HOMOGENEITY CLAUSES IN FEDERAL COUNTRIES: A COMPARATIVE ANALYSIS

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Abstract

Homogeneity clauses in federal countries can be defined as constitutional provisions that impose on sub-national constitutions the respect of the principles and the spirit of the national constitution, thus regulating the amount of constitutional autonomy allowed to sub-national entities. This paper analyzes comparatively two important aspects of the meaning and application of homogeneity clauses. In Part I, the contrast between the Brazilian and Austrian federations and the Argentinian system is used to illuminate how homogeneity clauses can receive completely divergent interpretations in different federal systems. In Part II, the description of the American and Argentinian experiences reveals that the justiciability of homogeneity clauses, which is taken for granted in some federations, is not a natural consequence of their existence, but seems to be a more desirable alternative. The paper concludes by pointing to two foundational normative questions of federal theory and practice that arise after the analysis of these two key features of homogeneity clauses: what degree of homogeneity is compatible with a federal system? What should be the role of courts in a federation?

Résumé

Les clauses d'homogénéité des États fédéraux peuvent être définies comme les dispositions constitutionnelles qui imposent aux constitutions sous-nationales le respect aux principes et à l'esprit de la constitution nationale, ainsi régulant le degré d'autonomie constitutionnelle laissée aux entités sous-nationales. Cet essai analyse comparativement deux aspects importants du sens et de l'application des clauses d'homogénéité. Dans la Partie I, le contraste entre les fédérations Brésilienne et Autrichienne et le système Argentin est utilisé pour démontrer que les clauses d'homogénéité peuvent recevoir des interprétations divergentes en différents systèmes fédéraux. Dans la Partie II, la description des expériences Américaine et Argentine révèle que la justiciabilité des clauses d'homogénéité, tenue pour acquise dans quelques fédérations, n'est pas une conséquence naturelle de leur existence, mais semble être l'alternative la plus avantageuse. L'essai conclut en indiquant deux questions normatives fondamentales de la théorie et de la pratique fédérales suscitées par l'analyse de ces deux éléments-clés des clauses

d'homogénéité : quel degré d'homogénéité est compatible avec un système fédéral ? Quel doit être le rôle des cours dans une fédération ?

Introduction

One of the main features of federal systems across the globe is the constitutional autonomy of sub-national entities (States, Provinces, Cantons, or whichever other form these entities might take in a particular federal system). Constitutional autonomy can be defined as the power of sub-national entities to adopt their own constitutions, *i. e.* formally entrenched legislative texts which deal with issues that are constitutional in nature, especially the organization and composition of the local administration, legislature and judicial power, as well as the checks and balances that operate between them.[1]

The question whether the sub-national entities of a given federation enjoy constitutional autonomy is not a "yes or no" question. Different federations allow different amounts of constitutional autonomy to their constituent units, so it can be best described as a *continuum*. At one end of the *continuum* we can find countries whose sub-national entities enjoy absolutely no constitutional autonomy. In those countries, the institutional arrangements applicable to sub-national entities are completely and unilaterally determined by the national constitution. Conversely, at the other end of the *continuum*, we find countries whose constituent units are the sole responsible for the design of their own institutional arrangements, without any interference from the national constitution. As we can see, where a country stands at the

[1] Francesco Palermo and Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Portland: Hart Publishing, 2017), at 128-129. Sub-national constitutions usually also contain bills of rights, but this will not be the focus of this paper. For a discussion of the role of sub-national bills of rights, see, for example, Matteo Monti, "Subnational constitutions between asymmetry in fundamental rights protection and the principle of nondiscrimination: a comparison between Belgium (Charter for Flanders) and Switzerland" in (2019) 11:1 Perspectives on Federalism at 3.

continuum depends on the extent to which its national constitution directly and unilaterally regulates the institutional arrangements of its sub-national entities.

A very similar idea is conveyed by the concept of *sub-national constitutional space*, developed by the American scholars G. Alan Tarr and Robert F. Williams. According to them, the extent of sub-national constitutional space is determined mainly by the degree of discretion left by the national constitution to sub-national constitutions.[2] Certain federations have national constitutions that define in details the institutional arrangements of the whole federal system, both at the national and sub-national levels. However, most federations are structured by an incomplete national constitution that allows sub-national entities certain leeway in designing their own institutions.[3]

According to Tarr, sub-national constitutional space comprehends a wide range of powers: the power to draft the sub-national constitution, the power to amend or replace it, the power to define sub-national governmental institutions, the power to define the sub-national legislative process, the power to create instruments of direct democracy, among many others. All these powers can be more or less exercised by the sub-national entities according to what determines the national constitution.[4]

Having presented the idea of a *continuum* of sub-national constitutional space, it is important to consider the constitutional mechanisms used by federations to regulate the amount of space they desire to allow to their constituent units. We can think of at least two of such mechanisms.

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[2] Robert F. Williams and G. Alan Tarr, "Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder and Cantons" in G. Alan Tarr, Robert F. Williams and Josef Marko (eds.), *Federalism, Subnational Constitutions and Minority Rights* (Westport: Praeger, 2004) at 3.

[3] Michael Burgess and G. Alan Tarr, "Introduction: Sub-national Constitutionalism and Constitutional Development" in Michael Burgess and G. Alan Tarr (eds.), *Constitutional Dynamics in Federal Systems. Sub-national Perspectives* (Montreal: McGill-Queen's University Press, 2012) at 3.

[4] G. Alan Tarr, "Explaining Sub-National Constitutional Space" in (2011) 115:4 Penn State L. J. 1133 at 1134.

Firstly, national constitutions can contain explicit provisions that impose or forbid certain institutional arrangements to the sub-national entities, *e. g.* constitutional provisions that determine that sub-national legislature must be unicameral or bicameral, that establish the tenure of the chief of the sub-national executive branch and the possibility of reelection etc. This type of constitutional provision is a very effective and straightforward mechanism of shaping sub-national constitutional space, as it defines clearly the limitations that are imposed on sub-national constitution-making.

Secondly, certain national constitutions contain what has been called by Palermo and Kössler *homogeneity clauses*. These constitutional clauses do not explicitly impose concrete institutional arrangements on the sub-national entities. On the contrary, they only impose on sub-national constitutions the duty to be in accordance with the "foundational principles and the overall spirit of the national constitution".[5] By ensuring the respect of the principles and of the spirit of the national constitution, these clauses also ensure a certain homogeneity among sub-national units, which is commonly thought to be a key element of federal systems.[6]

Even though such clauses exist in many different federations, they are not easy to operate. Contrary to the first mechanism presented above, homogeneity clauses are naturally vague and open to a variety of interpretations, either in the sense of expanding or in the sense of restricting sub-national constitutional space. Their meaning and true impact on sub-national constitutional space is ultimately a matter of constitutional interpretation and very often depend on the interpretation conferred by Supreme and Constitutional Courts. Being a rather problematic regulating feature of sub-national constitutional autonomy, it is important to understand how

[5] Francesco Palermo and Karl Kössler, *supra* note 1 at 134.
[6] For example, see Holger Hestermeyer, "Un análisis sincrónico del principio de la homogeneidad: Un principio clave de sistemas federales y sistemas de integración" in J. I Núñez Leiva (ed.), *Nuevas Perspectivas em Derecho Público* (Santiago: Librotecnia, 2011) at 559.

homogeneity clauses have been interpreted and enforced in some of the world's most prominent federations.

Two crucial aspects of the operation of homogeneity clauses will be analyzed in this paper. In Part I, the paper comparatively assesses the Brazilian, Austrian and Argentinian homogeneity clauses, in order to better understand the *degree* of homogeneity required by homogeneity clauses in different federations. In Part II, the paper deals with the issue of the justiciability of homogeneity clauses and the lessons that can be learned from the American and the Argentinian experiences. Finally, the conclusion explores two fundamental questions regarding the degree of homogeneity compatible with and desirable in a federal system and the role played by courts in the regulation of sub-national constitutional autonomy.

I. How homogeneous should federations be? The Brazilian, Austrian and Argentinian experiences.

As was indicated in the Introduction, homogeneity clauses are naturally abstract provisions that need instantiation through constitutional interpretation. Consequently, the degree of homogeneity required by a homogeneity clause depends not only on the text of the clause itself, but also, and mainly, on the interpretation that legal scholars and practitioners of a given federal system give to that clause. The Brazilian, Austrian and Argentinian federations exemplify different interpretations of their respective homogeneity clauses, resulting in federations with different degrees of homogeneity imposed on sub-national entities.

Contrary to some of its foreign counterparts, the Brazilian Constitution of 1988 contains a surprisingly open and vague homogeneity clause in its Article 25.[7] This provision establishes

[7] The English version of the Brazilian Constitution of 1988 is available here: https://www.constituteproject.org/constitution/Brazil_2017?lang=en.

that the Brazilian States shall adopt their own constitutions and laws, *observing the principles of the national constitution*. Article 25 doesn't explicitly mention any of the constitutional principles that have to be observed by the States in their constitution-making processes. The reason for this very open clause of homogeneity probably lies in the historical background that led to the adoption of the current Brazilian Constitution of 1988.

Brazil lived under a military dictatorship from 1964 to 1985, which repealed the democratic Constitution of 1946 and imposed a new, authoritarian constitution in 1967. This new constitutional regime seriously affected the autonomy of Brazilian States[8] – not only their constitutional autonomy, but also their administrative and political autonomy. The Brazilian federalism was completely reshaped by the intense centralization of the political power in the federal executive branch, to the detriment of sub-national autonomy.

In order to constrain sub-national constitutional space, the military government introduced a profoundly restrictive homogeneity clause in Article 13 of the Constitution of 1967. This article established that the States should adopt their own constitutions, *respecting a long list of principles of the national constitution*, many of which could not be truly called principles. They went from the observance of the rules of the federal legislative process, to the compliance with the federal rules concerning the issuance of public debt securities by the States. Therefore, even though Article 13 mentioned "principles", it imposed on the States a myriad of detailed rules that were applicable to the national level, thus creating a profound homogeneity among States in many aspects.

After the end of the military dictatorship, a new democratic regime was designed to eliminate all the authoritarian features that had been introduced in the previous decades. The Constitution

[8] Fernanda Dias Menezes de Almeida, *Competências na Constituição de 1988* (São Paulo: Atlas, 1991), at 47.

of 1988 was inspired by a new model of federalism, diametrically opposed to the extremely centralized federalism that was in place: a balanced federalism, with a more equitable distribution of powers between the national and sub-national levels.[9] In order to materialize this ideal, States had to be given back the autonomy that had been taken away from them, including their constitution-making powers, so that local institutional preferences and peculiarities could be truly satisfied.

This is the reason why the Constitution of 1988 introduced a very open homogeneity clause: instead of enumerating a constraining list of rule-like principles that had to be strictly observed by the States, it simply established that States had to comply with the *principles* of the national constitution, without further details. Of course, the Brazilian constitution also contains a significant amount of other provisions that directly determine certain institutional arrangements of the States, which are mechanisms of the first type mentioned in the Introduction.[10] However, apart from these constitutional rules that concern directly and explicitly the sub-national institutions, Brazilian States are *a priori* only bound to the foundational principles of the national constitution.

Nevertheless, this is not how the Brazilian Supreme Federal Court interpreted Article 25 in the years following the drafting of the new constitution. Thorough analysis of the case law developed by the Supreme Court after the enactment of the new constitution has shown that the Brazilian clause of homogeneity has not been interpreted as enhancing States' constitutional autonomy.[11] On the contrary, the Court interprets the homogeneity clause as a *principle of*

[9] Raul Machado Horta, *Direito Constitucional* (Belo Horizonte: Del Rey, 1999), at 370.
[10] For example, Article 27 of the Brazilian constitution determines the exact number of representatives in the States' legislatures, which must be unicameral, as well as criteria for the determination of their salaries. On that matters, sub-national constitutional space is clearly limited by explicit provisions of the national constitution.
[11] Rafael Viotti Schlobach, *Simetria Federativa e Separação de Poderes: um estudo da jurisprudência do STF no controle de constitucionalidade das Constituições Estaduais* (São Paulo: Sociedade Brasileira de Direito Público, 2014), online: http://www.sbdp.org.br/wp/wp-content/uploads/2018/03/264_Rafael-Viotti-Schlobach.pdf.

symmetry, according to which States have to adopt institutional arrangements that are symmetrical to those applicable at the national level. In other words, sub-national constitutions have to mirror a significant part of the institutional arrangements established by the national constitution.

A very clear example is the Court's assessment of the observance of the principle of separation of powers by the States' constitutions. The separation of powers is a principle explicitly mentioned in Article 2nd of the Constitution of 1988 and, as a principle, it is binding on sub-national constitutions, according to the homogeneity clause of Article 25. In this context, the Brazilian Supreme Federal Court has been iteratively invited to decide on the validity of sub-national constitutional provisions that allegedly violate the principle of separation of powers. Instead of considering this principle an abstract provision that could be instantiated in different ways by the States according to local preferences, the Court decided that sub-national mechanisms of checks and balances between powers have to mirror the mechanisms designed by the federal constitution for the national level. Even in the absence of explicit provisions of the national constitution concerning directly the States, they are bound to obey the institutional arrangements applicable at the national level. In other words, the *principle* of separation of powers has been interpreted by the Supreme Court as the set of *rules* established by the national constitution. It is interesting to mention some mechanisms of checks and balances created by Brazilian States that were deemed unconstitutional by the Supreme Court.

In an early decision rendered in 1989[12], the Court declared unconstitutional a provision of the Constitution of the State of Bahia that allowed the State legislature to summon the chief of the State executive branch for the provision of information on a given matter. The Court argued that such a mechanism of control did not have an equivalent in the national constitution,

[12] Supremo Tribunal Federal [Supreme Federal Court], Brasília, 25 October 1989 (1989), ADI 111-MC (Brazil).

according to which, at the national level, only ministers can be summoned by the federal legislature, never the President himself. This State constitutional provision was considered asymmetrical to the national one and the absence of an equivalent mechanism in the national constitution was interpreted by the Court as a prohibition of innovation by the States.

The Brazilian Supreme Federal Court has also adopted a restrictive position regarding instruments of direct democracy and public participation in the State administration. In a decision pronounced in 1999[13], the Court ruled unconstitutional a provision of the Constitution of the State of Rio Grande do Sul that established a mechanism of popular election for the directors of State public schools. The Court held the same position in a judgment rendered in 2002[14], declaring void a provision of the Constitution of the State of Rio de Janeiro that established popular participation in the selection of State chief police officers. The reasoning developed by the majority of the Court in both judgments was almost the same: the national constitution had determined exhaustively all the possible mechanisms of direct democracy and public participation, so any innovative mechanisms developed by the States would inevitably consist in a breach of the federal constitution. More specifically, those provisions would violate the independence of the State executive branch, which is, in principle, the competent institution for the selection of both public school directors and chief police officers. Those mechanisms of direct democracy would only be valid if the national constitution had itself established them as exceptions to the independence of the executive branch for the benefit of public participation.

As will be demonstrated below, very recent judgements of the Brazilian Supreme Court seem to indicate a slow turnaround in its traditional case law concerning the homogeneity clause and innovative mechanisms of direct democracy.

[13] Supremo Tribunal Federal [Supreme Federal Court], Brasília, 03 March 1999 (2001), ADI 578 (Brazil).
[14] Supremo Tribunal Federal [Supreme Federal Court], Brasília, 11 September 2002 (2002), ADI 244 (Brazil).

A similar situation can be observed in the Austrian federation. The Austrian Constitution also contains a very broad homogeneity clause in its Article 99[15], which prescribes that the constitutional law of the *Länder* shall not affect (*berühren*) the federal constitution. In an article that analyzes the meaning and operation of the Austrian homogeneity clause, Anna Gamper brilliantly summarizes the difficult issues behind the judicial application of such clauses: "the question remains as to what exactly the federal constitutional standard is according to which such a law will be repealed by the Constitutional Court on account of its heterogeneity".[16] In fact, Gamper analyzes a judgment of the Austrian Constitutional Court that repealed a provision of the Constitution of Vorarlberg, one of the Austrian *Länder*, on the basis of its heterogeneity regarding the federal constitution.[17]

The Constitution of Vorarlberg had allowed State citizens to exercise direct democracy through a wide range of mechanisms, including popular initiatives to the enactment of both ordinary and constitutional *Land* laws and popular referenda. The boldest and most innovative mechanism was the so-called *Volksgesetzgebung* – or popular legislation. According to this constitutional provision, if the *Land* parliament refused to enact a piece of legislation that was demanded by at least 20 percent of the *Land* voters, the matter would have to be subject to popular referendum. In case of success of the referendum, the *Land* parliament would be obliged to enact the piece of legislation as demanded by the popular petition.

However, the Austrian Constitutional Court deemed unconstitutional that *Land* legislature could be compelled by the citizens to enact a piece of legislation. According to the Court, the Constitution of Vorarlberg had promoted direct democracy to a much larger extent than the

[15] The English version of the Austrian Constitution is available here: https://www.constituteproject.org/constitution/Austria_2013?lang=en.
[16] Anna Gamper, "Homogeneity and Democracy in Austrian Federalism: The Constitutional Court's Ruling on Direct Democracy in Vorarlberg" in (2003) 33:1 Publius 45 at 49.
[17] Verfassungsgerichtshof [Constitutional Court], Vienna, 28 June 2001, VfSlg 16.241 (Austria).

Austrian federal constitution, which establishes representative democracy as the rule and direct democracy only through some exceptional instruments – but not through an instrument equivalent to the one created in Vorarlberg.[18]

Criticizing the Court's decision, Gamper notes that no *explicit* provision of the national constitution prohibits *Länder* from designing mechanisms of direct democracy different from the ones established at the national level. Still, the Court developed a reasoning very similar to the Brazilian "principle of symmetry" and decided that the federal model of direct democracy is implicitly mandatory to the *Länder*. In this context, Gamper argues precisely that "the mere fact that federal constitutional law includes several provisions regarding direct democratic procedures in the federal arena, maintaining though a generally representative system of democracy, does not necessarily imply that the *Länder* constitutions must contain the very same provisions".[19]

Very interestingly, an almost identical case has been recently decided by the Brazilian Supreme Court in a judgement rendered in October 2018. Apparently overruling the traditional "principle of symmetry", the Court ruled constitutional a provision of the Constitution of the State of Amapá that created the possibility of amending the State constitution by popular initiative, *i. e.* by a petition signed by a given percentage of the State voters. Even though such possibility does not exist in the Brazilian federal constitution, which cannot be amended by popular initiative, the Court considered that the State constitutional provision enhanced the democratic principle and popular political participation, and thus could not be constrained by a duty of symmetry. In this particular case, the absence of an equivalent provision in the federal

[18] Anna Gamper, *supra* note 16 at 50.
[19] Anna Gamper, *supra* note 16 at 54.

constitution was not interpreted as a prohibition for the State to create innovative mechanisms of direct democracy.[20]

In spite of this very recent decision of the Brazilian Supreme Court, Brazil and Austria still can be described as interesting examples of federations whose homogeneity clauses have been interpreted as profoundly restricting sub-national constitutional space. Instead of simply demanding obedience to the basic and foundational principles of the national constitution, their homogeneity clauses are understood as imposing a true symmetry between national and sub-national constitutions. Institutional features contained in the national constitution are seen as implicitly mandatory for sub-national entities, whereas institutional arrangements absent from the national constitution are seen as prohibited innovations for sub-national entities.

An insightful contrast can be drawn between the Austrian and Brazilian experiences and the Argentinian federation, which also contains a homogeneity clause in its structure. Article 5 of the Argentinian Constitution[21] establishes that each province shall draft its own constitution, *under a republican representative system and according to the principles, declarations and guarantees of the national constitution*. The Argentinian homogeneity clause seems to combine elements of both the Brazilian and the American constitutions[22]: it mentions both the republican principle and other unspecified principles contained in the national constitution.

Contrary to their Brazilian and Austrian counterparts, the Argentinian Supreme Court has given a much more generous interpretation to the homogeneity clause of Article 5. Ricardo Haro

[20] Supremo Tribunal Federal [Supreme Federal Court], Brasília, 25 October 2018, ADI 825 (Brazil).
[21] The English version of the Argentinian Constitution is available here: https://www.constituteproject.org/constitution/Argentina_1994?lang=en.
[22] About the American homogeneity clause, see Part II below.

mentions some cases in which the Argentinian Court explicitly acknowledged the necessity of deference to State constitutional autonomy, even in the presence of a homogeneity clause.[23]

In the case "*Electores y Apoderados de los Partidos Justicialista, Unión Cívica Radical y Demócrata Cristiano*"[24], decided in 1991, the Court emphasized that the control of the compliance of provincial law with federal law cannot interfere with provincial autonomy. It must preserve provincial autonomy and, at the same time, prevent provincial acts from jeopardizing the fundamental institutions that compose the provincial republican form of government, which is mandatory for the provinces according to Article 5.

This self-restraining position of the Argentinian Supreme Court can be better exemplified through the analysis of two interesting decisions rendered in the following years.

In 1993, in case *"Maria Cristina Scarpati y Otros"*[25], the Court dealt with the question of the irreducibility of judges' salaries, which is a widespread judicial guarantee in modern democracies. The Court stressed that, even though the irreducibility of salaries is a guarantee of judicial independence that must be observed at the sub-national level, provinces are not obliged to reproduce the exact same regulations applicable at the national sphere. Provided that provinces effectively ensure the irreducibility of judges' salaries, they are free to regulate the details of this matter according to local preferences and peculiarities. According to the Court, this freedom to regulate particular aspects of the principle of separation of powers at the sub-national level is part of the essence of a federal system.

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[23] Ricardo Haro, Las cuestiones políticas: ¿prudencia o evasión judicial?, in Ricardo Haro, *Constitución, poder y control* (Méxio D.F.: Universidad Nacional Autónoma de México, 2002) at 182-183.

[24] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 26 December 1991, *Electores y Apoderados de los Partidos Justicialista, Unión Cívica Radical y Demócrata Cristiano*, 314 Fallos 1915 (Argentina).

[25] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 06 December 1993, *Maria Cristina Scarpati y Otros v. Provincia De Buenos Aires*, 316 Fallos 2747 (Argentina).

Similarly, in the following year, the Court analyzed the validity of a provision of the Constitution of the Province of Santa Fe which had determined that provincial governors and vice-governors would have to observe a period of time before running for reelection.[26] The question to be answered was whether such a limitation on the right to reelection, without an equivalent in the Argentinian federal constitution, consisted in a violation of the republican form of government and, consequently, of the homogeneity clause of Article 5 of the Argentinian Constitution. The Court responded negatively. It declared that the republican principle does not comprehend necessarily a right to reelection, even if such right is contained in the federal republican system. Most importantly, the Court formulated a vehement defense of sub-national constitutional autonomy against potential restrictive effects of a clause of homogeneity:

> "La necesidad de resguardar el sistema representativo republicano debe conducir a que las constituciones de provincia sean, en lo esencial de gobierno, semejantes a la nacional; que confirmen y sancionen sus 'principios, declaraciones y garantías', y que lo modelen según el tipo genérico que ella crea. Pero no exige, ni puede exigir, que sean idénticas, una copia literal o mecánica, ni una reproducción más o menos exacta e igual de aquella."[27]

The analysis of the Brazilian, Austrian and Argentinian experiences demonstrates that homogeneity clauses can receive very divergent interpretations in different jurisdictions, causing different impacts on sub-national constitutional space.

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[26] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 06 October 1994, *Partido Justicialista de la Provincia de Santa Fe v. Provincia de Santa Fe*, 317 Fallos 1195 (Argentina).

[27] The duty to observe the republican representative system must guide provincial constitutions to be, in the essentials of government, similar to the national one; to confirm and enforce its [the national constitution's] 'principles, declarations and guarantees', and to shape it according to the general model that it [the national constitution] creates. However, it does not require, and it cannot require, that they be identical, a literal or mechanical copy, nor a more or less exact reproduction [of the national constitution].

In Brazil and Austria, very broad homogeneity clauses have received a very strict interpretation according to which sub-national entities are bound to reproduce constitutional rules prescribed by the national constitution and applicable *a priori* only at the national level. Any innovative institutional mechanism is understood as invalidly exceeding the limits of the national constitution.

On the other hand, in Argentina, a slightly more detailed homogeneity clause has received a completely different interpretation. The case law of the Argentinian Supreme Court reveals a deep concern with the constitutional autonomy of the provinces and with their ability to fill in the blanks left by the national constitution with innovative institutional arrangements peculiar to each one of them. The principles of the national constitution that provinces are bound to follow according to the homogeneity clause are indeed seen as *principles*, not as *rules* of the national constitution that are imposed to sub-national constitutions.

Consequently, the Argentinian federation seems to be more open to institutional experiments at the sub-national level. As described above, the Argentinian Supreme Court recognized the validity of a provincial constitutional provision that had established a sort of "period of quarantine" before governors and vice-governors could run for reelection. This provision can be seen as a typical institutional experiment that, if successful, could be eventually adopted by other provinces and even by the national sphere.

Conversely, the Austrian Constitutional Court does not recognize the power of *Länder* to experiment new mechanisms of direct democracy other than those already provided for in the national constitution. The *Länder*'s creative potential is dramatically restricted and possibilities of successful instruments of direct democracy are significantly diminished, because such innovations can only be brought about by the national sphere.

As for the Brazilian federation, even though it resembles the Austrian experience, we have reasons to believe that the Brazilian Supreme Court is slowly modifying its understanding of the homogeneity clause toward a more experiment-friendly federalism. As indicated above, a very recent decision recognized the validity of the popular initiative for the amendment of a State constitution, with no parallel in the federal constitution. If this mechanism proves to be successful, it might be adopted by other Brazilian States and even by the national sphere.

Finally, the analysis conducted in the first part of this paper leads to one inevitable question that concerns the very structure of federal countries: what degree of homogeneity is compatible with and desirable in a federal structure of government? This is a fundamental normative question that will be addressed in the Conclusion.

II. Should homogeneity clauses be justiciable? The American and Argentinian experiences.

"Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature".[28] With these words, the federalist James Madison expressed his deep concern with the necessity of homogeneity of principles of government among the constituent units of a federal system. He set out the basis for what can be called the homogeneity clause of the American Constitution: according to Article 4, Section 4, "the United States shall guarantee to every State in this Union a Republican Form of Government". The American homogeneity clause (also called Republican Clause or Guarantee Clause) is slightly different from the Brazilian and Austrian ones.

[28] James Madison, Federalist No 43, in Terence Ball (ed.), *The Federalist: With Letters of Brutus* (Cambridge: Cambridge University Press, 2003) at 211.

Firstly, Article 4, Section 4 establishes a duty of the Union to intervene in States that do not adopt a republican form of government. However, as Palermo and Kössler note, this type of intervention has been rarely exercised in the political and judicial realms, except in the years that followed the American Civil War.[29] On the other hand, the Brazilian federal judicial power has been constantly declaring sub-national constitutional provisions unconstitutional based on their inobservance of the principles of the national constitution, thus directly intervening in the States' constitutional autonomy. Similarly, the Austrian Constitutional Court also intervenes directly in the autonomy of the *Länder*, as it did in the *Volksgesetzgebung* case described above.

Secondly, we can observe that the American homogeneity clause explicitly mentions the principle of the national constitution that is mandatory for the States: the republican form of government. It is the opposite of the Brazilian clause of homogeneity, which simply mentions *principles* without defining which of them are to be respected by the States. It is also radically different from the Austrian homogeneity clause, which doesn't even mention the word "principle", prescribing simply that the constitutional law of the *Länder* must not affect the federal constitution. Of course, the mere mention of the republican principle by the American constitution doesn't make it a less vague provision, considering the uncertainty concerning the minimum criteria necessary for a government to be called republican.

Apart from these two differences, an interesting aspect of the American homogeneity clause regards its enforceability.

The possibility of judicially enforcing the homogeneity clause has always been taken for granted by the Brazilian legal community. Article 102, I, *a* of the Brazilian federal constitution clearly establishes that the Supreme Federal Court has the authority to declare unconstitutional

[29] Francesco Palermo and Karl Kössler, *supra* note 1 at 135.

all normative acts issued by the States. Based on this provision, Brazilian legal scholars and practitioners deem possible to obtain from the Supreme Court a declaration of nullity of sub-national constitutional provisions that violate not only explicitly State-oriented constitutional norms, but also provisions that violate the constitutional principles vaguely mentioned in the homogeneity clause of Article 25. Similarly, the Austrian Constitutional Court does not refrain from scrutinizing the compliance of sub-national constitutions with the duty of homogeneity regarding the national constitution.

This is not how the enforceability of the American homogeneity clause has been traditionally interpreted. Instead of taking for granted the judicial enforceability of the homogeneity clause, the Supreme Court of the United States developed the so-called "political question doctrine". According to this doctrine, the question whether a State had a republican form of government or not was a political question, not subject to judicial scrutiny.

The origins of the "political question doctrine" go back to the case *Luther v. Borden*[30], decided by the Supreme Court in 1849. After the independence of the United States, Rhode Island was the only American State that did not adopt a new State constitution. Instead, the Colonial Charter of 1633 was kept in force in Rhode Island, with its electoral system still based on census, which excluded many white men from voting. In the 19th century a suffragist movement decided to elect a convention and draft a new constitution, extending the right to vote to all white men. The suffragist constituents called new elections and a parallel suffragist government was elected. The establishment of the suffragist government unchained the Dorr Rebellion, which caused the introduction of martial law by the government based on the Colonial Charter. Martin Luther, one of the suffragists that was arrested based on the martial law, filed a lawsuit arguing that the martial law had been introduced by an illegal government that did not observe

[30] *Luther v. Borden,* 48 US (7 How) 1 (1849).

the republican form of government prescribed by Article 4, Section 4 of the American Constitution. The case arrived at the Supreme Court, which refused to appreciate the legitimacy of the government of Rhode Island. The Court considered it a non-justiciable political question that could be only appreciated by the Congress. Since then, the Court has constantly refused to adjudicate questions related to the Guarantee Clause of Article 4, Section 4, until recently.[31]

There is a common myth according to which the American Supreme Court never accepted the justiciability of the Guarantee Clause after 1849, when *Luther v. Borden* was decided. However, it was only in *Pacific States Telephone & Telegraph Co. v. Oregon*[32], in 1912, that the Court definitely interpreted the *Luther v. Borden* precedent as precluding judicial enforcement of Article 4, Section 4. Before that, during the second half of the 19th century, the Supreme Court accepted multiple times to enforce the Guarantee Clause, recognizing, for instance, that State racial segregation[33] and denial of the right to vote to women[34] violated the republican principle mentioned in the homogeneity clause.[35]

Although the non-justiciability position prevailed during most part of the 20th century, the situation seems to have slightly evolved in recent years. In fact, Erwin Chemerinsky notes that since the 1980s, voices against the traditional position of the Court have emerged among American scholars devoted to the study of the republican principle (main object of the Guarantee Clause). According to Chemerinsky, these authors were troubled by the perception that the traditional non-justiciability position of the Court ended up transforming the Guarantee Clause into a "dead letter" constitutional provision, deprived of all effectiveness.[36]

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[31] Francesco Palermo and Karl Kössler, *supra* note 1 at 135-136.
[32] *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 US 118 (1912).
[33] *Plessy v. Ferguson*, 163 US 537 (1896).
[34] *Minor v. Happersett*, 21 Wall. 162 (1875).
[35] Erwin Chemerinsky, "Cases under the Guarantee Clause Should Be Justiciable" in (1994) 33 University of Colorado L. Rev. 849 at 860-862.
[36] Erwin Chemerinsky, *supra* note 35 at 849-850.

Responding to this growing pressure from the American legal community, in the decision *New York v. United States*[37] the Court finally acknowledged that the Guarantee Clause could indeed be judicially enforced in some circumstances. In the majority opinion written by Justice O'Connor, the Court questioned the *Luther v. Borden* precedent, admitted that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions" and actually decided the merits of the case on the basis of the Guarantee Clause.[38]

Very interestingly, by influence of the case law of the Supreme Court of the United States, the observance of the homogeneity clause by the Argentinian provinces has also been traditionally considered a *cuestión política* (a political question), immune from judicial scrutiny, until recently. Ricardo Haro presents a very detailed account of the development of the case law of the Argentinian Supreme Court of Justice regarding the political nature of the homogeneity clause and the (im)possibility of its judicial enforcement.[39]

The traditional position held by the Argentinian Supreme Court during the first half of the 20th century was that the federal legislature was the only competent institution to decide whether a provincial government complied with the republican principle (case *Orfila*, 1929[40]). More broadly, the Court held that the compatibility of the provincial institutions with the homogeneity clause contained in Article 5 of the Argentinian constitution was a question of political nature, which precluded its analysis by the courts (case *Costes*, 1940[41]).

However, this traditional position against the clause's justiciability was gradually abandoned by the Argentinian Supreme Court, especially as of the second half of the 20th century. As will

[37] *New York v. United States*, 505 U.S. 144 (1992).
[38] Erwin Chemerinsky, *supra* note 35 at 850-851.
[39] Ricardo Haro, *supra* note 23 at 179-183.
[40] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 12 April 1929, *Orfila*, 154 Fallos 192 (Argentina).
[41] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 19 June 1940, *Antonio Costes v. Andres Prado*, 187 Fallos 79 (Argentina).

be demonstrated, more recent decisions of the Court indicate an openness to the judicial scrutiny of provincial acts that potentially violate the homogeneity clause of Article 5.

In 1967, advancing toward the justiciability of the homogeneity clause, the Argentinian Supreme Court considered void a decree issued by the executive branch of the Province of Salta that had declared unconstitutional a provincial law. According to the Court, the constitutional review of laws is a typical and exclusive function of the judiciary power and thus could not be validly exercised by the executive branch without judicial intervention. Such administrative declaration of unconstitutionality would violate the separation of powers, which is one of the "principles, declarations and guarantees of the national constitution" (case *Ingenio y Refineria San Martín del Tabacal*, 1967[42]). In other words, the Court seemed to assume the role of guardian of those constitutional principles, declarations and guarantees against violations perpetrated by provincial institutions. The Court held the same position twenty years after, in the case "*Sueldo de Polesman"*[43], in which it considered that the federal government, including the federal judiciary, had a duty to intervene in provinces where the republican form of government is corrupted.

This role of the Court was acknowledged in the case "*Electores y Apoderados de los Partidos Justicialista, Unión Cívica Radical y Demócrata Cristiano*"[44], decided in 1991, already mentioned above. In this case, the Court described its delicate mission of actively scrutinizing provincial constitutional law, verifying its compatibility with the federal law and maintaining

[42] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 08 November 1967, *Ingenio y Refineria San Martín del Tabacal v. Provincia de Salta*, 269 Fallos 243 (Argentina).
[43] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 22 April 1987, *Monica R. Sueldo de Polesman y Otra*, 310 Fallos 804 (Argentina).
[44] Corte Suprema de Justicia de la Nación Argentina [Supreme Court of Justice of the Argentinian Nation], Buenos Aires, 26 December 1991, *Electores y Apoderados de los Partidos Justicialista, Unión Cívica Radical y Demócrata Cristiano*, 314 Fallos 1915 (Argentina).

the republican representative form of government, which is mandatory for the provinces according to the Argentinian homogeneity clause.

The American and Argentinian federations offer an interesting perspective to the nature and operation of homogeneity clauses in federal systems. Contrary to the Brazilian and Austrian experiences, the justiciability of homogeneity clauses has not always been taken for granted in the United States and in Argentina. In these two countries, we can observe an evolution from a non-justiciability to a justiciability discourse. This conclusion offers two interesting insights.

First of all, it demonstrates that the possibility of judicial enforcement is not a natural consequence of the existence of a constitutional homogeneity clause, as some Brazilian and Austrian lawyers might think. The fact that some countries have resisted to grant courts the power to scrutinize sub-national constitutions on the basis of homogeneity shows that thought must be given to the political question argument. The constitutional review of an ordinary federal law is not the same thing as the constitutional review of a sub-national constitution. The stakes are much higher. When a Supreme or Constitutional Court declares the nullity of a sub-national constitutional provision, there is an immediate impact on sub-national autonomy and in the integrity of the federation. Sub-national constitutions are not ordinary law. They are the fundamental political expression of sub-national autonomy in a federation and deserve to be treated as so.

However, the evolution of the case law of the American and Argentinian Supreme Courts seems to indicate that the justiciability of homogeneity clauses has desirable effects that outweigh the political question argument. According to Chemerinsky, judicial self-restraint based on the political question argument is only appropriate when another branch of government is better

suited than the judiciary for the enforcement of a given constitutional provision[45]. This is not the case of the homogeneity clause. It is hard to imagine how the federal executive branch or the federal legislature could interfere in sub-national entities in order to declare that a given sub-national constitutional provision violates the republican principle (or other principles of the national constitution). Even though federal constitutions usually establish mechanisms of direct intervention of the federal government in the sub-national entities, these are very exceptional instruments[46] that cannot effectively guarantee in a consistent and durable way the minimum uniformity required by homogeneity clauses.

This reflection leads to a fundamental question for federal theory and practice, and that will be further analyzed in the conclusion: what role should Courts, especially Supreme and Constitutional Courts, play in a federation?

Conclusion

The purpose of this paper was to illuminate key elements of homogeneity clauses in modern federations. The two elements that were analyzed – the degree of homogeneity imposed by homogeneity clauses and the possibility of their judicial enforcement – lead to two foundational questions concerning federal theory and practice.

The first part of the paper dealt with the different degrees of homogeneity imposed by homogeneity clauses in different jurisdictions. The comparative analysis of the Austrian and Brazilian federations, on one side, and of the Argentinian federation, on the other side, demonstrates that different judicial interpretations of homogeneity clauses impact differently

[45] Erwin Chemerinsky, *supra* note 35 at 852.
[46] Article 34 of the Brazilian Constitution, for instance, establishes the possibility of "federal intervention" in the States in exceptional and urgent situations. Federal interventions that aim to guarantee the republican, representative and democratic principles (art. 34, VI, *a*), for example, require previous judicial authorization (art. 36, III), thus presupposing the possibility of judicial scrutiny of the compliance of States with these principles, which are comprehended by the homogeneity clause.

the structure of each federation. The questions that inevitably appear are the following: what degree of homogeneity is compatible with and desirable in a true federal structure of government? Could we say that the Argentinian federation, which seems to allow considerably more sub-national constitutional space, is "more federal" or a "better federation" than its Austrian and Brazilian counterparts?

As mentioned in the Introduction, federal countries can be categorized within a spectrum of sub-national constitutional space. Even if we cannot deny the quality of "federal" to countries situated at the minimum-autonomy end of the spectrum, it has been suggested that federal countries that allow considerable sub-national constitutional space are more *advanced* federations.[47] Instead of *advanced*, it seems better to say that such federations are *more complex* than systems that restrict or deny sub-national constitutional space in that they comprehend a variety of coexisting decentralized constitutional orders under the paramountcy of one national constitutional order.[48]

However, one normative claim certainly can be made in favor of maximizing sub-national constitutional autonomy – and it has been frequently made by scholars: the wider range of possibilities of institutional experimentation and innovation. In fact, federations that allow considerable sub-national constitutional autonomy benefit from the possibility of innovative institutional mechanisms (*e. g.* mechanisms of checks and balances or mechanisms of direct democracy) being "tested" at the sub-national level before they can be reproduced at the national level or at the sphere of other sub-national entities.[49] Therefore, if one cannot say that the Argentinian federation is *more advanced* or *better* than the Brazilian and Austrian ones, it

[47] Matteo Monti, *supra* note 1 at 3.
[48] Hans Kelsen, *Pure Theory of Law* (Clark, New Jersey: The Lawbook Exchange, Ltd., 2005) at 315.
[49] On the potential of sub-national constitutions for serving as laboratories for institutional innovations, see John Dinan, "The Consequences of Drafting Constitutions for Constituent States in Federal Countries" in Michael Seymour et Alain-G. Gagnon (eds.), Multinational Federalism. Problems and Prospects (New York: Palgrave Macmillan, 2012) at 237-240.

is true that Argentinian provinces are in a much better position to contribute, through innovation and experimentation, to the general institutional improvement of the whole Argentinian federation.

In the second part of the paper, the comparative analysis revealed that federations tend to recognize the possibility of judicial interpretation and enforcement of homogeneity clauses. In some countries, the power of courts to enforce such clauses is taken for granted. In Brazil, for instance, this power is justified under the general constitutional clause that allows the Supreme Court to review the constitutionality of "States' normative acts" – no attention seems to be given to the special, political nature of sub-national constitutions. In other countries, such as Argentina and the United States, we observe a gradual evolution from non-justiciability – based on the political question doctrine – toward justiciability of the homogeneity clause, corresponding to an increasing perception of the importance of the judicial role for its effectiveness. The normative question that arises is precisely the following: what role should be left to courts, especially Supreme and Constitutional Courts, in a federation?

Even though broad sub-national constitutional space is a desirable feature of federations, the Argentinian and American perspectives seem to indicate that federations also benefit from an active participation of courts in the guarantee of federal homogeneity. Supreme and Constitutional Courts have the crucial role of impartially drawing the boundaries between sub-national institutional features that are within sub-national discretion and those that affect the minimum homogeneity of the federation. Without an active judicial power, no other branch of government has the tools and the stimulus to nullify sub-national provisions that exceed sub-national autonomy and violate the minimum standard of federal homogeneity.

The so-called political question doctrine should not be used by Courts as an excuse for not scrutinizing any sub-national constitutional provision on the basis of its violation of

homogeneity, *i. e.* as an excuse for not deciding cases on the merits. On the contrary, it should be applied on the merits as a justification for a more restrictive interpretation of homogeneity clauses and for deference to sub-national innovative institutional arrangements, which are the ideal expression of political sub-national autonomy in a federation.