. **Right to Form Political Parties**

This must be within this Constitution and in conformity with the democratic organizational and operative guidelines, the representation of minorities and the diffusion of ideas.<sup>70</sup> Political

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68. ARG. CONST. art. 37 (amended 1994).

69. *Id.*

70. *Id.* art. 38.

parties now can receive economic support from the State,<sup>71</sup> a measure that is certainly debatable. Nevertheless, the parties should publicize the origin and destiny of their funds.

### 5. Right of Popular Initiative in Legislative Matters

In its implementing legislation, Congress cannot require more than three percent of the national electoral census to call for an initiative.<sup>72</sup> But such initiatives cannot be called with respect to laws dealing with constitutional reforms, treaties, taxes, budgets, and criminal rules,<sup>73</sup> a prohibition that has little support and that appears to distrust the abilities of the electorate to promote the creation of legal rules.

### 6. Popular Consultation

The new text contemplates two types of actions of the community in taking of political decisions. One is popular approval of bills, and the other is a simple, nonbinding consultation that can be called for by either the Executive or the Congress.<sup>74</sup>

#### *B. Civil Rights*

This area has many new prescriptions, some of them coming from convoking Law 24.309, and others from reforms to the "organic" sector of the Constitution, with respect to the structuring of the powers of the State. For example, when modifying the powers of Congress in the new Article 75, with certain assumptions that "contraband norms" existed and under the pretext of correcting constitutional rules for which the Constituent Assembly had been called, the Assembly modified rights that were not included in the reform plan.

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71. *Id.*

72. *Id.* art. 39.

73. *Id.* A recent statute, Law 24.747, regulates the right of popular initiative.

74. ARG. CONST. art. 40 (as amended 1994).

## 1. Ecological Rights

Article 41 assures the right to a clean environment. It suppresses damage to the environment, promotes rational utilization of natural resources (including its protection for future generations), and prohibits dangerous residues from entering national territory.

## 2. Rights of Consumers and Users

These rights were protected by Article 42. They include health, security, economic interests, true information, free elections, conditions of dignified treatment, defense of free competition, control of monopolies, and control of the quality and efficiency in rendering public services.

## 3. Rights to Equal Protection

The new text underlined the thesis of real equality in opportunities and treatment, generally for children, women, the elderly, and the handicapped.<sup>75</sup>

## 4. Rights of Children and Mothers

Besides the right to equal treatment, Article 75(23) creates a special protection for the unsupported child. This right extends from pregnancy to the end of elementary school, and for the mother, during the pregnancy and the period of breast-feeding.<sup>76</sup> The rule acquires a singular transcendancy because it shows the constitutional protection of the person from birth, and the consequent constitutional condemnation of discretionary or free abortion.

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75. *Id.* art. 75(23).

76. *Id.*

## 5. Worker's Rights

The principles of social justice were underlined in a special way as to the professional formation of employees and the politics of job creation.<sup>77</sup>

## 6. Indigenous Rights

A specific clause recognizes the ethnic and cultural pre-existence of the aborigines and, among other things, their identity, bilingual education, the legal personality of their communities, and their possession and communal property of the lands which they have occupied from ancient time.<sup>78</sup>

## 7. Rights to Education

Here too, the doctrine of equal opportunities and condemnation of discrimination was reiterated. It favors participation of the family and society in the education process.<sup>79</sup> It also favors free and equal state institutions, as well as autonomy in national universities.<sup>80</sup>

## 8. Author's Rights

The final part of Article 75(19) confers specialized tutelage to the freedom of creation and circulation of the works of authors as well as to artistic patrimony and to cultural and audiovisual spaces.

## 9. Emerging Rights of the International Conventions

One has to add the complex individual and social rights set forth in the documents of international law mentioned in Article 75(22) of the Constitution, and those that will be approved in the future, which will also have constitutional rank. The text of these treaties, conventions, and declarations are at least triple

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77. *Id.* art. 75(19).

78. *Id.* art. 75(17).

79. *Id.* art. 75(19).

80. *Id.*



that of the Constitution.

### C. *Constitutional Guarantees*

The new Article 43 of the Constitution explicitly deals with three guarantees.

#### 1. Action of *Amparo*

The *amparo* was designed to combat arbitrary and illegal acts of governmental authorities or private actions injurious to rights protected by the Constitution, laws, or treaties.<sup>81</sup> As a new development, the Constitution properly authorizes in the *amparo* proceeding a declaration of unconstitutionality of the norm on which the injurious act was based.<sup>82</sup> It also gives standing to anyone affected, including the Ombudsman and certain associations, to bring an *amparo* action for protection of diffuse interests, free competition, users, and consumers.<sup>83</sup>

#### 2. Habeas Data

Article 43 also permits this variation on *amparo*, designed to provide access to information held in public or private registries or data banks. The action allows reports of such information so that it can be corrected, reserved, updated, or excluded, in cases of falsity or discrimination.<sup>84</sup> This variation does not affect the secrecy of the sources of journalists.<sup>85</sup>

#### 3. Habeas Corpus

Lastly, Article 43 gives express constitutional recognition to habeas corpus, including application to the forced disappearance of persons, as well as to the more extensive forms of relief: reparative, preventive, corrective, and restrictive.<sup>86</sup>

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81. *Id.* art. 43.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See Jorge R. Vanossi, *El hábeas corpus no puede ni debe contraponerse a la libertad de los medios de comunicación* [Habeas corpus neither can nor should it be able to

## IX. IDEOLOGICAL MARK OF THE CONSTITUTION

The doctrinal text of the Constitution deserves separate reflection. It is well known that the 1853/60 Constitution had a multiple ideological cast blending liberal-individualist ingredients, Christian traditions, and after the reform of 1957, its own data of the social state of law.

The reform of 1994 added "third generation" rights (subsequent to liberal constitutionalism and social constitutionalism, such as those referring to ecology and to users) and accentuated the social bent of the Constitution. As indicators of this last route, one should mention the express assertion of the principle of social justice<sup>87</sup> and the repeated references to real equal opportunities.<sup>88</sup> These imply a very valuable theme for the social state of law, overshadowing the liberal posture of formal equality "before the law" set out in Article 16. Certain policies are plainly social, such as the promotion of jobs and training of the work force,<sup>89</sup> while others insinuate state protagonisms in the control of "natural and legal" monopolies or in taking care that there is no distortion in the markets.<sup>90</sup> The clauses, which protect consumers and are contained in Article 42, guard official actions to intervene and regulate the behavior of supply and demand, as long as the actions are otherwise legitimate. Similar conclusions can be drawn from the norms that promote the "national economic productivity" and "human development."<sup>91</sup> Other examples of social democracy, such as the semidirect forms of popular activity through referendums or consultations, are based upon Articles 39 and 40.

As to those clamoring for the dismantling of the social state,<sup>92</sup> the Constituent Assembly took the opposite position, at least according to the text approved. It maintained the social

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offset the liberty of the means of communication], E.D., Sept. 13, 1994; Néstor P. Sagüés, *Amparo, hábeas data y hábeas corpus en la reforma constitucional* [Amparo, habeas data and habeas corpus in the constitutional reform] L.L., Oct. 7, 1994.

87. ARG. CONST. art. 75(19) (amended 1994).

88. *Id.* arts 37, 75(19) and (23).

89. *Id.* art. 75(19).

90. *Id.* art. 42.

91. *Id.* arts. 41 and 75(19).

92. See RAMÓN GARCÍA COTARELO, *DEL ESTADO DE BIENESTAR AL ESTADO DE MALESTAR* 1986. PEDRO PLANAS, *EL ESTADO MODERNO: UNA NUEVA BIOGRAFIA* 105 et seq. (1993).

state, adopting provisions like defending the valor of money<sup>93</sup> and marking the general budget of calculations and resources in conformity with "the general program of the Government and to the plan of public investments."<sup>94</sup> Such a robust ideological position rebounds, in the interpretation of all the provisions of the Constitution, in the resolution of its doubts and in the integration of its gaps.

It is interesting to note that the political profile of the Constitution also underlines its democratic nature. The 1853 text did not categorically include the concept of democracy; which now expressly appears in Article 36 as well as condemns *coup d'état* and unjust enrichment at the expense of the treasury, announces the persistence of the validity of the Constitution despite an eventual de facto regime, and postulates a law of public ethics. It also appears in Article 38 with respect to political parties, Article 75(19) which requires education according to democratic values, and Article 75(24) relating to international treaties that respect the democratic order. Contrary to the notion of democracy is the requirement that one must possess 2,000 annual income of hard pesos in order to be a senator, president, or justice of the Supreme Court.<sup>95</sup> Another antidemocratic assertion is the statement that the federal government promotes "European immigration,"<sup>96</sup> nor is there greater coherence in encouraging the manifestations of participative democracy, such as initiatives, popular approval of rules and consultations,<sup>97</sup> and continuation of the statement that the people "neither deliberates nor governs" except through its representatives.<sup>98</sup>

## X. THE UNFINISHED CONSTITUTION

It is not easy to formulate a global judgment about the Constitutional text currently in force. Certainly, it lacks uniformity in style, for the old clauses, generally restrained and concrete, now coexist with detailed and extensive rules by which the Constituent Assembly often transformed itself into an ordinary legislature.

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93. ARG. CONST. art. 75(19) (amended 1994).

94. *Id.* art. 75(8).

95. *Id.* arts. 55, 89, and 111.

96. *Id.* art. 25.

97. *Id.* arts. 39 and 40.

98. *Id.* art. 22.

The reform has also resorted to complex formulas, such as combining five kinds of international treaties,<sup>99</sup> that are problematic not only in themselves, but also in fitting with the First Part of the Constitution. The new rules indicate that the treaties mentioned in Article 75(22), paragraph two, "do not derogate from any article of the First Part of this Constitution and ought to be understood as complementing the rights and guarantees recognized therein."<sup>100</sup> In each case, one has to determine compatibility or incompatibility. Moreover, it raises the question as to whether these treaties can derogate from the norms of the Second Part of the Constitution.

In other areas, the prescriptions adopted by the constitutional reform are decidedly polemical. For example, the prescriptions permit the immediate re-election of the president and the legal-political outline of the government, a position which falls half way between strong presidentialism and certain parliamentary features that have had little success in restraining the former. Nevertheless, with all of its virtues and vices, the reform finally concludes a debate whose further extension would have been unacceptable.

Implementation of many of the changes, that the constitutional reform has made for society, remain at the mercy of those who enact subsequent legislation. Thus, the independence of the judiciary will depend on how the Council of the National Judiciary and the jury of impeachment. The future of the Public Ministry depends upon the law that regulates it. Any real limitation of the executive's power to issue decrees of necessity and urgency also depends upon the dictates of a law. The generous pronouncements about protection of ecology, free and honest competition, rights to property in aboriginal lands, the effective degree of autonomy of the city of Buenos Aires, etc., depends equally on the regulatory rules that must be enacted. A further example showing this subordination of Constitutional provisions to ordinary legislation can be found in the final part of Article 36, which declares: "*Congress will sanction a law about public ethics for the exercise of its duties.*"

From an operative point of view, the constitutional reform of 1994 is definitely incomplete. It requires first an intelligent in-

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99. *Id.* art. 75(22) and (24).

100. *Id.* art. 75(22).

terpretation on the part of its operators—in particular, the judges—in order to mold it into the rest of the 1853/60 Constitution, to clarify the doubts that the new texts bring, and to give a reasonable interpretation to the sometimes over broad and ambiguous pronouncements. At the same time, it requires a laborious legislative undertaking to enact the large number of rules needed to complete the constitutional program. In this process, the legislature can guarantee the principle of supremacy of the Constitution if it elaborates these norms inspired by the spirit of greatness, or it can overturn this principle if it is guided by personal or sectorial partisan interests.

This undertaking is especially difficult when the Constituent Assembly has transferred to those who legislate the mission of concluding the building of the Constitution not as to those parts and sections that are mere adornments, but as to the basic structure of the State. Only in time will one truly know the result of this constitutional reform effort. In large measure, then, the Constitution is still to be done.