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**Executive-Legislative relationship in Argentina:  
From Menem's *Decretazo* to a new style?**

by

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## Law-making authority before the constitutional reform of 1994

Before the Constitutional reform of 1994, lawmaking authority was reserved to Congress, although the Executive had the authority to initiative bills and also to veto those bills passed by Congress. The Constitution granted the President neither the authority to pass laws nor the authority to issue legislative decrees. The Executive could issue, according to the Constitution, only two types of decrees:

- a) rule making decrees in the course of implementing legislation;
- b) autonomous decrees related to constitutional endowed presidential initiative.

Neither the Constitution nor any law granted the President the authority to issue the so called "*decretos de necesidad y urgencia*" (Need and urgency decrees -NUDs). Nevertheless Argentine Presidents had issued NUDs on very exceptional occasions. From 1853 to 1983, constitutional presidents issued no more than twenty NUDs. Those NUDs were issued in times of extremely dangerous situations, such as political and economic emergencies (especially during the crisis of the 1930s). Alfonsín issued ten NUDs from December 1983 to July 1989. In general, Alfonsín's NUDs were issued on the basis of economic emergency and financial crisis, as well as in support of administrative reform policies.

When the president issues an NUD, he actually "passes" law, usurping congressional law-making authority without consent. NUDs are temporary exceptions to the principle of separation of powers. NUDs are policy-making devices, whereby the Executive presents legislative *faits accomplis* that circumvent the principles of checks and balances, replacing the rule of law by presidential *fiat*.

Before the constitutional reform of 1994, there was no agreement regarding the constitutional status of NUDs. Some authors thought that NUDs were beyond the scope of authority granted to the President by the Constitution, so under no circumstance could the Executive issue this kind of decrees. Others thought that NUDs were valid on condition that they were issued during congressional recess. There were also those who accepted the lawfulness of NUDs but only if they were issued in response to serious crises and emergencies. Emergencies, they said, might make it necessary to use extraordinary prerogatives. In order to be considered constitutionally valid, NUDs had to fulfil certain requirements: a) they had to be an immediate response to an emergency, a response that could not be accomplished through the regular lawmaking process; and b) they had to be communicated to the Congress for ratification or repeal.

President Menem's administration introduced important changes in the institutional practice in Argentina. The relationship between the Executive and the Legislative was substantially modified and the once exceptional NUDs became ordinary decision making devices. A severe economic crisis affected Argentina when President Menem took office, in July 1989. President Menem soon realised that emergency management of economy would demand concentration of power in the Executive. So he tried and enlarged his authority by means of congressional

delegation and by the use of NUDs. The Congress enacted the Administrative Emergency Act and the Economic Emergency Act delegating authority in the Executive regarding privatisation and reduction of public expenditure, among other policies. At the same time Menem issued several NUDs to modify or repeal laws, to create new taxes and to deregulate economic activity. Concentration of power was favoured by two facts. On one hand Justicialist Party was the largest in both Houses of Congress<sup>1</sup>, and controlled the majority of provincial administrations, the Supreme Court and almost all of the audit agencies. On the other hand, public opinion demanded efficient government and centred its demands in the Executive who was better prepared to react quickly to economic crises.

Before the constitutional reform of 1994, President Menem issued 335 NUDs that created taxes, repealed congressional laws, and modified private contractual relations, among other important legislative policies. The noteworthy

<sup>1</sup> The distribution of Chamber of Deputies and of Senate seats between the two major parties, 1989-1999

#### Chamber of Deputies

Period*	Total Number of seats	Justicialist Party (P.J.) Seats	Radical Party (U.C.R.) Seats
July '89 - Dec. '89	254	106 (42%)	114 (45%)
Dec. '89 - Dec. '91	254	112 (44,5%)	90 (35,5%)
Dec. '91 - Dec. '93	257**	117 (46%)	84 (33%)
Dec. '93 - Dec. '95	257	128 (49,8%)	83 (32,5%)
Dec. '95 - Dec. '97	257	131 (50,9%)	68 (26,5%)
Dec. '97 - Dec. '99	257	119 (46,3%)	106 (41,2%)***

\*Half of the seats of the House of Deputies are renewed every two years.

\*\*The increase in the total number of the seats was due to the creation of a new province: Tierra del Fuego.

\*\*\* These seats correspond to the ALIANZA (UCR + FREPASO)

#### Senate

Period*	Total Number of seats	Justicialist Party (P.J.) Seats	Radical Party (U.C.R.) Seats
July '89 - Dec. '89	46	20 (43,5%)	19 (41,5%)
Dec. '89 - Dec. '92	46	26 (57%)	14 (30,5%)
Dec. '92 - Dec. '95	48**	30 (62,5%)	11 (23%)
Dec. '95 - Dec. '98	72***	37 (51,4%)	20 (27,7%)****
Dec. '98 - Dec. '01	72***	38 (52,7%)	20 (27,7%)****

\* A third of the Senate's seats were renewed every three years, according to 1853 Constitution.

\*\* The increase in the total number of the seats was due to the creation of a new province: Tierra del Fuego.

\*\*\* The Constitutional Reform of 1994 increased the number of seats per district to 3, instead of the previous 2.

\*\*\*\* These seats correspond to the ALIANZA (UCR + FREPASO)

increase in the use of NUDs gave birth to the expression "*Decretazo*" or government by decree.

### **Law-making authority after the Constitutional Reform**

In 1994 when the constitutional reform took place, the balance of power between the Executive and the Legislative was in practice quite different from that established in the written constitution. Many historic circumstances had brought about an increasing concentration of power in the Executive. This concentration of power had been remarkably accentuated during Menem's administration. The reform introduced some of those practices in the written text of the constitution. Although the declared intention of the reformers was in favour of a more balanced relation between presidential and congressional powers, and although they said they would control and weaken presidential authority, the result of the reform was in favour of the Executive.

In relation to law-making authority, the Constitution of 1994 grants the President not only the authority to initiative bills and to veto bills passed by Congress, but also the following authorities: a) to issue NUDs on very exceptional circumstances which make it impossible to follow the normal legislative proceedings and b) to partially promulgate bills passed by Congress. At the same time, the reform also introduced in the Constitution the authority of Congress to delegate its law-making authority to the Executive. The introduction of these "paraconstitutional practices" in the written constitution -so the argument went- would weaken presidential power because with the constitutionalization came the limits and controls of the use of these decision making devices, especially regarding the use of NUDs.

Section 99.3 of the Constitution now reads:

*..... The Executive Power shall never issue lawmaking decisions. This kind of measures will be considered null and void.*

*Only when exceptional circumstances make it impossible to follow the ordinary lawmaking process established by this Constitution, the Executive can issue NUDs insofar as they do not regulate penal, fiscal, electoral matters or political party law. NUDs must be decided by the Cabinet assembled and must be countersigned by the Cabinet Chief and the other Ministers.*

*Within ten days the Cabinet Chief will personally submit the NUD to a Permanent Bicameral Committee which will be composed proportionally to the political representation of the House and the Senate. The Committee will send its opinion to the floor within ten days. The House and the Senate must immediately consider the opinion. A special act, passed by the positive vote of the majority of the members of the House and the Senate, will*

*determine the proceedings and effects of the Congress' intervention in this matter.*

Section 99.3 establishes certain limitations to NUDs. One refers to the matter: NUDs will be null and void if related to 4 subject matters: penal, fiscal, electoral or political parties. Other limitations include formal aspects as the necessary intervention of the Cabinet Chief and the other Ministers or the compulsory communication of the NUD to Congress for ratification or repeal.

The profile of NUDs is not completely defined by the Constitution. Important institutional characteristics of NUDs, as their ratification process and effects, have to be determined by an act of Congress, that has not yet been passed (See Graphic 1). On the other hand, section 99.3 of the Constitution arises several questions that will certainly generate different interpretations. For instance, who will determine the existence of "the exceptional circumstances..."? Can this decision be questioned judicially? Does the "impossibility" to follow the ordinary lawmaking process include "political impossibility" (for instance: the government has not the necessary votes to pass a bill)?

The inclusion of NUDs in the Constitution generated different reactions. Some authors thought this new section was merely the recognition of constitutional practice. Others believed that the constitutional regulation of NUDs would strengthen the President's power and will reinforce concentration of power in the Executive.

The constitutional reform of 1994 introduced also the re-election of the President. Menem was re-elected in 1995. Did the Legislative-Executive relationship regarding law-making authority change after the reform? Which was the effect of the limits and restrictions introduced by the reform? Did the reform weaken the trend towards concentration of power in the Executive? This and other questions can be answered if we compare Menem's first and second administrations, especially regarding the use of NUDs.

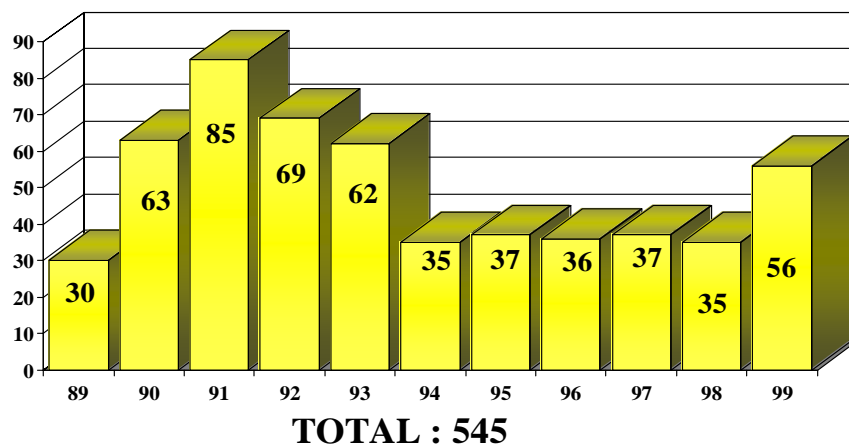
From July 7, 1989 to August 23, 1994<sup>2</sup>, President Menem issued 335 NUDs. After the Constitutional Reform of 1994, he issued 210 NUDs<sup>3</sup>. Figure 1 shows Menem's use of NUDs over time.

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<sup>2</sup> **Ferreira Rubio, D. and Goretti, M.** , "When the President governs alone. The *Decretazo* in Argentina (1989-94)", in **Carey, J. and Shugart, M.** (eds.), *Executive Decree Authority*, Cambridge Univ. Press, 1998.

<sup>3</sup> **Ferreira Rubio, D. and Goretti, M.**, "Menem's Decretazo (1989-1998). The inefficiency of the Constitutional Reform to modify the practice of the Executive regarding Need and Urgency Decrees", Latin American Studies Association, Chicago, 1998.

**TOTAL NUDs of Menem's Administration**  
**(July 7, 1989 - December 10, 1999)**



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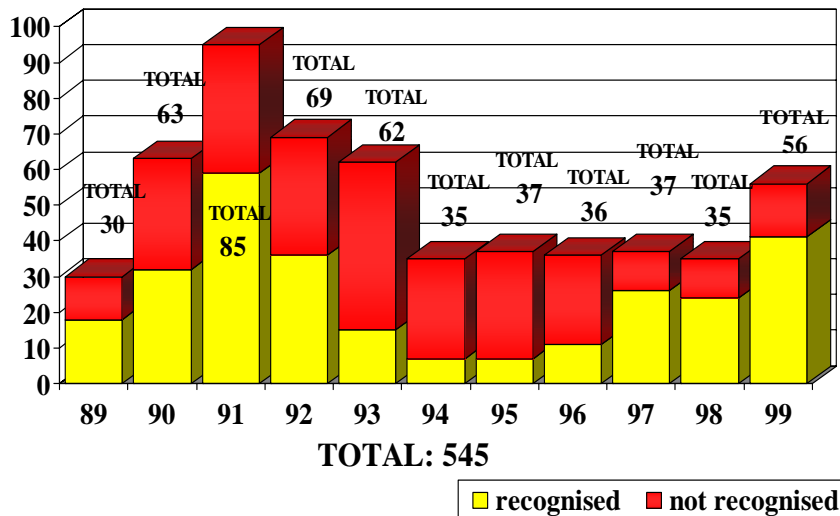
Fig. 1

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It seems clear that constitutional recognition of the authority of the President to issue NUDs did not encourage Menem to issue more NUDs than before 1994. On the contrary, the figure of NUDs per year remarkably decreased from 1994 on and the average of NUDs in the period August '94 - December '98 remained constant. Nevertheless, the last year of Menem's administration showed a sharp increase in the number of NUDs issued by the President. It is interesting to point out that Menem issued his last NUD just on December 9, 1999, his last day in office. In his last month in office, Menem issued 12 of the 56 NUDs of that year. Apparently, institutional restrictions -or their absence- were not a relevant element regarding the use of NUDs by President Menem. The increase in the number of NUDs in 1999 may probably be related to economic recession.

Not all of the NUDs issued by President Menem were recognised. Before the Constitutional Reform Menem issued 335 NUDs. He acknowledged that he was using this exceptional instrument in 166 cases (49,6%). After the Reform, Menem issued 210 NUDs from which 110 (52,4 %) are recognised as NUDs and 100 (47,6%) are not recognised as NUDs. Figure 2 shows Menem's acknowledgement of NUDs.

**TOTAL of Recognised and not recognised  
NUDs (Menem's Administration)**



Annual Conference: ARGENTINA 2000    Fig. 2    Delia Ferreira Rubio and Matteo Goretti

We include in the category "Not recognised NUDs" those decrees which modify or repeal Acts of Congress -in the absence of lawmaking authority or delegation-, or in any way imply the use of congressional legislative authority, although the Executive does not acknowledge them to be NUDs. We also include in this group those decrees which modify or repeal NUDs, because within Argentine legal system, a rule shall only be modified or repealed by another rule of the same or superior *status*, never by a rule of inferior *status*. For instance a decree issued by the President cannot be modified or repealed by the resolution of a Minister. This means that an NUD shall be modified by NUD or by an act passed by Congress. President Menem expressly adopted this criterion<sup>4</sup> although in many cases he issued not recognised NUDs to repeal previous NUDs.

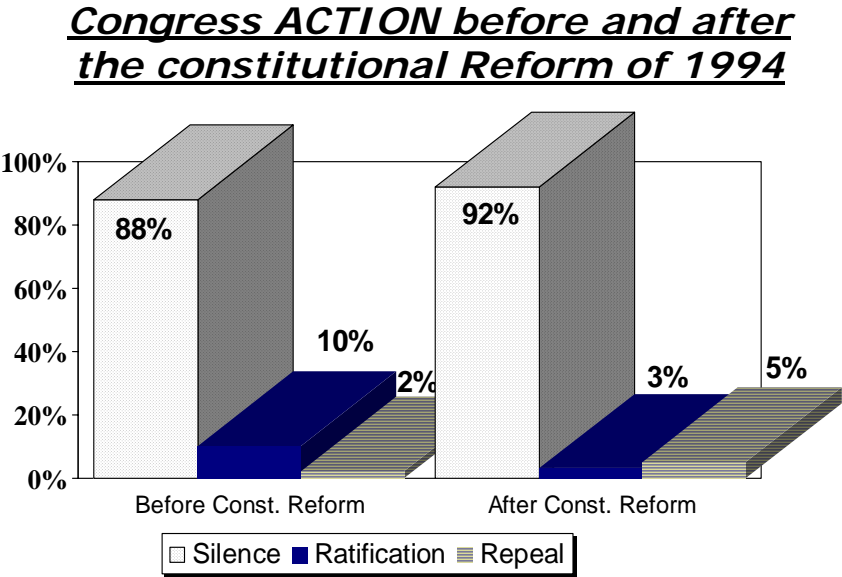
It is important to point out that only in 1997, it appeared a new trend in this respect. Figure 2 shows a considerable increase in the recognition of NUDs from 1997 on. Before Constitutional reform the higher percentage of recognised NUDs in a year was 69,4% in 1991. After Constitutional reform, both in 1997 and 1999 the percentage of recognised NUDs per year is higher than that: 70,3% (1997) and 73,2% (1999).

<sup>4</sup> See, for example, NUD 996/98 which modifies NUD 197/97. One of the preambles of NUD 996 reads: "Taking into account that Decree 197/97 was issued as an NUD under section 99.3 of the Constitution, and so it has the same category of an act of Congress, consequently this decree has to be issued also as NUD under the same section of the Constitution". Regarding the principle of "rule paralelism", see among others NUD 618/97 and NUD 1854/91.

As we have mentioned, section 99.3 of the Constitution introduces a severe restriction in relation to the matter of NUDs. The prohibition of NUDs on tax or fiscal policies was related with a basic legal principle: "there is no taxation without representation". Before the constitutional reform, Menem had issued more than 80 NUDs creating taxes and modifying those created by Congress. After the reform of the Constitution, President Menem issued more than 15 NUDs related to fiscal matters. Although since the reform of 1994 the number of NUDs related to taxation policies diminished, it is important to bear in mind that the prohibition of section 99.3 admits no exceptions.

According to section 99.3 of the Constitution, the Congress has two important control instances regarding NUDs: the first one is the passing of the act that shall regulate the Permanent Bicameral Committee, determine the proceedings for the consideration of NUDs by the Congress, and the effects of ratification, repeal, silence or modification. Until now the Congress has failed to pass this act.

The other authority granted to Congress is that to take legislative action regarding NUDs. Both before and after the Constitutional Reform of 1994, silence (or no action) has been the predominant response of Congress *vis-à-vis* NUDs. Figure 3 shows this information.



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What are the reasons that explain the passive reaction of Congress towards Executive's NUDs? Institutional restrictions play an important role in this respect.



Majority vote is necessary to repeal or ratify NUDs. On the other hand, the Executive can veto (and has vetoed) acts of Congress which repeal or ratify NUDs. Although Congress has the authority to insist, this requires two thirds of the vote in each House. There are also political restrictions. When considering NUDs Congress faces a *fait accompli*. The cost of overruling the Executive is higher than the cost of passing an act in the first place. NUDs force a reactive role of Congress.

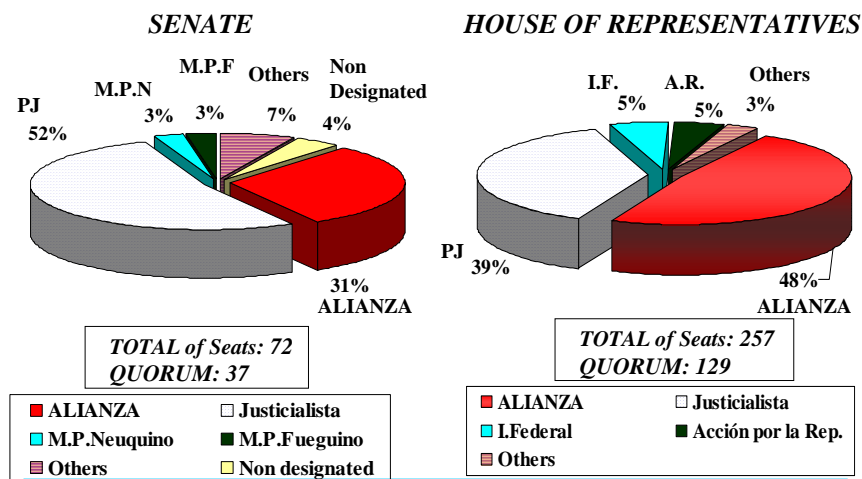
**De la Rúa's administration: from concentration of power towards consensus?**

Some analysts think that presidents issue NUDs when they have no majority in Congress and, therefore, they find it very difficult to get the laws they need to govern. That was not the case of Menem, whose political party had majority in the Senate and in some periods also in the Chamber of Deputies, where it was always the first minority.

President De la Rúa faces a different situation. As Figure 4 shows, the Alianza (Radical Party -UCR- and FrePaSo) has 124 seats in the House of Representatives which represent the 48% of all seats. The Senate is dominated by the opposition: the Justicialist Party has in Senate 52% of all seats. The balance of political parties in Congress will not change until December 2001. De la Rúa's administration has not found yet the accurate negotiation channels with the opposition especially in the Senate. Nevertheless, De la Rúa has not challenged the Congress with the possibility of an NUD -as Menem often did-. The NUDs issued by De la Rúa are not related to a frustration of his congressional initiatives.

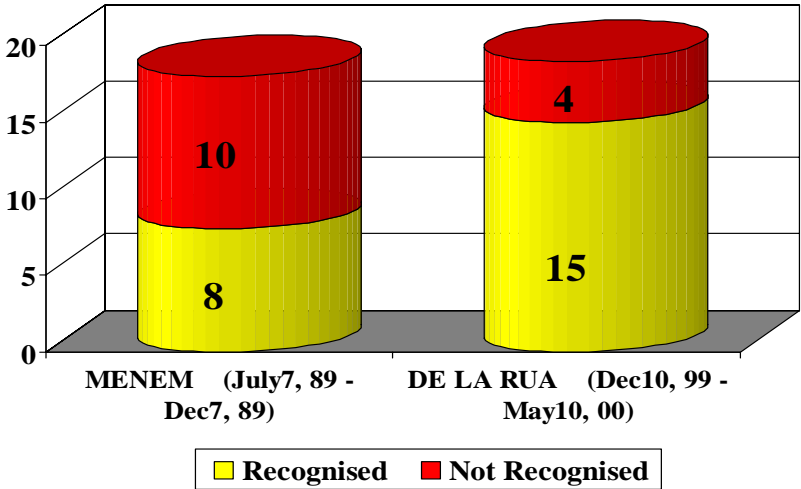
**Composition of the Argentine Congress**

(December 10, 1999 - December 9, 2001)



From the institutional point of view, everybody expect that De la Rúa's administration will represent a change from the concentration of power in the Executive towards a much more consensual decision making process. Although five months in office are not enough to judge whether this will be so, the general perception both of public opinion and the press is that De la Rúa does not govern by decree. Nevertheless, if we compare the first five months in office of Menem and De la Rúa, we will find out that they have issued almost the same number of NUDs, as it is shown in Figure 5.

**NUDs issued during the first 5 months in office**  
**Presidents Menem and De la Rúa**



Annual Conference: ARGENTINA 2000      Fig. 5      Delia Ferreira Rubio and Matteo Goretti

De la Rúa's NUDs are related mainly to the modification of the General Budget for 1999, passed by Congress in December 1998. These NUDs are based on the necessity to solve public deficit. Other NUDs repeal NUDs issued by Menem. There is also one NUD issued by De la Rúa, regarding taxation which, as we have already mentioned, is one of the forbidden matters for NUDs, under section 99.3 of the Constitution.

During Menem's administration, the passive reaction of Congress - dominated by the official party- towards presidential NUDs contributed to consolidate the concentration of power in the Executive Branch. With the Senate dominated by the opposition it is not probable that De la Rúa can expect a passive reaction of Congress towards his NUDs. During the 1990s, politicians both from the Radical Party and the FrePaSo severely criticised Menem's use and misuse of NUDs. Congressmen from these parties presented in Congress several proposals to control Executive's NUDs. Those bills fostered strict conditions in congressional proceedings for the ratification of NUDs. For instance, they established that the

ratification of NUDs should require the affirmative vote of the majority of both the Chamber of Deputies and the Senate. This is not any more the position of the Alianza. In the negotiations that are taking place in the Senate at the moment, the Alianza fosters a system that should require only the approval of one of the Chambers for an NUD to be ratified, meanwhile the repeal of an NUD by Congress should require the majority of both branches of Congress.

In the years to come we will find out whether concentration of power and government by decree consolidate as a new paradigm of Executive-Legislative relationship or, on the contrary, consensus replaces decisionism and NUDs become extraordinary decision-making devices for exceptional circumstances, as they used to be.