MILEI REFORM WATCH 2023-2027

THE REFORMS PROPOSED IN ARGENTINA BY PRESIDENT MILEI

HISTORICAL BACKGROUND, CURRENT SITUATION AND DECREE 70/23

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Abstract

President Milei inherited a country that has been in decline for more than a century and, at present, is facing a severe economic crisis. In response to this crisis, Milei decided to propose two immediate paths of reform: a Decree of Necessity and Urgency (DNU) and a bill sent to Congress. The contents of both represent the set of immediate reforms proposed by President Milei. These include an across-the-board deregulation of the economy, bureaucratic reform, state reform, labor reform, public health reform, changes in foreign trade policy, and additional reforms that allow greater contractual freedom. Yet, the current ambiguous legal status of the DNU is a cause of uncertainty. As noted, the DNU is in force, applicable, and any actions carried out under its authority will be valid, even if Congress is to invalidate the DNU in the future. However, as more time passes without a final ratification and the DNU is applied and becomes increasingly ubiquitous, the consequences of a future nullification would be serious, as it would mean reversing a series of reforms that are in full execution. Last, the constitutional validity of Decree 70/23 is analyzed.

Keywords: Argentina, Javier Milei, economic decline, Decree 70/23, omnibus law, deregulation, Decree of Necessity and Urgency (DNU), Executive Order, constitutional analysis

Author: Ricardo Rojas
UFM Reform Watch
Universidad Francisco Marroquín

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The Reforms Proposed in Argentina by President Milei: Historical Background, Current Situation and Decree 70/23

BY: RICARDO ROJAS

I. A Century of Decline

Upon assuming office as the next president of Argentina on December 10, 2023, Javier Milei announced a process of deep reforms to restore economic freedom to the country's populace, address the deep economic crisis that was inherited, and allow markets to function to resume economic growth.

Milei described the country's situation as a terminal crisis, resulting from many decades of collectivism and statism, which he summarized in the last twenty years, sixteen of which were governed by Kirchnerism. However, it can be said that this crisis has been brewing for at least a century.

At the beginning of the 20th century, Argentina rivaled the United States as a herald of global leadership and attracted a multitude of immigrants from all over the world in search of a better life. In 1895, Argentina had the highest per capita income in the world, surpassing that of the United States and almost double that of the major European countries. During the last years of the 19th century and the beginning of the 20th, Argentina was considered one of the eight richest countries in the world.

To a large extent, this growth was due to the rules established by the liberal Constitution of 1853-60, which took the United States Constitution as a blueprint. However, over the last 100 years, Argentina went down a path of self-destruction, gradually abandoning their earlier liberal philosophy. Indeed, the principles of freedom in all fields: political, legal, economic, social, which had contributed to its growth, were destroyed one by one, until collectivism,

Argentinian GDP per capita as a percentage of US GDP per capita

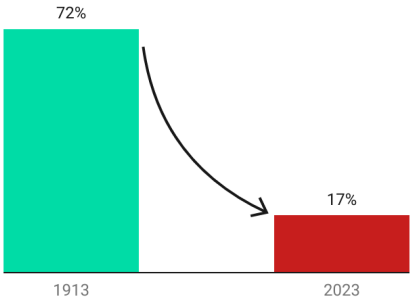

Chart: UFM Reform Watch • Source: Mercatus Center •

authoritarianism, restriction of freedom, and a demagogic sense of "solidarity" and "equality" were accepted as unbreakable dogmas, leading the country´s population to be equally poor and oppressed.

Economically, this process began in the 1920s with various laws regulating and prohibiting productive activities, as was the case of restrictions on urban leases, labor regulations, and other interventions. The country pressed forward in the 1930s with stronger regulation of the economy and crossborder trade, the creation of regulatory boards for the commercialization of grains and meats, the creation of the Central Bank which monopolized money production, etc. In the 1940s and 1950s, under the government of Juan Domingo Perón, economic regulations grew to suffocating levels, and this situation could only be partially mitigated afterward, but never disappeared.

The 1970s and 1980s were particularly complex from an economic standpoint, going through times of strong populism, collectivism, and inflation, during the government of Isabel Perón: rigid exchange controls disguised as freedom that constituted the remembered "tablita" of the Minister of Economy of the military government, José A. Martínez de Hoz, and a new period of unfettered spending during the administration of Raúl Alfonsín, which led him to call for early elections and leave the Government five months earlier, in the midst of hyperinflation.

The government of Carlos Menem, in the 1990s, was an attempt to rectify the populist and collectivist course that had been followed. Menem took office amidst the beginning of hyperinflation of 200% monthly, in July 1989, and a huge deterioration of all economic indicators. He began— not without complications and some errors—a path that led him toward a reduction in the size and functions of the State, privatizations, deregulation of the economy, and a convertibility plan that limited the monetary mass in pesos to the availability of an equal amount of dollars.

The government of Carlos Menem, in the 1990s, was an attempt to rectify the populist and collectivist course that had been followed.

These measures achieved economic and monetary stability that many saw as miraculous, but on the flip side, several counterproductive elements can be pointed out: a) public spending was not reduced, leading to a chronic budget deficit, which, not being able to be covered with monetary issuance or more taxes, led to increasing debt to have dollars against which to issue and pay expenses; b) the need to have the necessary political support to advance in the reforms led him to use a good part of the resources from the sale of assets and state companies in expenses aimed at keeping unions, governors, and legislators calm; c) with the purpose of amending the Constitution so that he could opt for a second presidential term that was then prohibited, he allowed the opposition to introduce a series of amendments to the Constitution, which conspired against its liberal spirit and produced later distortions.

The germ of chronic government deficit financed with external debt exploded in the government following Menem's, that of Fernando de la Rúa, producing a new crisis in 2002, this time financial, which led the country to default, the breakdown of convertibility and of the banking and financial system as a whole.

Then began two decades, of which Kirchnerism governed for sixteen years, marked by populism, economic regulations, increased spending, corruption, all of which led

to new abuses of monetary issuance and debt, which by the end of 2023 placed the country in a catastrophic economic situation.

Considering the country's evolution over the last century, politically, after 70 years of relative stability under the empire of the Constitution of 1853-60, which ran from the Battle of Pavón in 1861, which consolidated national unification, and the military coup of 1930, a process of instability began where constitutional governments and military governments that overthrew them alternated, which extended until 1983.

These were times when the Constitution was systematically altered, republican institutions did not function, and laws were enacted according to the will of whoever had power at any given moment, and not by an independent Congress representing all lines of thought.

Legally, the political instability existing until 1983 led each new Government—whether constitutional or *de facto*— to change the composition of the Supreme Court and even of some federal courts of strategic importance, weakening the independence of the Judicial Power and politicizing the creation of law. Clearly, political instability notably contributed to legal instability, and legislative interventions by each new Government increased exponentially.

This situation produced, over the last century, a perverse mechanism of wealth redistribution, where certain groups—starting with the rulers themselves—were sustained by the product of the working class. In the recent times of democratic stability, from 1983 onwards, the need to obtain votes and consolidate "democratic" power led to demagoguery, and then new laws redistributed wealth from the increasingly less productive, to maintain the increasingly more "needy."

Through this path, during the past decades, we have reached the current situation, in which half of the population is poor and must be sustained by public assistance, and of the other half, a good portion are retirees or public employees, meaning they also ultimately must be maintained by the State. As the State actually does not have its own resources, all of them must be sustained with the taxes paid by those who still work, who are increasingly fewer.

That was the situation at the end of 2023, which the new president would encounter, aggravated by a last period of government that exponentially worsened the economic deterioration.

How to get out of this problem that seems irreversible? Returning to the eficacy of the Constitution, with its limitation on political power and the supremacy of individual rights, would require that one of the following things happen:

I. That the very "political caste" that has created the problem solves it through republican institutions. This seems very unlikely, as it has been noted in recent years that the phenomenon of collectivization has not only not stopped but has deepened considerably.

> II. That people rebel against the political corporation and demand a reform. So many years of submission, collectivism, and demagogy make this solution also very unlikely to occur.

As a result, the country seemed irreversibly headed towards the intensification of a chronic problem, but this time with a social and economic situation as critical as it had never been experienced in the past.

The emergence of Javier Milei and his revolutionary proposal to return to the Constitution and end the dealings of the "political caste," invoking liberal and libertarian slogans and symbols, was an event that probably, a few years ago, nobody would expect. Of course, it would be a mistake to think that suddenly 57% of Argentine voters became "libertarians." It is more reasonable to think that citizens, already fed up with a century of statism, authoritarianism, and demagogy, identified a candidate who proposed the complete opposite. Then, the unexpected happened: through the electoral process itself, the majority of people bypassed the conditions imposed by the system designed to vote for populists, and expressed their repudiation of the "caste," voting for Milei.

II. The Current Situation in Argentina As Explained by Javier Milei

Javier Milei assumed the presidency of the Republic on December 10, 2023. After swearing in before the Legislative Assembly, composed of deputies and senators, instead of giving a first speech to the Assembly, as has traditionally occurred, he decided to go out to the steps of Congress and, from there, he made his first statements to a crowd gathered in the square.

There, for approximately thirty-five minutes, he did not convey a message of optimism and joy, but rather informed the citizens of the severity of the inheritance he was receiving, predicted times of great effort and sacrifice, and the urgency of immediately rectifying the economic course to avoid a greater crisis.

He began by pointing out that:

> Argentines, emphatically, have expressed a desire for change that is now irreversible; there is no turning back; today, we bury decades of failure, internal fights, and meaningless disputes; fights that have only succeeded in destroying our beloved country and leaving us in ruins. (Milei 2023)

He then reminded the public of the situation of economic deterioration that has already lasted 100 years:

> For more than 100 years, politicians have insisted on defending a model that only generates poverty, stagnation, and misery. A model that considers citizens to be at the service of politics and not that politics exist to serve the citizens; a model that believes the task of a politician is to direct the lives of individuals in all possible areas and spheres; a model that sees the state as a spoil of war to be distributed among

> friends. Ladies and gentlemen, that model has failed, it has failed worldwide, but it has especially failed in our country. (Milei 2023)

From there, he presented some facts about the state in which he inherited the government, from an economic standpoint:

> These days, much has been said about the inheritance we are to receive. Let me be very clear on this: no government has received a worse inheritance than the one we are receiving. Kirchnerism, which at its inception boasted of having twin surpluses, that is: fiscal and external surplus, today leaves us with twin deficits of 17% of GDP. Of those 17 points of GDP, 15 correspond to the consolidated deficit between the Treasury and the Central Bank. Therefore, there is no viable solution that avoids addressing the fiscal deficit. At the same time, of those 15 points of fiscal deficit, 5 belong to the National Treasury and 10 to the Central Bank, meaning the solution involves, on one hand, a fiscal adjustment in the national public sector of 5 points of GDP, which, unlike in the past, will fall almost entirely on the State and not on the private sector.
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> […] Having issued 20 points of GDP as was done in the outgoing Government is not free; we are going to pay for it in inflation.
>
> […] Given the situation of the Central Bank's remunerated liabilities, which is worse than what we had before Alfonsín's hyperinflation, in a very short time, the amount of money could quadruple, thereby bringing inflation to annual levels of 15,000%. That is, the outgoing Government has planted the seeds for hyperinflation, and it is our utmost priority to make every possible effort to avoid such a catastrophe, which would lead to poverty above 90%, and extreme poverty above 50%.
>
> […] In the exchange rate realm, the gap ranges between 150 and 200%, levels also similar to those we had in the "Rodrigazo." Moreover, the debt with importers exceeds 30 billion dollars; and retained earnings from foreign companies reach 10 billion dollars. The debt of the Central Bank and YPF amounts to 25 billion dollars, and the outstanding treasury debt adds up to about 35 billion dollars more. That is: the bomb —in terms of debt— amounts to 100 billion dollars that will have to be added to the nearly 420 billion dollars of existing debt.
>
> […] To these problems, we must also add the debt maturities of this year, where the debt maturities in pesos are equivalent to 90 billion dollars and 25 billion dollars in foreign currency with multilateral credit organizations.
>
> […] As if all this were not enough, this occurs in an economy that has not grown since 2011; and in line with the above, formal employment in the private sector remains stagnant at 6 million jobs, reaching the madness that it is surpassed by 33% by informal employment; therefore, it should surprise no one that real wages have been destroyed; positioned around 300 dollars per month, which are not only 6 times lower than those of the convertibility but had the trend of those years been maintained —or as they called it: "the damned liberalism"— today would range between 3,000 and 3,500 dollars per month. They have ruined our lives; they have made our salaries fall by 10 times. Therefore, it should also not surprise us that populism is leaving us with 45% poor and 10% in extreme poverty. (Milei 2023)

> The conclusion is that there is no alternative to economic adjustment and no alternative to shock therapy. Naturally, this will negatively impact the level of activity, employment, real wages, and the number of poor and destitute.

Given this scenario, the inevitable path was that of a strong economic adjustment, coupled with a reform in the size and functions of the State, elimination of bureaucratic obstacles and legal procedures that hinder production, monetary sanitation, and all the necessary transformations to start producing wealth again. And as the president himself explained, these measures had to be adopted immediately, not gradually as had been attempted in other times:

> After this situation, which clearly seems insurmountable, it must be clear that there is no possible alternative to adjustment. There is also no room for discussion between shock and gradualism; in the first place, because from an empirical point of view, all gradualist programs ended badly; while all shock programs—except for the one in 1959—were successful. Secondly, because from a theoretical perspective, if a country lacks reputation—as is unfortunately the case of Argentina—, entrepreneurs will not invest until they see the fiscal adjustment, making it recessionary. Thirdly, and no less important, to do gradualism financing is necessary; and unfortunately, I have to tell you again, there is no money (*APPLAUSE*). Therefore, the conclusion is that there is no alternative to adjustment and no alternative to shock therapy. Naturally, this will negatively impact the level of activity, employment, real wages, and the number of poor and destitute. (Milei 2023)

III. The First Measures of the New Government

President Milei took advantage of the initial momentum of popular support for his appointment to outline an extremely difficult situation and at the same time announce the shock policy that he began to implement just a few days later. This was carried out primarily through two regulations that I will examine in greater detail in the remainder of this paper:

1. Decree (Executive Order) 70/23

Decree 70/23, titled: *Foundations for the Reconstruction of the Argentine Economy*, which was signed on December 17, 2003, as a decree of necessity and urgency (DNU) under the terms of article 99, subsection 3, paragraphs 3 and 4, of the National Constitution, consisting of 366 articles.

2. Bill to Congress

The bill sent to the National Congress on December 27, titled: *Law of Foundations and Starting Points for the Freedom of Argentinians*. This bill of more than 660 articles contains modifications in all areas of the Argentine legal order, but fundamentally in those areas where the president is prohibited from issuing DNU: that is, fundamentally in matters of political, fiscal, and criminal reform.

These two regulations contain the fundamental tools for the major reform proposed by Milei, and succesively I will examine their key points and the progress of their implementation since then.

It should be noted, as a first approach to the content of these regulations, that

President Milei chose to propose a comprehensive reform from the outset. However, lacking majority support in both Chambers of Congress, where he must resort to alliances and seek support from different blocs, he preferred to present the entire project through these two regulations in the early days of his government, instead of progressing topic by topic and seeking consensus on each occasion.

At the beginning of his government, the president faces a series of obstacles that hinder his action:

1. Critical Economic Situation

The critical economic situation, with a country on the verge of hyperinflation and a deficit caused by enormous public spending; with more than 50% of the population below poverty levels, and the financial system on the brink of default due to accumulated external debt.

2. The Pressure from Governors

The pressure from governors, who, due to the tax-sharing system and the habit of receiving extraordinary aid from the Federal Government in exchange for political support, are not willing to submit themselves to the same adjustment regime that the National Government proposes for itself. In this regard, the demands for funds are compounded by resistance to approving reductions in shareable taxes and reforms to certain highly regulated regional economic activities, which have been traditionally managed by these Governments.

3. The Opposition

The conditions imposed by the political parties of the opposition, and especially the direct confrontation with Kirchnerist Peronism, a sector of left-wing radicalism, as well as other left-wing parties, at the time of implementing the proposed reforms.

This situation of extreme seriousness is what motivated this move, which is both logical and strategic, to quickly tackle reforms, having initially strong popular support and cautious optimism from the international community regarding his first announcements.

He also benefited from very well-received support from former President Macri and the candidate of Together for Change, Patricia Bullrich, who ended up being appointed as his Minister of Security. A significant part of that coalition, which eventually disbanded, became a fundamental block in Congress supporting the Government's reforms, along with a significant part of radicalism and other smaller blocks.

However, this support has not been even, and while the PRO and part of the radicals

have maintained their firm alliance with the Government, other blocks have been more oscillating in their support for the measures, which, as we will see, led to the failure of the approval in the Chamber of Deputies of the bill popularly known as the omnibus law.

In this regard, Milei's intransigence in dealing with members of other political sectors has been criticized, which some consider a form of authoritarianism that prevents him from achieving consensus. On the other hand, his initial firmness to present a comprehensive reform with radical ideas, and to strictly maintain it without concessions, has allowed him to maintain high popular support and some opponents ended up yielding to his first political decisions.

Nonetheless, such authoritarianism that some opposition politicians have attributed to him is not evident in the facts. He has sent both the decree of necessity and urgency for legislative treatment and the bill to Congress and has subjected himself to parliamentary decision. In fact, the bill was eventually withdrawn when it did not reach the required majority to be approved, at least in a significant percentage. His confrontation with the governors has remained within the scope of constitutional and legal powers; it involves a struggle for resources and power that governors have obtained in exchange for political favors in the past, in a situation that the new president does not wish to continue.

Thus, President Milei has started his government with clear ideas about the necessary reforms to change the course of the country, with strong popular support and a firm direction in the first measures he has adopted. But with governance problems, due to his political confrontation with some opposition parties and sectors that struggle to maintain privileges, such as governors, labor unions, and associations that have received large amounts of money in the past for welfare purposes, but whose administration has detected serious irregularities with enormous economic loss for the treasury.

In turn, the first audits carried out in dependencies of the national government and decentralized agencies are showing pockets of corruption in the handling of public funds during the previous government, which the president has decided to take to justice for in-depth investigation.

III. Decree (Executive Order) 70/23

Ten days after taking office (December 20, 2023), President Milei issued the decree numbered 70/23. It is an extensive decree of 366 articles, issued under the terms of article 99, subsection 3, of the National Constitution, by which a large number of existing laws are repealed or modified and more than 300 regulatory frameworks for various activities are eliminated.

The purpose of the decree is clear: it aims to quickly begin a transformation of the economic structure that has been distorted over the last few decades, marked by a significant increase in state intervention, bureaucratic over-sizing, and the exponential increase in public spending, which led to the current situation in which the country is on the verge of falling into a hyperinflationary spiral, practically in

default, with 50% of the population in poverty and production paralyzed.

The president has repeatedly expressed this diagnosis during the campaign, and the basis of his electoral victory lay in the weariness and clamor for profound changes, expressed by the electorate. From the first moment, after swearing in and beginning his term, Javier Milei expressed the severity of the crisis and the great efforts that would be demanded of the population to overcome it.

Therefore, it was not surprising that a few days after taking office, he issued this extensive decree, and a few days later (December 27), he sent to Congress a bill titled: *Law of Foundations and Starting Points for the Freedom of Argentinians*, which added other reforms. I mention it because, for the analysis of the constitutional validity of the decree, it will be very important to also take into account this bill, which is complementary and refers to areas such as electoral, tax, or criminal reform, which are prohibited to the president, through decrees like 70/23.

3.1 ¿Why Did Milei Decide on an Executive Order?

The review of Decree 70/23 shows that many of its provisions have a legislative character; they are dispositions that repeal laws or replace them, or deal with issues that should be resolved by Congress. In this regard, article 99, subsection 3, paragraph 2, of the Argentine Constitution is categorical:

> The Executive Power may under no circumstances, under penalty of absolute and irremediable nullity, issue legislative dispositions.

In principle, to push for a profound reform as intended, the president should send to Congress a bill or set of laws for it to discuss and eventually sanction or modify. However, due to the severity of the existing economic crisis, with the country on the verge of hyperinflation, it was necessary to promote urgent measures to reduce the level of unnecessary spending and begin to rationalize the size and functions of the Government. It was not possible to wait for the parliamentary discussions, which could extend the treatment of this project for a period of several months, with the risk of the economic crisis spiraling out of control.

Therefore, Milei resorted to this exceptional way of solving an urgent and serious problem that does not allow waiting for the intervention of Congress, which is provided for and regulated by the same article 99, subsection 3, in its third and fourth paragraphs, and regulated by Law 26.122, enacted in 2006.

Beyond invoking the necessity and urgency, the president had strong incentives to issue this decree. Due to its exceptional nature, DNU (Executive Necessity and Urgency Decrees) begin to apply immediately, beyond the subsequent parliamentary evaluation on their eventual validation; and, in the case they are rejected by Congress, the acts performed during the period of their application until the rejection, retain validity. This allowed the president to have a legal instrument authorizing him to start the necessary reforms.

Further below, we will conduct a deeper analysis of the nature of DNU, the conditions of their validity, and how the validation process of this decree evolves, in

particular by the National Congress, according to the procedure established in the National Constitution and in the regulatory law.

3.2 The Contents of Decree 70/23

The extensive decree aimed to establish the fundamental guidelines to produce two effects:

(1) Deregulation

The deregulation of economic activity in various areas.

(2) Bureaucratic reform

The reform of the bureaucratic structure, aiming to reduce the size of the State, and to simplify procedures and processes.

To achieve these goals, and due to its nature as an exceptional norm, the DNU establishes the repeal of numerous laws and authorizes the repeal of many decrees and resolutions. There is a certain parallel between this decree and the one issued by President Menem in the early nineties (2284/91) in line with the State Reform Law (Law 23.696) and the Economic Emergency Law (Law 23.697), all of which allowed him at that time to push forward a process of deregulation, privatization, and bureaucratic reduction similar to the current one.

However, the difference between both processes lies fundamentally in the depth with which the current president has advanced the reforms, covering in detail all areas of governmental activity, with quite specificity. The decree can be classified into a series of themes that it addresses throughout its 366 articles:

1. Public Emergency. Article 1 of the decree declares a public emergency in economic, financial, fiscal, administrative, pension, tariff, health, and social matters until December 31, 2025. Historically, this declaration authorizes the Government to relax certain formal requirements when making decisions in the areas involved in the emergency.

2. Deregulation. Article 2 of the decree stipulates that the National State will promote and ensure the effective enforcement, throughout the national territory, of an economic system based on free decisions, made in a context of free competition, with respect to private property and the constitutional principles of free movement of goods, services, and labor. To achieve this purpose, the broadest deregulation of commerce, services, and industry throughout the national territory will be enacted, and all restrictions on the supply of goods and services, as well as any normative requirement that distorts market prices, prevents free private initiative, or hinders the spontaneous interaction of supply and demand, will be annulled.

③ State Reform

Several repeals of regulations are promoted to reduce the size of the State and its bureaucratic structure, which implies eliminating offices, reducing the number of employees, starting with many high-ranking officials who are unnecessary for the proper functioning of public administration.

This process of restructuring the bureaucratic apparatus of the State was to be complemented by the process of privatizing public companies and eliminating decentralized state agencies, as provided in the bill that was also sent to Congress, but which was ultimately withdrawn for the time being.

④ Labor Reform

In this area, regulations that have imposed so many restrictions on employment hiring are eliminated, which in practice generated incentives not to hire legally and encouraged "illegal" work.

⑤ Foreign Trade Reform

Article 3 establishes the principle of "insertion into the world," stating that Argentine authorities, within their competencies, will promote greater integration of the Argentine Republic into world trade.

In this regard, it stipulates that the National Executive Power will develop and/or issue all necessary regulations to adopt international standards in terms of trade in goods and services, seeking to harmonize the internal regime, as far as possible, with other Mercosur countries or other international organizations.

Moreover, the decree includes the repeal of several laws that hinder international trade and promotes amendments to the Customs Code.

With this objective in view, President Milei appointed a renowned economist to lead the Ministry of Foreign Affairs, entrusting her with the primary task of opening the country to global markets and trade.

⑥ Deregulation related to various economic areas

In this regard, the decree stipulates:

a. The repeal of multiple regulations concerning special crops, including the regime related to yerba mate.

b. Repeal of regulatory laws concerning mining, energy production, as well as modifications to the promotion regime for the generation and distribution of renewable energy integrated into the electricity grid.

c. Deregulation of the air transport regime, including the repeal of laws that hinder the activity, as well as modifications to the Aeronautical Code and the commercial air transport regime, with the aim of facilitating the "open skies" policy and competition in the area.

7 Modification of laws aimed at ensuring contractual freedom.

In this regard, modifications were made to various articles of the Civil and Commercial Code, aimed at upholding the principle of contractual freedom, limiting judicial intervention to alter contract clauses, and eliminating regulations on the urban lease regime.

One of the first effects that were quickly observed with the entry into force of the decree was that the liberation of the real estate rental market immediately increased the supply of properties, leading to a reduction in prices and changes in conditions, according to the free will of the parties.

8 Public Health Reform

Several legislative reforms and the repeal of regulations were made in the public health sector, the prescription regime, and the pharmaceutical market. The regime of social security organizations was also modified to allow free affiliation and the change of institutions by decision of the users, which leads to an increase in competition, a decrease in bureaucracy, and greater openness.

9 Other Reforms

Through the decree, legislative modifications and repeals were also promoted to improve the broadcasting regime, the organization of sports associations by promoting the figure of the corporation for the organization of clubs, the repeal of laws that hindered the tourism market, and others related to vehicle registration.

3.3 The initial effects of the implementation of Decree 70/23

As necessity and urgency decrees come into effect immediately and remain so until they are repealed by legislative or judicial intervention, the Government began implementing a series of reforms, especially related to reducing the size of the state and the bureaucracy that hinders and increases the costs of administrative procedures. Unnecessary government departments were eliminated, appointments of senior officials in those areas were not renewed, and several executive decrees and resolutions creating inefficient and unnecessary transaction costs for citizens were eliminated.

Some modifications were made that contributed to production, and markets were opened, such as the rental market, which immediately improved trade in that sector. Innovations are also being implemented in the field of aeronautical transport, with the reappearance of companies offering low-cost domestic services.

However, almost immediately after the decree was issued, several federal court injunctions were filed to prevent its implementation. Some of them were rejected; others, such as the one filed by the National Yerba Mate Institute, were accepted by

the federal court in the province of Misiones, and most are still pending. In the latter cases, precautionary measures have been requested to prevent the execution of the decree until a definitive ruling is issued. Such measures have been granted, and consequently, progress has not been made with deregulation in the labor reform area, and part of the health reform. The Supreme Court of Justice of the Nation has not yet addressed the issue of the constitutionality of the decree, and will have the final say on that matter.

Thus, the evaluation made by the end of February indicates that the decree is being implemented partially, that there is still no definitive decision in the judicial sphere regarding its constitutional validity, and that Congress has not yet ruled on the matter, despite the clear provisions of the Constitution and the regulatory law requiring immediate treatment.

Meanwhile, the Government is moving forward with the implementation of reforms, and these advances are generating changes that, in principle, will remain even if the decree is revoked by legislative or judicial decision.

IV. Parliamentary Debate on the Validity of Decree 70/23

4.1 The Status of Decree 70/23

On December 20, 2023, ten days after assuming the presidency, Javier Milei issued Decree 70/23, consisting of 366 articles, which promotes a strong reform of the State: deregulation, removal of barriers to production, and modifications to essential norms.

By resorting to a decree of necessity and urgency, it implies that its validity is subject to a certain procedure of validation or rejection by the Congress, as well as to potential judicial challenges that may arise.

Although the Constitution and the regulatory law of these types of decrees establish some clear principles on how Congress should proceed —with the necessary promptness due to the delicacy of the matter and the legal uncertainty resulting from the uncertainty about its validity—, the fact is that, more than two months after its issuance, there is still no clear situation regarding the future of this norm.

This does not seem abnormal, considering that the Permanent Bicameral Committee, responsible for monitoring these types of decrees, has hardly ever met, and that there are still a large number of DNU signed by former President Alberto Fernández, and even by Mauricio Macri, that never underwent parliamentary treatment. But given the importance of this decree, which seeks to address an extremely serious crisis, all eyes are now on parliament, awaiting some decision.

On March 1, the ordinary sessions of Congress begin, leading to the expectation

that from then on, the issue of this decree could be addressed, although according to the constitutional text, this matter should be addressed at any time a DNU is issued, due to the urgency in its treatment. For this purpose, the aforementioned "permanent bicameral committee" is provided.

However, during the month of January, Congress met in extraordinary sessions, and in the Chamber of Deputies, the project sent by the president was extensively discussed, but the validity of the DNU was not addressed in either chamber, despite the Constitution requiring them to proceed with its explicit and immediate treatment (Article 99, section 3, National Constitution).

This creates a legal uncertainty that needs to be explained in some detail.

4.2 On the nature of decrees of necessity and urgency

It deserves an initial explanation of the nature and scope of the so-called decrees of necessity and urgency. During the discussion of the constitutional reform of 1994, the idea was to eliminate the unconstitutional practice —which had intensified greatly during the government of Carlos Menem— of issuing decrees with legislative content under the guise of necessity and urgency, to the point that the powers of Congress had practically been replaced by decisions of the Executive Branch. Therefore, it was decided to include among the powers of the Executive Branch a generic prohibition on issuing decrees with legislative content, and to regulate in two paragraphs the way in which this prohibition could, exceptionally, be altered in emergency situations.

However, following the explicit prohibition and the inclusion of the third and fourth paragraphs in section 3 of Article 99 of the Constitution, the number of decrees of necessity and urgency not only did not decrease, but they became increasingly numerous and were issued for insubstantial matters.

It is often considered that the third paragraph is a sort of "exception" to the resounding principle stated in the previous paragraph, which prohibits the Executive Branch from issuing provisions of a legislative nature, under penalty of absolute and incurable nullity. But what such exception actually proposes, when examining the clause in context, is a procedure to resolve a situation of institutional crisis, when the usual mechanisms cannot provide a solution to an issue that requires urgent action ("when exceptional circumstances make it impossible to follow the ordinary procedures established by this Constitution for the enactment of laws, and it does not concern rules that regulate criminal, tax, electoral matters, or the regime of political parties, he may issue decrees for reasons of necessity and urgency [...]").

There are several clauses in the Constitution that foresee situations of this kind. For example, cases of a state of siege (Arts. 23, 75, subsections 29 and 99, subsection 16) or federal intervention (Arts. 6, 75, subsections 31 and 99, subsection 20).

Just as these institutions are not intended to determine when the Government can suspend constitutional guarantees of citizens, or when the federal Government

can appoint exclusive authorities of a province, neither is the spirit of Article 99, section 3, third paragraph, to determine in which cases the president can arrogate legislative powers. On the contrary, what the Constitution seeks to do is to resolve situations in which constitutional institutions cannot function properly to fulfill their purposes, and it is necessary to find a solution.

Another example in this regard is the new Article 36, which addresses the case of violation by acts of force, of the institutional order, and the democratic system. Although it may be anecdotal, it is worth remembering that, at the time of the approval of the 1853 Constitution, Juan B. Alberdi, when writing his famous "Bases," attached as an annex a model of a Constitution, which in its Article 27 foresaw, in the event of a breach of the constitutional order, that "all usurped authority is ineffective; its acts are null." But the absence of a similar clause in the text finally approved by the Constitutional Convention left judges defenseless in cases of coups d'état during the 20th century, which probably led to including Article 36 as it is currently drafted.

I reiterate that the situation that Article 99, section 3, third and fourth paragraphs seeks to address should be framed as one of these exceptional situations. And perhaps the best legislative technique would have been to include a specific treatment of the case in generic terms in the first part of the Constitution (as with Articles 6, 23, and 36), and only refer to the powers that, in such cases, would correspond to the legislative and executive branches in Articles 75 and 99.

If the institution is understood in these terms, perhaps its scope and limitations can be better understood. And from this perspective, I believe that the requirements established by the Constitution should be examined:

1. The existence of exceptional circumstances.

2. That there are reasons of necessity and urgency to enact the norm.

3. That it does not concern rules that regulate criminal, tax, electoral matters, or the regime of political parties.

4. The impossibility of following the ordinary procedures established by the Constitution for the enactment of laws.

If we apply these requirements with the rigor with which constitutional clauses must be interpreted and applied, practically no DNU since 1994 has met the standard of constitutional validity. I can only think of one case — which may be constitutionally challenged for other reasons — where at least these requirements were respected: the first DNU issued by President Fernández on March 20, 2020, establishing the quarantine, and perhaps its initial extensions, until Congress was able to meet virtually.

Indeed, there was then a situation of massive contagion worldwide, with an alarming number of deaths, countries closing borders, suspending travel, and in Argentina an increasing number of infected and dead from the virus. Congress,

for that reason, had ceased to meet a couple of days earlier, and legislators had gone to their respective provinces to isolate themselves to avoid contagion. The government had to make some legislative decision, and Congress could not do so (it even took quite some time to decide that it was valid to meet virtually, and to establish the mechanism for doing so). Regardless of whether the solution implemented by the president was correct or not, the legal mechanism by which it was adopted in this case seemed appropriate.

However, if we review the DNUs issued since the constitutional reform, it can be observed that they were used without respecting constitutional requirements, and outside of cases of utmost seriousness because they were issues that necessarily had to be debated in Congress, they have been resolved through DNUs. For example, organizing a Formula 1 race, donating cement to Bolivia, or declaring holidays that were not established in the respective law.

DNUs have become a way for the president to govern by decree, with the passivity of Congress, and the regulatory law has contributed to this. The fact that Congress has validated them, in many cases allowing time to pass without addressing them as required by the Constitution, does not justify continuing to admit such irregularity. Therefore, I believe it is advisable to evaluate more carefully the requirements demanded by the law for their validity.

4.3 The Procedure for Parliamentary Analysis of the DNU

According to the Constitution, once the DNU is issued, the Chief of the Cabinet of Ministers of the Executive Branch must submit a copy to the Congress for it to be entered into the Permanent Bicameral Committee, which evaluates its appropriateness and validity. This committee has a period of ten days to submit its favorable or unfavorable report on the validity of the decree to each Chamber of Congress. Once this is done, each Chamber must immediately engage in its express consideration.

Regulatory Law 26.122 stipulates that the Bicameral Committee must consist of sixteen legislators, eight senators, and eight deputies, appointed by the presidents of the respective chambers upon proposal by the parliamentary blocs, respecting the proportion of political representations. Annually, a president, a vice president, and a secretary are chosen, with the presidency alternating between deputies and senators each year; this year it belongs to the Senate.

Only in mid-February, two months after the DNU was signed, did the Chambers of Congress decide to integrate the Bicameral Committee. In the Senate, it was composed of one senator from the ruling party, three from Union for the Homeland, two from Together for Change (one from PRO and one from the Radical Civic Union), and two from federal blocs. Regarding the deputies, it consisted of two from the ruling party, three from Union for the Homeland, two from Together for Change (one from PRO and one from the Radical Civic Union), and one from the federal bloc.

The regulatory law states that decrees acquire full force according to the provisions of the Civil and Commercial Code. While this legislative process related to its validity is underway, the decree retains its force and operability (Article 17); thus, all acts performed in execution of the decree during this period will remain valid even if Congress decides to invalidate it later.

The Bicameral Committee's opinion is limited to assessing whether the decree complies with the formal and substantive requirements established constitutionally for its issuance (Article 10, second paragraph of the regulatory law). That is, it evaluates the formal appropriateness of the decree, ensuring it does not address topics explicitly prohibited by the Constitution and that exceptional circumstances exist that justify the decree's viability. However, it cannot assess its content or convenience.

If the ten-day period elapses without the Committee submitting the corresponding report, each Chamber of Congress will engage in its express and immediate consideration (Article 20).

Chambers cannot introduce amendments, additions, or deletions to the decree's text but must limit themselves to its acceptance or rejection by an absolute majority of their present members (Article 23). If the decree is rejected by both Chambers, it will be repealed, while rights acquired during its validity are protected (Article 24). Thus, it would suffice for one of the Chambers to approve it for the decree to be valid, even if the other rejects it.

Despite the serious criticisms leveled against this regulatory law, it is the one currently in force and must be applied in this case. Clearly, the incentives are aligned with the interests of the Executive Branch, as instead of sending a bill and waiting for Congress to process it, in this case, the decree acquires immediate validity under common law and retains its force until rejected by both Chambers.

4.5 A brief analysis of the constitutional validity of Decree 70/23

It is therefore appropriate to analyze the requirements contained in the Constitution, in light of the decree in question, to attempt a preliminary opinion on its validity.

1. Exceptional circumstances

According to the Constitution, for a DNU to be valid, it must address a situation of crisis requiring an immediate solution, as failure to do so could result in extremely serious consequences.

The exceptional economic crisis caused by the oversized state, leading first to indebtedness and then to uncontrolled monetary issuance, has been recognized by specialists and politicians, and clearly explained in the initial considerations of the decree.

The problem is not merely temporary; it spans years, decades of statist, planning policies that stifled the economic process in flagrant violation of the rights recognized by the National Constitution, dragging half the population into poverty.

It's like a car speeding towards a concrete wall, urgently needing to change its direction to avoid catastrophe. We have already experienced this. The difference between sustained 10% monthly inflation and hyperinflation that completely erodes the value of money is a leap that occurs quickly, and the consequences are deadly, especially in a country already suffering from the consequences of statism in terms of poverty levels, lack of employment, and investment.

2. That there are reasons of necessity and urgency

This point is linked to the previous one. It is not only about the necessity of addressing a problem that could have extremely serious consequences if left unaddressed, but also the urgent need to make decisions to confront it.

This point has also been highlighted by the president in his speeches and in the rationale behind the decree and the bill.

The combination of the decree and the bill covers a significant portion of the rule changes needed to avoid the collision, which is widely viewed as both necessary and urgent.

3. That it does not concern norms regulating penal, tax, electoral matters, or the regime of political parties.

In this regard, the president has been careful not to include modifications in areas explicitly prohibited by the Constitution in the decree.

Therefore, reforms related to penal, tax, and political matters are included in the bill submitted to Congress on December 27th.

A long-term tax reform will be essential—once economic deregulation begins to yield results and public spending significantly decreases—and it will also be crucial for provinces to acknowledge their share of responsibility and implement reforms within their jurisdictions that align with these principles—some are already doing so—ultimately leading to a modification in the revenue-sharing system. The president cannot do this by decree; it requires a federal commitment in this regard.

4. The impossibility of following the ordinary procedures outlined by the Constitution for the enactment of laws

This is perhaps one of the most important points in the discussion about the validity of the decree. Indeed, the Constitution requires, as a requirement, that it be impossible to follow the ordinary procedures for the enactment of laws

that should ordinarily be enacted instead of the decree. Many, including the Supreme Court itself, have understood that this paragraph means that decrees of necessity and urgency can only be enacted when Congress is not in session. I understand that this is not the only meaning that should be given to the constitutional requirement, and this case is a good example of that. It can be interpreted that what the Constitution refers to is, in generic terms, that it is impossible for Congress to resolve, through one or more laws, the emergency situation in which decisions need to be made, within the time imposed by the urgency. Of course, the circumstance that Congress is not in session may justify the enactment of a DNU (as in the case of the first decree during the pandemic). But it is also true that emergency sessions can be convened, and it would not take too long to be able to convene them. It is worth remembering that when the Constitution has wanted to give the Executive Branch a power that ordinarily should belong to Congress, as a result of the parliament being in recess, it has expressly stated it (for example, in the case of federal intervention, Article 99, section 20, or the declaration of a state of siege due to internal turmoil, section 16). The problem, I believe, is not necessarily that, in this case, but that even when it is in session, the magnitude of the reforms proposed by the president, which must be evaluated urgently—it practically means modifying the entire Argentine regulatory legal system in all areas—that even if they were urgently convened for extraordinary sessions, probably due to the timing of parliamentary work and the constitutional and regulatory procedures established for the enactment of laws, it would take them a great deal of time to discuss each and every one of the issues raised in the proposed norms. During that time, if urgent corrections are not made, the country could already be immersed in hyperinflation, in a cessation of payments and default, and the economic consequences for the inhabitants would be even more serious. So, in this context, I understand that the requirements set forth in Article 99, section 3, third and fourth paragraphs, can be considered fulfilled to justify the issuance of the decree. This is said with the reservations of recognizing that every exceptional situation must be interpreted restrictively, and also with the clarification that, as I will explain later, it is Congress who now holds the key to giving both instruments issued by the Executive Branch the constitutionally valid course that corresponds.

Este es quizá uno de los puntos más importantes en la discusión sobre la validez del decreto.

En efecto, la Constitución exige, como requisito, que sea imposible seguir los trámites ordinarios para la sanción de las leyes que ordinariamente deberían dictarse en lugar del decreto.

Muchos, incluyendo la propia Corte Suprema, han entendido que este párrafo significa que solo pueden sancionarse decretos de necesidad y urgencia cuando el Congreso no se encuentra en sesiones. Entiendo que no es ese únicamente el sentido que debe darse a la exigencia constitucional, y este caso es un buen ejemplo de ello.

Puede interpretarse que a lo que la Constitución se refiere es, en términos

genéricos, a que le sea imposible al Congreso resolver a través de una o varias leyes la situación de emergencia en la que es necesario tomar decisiones, en el tiempo impuesto por la urgencia.

Por supuesto que la circunstancia de que el Congreso no esté en sesiones puede ser un caso que justifique la sanción de un DNU (como en el caso del primer decreto en ocasión de la pandemia). Pero también es cierto que se pueden convocar de urgencia sesiones extraordinarias, y no tardaría demasiado en estar en condiciones de sesionar. Es bueno recordar que cuando la Constitución ha querido darle al Poder Ejecutivo una facultad que ordinariamente debería corresponder al Congreso, como consecuencia de que el parlamento está en período de receso, lo señaló expresamente (por ejemplo, en el caso de la intervención federal, artículo 99 inciso 20, o la declaración del estado de sitio por causa de conmoción interior, inciso 16).

El problema creo que no es necesariamente ese, en este caso, sino que aun cuando esté en sesiones, es tal la magnitud de las reformas propuestas por el presidente y que deben ser evaluadas con premura —supone prácticamente modificar todo el sistema jurídico regulatorio argentino en todas las áreas—, que aun cuando se reuniera urgentemente convocado a sesiones extraordinarias, probablemente, debido a los tiempos de la labor parlamentaria y los procedimientos constitucionales y reglamentarios dispuestos para la sanción de las leyes, les llevaría una gran cantidad de tiempo discutir todas y cada una de las cuestiones planteadas en las normas propuestas. Durante ese tiempo, si no se realizan las correcciones urgentes, el país podría ya estar inmerso en una hiperinflación, en una cesación de pagos y default, y las consecuencias económicas para los habitantes serían mucho más graves aún.

De modo que en este contexto entiendo que se pueden considerar cumplidos los requisitos exigidos por el artículo 99, inciso 3.°, tercer y cuarto párrafos, para justificar la emisión del decreto. Esto dicho con las reservas de reconocer que toda situación excepcional debe interpretarse restrictivamente, y además con la aclaración de que, como explicaré más adelante, es el Congreso quien tiene ahora la llave para darle a ambos instrumentos emitidos por el Poder Ejecutivo el cauce constitucionalmente válido que corresponda.

4.6 A constitutional peculiarity of this decree

This decree has a peculiarity that has not been seen in others sanctioned in the past.

In general, DNUs have been used to exercise state power over the inhabitants, further increasing pressure on taxpayers. But the objective of this decree, on the contrary, is to restore the rights of the inhabitants, enforcing the mandate of the Constitution.

There are certain articles of the Fundamental Charter that mark the essential guidelines of the Government. The representative, republican, and federal form of government (Art. 1), provincial autonomies (Arts. 5 and 121 et seq.), etc., but

fundamentally the legal order is determined by two articles that must be analyzed complementarily: Articles 31 and 28.

Article 31 establishes that the Constitution, the laws of the nation enacted in consequence thereof, and international treaties are the supreme law of the nation; and the authorities of each province are obliged to comply with it. There, the principle of supremacy of the Constitution is enshrined. The entire legal order must conform to the constitutional text, both at the federal and provincial levels.

In this sense, laws 48 and 4055 established the procedure of the extraordinary appeal, so that ultimately the Supreme Court, acting as a true constitutional court, guarantees this scheme and prevents collisions of norms that affect the Constitution.

But in addition to the supremacy of the Constitution over the entire legal order, there is also the supremacy of individual rights over the power of the Government created by the Constitution itself. Thus, Article 28 provides that the principles, guarantees, and rights recognized in the preceding articles cannot be altered by laws regulating their exercise.

Therefore, individual rights are above the regulatory power of the Government, and since this is a constitutional principle, and the Constitution is at the head of the legal order, no norm of inferior rank could contradict it.

The fear that through regulation this fundamental guarantee could be violated—perhaps the most important of the entire Constitution—led Alberdi to argue in the Bases: "It is not enough for the Constitution to contain all known freedoms and guarantees. It is necessary, as stated before, that it contains formal declarations that there will be no law that, under the pretext of organizing and regulating the exercise of these freedoms, annuls and distorts them with regulatory provisions. One can conceive a constitution that embraces in its sanction all imaginable freedoms; but which, admitting the possibility of limiting them by law, suggests itself the honest and legal means to fail to deliver on everything it promises" (Juan Bautista Alberdi, Bases and starting points for the political organization of the Argentine Republic, p. 418).

This fundamental idea of our constitutional organization has been ignored by Argentine Governments during the last century. Suggestively, the examined decree aims to restore to the inhabitants of the country those rights that have been altered in the name of their regulation, which has meant violating such rights through the legislative tangle of regulations and prohibitions that are now intended to be eliminated to overcome the economic crisis.

Therefore, it should be noted that this is the intention, and that from the entry into force of the decree, the scope of individual rights will be strengthened rather than weakened, as has historically happened in the past.

4.7 The lack of parliamentary treatment of the DNU and legal uncertainty

As can be seen from the reading of the constitutional text and the regulatory law, the delicacy of the debated issue justifies its urgent review by Congress. Therefore, it is assumed that the Bicameral Commission must be permanently constituted to be able to immediately address, upon the presentation by the Chief of Staff, and to be able to issue a report within the period of ten days.

However, in the present case, more than two months have passed and the commission has only now been constituted and has begun to evaluate the decree. The Constitution does not speak of ten days from when Congress decides to form the Commission, but ten days from when the Chief of Staff presents the decree, which occurred at the end of December.

Furthermore, the regulatory law stipulates that if that period elapses and the Commission does not issue the report, each Chamber must undertake the express and immediate consideration of the DNU, which also did not happen.

This situation generates uncertainty and legal insecurity. As noted, the DNU is in force, applicable, and acts performed under it will be valid even if Congress invalidates it in the future. But as time passes without a decision, and the application of the DNU expands, the consequences of a future annulment would be serious, as it would entail rolling back a series of ongoing reforms.

This suggests that the treatment of the decree cannot be indefinitely delayed. If we consider the ten-day periods for the report and the "express" and "immediate" consideration required of the Chambers, it would lead to the conclusion that if a reasonable period elapses without their pronouncement, the DNU could be tacitly validated, as the opposite could generate serious complications once its provisions have been repeatedly applied.

As we enter the last days of February, the situation regarding the future of the DNU is uncertain, and this uncertainty is compounded by the judicial injunctions filed against it, which in some cases have led to the imposition of precautionary measures to prevent it from taking effect in certain areas.

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