

THE ROLE OF CONSTITUTIONAL COURTS IN INTERGOVERNMENTAL CONFLICT RESOLUTION: THE ARGENTINE CASE

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Abstract

The constitutional and federal theory has debated about what are or what should be the *safeguard mechanisms* in modern federations, with two conflicting positions: the one that maintains that the mechanisms are essentially *political* (political safeguards), since the institutional design of the federal government is thought to guarantee an adequate representation of the subnational governments; while a second position holds that the judiciary, in general, and the supreme courts (or constitutional courts) in particular, are the bodies that stand as mechanisms tending to protect the federal system, based on the resolution of specific cases. This paper seeks to analyse what has been the position taken by the Supreme Court of Justice of the Nation of the Argentine Republic in the resolution of (vertical and horizontal) intergovernmental conflicts, in particular, due to the emergence of a new jurisprudence that has taken certain importance in the last decade; the paper concludes that the Argentine Court has opted for an *intermediate* position, where it is recognized itself as an actor with institutional capacity to resolve intergovernmental conflicts, identifying, providing content

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and making effective the general constitutional principle of federalism, but at the same time, highlighting the importance of political mechanisms for the resolution of such conflicts, orienting, guiding and even exhorting the constituent actors to resolve conflicts through institutional dialogue and negotiations.

Keywords: Constitutional theory; Institutional dialogue; Political safeguards; Supreme Court of Justice of the Nation of the Argentine Republic

I. INTRODUCTION

Classical literature on federalism has identified different “prerequisites”, “preconditions” or “requisites” to the formation and survival of a federal polity; in other words, a list of factors making federalism work. In a summarized list, we can identify the following conditions of success:

There are ideological factors, such as “the desire for federal union” in terms of Kenneth Wheare, or “feel federal”, in Franck’s words; historical conditions, such as the hostility of a common enemy and the need for common defense (Wheare), socio-cultural factors, such as the community of race, language, religion and nationality (Wheare), social and cultural homogeneity (Ursula Hicks); political factors, such as similar social and political institutions (Wheare), both created within the formal constitutions and outside of it (William Riker), charismatic leadership (Thomas Franck) and the role of political parties and the party system (Riker).¹

However, little attention has been paid to institutional factors. Hicks states that the federal constitution and institutional design must be appropriately devised to create a nation and preserve the identity of the constituent units, and Riker recognizes that the operation of political institutions have to effectively process stress, strains and tensions in the federation to achieve legitimacy; otherwise, according to Riker, the existence of political and legal institutions that are dysfunctional and fail effectively to process conflicts or lack legitimacy contribute

¹ Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford: Oxford University Press, 2012).

to the failure of the system. Despite these general considerations, there are no further development regarding the role and scope of courts in federal systems as a factor contributing (or not) to their workability and success.

These broad considerations take for granted that cooperation between levels evolve peacefully, when the reality shows a very different pattern. As Deil Wright has warned, both conflict and cooperation simultaneously exist in intergovernmental relations and that – more importantly – both terms are not opposite ends of the continuum; the presence of conflict does not imply absence of cooperation. These assertion leads the author to another important conclusion: conflict is not a pathological state; however – I would add – what is pathological is the non-resolution of conflicts, or the partial resolution of them.²

So is that the existence of institutions designed to resolve intergovernmental conflicts is crucial to the survival of a federation.

This paper will focus on an *institutional aspect* (neglected by the classic literature) for the survival and workability of a federation, and the role of the supreme court in resolving intergovernmental conflicts. However, as it will be seen later, this role goes well beyond the resolution of a (legal) dispute; it delivers to the actors involves materials for the interpretation of the constitutional principles governing the intergovernmental relations and gives them a more precise content.

This legal and judicial factor has played an important role in intergovernmental relations, since changing in legal interpretation has fundamentally altered the character and content of national, state and local relations; despite that some literature refuse the power of courts to resolve intergovernmental disputes, as a matter of fact, decisions by the courts have indeed shape the key features of federal organizations.³

² Deil S. Wright, *Understanding Intergovernmental Relations* (Pacific Grove, CA: Brooks/Cole Publishing, 1988).

³ Andrej Stefanovic, "Role of the Judiciary in Shaping Federations: Cases of the Supreme Court in the United States and the Court of Justice in the European Union," *Journal of Liberty and International Affairs* 3, suppl. 1 (July 2017).

II. POLITICAL SAFEGUARD VS JUDICIAL SAFEGUARD

Recent literature, has focused on federalism as an institutional setting ideal conflict solution mechanism,⁴ although empirical research findings are diverse,⁵ however, one question arises: who is the umpire in those conflicts that federalism is intended to resolve?

A heatedly debated point in contemporary legal literature revolves around the issue of conflict resolution between levels of government, with two conflicting positions. Those who argue that the problems raised in the intergovernmental sphere must be resolved by the actors involved themselves, in the political field, and those who maintain that they are matters that can be adjudicated and, therefore, put the task of resolving these conflicts before the courts, applying the law and the principles that govern – or should so – that relationship.

There are two main mechanisms to protect the federal principle in any federation: on the one hand, the institutional design of the departments of the federal level of government are intended to guaranteed an adequate representation of subnational entities, especially in the federal decision making process and enactments of federal laws through a second chamber, the Senate or the federal council. This mechanism has been called *political safeguards*.

On the other hand, the *mechanism of judicial review or Judicial Safeguards* also protects constitutional federalism. In this sense, tribunals in general, and the supreme courts in particular, are established as mechanisms to protect the federal system, based on the resolution of specific cases. Therefore, one of the essential characteristics of any federation is the existence of a “normally judicial” body to settle conflicts between the members of the federation.⁶

⁴ Soeren Keil, “Federalism as a Tool of Conflict Resolution,” in *A Research Agenda for Federalism Studies*, ed. John Kincaid (Cheltenham, UK / Northampton, MA: Edward Elgar, 2019), 153.

⁵ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in ThirtySix Countries* (New Haven, CT: Yale University Press, 1999).

⁶ Karl Loewenstein, *Teoría de la Constitución [Theory of the Constitution]* (Barcelona, Caracas, and Mexico City: Ariel, 1986); Antonio M. Hernández, “Los sistemas políticos federales [*Federal Political Systems*],” in *Derecho Público Provincial [Provincial Public Law]*, eds. Antonio M. Hernández and Guillermo Barrera Buteler (Buenos Aires: Abeledo Perrot, 2020), 29–69; Francisco Fernández Segado, *El Federalismo en América Latina [Federalism in Latin America]* (Mexico City: UNAM / Corte de Constitucionalidad de Guatemala, 2003); George Anderson, *Federalism: An Introduction* (Oxford: Oxford University Press, 2008); Jorge Carpizo, *Federalismo en Latinoamérica [Federalism in Latin America]* (Mexico City: UNAMIIJ, 1973); Giuseppe De Vergottini, *Derecho Constitucional Comparado [Comparative Constitutional Law]* (Mexico City: UNAMIIJ, 2004); Lijphart, *Patterns of Democracy*.

As Aroney and Kincaid has claimed, “After all, a federal system ordinarily requires a written constitution, and a written constitution requires interpretation, usually, though not always exclusively, by judges. The importance of the judiciary was established by most of the pre-federation U.S. state constitutions, such as the Massachusetts Constitution of 1780, the world’s oldest written constitution still in effect”⁷ and “Because federalism is a constitutional arrangement in which powers (or competences) are divided and shared between two or three orders of government, courts – as arbiters of constitutional disputes – have a potentially very important role in policing the distribution and sharing of powers.”⁸

However, part of the constitutional literature has rejected the notion that courts could have jurisdiction to review and decide upon the limits of the constitutional powers of the federal government, specifically those who argue that is the Congress the main and sole mechanism of conflict resolution, since the states are duly represented in it through the Senate; therefore, political safeguards would be enough to protect federalism, and *judicial review* would not be necessary: “From 1954 until the early 1990s, some authors claimed that federal courts had no power to review the limits of enumerated powers at the national level because federal cases raise political questions.”⁹

There are several reasons for this last position, including the argument which states that establishing Congress as the only arbiter to settle intergovernmental disputes is putting the fox in charge of the hen house.¹⁰ The concept of political safeguards has been doctrinally developed by Wechsler¹¹ and Choper,¹² and formally adopted by the U.S. Supreme Court in the *Garcia* case of 1985 – expressly citing Wechsler.¹³

⁷ Nicholas Aroney and John Kincaid, “Introduction: Courts in Federal Countries,” in *Courts in Federal Countries: Federalists or Unitarists?*, eds. Nicholas Aroney and John Kincaid (Toronto: University of Toronto Press, 2017), 193–222, 11.

⁸ Aroney and Kincaid, “Introduction,” 4.

⁹ Steven G. Calabresi and Lucy D. Bickford, “Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law,” (Faculty Working Paper 215, Northwestern University School of Law, 2011), 23.

¹⁰ Calabresi and Bickford, “Federalism and Subsidiarity,” 26.

¹¹ Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review* 54 (April 1954).

¹² Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: The University of Chicago Press. 1980).

¹³ Wechsler, “The Political Safeguards of Federalism,”.

Thus, a *procedural approach* is contrasted with a *substantive approach*, a clash between the two classical models, the traditional model of judicial enforcement of categorical jurisdictional limits, and the political model that rejects jurisdictional control over the limits to federalism.¹⁴ In the end, a reasoning underlying this doctrine arises, which is the question of the institutional capacity of the courts to establish principles and limits in the federal structure, i.e., whether they are institutionally capable of designing new rules that would constrain Congress and at the same time limit courts.¹⁵

Intervention by tribunals is therefore not only unnecessary, but also inappropriate.¹⁶ Starting from an *originalist* perspective, Wechsler¹⁷ held that judicial intervention was inconsistent with the original vision of the founding fathers. Thus, any attempt by Congress to usurp powers from the states could and should be thwarted through the growing popular appeal of state officials.¹⁸ For Choper, on the other hand, the argument is not historical, but functional, and is due to a functional reconsideration of the Court's role, a role in which it has no place in federal questions.¹⁹

In *Garcia* case (1985), the United States Supreme Court explicitly adopted this position: "Apart from the limitation on federal authority inherent to the delegated nature of the powers of Congress recognized by Section I, the primary way chosen by the Framers to ensure the role of the States in the federal system is found in the very structure of the Federal Government."²⁰

Later, this precedent would be set aside by the *Rehnquist Court*, by rejuvenating the theory of *judicial protection of federalism* especially in the cases *Gregory v.*

¹⁴ Stephen Gardbaum "Rethinking Constitutional Federalism," *Texas Law Review* 74, (1996) 795-838.

¹⁵ Lynn A. Baker and Ernest A. Young, "Federalism and the Double Standard of Judicial Review," *Duke Law Journal*, 51, (October 2001): 75-164. This reasoning can be seen present in the *Garcia* case, when Judge Blackmun held "What has proven problematic is not the perception that the federal structure of the Constitution imposes limitations on the Commerce Clause, but the nature and content of those limitations."

¹⁶ Lynn A. Baker "Putting the Safeguards Back into the Political Safeguards of Federalism," *Villanova Law Review* 46, no. 5 (August 2001): 951- 974.

¹⁷ Wechsler, "Political Safeguards of Federalism."

¹⁸ Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," *Columbia Law Review* 100, no. 1 (January 2000): 215-293.

¹⁹ John C. Yoo, "The Judicial Safeguards of Federalism," *Southern California Law Review* 70 (1996): 1314-1406.

²⁰ Daniel A. Lyons, "Note: The Lesson of *Lopez*: The Political Dynamics of Federalism's Political Safeguards," *Harvard Law Review* 119, no. 2 (2005): 609-630, 609.

Ashcroft, New York v. United States, United States v. Lopez,²¹ where the Court addressed the issue of federalism as a *substantive matter*, setting precise limits on federal power, drawing clear lines between the enumerated powers of the federal government and the states' sovereignty, thereby exercising full judicial review over issues related to state sovereignty and federalism.²²

III. THE DEBATE IN COMPARATIVE PERSPECTIVE: THE EUROPEAN UNION AND SOME FEDERATIONS

In the European Union, the debate on the competence of tribunals to decide intergovernmental conflicts went hand in hand with the debate on *the justiciability of constitutional principles*; debates which were initiated with the explicit incorporation of the principle of subsidiarity in the Treaties establishing the European Union.

To ensure its effective application, the European Council adopted, at the Edinburgh Summit (December 1992), a set of "guidelines" to help ensure that the EU institutions comply with the *principle of subsidiarity* in their day-to-day operations. These guidelines stated that proposed legislation at the Union level would require consideration of the following factors: (1) whether the problem being addressed "has transnational aspects which cannot be dealt with successfully by action of the Member States"; (2) whether failure to act by the Community "would be in contravention of the requirements of the Treaty...or would otherwise prejudice substantially the interests of the Member States"; and (3) whether the proposed measure "would result in a liberalization of the Member States".

The guidelines also require the Commission to include in its explanatory memorandum accompanying any legislative proposal sent to the Council (of the European Union) a statement that justifies its initiative with respect to the principle of subsidiarity.²³

²¹ Yoo, "Judicial Safeguards of Federalism"; Saikrishna B. Prakash and John C. Yoo, "The Puzzling Persistence of Process-Based Federalism Theories," *Texas Law Review* 79 (2001): 1-73.

²² Yoo, "The Judicial Safeguards of Federalism."

²³ Gardbaum, "Rethinking Constitutional Federalism," 833.

In addition, the Commission issued an Adaptation Report (November 1993), as part of its subsidiarity analysis, for each legislative proposal falling within the concurrent competence of the EU and the Member States; this analysis would address, as part of the explanatory memorandum, the following questions: (1) what are the objectives of the proposed action in terms of the Union's obligations? (2) what is the most effective solution to the problem identified, given the means available to the Union and the Member States; and (3) what is the specific added value of the proposed action and the potential cost of not acting? In addition, the Commission would publish this analysis in the Official Journal of the EU.

The Amsterdam Protocol also established guidelines for the application of the principle of subsidiarity, being nearly the same as those established at the Edinburgh Summit.²⁴

These procedures have been thought with the clear purpose that the principle would have a concrete effectiveness, but nothing is sustained about its justiciability.

The European Council, in the conclusions of the Edinburgh Summit, took an affirmative view, holding that the principle of subsidiarity was a principle justiciable by the European Court of Justice.²⁵

The doctrine opposing justiciability is based on the assumption - similar to that of the American theory of political safeguard - that it would imply substituting the judicial viewpoint for the legislative one in matters of a political nature, and would therefore be inappropriate. This is, for example, the position adopted by the British House of Lords, which holds that the application of the principle of subsidiarity rests on the legislators, not on the judges²⁶ - coherent with the basic principle of parliamentary sovereignty.

On the other hand, the receptive theory of the *judiciability* of the constitutional principles can be classified into two types: one that holds a *substantive* position, according to which the judicial control of legislative rationality by the European Court of Justice, falls not on the *effectiveness* of the decision, but only on whether

²⁴ Katarzyna Granat, *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System* (Oxford: Hart, 2018).

²⁵ European Council, quoted in Gardbaum, "Rethinking Constitutional Federalism," 834.

²⁶ Gardbaum, "Rethinking Constitutional Federalism," 834.

the decision of the legislative institutions is *reasonable*. The other position holds that the principle of subsidiarity should be understood and applied as a *procedural* – not *substantive* – restriction on the legislative process; from this perspective, the role of the court is to analyze whether the legislative institutions have given enough consideration to the possibility of regulation at the level of the Member States.

The debate has been largely resolved by the 2004 “Protocol on the Application of the Principles of Subsidiarity and Proportionality”, establishing the conditions for the application of the principles of subsidiarity and proportionality, as set out in Article I-II, and establishing a system for monitoring the application of those principles. It should be clarified that the Protocols to the Treaties are legally binding in contrast to the mere declarations of the Treaties, which are not²⁷ in particular, the provisions of art. 8 of the Protocol, states that “The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it”.

The rule, however, does not expressly take a position on whether the judicial application of the principle is procedural or substantial (Flynn 2005). Some scholars, like Bermann,²⁸ argue that the procedural position allows the Court of Justice to better promote respect for localism values without getting entangled in deeply political judgments that it is not prepared to make and ultimately is not responsible for making.

At a national level, the same debate about the justiciability of principles can also be found, for example, in Germany, while the Federal Constitutional Court (*Bundesverfassungsgericht* – BverfG) is characterized by a long and inveterate jurisprudence on constitutional principles of German federalism, in particular on

²⁷ Brendan Flynn, “Reformed Subsidiarity in the Constitution for Europe: Can It Deliver on Expectations?” (European Institute of Public Administration Working Paper 2005/W/07, 2005).

²⁸ George A. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States,” *Columbia Law Review* 94, no. 2 (March 1994): 331–366.

the principle of good faith or federal loyalty (*bundestruue*), it has also recognized its jurisdictional limits in applying them.²⁹

The jurisprudence of the German Constitutional Court “on the grounds of this specific principle [federal loyalty] has acknowledged additional duties of the states towards the Federation and additional duties of the Federation towards the states, as well as specific restrictions on the exercise of the competences that the Fundamental Law has assigned to the Federation and the states.”³⁰ This new role of the BVerfG has appeared since the unification of the country in 1989: “most federal-state conflicts never reached the Constitutional Court. They [were] usually resolved politically through the mechanisms of collaborative federalism. However, when considering the evolution since unification, this conclusion has to be revised. Various “mechanisms of collaborative federalism’ have in fact been hampered by intense conflicts, and the Court has gained significant influence through its adjudication of disagreements.”³¹

In Belgium, something similar happened with the principle of *federal loyalty*. But the principle was originally conceived in a political, and not judicial, sense, so it was expressly outside the competence of the Court. These issues were to be resolved through political channels to be designed by ordinary legislation,³² however, from 2010, courts began to make application of this principle to suspend and even repeal federal rules that undermined the principle of federal loyalty.³³ Finally, with the 6th State Reform (*6e Réforme de l’État*) from 2012, the principle of federal loyalty became a formally justiciable principle, being part of the block of constitutionality and, as such, enforceable by the Constitutional Court.³⁴

²⁹ Gardbaum, “Rethinking Constitutional Federalism,” 834.

³⁰ Jürgen Schwabe, *Jurisprudencia del Tribunal Constitucional Federal Alemán: Extractos de las sentencias más relevantes* [Case Law of the German Federal Constitutional Court: Extracts of the Most Relevant Judgments] (Mexico City: Fundación Konrad Adenauer, 2009).

³¹ Arthur Benz, “The Federal Constitutional Court of Germany: Guardian of Unitarism and Federalism,” in *Courts in Federal Countries*, eds. Aroney and Kincaid, 208–9.

³² Jan Raeimon Nato, “Development of Duties of Federal Loyalty: Lessons Learned, Conversations to Be Had,” Baxter Family Competition on Federalism (2019); Anne Catherine Rasson, “Le principe du « vivre ensemble » belge: une épopée constitutionnelle [The Principle of Belgian “Living Together”: A Constitutional Epic],” *CPDK* 1 (2012): 25–75.

³³ Raeimon Nato, “Development of Duties of Federal Loyalty.”

³⁴ Anna Mastromarino, “El laboratorio belga: ¿reforma constitucional o acción constituyente? [The Belgian Laboratory: Constitutional Reform or Constituent Action?],” in *Parlamento, ciudadanos y entes territoriales ante la reforma constitucional. Quién y cómo participa?* [Parliament, Citizens, and Territorial Entities in Constitutional Reform: Who Participates and How?], ed. J. M. Andreu Castellà (Barcelona: Tirant Lo Blanch, 2018), 19.

In *Austria*, the Constitutional Court is competent to resolve disputes concerning consultation mechanisms (provided by the Constitution). Since these mechanisms came into force in 1999, until 2014, there had been no recourse to the Court, as all disputes had been settled politically; only in 2014 did the Court decide a case where it declared that the federation had violated the consultation mechanism on the costs of railway crossings for Austrian municipalities (Constitutional Court judgment of March 12, 2014, F 1/2013-20).³⁵

Certain constitutional texts lean towards the political settlement of intergovernmental disputes, rather than the judicial one, although obviously without ruling it out. These systems seek to encourage resolution through dialogue between the parties involved, and only resort to judicial resolution as the *ultima ratio* of the system. Among others, the constitutions of Italy, South Africa, Switzerland and Austria.

South Africa is a very interesting case. Its constitution has three main disposition in this regards:

“First, it requires that national legislation create institutions and procedures for intergovernmental relations and dispute settlement. Second, it also requires governments to resolve intergovernmental disputes in court as a last resort, only after having exhausted these mechanisms. Third, it requires courts to refer intergovernmental disputes back to these bodies if they are not satisfied that governments have exhausted those non-judicial mechanisms.”³⁶

On a rigorous interpretation, it can be argued that these explicit constitutional requirements of the South African constitution,

“federal loyalty requires cooperation, coordination, consultation, and exhaustion of all remedies prior to judicial remedy to avoid encroachment on others. Actors must take substantive steps to cooperate and coordinate when passing legislation. When, inevitably, conflicts arise, they must attempt to resolve the issue absent judicial interference. Call an interpretation

³⁵ Peter Bußjäger, “Austria’s Cooperative Federalism,” in *Austrian Federalism in Comparative Perspective*, eds. Günter Bischof and Ferdinand Karlhofer (Innsbruck: Innsbruck University Press, 2015), 17.

³⁶ Sujit Choudhry, “German Federalism in Translation: The German *Grundgesetz*’s Impact on South Africa’s 1996 Constitution,” in *70 Jahre Grundgesetz – Der deutsche Bundesstaat im Spiegel internationaler Erfahrungen*, ed. Friedhelm Knüpling et al. (Berlin: Springer, 2020), 240.

requiring all substantive obligations associated with Germany or South Africa ‘demanding federal loyalty.’³⁷

Based on the principle of cooperative government, established in art. 41 of the constitution, the Constitutional Court rejected cases brought before it, on the grounds that conflict resolution mechanisms had not been previously exhausted, for example, the one provided for in the 2005 *Intergovernmental Relations Framework Act* that establishes mediation mechanisms for the resolution of intergovernmental conflicts. Thus, for example, in a dispute between the district municipalities and the National Treasury over the right of the former to an equitable share of the revenue collected at the national level, the Court refused to hear the case because the municipalities had not used a forum intergovernmental body scheduled to resolve the matter, the *Budget Council*; in another similar case, it also rejected action by the federal government when it attempted to prevent the KwaZulu-Natal provincial government from establishing a gambling monitoring regime (gambling is a concurrent competence) that colluded with the national system, basically, “because the parties did not make every reasonable effort to settle the dispute by means other than litigation (s. 42(2)).”³⁸

In *South Africa*, according to Nico Steytler³⁹ the low number of federalism-related cases can be attributed to two factors: First, with eight of the nine provinces and all but one of the major cities under ANC control, intergovernmental disputes between ANC-controlled organs of state are usually resolved through intra-party directions or mediation; and secondly, due to the existence of the constitutional principle of *cooperative government* “that eschews the solution of intergovernmental disputes through litigation (s. 41(1)(h)(vi)).”⁴⁰

Ethiopia presents a very particular design, a mix between the US system of political safeguard and the British principle of Parliament supremacy: “The

³⁷ Michael Da Silva, “Federal Loyalty and the ‘Nature’ of Federalism,” *Review of Constitutional Studies / Revue d’études constitutionnelles* 24, no. 2 (June 2019–2020): 222.

³⁸ Nico Steytler, “The Constitutional Court of South Africa: Reinforcing an Hourglass System of MultiLevel Government,” in *Courts in Federal Countries*, eds. Aroney and Kincaid (Toronto: University of Toronto Press, 2017), 328–29.

³⁹ Steytler, “The Constitutional Court of South Africa.”

⁴⁰ Steytler, “The Constitutional Court of South Africa,” 344.

country has also adopted an unusual model of constitutional review in which the House of the Federation (HoF), the upper house of the federal Parliament and not the judiciary, is given the power to interpret the Constitution, including the exclusive power to resolve disputes between the two levels of government and declare a law unconstitutional.”⁴¹

Consequently, the role of the courts is almost null. Both state and federal courts are excluded from dealing with constitutional disputes and even constitutional interpretation and constitutional review. This task has been entrusted to the HoF, the second chamber of the federal Parliament,⁴² which has “the unique power of interpreting the Constitution and determining the constitutionality of federal and state laws. It discharges this unique power of constitutional adjudication with the help of the *Constitutional Inquiry Council* (CIC).”⁴³

This Constitutional Council has a particular composition: the president and the vice president of the *Federal Supreme Court*, six legal experts appointed by the president of the Republic based on recommendations of the *House of Peoples Representatives* and three members of the *House of the Federation*. The findings of the council are mere recommendations and the HoF is at liberty to accept or reject them, since it retains the power to make the ultimate and final decision on constitutional matters, according to the federal Constitution (Articles 83 and 84). However, until date, not even a single intergovernmental dispute has been brought to the HoF.

In *Italy*, the Constitution entrusts Parliament with the creation and regulation of forms of coordination between the State and the regions, as well as the regulation of other forms of understanding and agreements between levels (article

⁴¹ Yonatan T. Fessha and Zemelak Ayele, “Giving ‘Shape and Texture’ to a Federal System? Ethiopia’s Courts and Its Unusual Umpire,” in *Federalism and the Courts in Africa*, eds. Fessha and Kössler (Abingdon, New York: Routledge), 47–48.

⁴² This chamber “...enjoys no legislative powers. Its involvement in the legislative process of the federal government is limited to initiating laws that would operationalize its constitutionally allocated powers, including its power to regulate federal intervention and engage in constitutional adjudication. It does not deal with laws passed by the lower house, let alone suspend or veto such laws” (Fessha and Zemelak Ayele, “Giving ‘shape and texture’ to a federal system?,” 60).

⁴³ Fessha and Ayele, “Giving ‘Shape and Texture’ ...,” 60.

118.3). In this regard, the Standing Conference of State and Regions has actually become the very pivot in the system and the preferred institutional setting.⁴⁴

The Swiss constitution expressly includes within the jurisdiction of the Federal Supreme Court, the competence to hear in “disputes between the Confederation and Cantons or between Cantons” (article 182.2); however, as Lienhard *et al.* sustain,⁴⁵ intercantonal disputes have been very rare: only three in twenty years – for example, issues related to the definition of intercantonal boundaries (Bern vs. Valais), on the right to vote (Bern vs Jura) and on double taxation (nullity of taxes established by Geneva that taxed the income of travelers from Vaud). To this should be added that in the Swiss system there is no abstract judicial review of decisions made by the federal parliament or the federal executive, nor is there any concrete judicial review of federal laws – Although Federal Supreme Court can declare cantonal norms to be unconstitutional only if it appears genuinely impossible to apply them in conformity with the Federal Constitution. From this perspective, the Swiss federal system lacks a neutral arbiter: decisions made by the federal parliament (and the people in a referendum) take precedence (*de facto*) even over the constitution).⁴⁶

IV. AN ALTERNATIVE MODEL

Between these two extreme positions, some scholars have put forward a more intermediate position.⁴⁷

At present, almost all constitutional courts and tribunals have made an extensive application of the constitutional principles governing the relations between levels of government, so it can be concluded that the doctrine of

⁴⁴ Jens Woelk, “Loyal Cooperation: Systemic Principle of Italy’s Regionalism?,” in *Federalism and Constitutional Law*, eds. Erika Arban, Giuseppe Martinico, and Francesco Palermo (London / New York: Routledge, 2021), 171–88.

⁴⁵ Andreas Lienhard *et al.*, “The Federal Supreme Court of Switzerland: Judicial Balancing of Federalism without Judicial Review,” in *Courts in Federal Countries*, eds. Aroney and Kincaid (Toronto: University of Toronto Press, 2017), 404–39.

⁴⁶ I appreciate Dra. Eva María Belser for this observation.

⁴⁷ Jenna Bednar and William N. Eskridge Jr., “Steadying the Court’s ‘Unsteady Path’: A Theory of Judicial Enforcement of Federalism,” *Southern California Law Review* 68 (1995): 1447–91; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009); Garbbaum, “Rethinking Constitutional Federalism”; Vicki C. Jackson, “Subsidiarity, the Judicial Role, and the Warren Court’s Contribution to the Revival of State Government,” in *Federalism and Subsidiarity*, eds. James E. Fleming and Jacob T. Levy (New York: NYU Press, 2014), 190–213.

justiciability of constitutional principles currently predominates in all modern federations.

This mechanism of resolution has not, logically, displaced the political mechanism, which is at the foundation of the federal institutional structure and without which any type of federation would lose its very essence. It is a mechanism that complements the political mechanisms of conflict resolution.

It is in the light of the criticism of this judicial activism that a third model has recently emerged in contrast to the two classic models, the *procedural* approach and the *substantive* approach, with two basic characteristics: the importance of (interinstitutional and intergovernmental) *dialogue* and the fact that they are based on constitutional principles (such as subsidiarity, solidarity, and federal loyalty, among others).

Thus, for example, in the alternative model proposed by Gardbaum called constitutional federalism, it is required that the interests and position of the states be considered and taken seriously by Congress before deciding to preempt them in the regulation of certain matters, *i.e.*, it must be guaranteed that Congress is involved in this type of deliberations, where: (1) considers carefully and in good faith the position and interests of the states and (2) concludes affirmatively that, on the substance, the claims of uniformity prevail and, therefore, justifies the termination of the states' constitutionally concurrent legislative authority.⁴⁸

Whereas the role of the Court in this scheme is to perform a "hard look", promoting transparency and rationality in decision-making by ensuring that the agency in question has carefully examined all relevant factors before making its decision, and that the decision was not "arbitrary" or "capricious". This is the procedural perspective.

So far, the mechanism is adequate, but not sufficient: it is insufficient because Congress would have no limit to its decision-making power: "Accordingly, the states should be entitled not only to a fair hearing and a rational decision-making process but also to a reasonable outcome; the 'respect that the States are due

⁴⁸ Gardbaum, "Rethinking Constitutional Federalism," 824-25.

as States' under the spirit of the Constitution should be understood to have a substantive dimension in this context and not just a procedural one."⁴⁹

In other words, the role of the courts should be to judicially enforce deliberative and justificatory restrictions when advancing on concurrent powers. That is to say, to add to the procedural perspective, a substantive one that takes into account the result achieved.

Vicki Jackson reinforces the idea of *dialogue* in the resolution of conflicts, a dialogue that should be carried forward by the federal subjects, and promoted by the courts and tribunals: "I suggest that the courts may be better situated as an institutional matter to try to assure that other branches attend to considerations of subsidiarity so as to make the substantive judgments directly" (2014:191). In similar position, Mark Tushnet proposes a dialogic judicial review, in which dialogue between courts and political actors can operate in different ways and even in different times.⁵⁰

The main point is that the courts are not, therefore, the only instance of constitutional interpretation and, as a result, of decision on how conflicts should be resolved, helping to improve the quality of the legislative process,⁵¹ inviting and encouraging dialogue between the different actors,⁵² considering new mechanisms and areas of discussion where not only the political actors are involved, but also the people themselves,⁵³ throughout different institutional mechanisms, such as *amicus curiae*, public hearings, and structural litigation.⁵⁴

⁴⁹ Gardbaum, "Rethinking Constitutional Federalism," 826-27.

⁵⁰ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008).

⁵¹ Jackson, "Subsidiarity," 203.

⁵² Robert Post and Reva Siegel, *Constitucionalismo democrático. Por una reconciliación entre Constitución y pueblo* [Democratic Constitutionalism: Toward a Reconciliation between Constitution and People] (Buenos Aires: Siglo Veintiuno, 2013).

⁵³ Leonardo García Jaramillo, "Introducción [Introduction]," in *Constitucionalismo democrático*, eds. Post and Siegel (Buenos Aires: Siglo XXI Editores), 11-29; Roberto Gargarella, "Un papel renovado para la Corte Suprema. Democracia e interpretación judicial de la Constitución [A Renewed Role for the Supreme Court: Democracy and Judicial Interpretation of the Constitution]," *Gaceta Constitucional*, special issue (2008): 573-590; Roberto Gargarella, "Democracia e interpretación judicial de la Constitución," *Espacio Abierto* 17 (2012): 9-19.

⁵⁴ Marcos Antonio Vela Ávalos, "Dialogic Justice in a Constitutional Engineering Resistant to Dialogic Constitutionalism: The Case of El Salvador," *Anuario Iberoamericano de Justicia Constitucional* 26, no. 1 (2022): 181-211, <https://doi.org/10.18042/cepc/aijc.26.07>.

V. THE ROLE OF THE ARGENTINE SUPREME COURT OF JUSTICE IN THE RESOLUTION OF INTERGOVERNMENTAL DISPUTES

What has been the role assumed by the Argentine Supreme Court of Justice with respect to intergovernmental disputes? In recent decades, the Argentine Supreme Court of Justice has issued an important series of rulings whose content may justify the assertion of the beginning of a new period, a *new judicial federalism* in Argentina – especially if it is considered its prior tradition of centralist precedents since the beginning of the federation. It is a set of rulings that have identified, interpreted and applied different constitutional principles on the federal system, while defining and specifying the role of the Court in this type of controversies.

The competence of the Supreme Court of Argentina, including the resolution of intergovernmental disputes, originates primarily from its constitutional mandate, starting with article 116 of the Constitution that establishes the Court's role as the highest judicial authority, granting it jurisdiction over cases involving constitutional matters, national laws, and conflicts where provinces or the federal government are parties.

With respect to intergovernmental disputes, its competence to resolve disputes between provinces or between provinces and the federal government comes specifically from Article 117 of the Constitution. This article provides for the Supreme Court's original and exclusive jurisdiction in cases where a province is a party. This framework ensures that disputes concerning federalism and provincial autonomy are adjudicated impartially by the nation's highest judicial body.

The historical development of this competence reflects Argentina's federal structure. For example, cases like “Cullen v. Llerena” emphasize the judiciary's role in maintaining constitutional order during intergovernmental conflicts.

The principle of Supremacy of the Constitution (Article 31) ensures that all provinces and the federal government operate within constitutional bounds, making the Supreme Court the arbiter when conflicts arise. The Court also

applies principles of reasonableness and proportionality when determining the legality of actions by either level of government. These provisions and principles reinforce the Court's central role in upholding the Constitution and balancing the distribution of powers within Argentina's federal system.

In one of its most recent precedents, in the case “Shi v. Municipalidad de Arroyito” of 2021⁵⁵ – a case in which a supermarket contested the constitutionality of a local ordinance prohibiting commercial activities on Sundays, arguing that this is not a local competence – the Minister Ricardo Lorenzetti (in his own vote) makes explicit in a concrete manner the particular role of interpreter the Court has while it elucidates a conflict, holding, on the one hand, that “the judicial task consists of establishing a dialogue between [the constitutional principles in dispute], so that the interpretation is coherent and harmonic, considering the consequences of the decision on the constitutionally protected values”. What is striking about this case is that the Court focused its argument on the merits of the local law, which is rare.⁵⁶

In the last decade, the Supreme Court has issued a series of very relevant sentences on federalism, resolving important intergovernmental conflicts; in these precedents, a series of common elements can be identified: identification of the normative gap and the “denunciation” of the inactivity of the power obliged to fill it - with the consequent exhortation to do so; identification of the fundamental problem in which the case is inserted, the resolution of the concrete case and the establishment of guidelines to solve that fundamental problem and inviting the parties to solve the problem through dialogue and negotiation.

Thus, two main assumptions can be identified: In some cases, it is a matter of constitutional omissions – for example, the failure to sanction the co-participation regime mandated by the Constitution – but in other cases,

⁵⁵ Corte Suprema de Justicia de la Nación (Argentina) [CSJN], *Shi, Jinchui c/ Municipalidad de la Ciudad de Arroyito s/ acción declarativa de inconstitucionalidad*, CSJ 1751/2018/RH1, judgment of 20 May 2021.

⁵⁶ Eduardo J. Torres Buteler, “*Algunas curiosidades de un fallo que maximiza la competencia municipal* [Some Curiosities of a Ruling That Maximises Municipal Competence],” *Revista Facultad de Derecho* 5 (2021): 260–64; see also María G. Ábalos, “Lecciones de federalismo ...,” *El Derecho – Constitucional* 5 (May 2021); María Gabriela Ábalos, “*Autonomía municipal ...*,” *Instituto de Estudios Constitucionales* [Municipal Autonomy ..., Institute of Constitutional Studies] (2021); Andrés Gil Domínguez, “*Federalismo, municipios y libertad de comercio* [Federalism, Municipalities, and Freedom of Commerce],” Rubinzal Culzoni RCD416/2021.

it is a matter of conflicts of a political nature between subjects of public law endowed with sovereignty, who are on an equal basis - nation and provinces, or provinces among themselves - a conflict whose resolution requires, on the one hand, that the court assume a role different from that of a jurisdictional court that applies positive law, and on the other hand, that the parties themselves put a definitive end to it, since the final resolution of the conflict remains in their hands, not in the hands of the Court. In this second case, we are dealing with what the Court itself has called “adjudicatory jurisdiction”, a function essentially different from the judicial or jurisdictional function itself.⁵⁷ The Court specified that “It consists of a political and non-judicial function, which arises both from the nature of the case and from the nature of the parties involved, by which a dispute requiring a decision of a political and diplomatic nature is settled.”⁵⁸

In this set of verdicts issued in the last seven years (2015-2022), it is possible to identify some common elements (despite the fact that the casuistry is quite varied and the decisions taken in each of them, very dissimilar), i. e:

5.1. The Court Recognizes and Analyzes the Fundamental Problem in Which the Case Under Study is Inserted

A paradigmatic example in this sense has been the vote of Justice Lorenzetti in the case “Esso v. Quilmes” of 2021,⁵⁹ where the municipal taxing power was being debated. The municipality of Quilmes intended to calculate the rate of the local charge, not only considering the cost of the service, but also including the gross income of the company throughout the territory of the Province of Buenos Aires. Instead, Esso company stated that the liquidation and payment of the local charge should be implemented taking only the gross income earned in the Municipality of Quilmes. In his vote, Justice Lorenzetti makes a broad and

⁵⁷ Cristian Altavilla, “El Rol de la Corte Suprema en los conflictos intergubernamentales. Análisis del caso *Prov. de La Pampa c/ Prov. de Mendoza* [The Role of the Supreme Court in InterGovernmental Conflicts: Analysis of the Case Province of La Pampa v. Province of Mendoza],” *Cuadernos de Federalismo* 22 (2009): 119–49. Cristian Altavilla, “El Rol de la Corte Suprema en los conflictos intergubernamentales. Análisis del caso *Prov. de La Pampa c/ Prov. de Mendoza* [The Role of the Supreme Court in InterGovernmental Conflicts: Analysis of the Case Province of La Pampa v. Province of Mendoza].”

⁵⁸ Altavilla, “El Rol de la Corte Suprema [The Role of the Supreme Court],” 109.

⁵⁹ CSJN, *Esso Petrolera Argentina S.R.L. y otro c/ Municipalidad de Quilmes s/ acción contenciosoadministrativa* [Esso Petrolera Argentina S.R.L. and another v. Municipality of Quilmes on administrative litigation action], Judgment of 2 September 2021.

interesting report on the general situation of all the municipalities of the country in the economic-financial aspect: “in the public hearing held in this case, the concerning financial situation of the municipalities became evident, since their functions were increased and their resources were decreased” (Paragraph 7°).

The decision of the court goes far beyond the case raised by the appellant (the competence of the municipality to establish this type of charge) and analyzes a fiscal policy problem, rather than tax law or the mere legality of the debated issue (“Esso” 2021, vote Minister Lorenzetti, Paragraph 8°). In Santa Fe (2015), he also makes a general consideration of the nation-province tax relations and their situation in the last four decades, analyzing the specific claim of the province (which was specifically the annulment of a unilateral decision of the federal government to draw co-participable resources from the provinces to finance the Federal Administration of Public Revenue, AFIP).

In “Bazán” (2019)⁶⁰ – a case of conflict of competence between non-federal judges based in that City – he makes a consideration of all the Court’s rulings where serious problems in the functioning of the Argentine federalism have been noticed, due – among many other causes – to the non-compliance with the constitutional text. It brings up very important precedents of its own (“La Rioja v. Province of La Rioja”⁶¹ of 2014, later reiterated in Municipality of “La Banda v. Province of Santiago del Estero”⁶² of 2018, “Santa Fe”, “San Luis” and “Córdoba”, all three of 2015).

The Court identifies a serious problem of omission and immobilism that threatens the correct and efficient performance of the federal system: “That in the terms of the indicated jurisprudence, the situation that is noticed in the matter under examination reveals an assumption of ‘immobilism’ [...] that must also be considered as a serious institutional maladjustment of one of the structural mechanisms of the functioning of federalism, without the delay in

⁶⁰ CSJN, *Bazán, Fernando s/ amenazas* [Bazán, Fernando – Threat Charges], Fallos 344:514, judgment of 4 April 2019.

⁶¹ CSJN, *Intendente Municipal Capital s/ amparo* [Municipal Mayor of the Capital, concerning a writ of amparo], judgment of 11 November 2014.

⁶² CSJN, *Municipalidad de la Ciudad de La Banda c/ Gobierno de la Provincia de Santiago del Estero s/ conflicto entre poderes públicos* [Municipality of La Banda v. Government of the Province of Santiago del Estero – Conflict Between Public Authorities], Fallos 341:939, judgment of 23 August 2018.

the concretion of the constitutional mandate appearing in any way reasonably justified. This omission not only constitutes a literal violation of the National Constitution with the consequent weakening of the normative force of its text. It also impacts on the distribution of public resources” (Bazán, 2019, paragraph 12).

The Court warned that these omissions and delays generate serious intergovernmental conflicts and detrimental consequences to Argentine federalism.

5.2. It Shows Deference to the Other Powers and Parties Involved

The cited rulings seek a balance between the competence of the Court to resolve the cases brought before it and the competences (and obligations) of the other branches of government (at their different levels of government) within the framework of the principle of division of powers – as a concrete example of self-restraint.

However, while it is true that the Court cannot interfere in the tasks proper to the other branches and constitutional bodies, it is also true that it is incumbent upon it “to exercise control [...] over the activities of the other branches of government”, especially when the same fail to comply with the national constitution (“Santa Fe”, 2015, Paragraph 39). In the federal system, this deference is both horizontal, i.e., between the branches of the National State, and vertical, between the levels of government, respecting the functional and territorial dimension of the division of power: “this Court is obliged to ensure that the institutional system of division of powers established by the Constitution (art. 1º) is respected, both in its material aspect in the framework of the republican system of government (legislative, executive and judicial branches), and in its territorial dimension proper to the Argentine federal system” (“CABA v. National Government”, 2020, Paragraph 26⁶³).⁶⁴

⁶³ CSJN, *Colegio de Abogados de la Ciudad de Buenos Aires y otro c/ EN – ley 26.080 – decreto 816/99 y otros s/ proceso de conocimiento* [Bar Association of the City of Buenos Aires et al. v. National Government – Law No. 26.080 – Decree No. 816/99 et al., concerning a declaratory judgment action], judgment of 16 December 2021. A case during the COVID-19 pandemic, in which the City of Buenos Aires asked the Court declares the unconstitutionality of a federal government decision to prohibit in-person classes in the territory of the city.

⁶⁴ A controversial case on this point has been the “Entre Ríos” ruling (CJSN, 2019), especially see dissenting vote of Minister Carlos Rosenkrantz.

5.3. Encourage Dialogue

The Court has invariably insisted on the need for dialogue in numerous precedents. In “Barrick” (2019)⁶⁵ it held that the task of federal concertation corresponds primarily to the political authorities, national and provincial, and in this concertation, actors involved must combine their interests (not always coinciding) to enhance the fulfillment of the constitutional objectives and values.

The Court has consistently emphasized that the basis of Argentine federalism is dialogue and agreement, two fundamental ideas that are at the base of concertation or cooperation federalism and respond mainly to the constitutional principles of cooperation, collaboration, concertation and coordination.

In “Santa Fe” (2015), it held that “The conventional nature is another constitutive aspect of the system, since the Fundamental Law establishes that an agreement law must be passed, based on agreements between the Nation and the provinces [...] and that this agreement law must have the Senate as its Chamber of origin, must be sanctioned with a qualified majority, cannot be modified unilaterally, and must be approved by the provinces (paragraph 2°, second and fourth paragraphs).” (Santa Fe 2, p. 1405, Paragraph 3°).

This type of agreements constitutes “positive manifestations of the so-called cooperative federalism [*federalismo de concertación*]”, by which it is intended to achieve “a concurrent regime in which provincial and national powers are united in the higher objective of achieving a uniform policy for the benefit of the interests of the National State and the provinces”, citing another of its precedents where it outlined some basic principles of the Nation-Provinces fiscal relations, in “El Cóndor,”⁶⁶ of 2001.

⁶⁵ CSJN, *Barrick Exploraciones Argentinas S.A. y otro c/ Estado Nacional s/ acción declarativa de inconstitucionalidad* [Barrick Exploraciones Argentinas S.A. et al. v. National State – Declaratory Action of Unconstitutionality], Fallos 342:917, judgment of 4 June 2019. The Court rejected the claim of unconstitutionality against the glacier preservation law (26.639) promoted by Barrick company, since it failed to demonstrate that the glacier preservation system established by the National Congress generated any type of damage to its mining right. The Court argued that the Constitution establishes that the protection of the environment is a joint task of the national government and the provinces, and that the interpretation of its provisions must combine national and provincial interests to promote compliance with environmental protection throughout the country.

⁶⁶ CSJN, *El Cóndor Empresa de Transportes S.A. v. Provincia de Buenos Aires* [El Cóndor Transport Company S.A. v. Province of Buenos Aires], Fallos 324:4226, judgment of 7 December 2001.

These rulings are referring to a new conception of federalism in general, and in particular of the exercise of concurrent competences. In its latest jurisprudence, the Court has established new benchmarks for the exercising of competences that fall within the orbit of both levels of government, leaving aside the more traditional view, of indistinct or indifferent exercise, to move to a model based on dialogue, mutual assistance, communication and intergovernmental coordination (“Neuquén” 2018, “La Pampa v. Mendoza” 2017, “Barrick” 2019, “CABA v. National Government” 2020, “Shi” 2021).

Both the exercise of these powers and the resolution of conflicts arising from such exercise must now be based on a *conjunctive* or *cooperative perception*, which is typical of cooperative federalism, and no longer from a disjunctive or separatist view (“Neuquén”, 2018, vote of Minister Horacio Rosatti).

Dialogue and agreement are mechanisms that serve not only to establish common policies, or to agree on joint actions to achieve common goals, but also to settle their disputes and controversies: the parties are free to establish the negotiation modalities they deem convenient, “as long as the chosen mode properly complies with the mandates established by the National Constitution” and if the parties act in good faith, they can agree on the necessary measures to achieve the constitutionally set goals (“Bazán”, 2019, Paragraph 15°).

But the Court has been emphatic in holding that reaching an agreement is an *obligation* of the parts, not an option: on one hand, there are clear constitutional mandates requesting prior agreements between the parties, on the other hand, parties cannot argue the lack of agreement to justify the non-compliance with the constitutional mandates (“Santa Fe”, 2015).

5.4. Exhorts the Parties to Comply with The Constitution and Its Objectives

“This exhortation to the superior organs of our constitutional organization is imposed, in order to consolidate the federal project of our primordial Constitution, claimed by the 1994 conventional constituents, in compliance with the strengthening of the federal regime entrusted to them” (“Santa Fe”, 2015); It again exhorts the intergovernmental actors to comply with the Constitution in

“Esso” (2021), (vote Minister Lorenzetti); “Corrales”⁶⁷ 2015, “Bazán”, “Las Colonias” (2020),⁶⁸ where it decided to “exhort the provincial authorities to adopt the necessary regulations for the due compliance with the mandate that emerges from Article 123 of National Constitution,”⁶⁹ a doctrine that was reiterated in “Municipalidad de Castelli” (2022).⁷⁰

The oldest ruling in this line of exhortation of the Court is undoubtedly the case “La Pampa v. Mendoza” of 1987,⁷¹ where it resolved “to urge the parties to enter into agreements for a reasonable and equitable participation in the future uses of the waters of the Atuel River, on the basis of the general principles and the guidelines established in that judgment”; Later, in “La Pampa v. Mendoza” of 2017,⁷² it will again exhort the contending parties (together with the National Government), this time to contribute with necessary resources for the institutional strengthening of the Interprovincial Commission of the Lower Atuel (Comisión Interprovincial del Atuel Inferior – C.I.A.I.). However, the Court also resolved the realization of “a program of execution of works that contemplates different alternatives of technical solution of those foreseen in relation to the problems of the Atuel” program that, in addition, “must be submitted to the approval of this Court within one hundred and twenty (120) days”.

In a similar case, “Provincia de Buenos Aires c/ Provincia de Santa Fe”, 2019, the Court understood it necessary “[...] to urge the provinces of Buenos Aires, Santa Fe and Córdoba, and the National State, to institutionally strengthen the

⁶⁷ CSJN, *Corrales, Guillermo Gustavo y otro s/ hábeas corpus* [Corrales, Guillermo Gustavo et al. – Habeas Corpus Petition], Fallos 338:1517, sentencia del 9 de diciembre de 2015 [judgment of 9 December 2015].

⁶⁸ CSJN, *Asoc. Pers. Munic. las Colonias c/ Fed. Sind. Trab. Munic. Festrám y otros s/ acción de amparo* [Association of Municipal Personnel of Las Colonias v. Federation of Municipal Workers' Unions (FESTRAM) et al. – Constitutional Protection Action (Amparo)], Fallos 343:1389, judgment of 29 October 2020.

⁶⁹ The court declared the unconstitutionality of a provincial law regulating Municipal Public Employment, because it violates the municipal autonomy guaranteed by articles 5 and 123 of National Constitution.

⁷⁰ SJN, *Intendente de la Municipalidad de Castelli c/ Provincia de Buenos Aires s/ acción declarativa* [Mayor of the Municipality of Castelli v. Province of Buenos Aires – Declaratory Judgment Action] (*art. 322 Cód. Procesal*), sentencia del 10 de febrero de 2022 [judgment of 10 February 2022]. The mayor of the municipality of Catelli, went to the Court asking the declaration of unconstitutionality of the Constitution of the Province of Buenos Aires, since the provincial supreme norm does not guaranty the municipal autonomy established by articles 5 and 123 of National Constitution.

⁷¹ CSJN, *Provincia de La Pampa c/ Provincia de Mendoza* [Province of La Pampa v. Province of Mendoza], Fallos 310:2520, judgment of 3 December 1987.

⁷² CSJN, *La Pampa, Provincia de c/ Mendoza, Provincia de s/ Uso de aguas* [Province of La Pampa v. Province of Mendoza – Dispute over Water Use], Fallos 340:1695, judgment of 1 December 2017.

constitution and operation of the Interjurisdictional Commission”, imposing on the parts, certain actions to be taken, such as strengthening the Interjurisdictional Commission of the Laguna La Picara Basin (CICLP), to develop the necessary works related to infrastructure projects that prevent, regulate or control the runoff of the Laguna La Picara, regulate or control the runoff of water from the lagoon, to coordinate the rational, equitable and sustainable management of water in the lagoon basin and to control the hydraulic works carried out in the area, “to advance in the definitive solution of this problem of general interest, based on the principles of solidarity, cooperation and subsidiarity”.

Thus, in addition to resolving the specific case, the Court urges, exhorts, encourages the disputing parties to resolve the conflict themselves, complying with the guidelines and principles established by the Constitution.

5.5. Sets Guidelines for Future Action

Indeed, in all these rulings, the Court has identified certain constitutional principles that are guidelines in the way the federated actors should act, in order to achieve the goals, values and objectives set by the Constitution.

The Court itself has recognized that it is its task to interpret the rules of federalism: “That a primary function of this Court consists of interpreting the rules of federalism so that the exercise of functions performed by the authorities avoids frictions susceptible of increasing the powers of the central government to the detriment of local powers” (Bazán 2019). In this task, what is sought is that the Interpretation of the infra-constitutional regulations be consistent with the federal system (“Shi” 2021, Vote of Minister Ricardo Luis Lorenzetti, Paragraph 7°).

Considering all the precedents analyzed before, it is possible to conclude that its interpretative task is not reduced to the originalist reading of a text crystallized in time; on the contrary, it strengthens the dynamic reading aimed at implementing it.⁷³

⁷³ María Gabriela Ábalos, “Federalismo y autonomía municipal: la Corte Suprema reafirma su función arquitectónica en el desarrollo constitucional argentino,” *Suplemento de Derecho Constitucional, El Derecho* [Federalism and Municipal Autonomy: The Supreme Court Reaffirms Its Structural Role in the Constitutional Development of Argentina,” *Constitutional Law Supplement, El Derecho*] (February 2015).

VI. CONCLUSIONS

There is no doubt that Apex Courts are playing a key role in modern federations. As Erin Delaney has warned, “The role of apex courts in constitutional development is widely seen as a central aspect of modern constitutionalism, and in a federal system, courts participate in structuring and mediating the very societal conflicts that contributed to the initial desire for power-sharing.”⁷⁴ However, this role varies widely across federations.

In this regards, two African federations adopted a political mechanism over the judicial, without of course neglecting the role of the court in resolving disputes, as the cases of South Africa and Ethiopia; Belgium adopted this system until the same Court decided to intervene in intergovernmental dispute in 2010 and then, after the 6th State Reform from 2012, this role was recognized by the Parliament through legislation.

On the other side, some federations such as the Austrian and German, tend to make the court the primary safeguard. Of course, the general tendency is to establish political mechanism of negotiations and bureaucratic agencies to coordinate and implement decisions.⁷⁵ But, again, in accordance with Erin Delaney

“Given the theoretical expectation that a federal compact will require some type of arbiter and that courts generally are relied upon to interpret and enforce contractual rules, it is perhaps unsurprising that an apex court is the institution most often selected to fulfill that role. Although the occasional scholar is willing to leave ambiguous the ultimate-arbiter designation or hypothesizes a political body instead of a court, 7 most actual federal systems use the judiciary to mediate the challenges of federalism and provide constitutional review. 8 Thus apex courts – both their design and function – have received the most sustained scholarly attention.”⁷⁶

Undoubtedly, the Court has acquired a leading role in the Argentine federal system through its recent jurisprudence, clearly opting for a *system of judicial*

⁷⁴ Erin F. Delaney, “Judicial Federalism in Comparative Perspective,” in *Federalism and the Courts in Africa*, eds. Fessha and Kössler (Abingdon/New York: Routledge), 15–28, 16.

⁷⁵ Johanna Schnabel, *Gestión de interdependencias en sistemas federales: consejos intergubernamentales y creación de políticas públicas* [Managing Interdependence in Federal Systems: InterGovernmental Councils and PublicPolicy Making] (Toluca: Universidad Autónoma del Estado de México, 2022).

⁷⁶ Erin F. Delaney, “Judicial Federalism in Comparative Perspective,” 17.

safeguards, without disregarding, of course, the political mechanisms. in line with a more general trend, as Ronald Watts has emphasized (2001). The Argentine Court's own rulings show the importance of these *political mechanisms* in the resolution of intergovernmental conflicts, which should not only precede the Court's intervention, but also, from a normative and teleological point of view, are preferable to the Court's intervention. Citing the U.S. Supreme Court, it held that "conventions and mutual agreements should, as far as possible, be the means of settlement rather than the invocation of our jurisdictional power" (La Pampa v. Mendoza 1987). What the Court is ultimately saying, is that those conflicts must be resolved by the parties themselves.

When agreement has not been possible, and negotiations have been unsuccessful (if there have been any), the intervention of the Court will be necessary, and the Court has taken advantage of these different opportunities to establish clear and precise criteria of behavior, through the interpretation of the Constitution and the principles derived therefrom.

The Court is recognized itself as an actor with the institutional capacity to recognize, identify, give content to and give effect to the general constitutional principle of federalism (and all the others principles that derive from it). That is, federalism is recognized as a general constitutional principle that can (and should) be distinguished from other constitutional principles, as a separate category and, moreover, can (and should) be judicially enforced.

Matching a generalized trend at the level of comparative federalism, and promoted by an important part of the doctrine (Gardbaum 1996, Jackson 2014, Bermann 1994, Bednar and Eskridge 1995, Bednar 2009) the Argentine Supreme Court embraces a third position, where it exhorts the parties to strengthen political mechanisms, but at the same time reaffirms its institutional role as arbiter of intergovernmental disputes. Throughout its most recent jurisprudence it is possible to find the two characteristic elements of the third model that have been identified in this paper, that is, the importance of dialogue (interinstitutional and intergovernmental) and the leading role of the constitutional principles governing relations between levels.

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