# Chapter 2
# Argentina on the Eve of a New Civil and Commercial Code

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**Abstract** This paper originates in the report submitted to the Intermediate Congress of the International Academy of Comparative Law, which took place in Taiwan in May 2012 under the heading "Scope and Structure of the Civil Codes". However, this is in fact a different paper because in between the preparation of such paper and today, Argentina has decisively advanced towards the enactment of a new Civil and Commercial Code. Hence, this paper will mainly refer to the presentation of the Civil and Commercial Code Draft which will probably have been passed by Congress by the time this book gets to the readers.

The first few pages will be covering introductory matters to focus then our analysis on the Draft and we will respond the suggested topics from this perspective.

**Keywords** Argentina • Civil Code • Civil and Commercial Code Draft • Codification • Recodification • Unification

## 2.1 Introduction

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## 2.2 History of Codification

### *2.2.1 Political Organization in Argentina*

The territory of what is Argentina nowadays was discovered and inhabited by the Spaniards in the sixteenth century.[1]

At the beginning of the nineteenth century, more specifically in 1810, an emancipation movement originated which ended in the declaration of independence from Spain in 1816. The national organization process was consolidated in 1853 with the enactment of the Constitution; however, it was in 1860 that the National State adopted the features it has maintained up to these days.[2]

In 1853, the Constitution which created the Argentine Confederation was enacted, but the Province of Buenos Aires did not agree to its incorporation and remained separated from the Confederation and it was the State of Buenos Aires until the Constitutional Reform in 1860. As a result of this reform, the term Confederation was no longer used and Argentina began to be organized as a Federal State. Such 1853/60 Constitution is the one in force nowadays, though with a number of revisions, which we will make reference to later in this paper.

The 1853 Constitution organizes a representative and federal republic, basically inspired in the model of the United States Constitution, though recent research focuses on the influence the 1812 Cadiz Constitution could have had.

The constitutional organization in Argentina is based on the division of three branches of power.

The Executive Branch is in the hands of the President vested with major authority in political decisions.

The Legislative Branch with a bicameral legislature divided into the House of Representatives and the Senate.

The Judicial Branch presided over by the Supreme Court of Justice, regarded as the ultimate interpreter of the Constitution; constitutionality control is diffused owing to the fact that all judges are vested with authority to check the constitutionality of statutes and administrative acts, and it is within the authority of the Supreme Court to monitor the constitutionality of the judgments rendered by any other federal or local court.

Today in Argentina there exist 23 provincial states and the Autonomous City of Buenos Aires; each of which also has a three branch power system. That is to say,

[1] Buenos Aires was first founded in 1536 and Santiago del Estero in 1550. The land was only partially occupied by the original inhabitants of scarce population and of a highly primitive nature. It was part of the Viceroyalty of Peru until August 1st 1776 when the Viceroyalty of Rio de la Plata was created.

[2] In 1853 the Constitution which creates the Argentine Confederation is enacted, but the Province of Buenos Aires does not incorporate to it and remains separated from the Confederation as the State of Buenos Aires until the 1860 Constitutional Reform. As a result of this Reform, the term Confederation is no longer used and Argentina organizes as a Federal State.

each province – and the Autonomous City – has an Executive, a Legislature and a Judiciary independent from the federal authority.

The relation between the "provinces" and the Federal State may be summarized as follows:

- The National State acknowledges the provinces as entities legally and historically preceding the creation of the Federal State.
- The provinces delegate some of their authority to the National State.
- The provinces retain all the powers other than those delegated to the federal government.
- The National Constitution clearly outlines which powers the provinces are to delegate to the Federal Congress.

One of the powers delegated by the Provinces to the Federal Congress is the authority to draft the civil, commercial, criminal and mining codes.[3]

Therefore, in Argentina, despite its federal organization, the provincial states have delegated to the Federal Congress the authority to enact its substantive codes. This is one of the most remarkable differences between the Argentine Constitution and the United States of the Mexican Constitution.

It is important to note that the Argentine Constitution – like the American Constitution – is of a highly liberal spirit in that it acknowledges an absolute equality status to foreigners, the freedom of religion, freedom of press, respect for private property and freedom of commerce and the principle of individual autonomy.

The Argentine Constitution was subjected to many revisions, the most relevant in 1957 and 1994. The latter gave international treaties a hierarchy superior to laws, attributed constitutional hierarchy to a number of human rights treaties listed under article 75, section 22, and included competition law, consumer protection and the conservation of the environment within its constitutional safeguards.

## *2.2.2 Civil Code*

### 2.2.2.1 Standing in the Contemporary Legal Families

The Civil Code of the Argentine Republic is a member of the Romano-Germanic family according to the classification of Rene David.

The Civil Code was enacted on September 29th 1869, and it has been in force since January 1st 1871.

The Civil Code was drafted by Dalmacio Vélez Sarsfield, not only a jurist but a true statesman, who stood out as Minister of the Executive on a number of occasions and for valuable contributions during his public life.[4]

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[3] Article 67, section 11 of the original text; article 75, section 12 of the text reformed in 1994.

[4] V. Rescigno, Pietro, Dalmacio Vélez Sarsfield codificatore, en Dalmacio Vélez Sarsfield e il diritto latinoamericano, a cura di Sandro Schipani, Atti del congreso Internazionale, Roma, march 1986, page 27.

#### 2.2.2.2 Sources

The author of the Argentine Civil Code used five relevant sources in the draft of the code.

The first source was Roman Law, not only legislated law but that which stem from the treatise authors as well. Thus, our codifier continually quotes authors in his notes[5] such as Vinnio, Heinecio, Cujas and the Romanic authors of that time, like Maynz, Mackeldey, Molitor, Ortolan and specially Savigny.

The second source was the applicable law in force at the time and with which Vélez Sarsfield was very familiar due to his practical experience as a lawyer. This applicable law contained numerous and complex statutes, such as the Seven-Part Code (*Libro de las VII Partidas*) which in *Indies* was the effective applicable law– laws specifically enacted for its application in *Indies* – which gave rise to what was known as "patriot law", which was in fact the law enacted by the Provinces during the national organizational stage.

Other sources were the foreign codes and the doctrine arising from them; mainly the Napoleon's Code and its commentators. Among them, Vélez repeatedly quotes the German Zachariae, his Alsatian followers Aubry and Rau, as well as Troplong, Toullier, Demolombe, Duranton, Marcadé, Merlín, Mourlon and the Belgian Laurent. Also, Pothier is frequently quoted, especially in the sphere of obligations and contracts.

The fourth source accounted by Vélez was Freitas' *Esboco*, draft of a Civil Code in Brazil. Freitas was characterized by a particularly balanced spirit in legal matters and very progressive ideas. He was the main source of inspiration for Vélez Sarsfield in the book "Of the Persons".

A fifth group was comprised by other codes, such as the Bavarian Code, the Chilean Code of Andrés Bello, the Civil Code Draft for Spain of García Goyena, Acevedo's Draft for the Oriental Republic of Uruguay, the 1811 Austrian Code; and further doctrinal works less quoted such as those of Story, Gregorio López, to name but a few. Vélez also worked with codes of German States, such as Sajonia, Wurtenberg and the abovementioned Bavaria.

Additionally, many other codes, many of which were almost an exact copy of the Napoleon's Code, have served as sources of the Argentine Civil Code such as the Sardinia Code, the Codes of Tuscany, Parma, the two Sicilies, Holland, the Louisiana Code, the Vaud Code, the State of New York Code and even the 1865 Italian Code.

The sources used in the draft of the Civil Code show that the legislator was clearly familiar with the comparative law of that time.

[5] All editions of the Argentine Civil Code have a special feature: they include the notes that Vélez wrote as he advanced on the texts; in such notes he included the authors or legal bodies he consulted and were his sources, pointing out similarities and differences with them; and on some occasions he justified the draft as an article of the Code. Although the notes have not been passed by the Federal Congress, they are regarded as a valuable tool in the interpretation of the Code.

The knowledge of comparative law enabled Vélez to draft a code which succeeded in merging the law applicable in Argentina at that time with the innovations demanded by a plan or project of country endorsed by his generation, and with the necessary modernization of the institutions in force.

#### 2.2.2.3 The Commercial Code

The history of legislation in Argentina reveals a curious feature, which is that the Commercial Code was enacted before the Civil Code. As it has already been pointed out, between 1853 and 1860 the State of Buenos Aires was separated from the Argentine Confederation. In this period and in this independent State the enactment of a Commercial Code was prompted, which draft was commissioned to a Uruguayan jurist, Eduardo Acevedo and Dalmacio Vélez Sarsfield himself. Their draft became the Commercial Code of the State of Buenos Aires in 1859. Having the State of Buenos Aires been incorporated as part of the Argentine Republic with the constitutional reform of 1860, such Code became the National Commercial Code in 1862.

#### 2.2.2.4 Content of the Civil Code. Governing Principles

The Argentine Civil Code begins with two preliminary titles: "Of the Laws" and "Of the methods to count the intervals of the Law."

From the titles, it breaks down into four Books.

Book I is entitled "Of the Persons", and deals with persons in general in the first section, and "the personal rights in the family relations" in the second section; this Book legislates on marriage, divorce, filiation, parental rights and duties, guardianship and curatorship.

Book II is named "Of the personal rights in the civil relations" and it regulates obligations, events and acts of law and contracts, and civil liability.

Book III governs real estate rights and Book IV is called "Of the real and personal rights: Common Provisions", and it comprises in rem rights, succession, preemption and prescription.

The Argentine Civil Code, like other codes of the time, was founded on the following principles:

(i) the absolute respect for the pledged word and the unquestionable enforceability of the contractual bond
(ii) liability for negligence
(iii) the patrimony unit
(iv) the absolute nature of the ownership right
(v) the family law relying on indissoluble marriage, obviously between different-sex couples.
(vi) the incapacity of the married woman.
(vii) parental rights and duties in charge of the father.

## 2.3 The Decodification Process

### *2.3.1 Introduction*

During the twentieth century, a number of matters of the Civil Law separated from its common backbone. Among them, we find labor law, agricultural law and consumer law.

Notwithstanding this, a few matters which had not been incorporated to the Civil Code were legislated outside the Code, such as name, adoption, property registry and even civil matrimony, even when such laws are deemed to integrate or form part of the Civil Code.

In the past few years, this trend accelerated and we will continuously see that many institutions have been legislated outside the Civil Code, prompting the creation of real microsystems.

### *2.3.2 Reforms to the Civil Code*

The rationalistic concept of a "code" under which all law is to be laid down opposes to the reality of constant social, ideological, political and economic changes which prompt the continuous adjustment of texts, which is achieved by means of case law or legislative revisions.

I will detail below the most relevant revisions of the Civil Code by diving them into stages:

#### 2.3.2.1 First Stage

The first stage comprises the period from the enactment of the Civil Code until 1968, when the Code was updated by special laws regulating new issues or modifying existing institutions.

(a) Civil Matrimony Law:
On November 12th 1888, Law 2393 of Civil Matrimony was passed which superseded the matrimonial regime of the Civil Code. This was a necessary reform owing to the fact that the system of the Civil Code excluded non-Catholics from the possibility of the celebration of marriage.

This Law was then modified in 1968, by Law 17.711, and replaced by Law 23.515, enacted on June 8th 1987, and finally revised by Law 26.618 in 2010 which permits marriage between people of the same sex.

(b) Law of the Civil Rights of Women
Law 11.357, passed on September 14th 1926, considerably broadened the civil capacity of the married woman.

The capacity and the rights of women have extended to civil equality with men and to the elimination of all kinds of discrimination.

(c) Adoption Law:
Our Code failed to regulate adoption, which was incorporated by Law 13.252, today replaced by Law 19.134, which was revised by Law 24779 modified by Law 26.618 in 2010 to permit adoption by same-sex couples.

(d) Horizontal Property Law:
The codifier had prohibited the horizontal division of property (article 2617). This was derogated by Law 13.512, passed on September 30th 1948, which is still applicable.

(e) Law for the sale of land in lots and in installments:
Law 14.005, enacted on September 30th 1950, regulated the sale in installments of pieces of land, with the aim of protecting the purchasers who were on many occasions the victims of unfair acts. This Law is still in force with the revisions introduced by Law 23.266.

(f) Law on Children born in or out of wedlock:
Law 14.367 of October 11th 1954 introduced substantial reforms to the regime of Family and Succession Law when it partially abolished the difference between children born in or out of wedlock. Nowadays, children have the same status under the law (law 23.264).

(g) Land Registry and Prescription of real estate property:
Law 14.159 of October 3rd 1952 outlined regulations on the Land Registry and ruled that the acquisition of real estate property through prescription would be subjected to a court procedure. It is substantially in force.

(h) Regime of minors and the family:
Law 14.394 of December 30th 1954 introduced major reforms in the matter of the legal capacity to celebrate marriage and presumption of death from absence or disappearance.

It also incorporated the "homestead exception", property which cannot be foreclosed for debts incurred subsequent to the coming into effect of this exemption.

Although it was not part of the draft submitted by the Executive to the Congress, this Law included divorce (article 31) for the first time in the history of the national legislation. The validity of this text was suspended (decree law 4070/56), and then reinstated by Law 23.515 which ruled again this form of marriage dissolution.

#### 2.3.2.2 Second Stage. The 1968 Revision: Law 17.711

In 1968, the Argentine Civil Code was partially revised by Law 17.711 which modified about 200 articles of the Code. Nevertheless, its importance does not lie in the number of articles, but in the change of perspective of the Code, which is reflected in some of the institutions incorporated to it.

Thus, it is worth mentioning that law 17711 incorporated to the Code:

- the abuse of law (article 1071);
- fraud in the inducement (article 954);
- the principle of good faith as a rule for the interpretation of contracts (article 1198);
- the unforeseeability rule (article 1198);
- the limitation to the absolute nature of the ownership right (articles 2512, 2513);
- extended compensation for moral distress in civil liability either contractual (article 522) or extra contractual (article 1078);
- the possibility to reduce the compensation in torts (article 1069);
- vicarious liability in civil wrongs caused by the act of things (article 1113);
- joint and several liability of joint tortfeasors (article 1109, 2nd paragraph.);
- equitable compensation for the victim of an involuntary act (article 907);
- automatic default in payment as a rule in obligations with a term certain (article 509);
- forfeiture clauses implied in contracts (article 1204);
- registration in real estate registries as public notice for the conveyance of real estate rights in property (article 2505);
- protection of the third party in good faith, sub-purchasing real or personal property rights in the event the transaction is void (article 1051);
- the protection of the purchaser with a preliminary sales contract (articles 1185 bis and 2355);
- attainment of the age of majority at 21 years old (article. 126);
- emancipation of minors at the age of 18 years old (article 131);
- extension of the capacity of the minor who works (article 128);
- divorce (personal separation), by mutual agreement (article 67 bis of the Civil Matrimony Law);
- modification of the order of succession (articles 3569 bis, 3571, 3573, 3576, 3576 bis, 3581, 3585, 3586);
- presumption of acceptance of the inheritance by the heirs with the right of inventory (article 3363).

The preceding enumeration is a clear illustration of the relevance of the reform, which changed the pillars of the nineteenth century codification as follows:

- Limitation to the absolute nature of the principle *pacta sunt servanda*, with the admission of the unforeseeability rule, fraud in the inducement and the abuse of law, all corollaries of the general principle of the good faith which is expressly set forth;
- Limitation to the absolute nature of the ownership right, by abridging the powers of proprietors;
- Change in the regime of civil liability by admitting the vicarious liability, the redress of moral distress in a broader extent and joint and several liability of joint tortfeasors.
- Adoption of solutions which respond to a dynamic concept of patrimony, such as automatic default in payment and the forfeiture clause implied in contracts;

Law 17.711 represented a significant breakthrough in our civil legislation, a modernization of the law which allows us to state that as of 1968 there has been a new Civil Code, which, without abandoning the protection of freedom, has adopted a less individualistic perspective and a more accentuated solidarity aspect in comparison with the original Civil Code.[6]

#### 2.3.2.3 Third Stage

The third stage comprises the period between the laws passed as from 1968 to today. The most relevant laws will be mentioned as follows:

(a) Real Estate Registry:
Law 17.711 had provided in its article 2505 the registration in real estate registries as public notice for the conveyance of real estate rights in property. A few days later, Law 17.801 was enacted, which was the National Law of the Real Estate Registry.

(b) Name of natural persons:
The isolated provisions existing on this matter were replaced by Law 18.248, which ruled the subject on its entirety. This Law has been subjected to subsequent partial revisions, the most relevant being the reform introduced by Law 26.618 which governs the family name of homosexual couples.

(c) Adoption:
The up-to-then in force law was replaced by Law 19.134, enacted on June 3rd 1971. Afterwards, such text was superseded by Law 24.779 which incorporated the adoption regime in between articles 311 and 340 of the Civil Code.
In 2010, Law 26.618 reformed adoption and permits that children be adopted by same – sex married couples.

(d) Prehorizontality:
Law 19.724, named Prehorizontality Law was passed on July 6th 1972.

(e) Non-Profit Organizations:
The Non-Profit Organizations Law, which fills a void in the Code, has been in force since September 25th 1975, under number 19.836.

(f) National Land Registry:
The National Land Registry Law has the number 20.440 and was passed on June 5th 1973.

(g) Right of habitation of the surviving spouse:
Law 20.793 incorporated article 3573 bis to the Civil Code which established the in rem right of habitation of the surviving spouse.

(h) Right to privacy:
Law 20.889 had attempted to regulate for the first time the right to privacy, by means of the incorporation of article 32 bis, but there existed a defect in its enactment, as both legislative chambers had voted on different texts. Therefore,

[6] V. Casiello, Juan José, "Memorando la reforma civil de 1968", LL 28.11.08.

by means of Law 21.173 of September 30th 1975, article 1071 bis of the Civil Code was finally enacted.

(i) Adjustment clauses in mortgages and pledges:
Law 21.309 set forth a system for the public notice of adjustment clauses in mortgages and pledges with registry. It was enacted and promulgated on May 7th 1976. It was derogated by the Convertibility Law 23.928. Convertibility had no further effect as of January 6th 2002 when Law 25.561 was passed for such purpose, though this has not prompted the reappearance of the adjustment clauses; as it was already explained, Law 23.928 is still in force and it expressly prohibits the use of these adjustment clauses.

(j) Transplants:
Law 21.541 constitutes the first national regime on the transplant of organs; passed on March 18th 1977, it was partially revised by Law 23.464, enacted on October 30th 1986. Nowadays, Law 24.193 is in force.

(k) Marks and signals:
The regime of marks and signals, used as a way to identify small and large cattle, omitted by the Civil Code and gathered in rural codes, became incorporated to national legislation by means of law 22.939 of October 6th 1983.

(l) Blood Law:
Law 22.990 called Blood Law and passed on November 20th 1983 constitutes an extensive text of 100 articles which governs different aspects in the use of human blood.

(m) Filiation and Parental Rights and Duties:
One of the most relevant reforms as from the 1968 reform is that effected by Law 23.264, passed by the National Congress on September 25th 1985.

It is especially relevant in the matter of filiation, as it recognizes the absolute equality between children born in or out of wedlock and parental rights and duties which are to be exercised equally by both parents.

In addition, it introduced reforms in other matters such as capacity, domicile, to name but a few.

(n) Civil Matrimony:
Another important revision of our Family Law originates in Law 23.515, which replaced the 2393 Civil Matrimony Law.

Among other multiple modifications, it is important to bear in mind that this regime reinstates divorce, which had been suspended as of 1956.

(o) Pact of San Jose, Costa Rica:
Law 23.054, passed on March 19th 1984, ratifies the American Convention on Human Rights, generally referred to as Pact of San Jose, Costa Rica.

By its incorporation to internal law, it has had direct influence on many matters, especially on those related to the rights of personality.

(p) Convention on the Elimination of all Forms of Discrimination against Women (CEDAW):
Law 23.179 ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), passed by resolution 34/180 of the General Assembly of the United Nations.

(q) Law of *fideicomiso* or trust and leasing:
Law 24.441 generally referred to as the construction financing law, represents one of the most relevant advances in the Argentine legislation in the last few years. This is due to the fact that it incorporated the trust agreement, which permits the creation of a separate patrimony which cannot be reached by creditors of neither of the two parties; and the leasing, a very much used contract in the contemporary economy. Also, a few reforms were made to the Civil Code on the matter of assignment of claims. The regulation of the leasing contract made by Law 24.441 has been replaced by that of Law 25248, now in effect.

(r) Law of Forest Surface
Law 25.509, passed in November 2001, incorporated the in rem right of forest surface with the intention of facilitating and promoting forestation activities.

(s) Sexual health and responsible procreation
Despite criticism from reactionary sectors, Law 25673 was enacted on October 30th 2002 which created the National Program of Sexual Health and Responsible Procreation. It integrates to Law 26.150 of Sexual Education (National Program of Integral Sexual Education) and Law 26.130, Regime for Surgical Contraceptive Operations.

Many provinces have passed legislation on the matter within the scope of their constitutional jurisdictional authority[7];

(t) Protection of children and adolescents
Law 26.061 of Integral Protection of Children and Adolescents represents a significant advance not only in their protection but in the recognition of their rights and the exercise of such rights by themselves. Argentina has also ratified the Convention on the Rights of the Child (Law 23849 of 1990). Like in the case of the Convention on the Elimination of all Forms of Discrimination against Women, this Convention on the Rights of the Child has constitutional hierarchy as from the reform of the supreme law in 1994 (article 75, section 22).

(u) Integral protection of women
On April 14th 2009 Law 26.485 on the Integral Protection of Women was enacted. This Law completes the anti-discriminatory policy with respect to women and is directed to their effective protection against all kind of violence women are subjected to in contemporary societies.

(v) Civil Registry
In September 2008, Law 26.413 was enacted, which sets forth the organization of the Registry of Civil Status and Capacity of Persons, both within the jurisdiction of the Autonomous City of Buenos Aires and in the Provinces. Article 95 of Law 26.413 derogated decree 8204/63.

(w) Law 26618 of equal marriage passed in 2010.
This Law permits the marriage of persons of the same sex with the same effects of the marriage between people of different sex.

[7] V. Rosales, Pablo O. – Villaverde, María Silvia, *Salud Sexual y Procreación Responsable*, Bs. As., 2009.

### 2.3.3 Decodification of the Commercial Code

Having read the abovementioned sections, it can be concluded that the codified civil law has experienced a process of permanent transformation, both inside and outside the Code. However, the decodification process has had a major impact on the Commercial Code, as there is hardly anything left from the 1859/62 Code substantially modified in 1889.

Bankruptcy Law was detached from the original Commercial Code (four laws from the enactment of the code in 1889: Law 4156, Law 11719, Law 19551–reformed by law 22917–and Law 24522, reformed twice in 2002–Laws 25563 and 25589–and again in 2011).

Also, the regulation of companies, bill of exchange, promissory note, check, navigation and insurance was removed from the Commercial Code.

In addition, many institutions which had not been originally covered by the Code were then legislated, such as: customs warrant, warrant, pledge with registry, stock exchange and markets, agricultural pledge, mixed economy entities, cooperatives, the Companies' Board (IGJ), negotiable obligations, mutual funds, financial entities, and so on.

Another new topic is that pertaining to the air transportation which gave rise to the Aeronautic Code, independent from the Civil Code. And, maritime law is governed by the General Maritime Law, incorporated to the Commercial Code.

A number of rules surviving the Commercial Code, like that in Article 7 which states that unilaterally commercial acts are governed by the Commercial Code, have lost importance due to the fact that when such acts are undertaken with consumers, they will be subject to the regulations of the special law; thus, only the general regulation of the typical contracts in the Commercial Code will be applicable to such acts with consumers as long as it does not contradict the provisions of the consumer protection law.

### 2.3.4 Acknowledgment of Other Sources as Further Decodification

As Professor Rivera has pointed out on many other occasions, the decodification process does not end in the reforms to the Code or in a number of matters detached from the Civil or the Commercial Code to be regulated by special laws. However, beyond all these factors, it is true that the Code has to co-exist with other sources of an even superior hierarchy – such as the Constitution, supranational law, communitarian law – out of which subjective rights arise, the fulfillment of which individuals may be entitled to claim before national or supranational instances.[8]

[8] Rivera, Julio César, "Codificación, descodificación, recodificación", not published, to appear in Revista de Derecho privado y Comunitario.

#### 2.3.4.1 The Constitution as a Source of Subjective Rights

For a long time, jurists have noticed that the Constitution is a source of statutes which could have a direct efficacy and not only pragmatic. In Argentina, the role of the Supreme Court was extremely valuable for this concept to be understood when 50 years ago in two extraordinary judgments, "Siri" and "Kot", our Supreme Court set forth that individuals were entitled to claim the enforcement of the rights acknowledged by the Constitution without the need of an inferior statute to regulate the exercise of such rights.

On the other hand, it has also been outlined that many matters of private law are in the National Constitution, a few from its enactment, others from the 1994 reform. This is what is known as "constitutionalization of the civil law."

#### 2.3.4.2 Supranational Law

Since 1983, Argentina has embarked on a process to incorporate human rights to supranational law. This was effected by the 1994 constitutional reform in section 22 of article 75.[9]

The impact of supranational law when it became incorporated to the Constitution by the 1994 reform has been appropriately pointed out by the Supreme Court in recent decisions. In the "Arriola" case, the Supreme Court has stated as follows:

> "*…One of the basic principles of all the institutional scaffolding prompting the Constitutional Convention in 1994 was to incorporate the international treaties on human rights on par with the National Constitution* (*article 75*, *section 22*). *Therefore*, *the 1994 constitutional reform recognized the importance of an international system of human rights and did not restrict to the principle of unrestrained sovereignty of the nations … This historical event has deeply modified the constitutional perspective in many aspects …*" .[10] And,

[9] Article 75 (22) "*To approve or reject treaties concluded with other nations and international organizations*, *and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws*.

*The American Declaration of the Rights and Duties of Man*; *the Universal Declaration of Human Rights*; *the American Convention on Human Rights*; *the International Pact on Economic*, *Social and Cultural Rights*; *the International Pact on Civil and Political Rights and its empowering Protocol*; *the Convention on the Prevention and Punishment of Genocide*; *the International Convention on the Elimination of all Forms of Racial Discrimination*; *the Convention on the Elimination of all Forms of Discrimination against Woman*; *the Convention against Torture and other Cruel*, *Inhuman or Degrading Treatments or Punishments*; *the Convention on the Rights of the Child*; *in the full force of their provisions*, *they have constitutional hierarchy*, *do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced*, *in such event*, *by the National Executive Power after the approval of two-thirds of all the members of each House*.

*In order to attain constitutional hierarchy*, *the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House*, *after their approval by Congress*."

[10] CSN, Arriola, 25.8.09; in Zaffaroni's vote in this same case Estrada was quoted: "… article 19 clearly separates law and individual morality, making a distinction, once and forever, between the State that imposes a morality and that which respects the moral freedom of the individual; the first he calls "pagan and socialist" and the second "Christian and liberal"".

in the same decision, the Court emphasized: "…*the hierarchy granted to the international treaties has had, on occasions, the virtue of ratifying the protection of rights and safeguards already provided for in our Magna Charta of 1853; in other cases, it has strengthened them, and in other cases it has raised further proclamations or has defined their extent with more detail and precision*."

#### 2.3.4.3 Supreme Court's Precedents

In Argentina, case law as a source of law is practically not questioned. Beyond all theoretical debates aroused by this topic, it is true that no lawyer, professor, judge or law student could be oblivious to the decisions of the Supreme Court.

This is due to the fact that it is very frequent for courts to base their decisions on precedents rendered by other courts. And, it is also attributed to the fact that the work of courts has been relevant in the transformation of the civil law.

For many decades, the judgments which were better known and quoted were those rendered by the civil courts of the City of Buenos Aires.

Notwithstanding this, a few Supreme Court decisions have had a decisive influence on central aspects of private law.

However, since 1983 and also as a result of the Constitution being regarded as another source of private law and the incorporation of Argentina to the map of supranational law on human rights, it is the Supreme Court's precedents that begin to have a leading role.

And, it is important to mention that this Supreme Court has had the virtue of reinstating and ratifying the liberal spirit of the 1853 Constitution.

This is what the Court did in the judgment rendered on the case "Asociación Lucha por la Identidad Travesti Transexual" (Association for the Fight of Transvestite Transsexual Identity) – in November 2006 – in which the Court set a number of paramount outlines.

As for the liberal and democratic ideas of the Constitution, the Court – referring to the "Portillo" precedent and even improving it – said:

> *The definite reinstatement of the democratic and republican ideals constitutionalists laid down in 1853 and deepened in 1994 calls for a national unity in freedom, but not for uniformity or homogeneity. The sense of democratic and liberal equality is the right to be different, but it cannot be confused with the "equalization" which is a totalitarian concept. Article 19 of the National Constitution, combined with all safeguards and rights recognized by the Constitution, undoubtedly illustrates the concern constitutionalists had to respect the autonomy of consciousness as an essence of the person – and, therefore, the diversity of thoughts and values – and not to force citizens to a uniformity which fails to be in line with the* ***liberal political philosophy that inspires our Fundamental Statute***. (third paragraph of whereases; emphasis added)[11]

It is important to mention that what was being discussed was the possibility of either granting or not authorization to a civil association in the framework of the

[11] CSN, "Asociación Lucha por la Identidad Travesti – Transexual c. Inspección General de Justicia", 21.11.06, Fallos 329:5266.

general law. It is the requirement of the Civil Code that associations have a "common weal" aim. The Court construed this requirement in the light of the liberal spirit of the Constitution.

#### 2.3.4.4 Conclusion

To some extent, what has happened is what the Italian jurist Natalino Irti anticipated: "*On the one hand*, *the Code has lost all constitutional value due to the fact that all political and civil freedoms*, *the property right*, *the private economic initiative*, *are all safeguarded by the Constitution*, *that is to say*, *by statutes of a superior hierarchy* (…) *To these safeguards*, *there is nothing the Civil Code could add as it was deprived of the protection role it assumed in the XIXth century and it is daily undermined by special laws*."

## 2.4 Current Status of the Codification

Private Law in Argentina is still codified law. But, as we have already pointed out, the civil code and the commercial code are no longer the exclusive sources in such matters. Both Codes have to co-exist with sources of a superior hierarchy, such as the Constitution and the international treaties; with legislative microsystems which comprise numerous and relevant matters (name of persons, companies, bankruptcy, insurance, property registry, etc.); and with case law which has an extraordinary value due to the fact that it has permitted that the structures and principles of patrimonial and family private law be renewed by means of judges' decisions.

All this process which resulted in the codes losing their central and almost exclusive role prompted changes – as we have already anticipated – in the fundamental principles on which the nineteenth century codification relied. Thus,

- the family founded on indissoluble marriage has given place to multiple forms of family[12];
- as of the coming into effect of divorce, matrimonial and extra matrimonial families are given equal status;
- the principle of contractual freedom still continues to be the basis of the contractual system, though it recognizes multiple limitations, most in force nowadays, such as: the unforeseeability rule, fraud in the inducement, the abuse of law, consumer protection, control of general provisions, special regulation of adhesion contracts; which have extended to commercial law;
- civil liability may see negligence as its backbone, but big sectors have been invaded by objective factors of attribution of liability, so in practice negligence becomes a residual factor;

[12] The subject was dealt with in the International Congress of Family Law held in Mendoza in 1998.

– the right of ownership has limits set forth by the same code, significantly accentuated since the revision in 1968.
– the principle of patrimony unit has been replaced by the recognition of the possibility that a natural or legal person may be holder of more than one patrimony; this has been ratified by the incorporation of the *fideicomiso* or trust to Argentine law by means of Law 24441, inspired in the Anglo-Saxon trust;
– Women have equal rights to men and parental rights and duties are to be exercised by both parents equally.
– Different-sex couples are no longer a requirement for the celebration of marriage as of 2010 when homosexual matrimony began to be admitted.

## 2.5 The Recodification. 2012 Draft of the Civil Code

We agree with Professor Rivera that a transformation of the private law legislation is essential. Even though some areas – such as family law – have been deeply modified, there are others like real estate, succession and private international law which have been subjected to very few changes since the enactment of the Civil Code. Indeed, the significant influence of the constitutionalization of private and supranational law demands the adaptation of the inferior legislation.

For that purpose, Argentina has seen in the past 25 years many attempts to recodify private law. We could mention the following drafts:

– The 1987 Unification Draft; it was enacted by Congress but vetoed by the National Executive Power.
– Civil Code Draft prepared by the Executive Power by Decree 468/92
– Draft submitted by a Parliamentary Commission known as the 1993 Draft;
– Draft of the Civil Code unified with the Commercial Code in 1998.

Finally, in 2010, the President of the Argentine Republic commissioned three jurists to prepare a Civil Code Draft unified with the Commercial Code.

These jurists have invited 90 people to cooperate in the draft of the reform of the Code dividing them into sub Commissions who were requested the draft of a first proposal on a specific part of the Civil Code and on the basis of the following premises:

- Adequacy to the Constitution and to the participation in the MERCOSUR
- Reception and regulation of human rights, so that the codes will be, out of all the sources, the one closer to the protection of the person.
- Protection of the weak and respect for the contractual freedom between people with the same bargaining power
- Reformulation of the contractual principles, informatization processes and the circulation of assets.
- Recognition of the new forms of property.
- Definition of a balanced system of civil liability

- Strengthening of the family.
- Respect for minorities.
- Acknowledgment of the cultural identity of the aborigine populations
- Procedure to facilitate cultural integration by means of internal legislation

The Civil and Commercial Code Draft was presented in 2012 and after a revision of the original text by the Executive, it was directed to the National Congress. A bicameral commission was formed which has heard in public hearings social organizations and individuals interested in expressing their opinions to the Congress. The report of the bicameral Commission is expected to be released during the first months in 2013 and from that point the prompt enactment of the new Civil and Commercial Code of the Argentine Republic.

Given this new reality, the recommended topics will be dealt with in the context of the Civil and Commercial Code Draft.

## 2.6 Commercial Law

### *2.6.1 Commercial Law in Codification*

The Argentine Commercial Code, like many others of the nineteenth century, considered commercial law as the law of merchants, individuals whose profession is the exercise of commerce and commercial acts.

Under Argentine legislation, like in many other countries, civil law is of supplementary application in the scope of commercial law. However, the connections between both branches of law have significantly strengthened.

Over the twentieth century, the diffusion of massive contractual forms and the relevance attained by business associations changed the relation that Civil and Commercial Law had during the nineteenth century. Today it is possible to observe a commercialization of civil law and a civilization of commercial law.

#### 2.6.1.1 The "Commercialization" of Civil Law

On the one hand, Commercial Law has expanded in comparison with Civil Law, resulting in a phenomenon that authors refer to as the commercialization of Civil Law, strengthened by the social-economic transformation known as industrial revolution. Technological innovations enable the introduction of machines to the productive process making mass industrial production technically possible, which contributes to both an increase in job productivity and a reduction of production costs. Demographic development and urban concentration have both given rise to a huge availability of the workforce. Galgano, with his peculiar ideological tone, states that in this era of the industrial revolution, it is no longer possible to make a distinction between relations relevant and relations indifferent to the mercantile

class and this is the reason to explain why this strong influence of commercial law takes place, which has led Argentina to look for the unification of its Civil Law and Commercial Law for more than 50 years.

#### 2.6.1.2 The "Civilization" of Commercial Law

But, at the same time, Civil Law has had influence on Commercial law through its civil institutions. The protection of the weaker party to a contract, the protection of consumers in general subjected to commercial regulations under provisions like Article 7 of the Argentine Commercial Code, and undoubtedly the event that the general theory of obligations does not appear anywhere but in the Civil Code, have evidenced the influence of the Civil Law on Commercial Law.

#### 2.6.1.3 Tendency to Unification

The drafts for the reform of the Argentine Civil Code we have referred to recommended a legislative unification of the civil and commercial codes similar to that of the Swiss Code of Obligations of 1911 and the 1942 Italian Civil Code.

The recommended unification does not mean the disappearance of the commercial law, or the loss of its didactic, doctrinal or scientific autonomy; but it involves recognizing that provisions in common to all patrimonial private law should be elaborated.

Such unification is grounded on the following reasons:

- the existence of a commercial law of subjective orientation with the merchant at its center is absent from real substance; this is a classic conception of the commercial law, largely superseded by others;
- the reason for a commercial law of objective orientation sustained in the existence of certain acts which are commercial by nature has been lost forever;
- in fact the concept of *commerce* as a means to the exchange of movables is extremely narrow and unsuitable given the current reality; otherwise, all productive activities form part of the current idea of commerce;
- there is no ontological distinction in the essential concepts of patrimonial law (obligation, contract, in rem right) whether they are expressed in Civil Law or in Commercial Law;
- there are certain law fields that have become unified (bankruptcy) and others have done so by default (companies, due to the use of the corporation (*sociedad anónima*) for all kind of activities and given the virtual disappearance of the Civil Code corporation (*sociedad* civil);
- commercial law is today the law of companies, of the economy, of business, according to the many expressions used by doctrine and it is formed by a fluctuating mass of matters such as competition law, industrial property law, law of companies and business groups, company reorganization, bankruptcy law, distribution, and so on. These are matters which are not contemplated in what is left of the Commercial Code, but under special legislation.

Thus, the 1998 Civil Code Draft and the 2012 Draft recommend a single Code of Private Law in the body of the Civil Code, with the corresponding derogation of the Commercial Code.

#### 2.6.1.4 Commercial Law in the 2012 Draft

Regardless of the intention of the jurists in charge of the preparation of the Draft, it is important to mention that there exists in the Draft a virtual absorption of the commercial law by the general law. In this sense, we could refer to the absence of rules on a subject proper of the commercial law, the merchant, the business enterprise. Also, there are no rules on the Public Registry of Commerce and the terms "commerce", "commercial" or similar words have almost disappeared. Additionally, the law of business associations – which survives in a separate body – is now called "General Law of Companies". That is the reason why some authors have recently referred to the "blurring of commercial law".[13]

From a different perspective, institutions which are typical of commercial law are incorporated to the Code; for example, securities and contracts like leasing, franchise, trust and banking.

However, it is important to note that the unification of the codes does not mean that the microsystems typical of the commercial law will disappear. Therefore, upon the enactment of the new Civil and Commercial Code, the law of business associations will survive under its new name, as well as the bankruptcy law, insurance law, the multimodal transport law, credit cards law, the aeronautic code and hundreds of other statutes that regulate specific institutions. Notwithstanding the Vienna Convention on the international sale of goods which has been ratified by the Argentine State and is part of its domestic law.

### *2.6.2 Consumer Protection Law*

In Argentina, like in many other countries, consumer law is ruled by means of a special law, independent from both codes of private law.

However, this does not mean that the consumer protection law is completely autonomous, but – on the contrary – it integrates to all the body of laws in general and to the Civil Code in particular, either when it introduces new regulations applicable to the acts or contracts these regulations rule, or when it imposes solutions to matters which, partially or totally, cannot be solved by the rules of the general law.

The title of this section resembles that of article 3 of Law 24.240 in its drafting by Law 26.361. Given its importance, we transcribe this article: "*Article 3°*:

[13] Junyent Bas, Francisco, "La "difuminación" de la comercialidad en el Proyecto de Código Civil y Comercial y la necesidad de una relectura completa. A propósito del nuevo rol de la empresa y el quehacer mercantil", *Rev. Derecho Comercial*, *del Consumidor y de la Empresa*, LL, Octubre 2012, ps. 3–28.

*Consumer Relation. Integration to Statutes. Preeminence. The consumer relation is the legal bond between the supplier and the consumer or user. The provisions under this law are integrated to the general laws and special laws applicable to consumer relations…. In case of doubt regarding the interpretation of the principles set forth by this Law*, *the provision more favorable to the consumer shall prevail*."

The law transcribed envisages its integration to the Civil Code and other regimes and the preeminence of the Consumer Protection Law over other legal rules comprised by the Civil Code. But, should there exist any clash between a general law rule and another provision which protects the consumer, the latter will prevail. Therefore, the legal regime arising from the Consumer Protection Law will not only s*upplement* but also *modify* or *derogate*, even partially, the statutes pertaining to other legal spheres applicable to the consumer relation taken into consideration.

#### 2.6.2.1 Consumer Protection Law in the 2012 Draft of the Civil and Commercial Code

The status of consumer law will see a substantial change with the enactment of the Civil and Commercial Code of the Argentine Republic, as it contains regulations on the consumer protection law which shall be construed and applied in relation to the special regulation.

The bases for the Civil and Commercial Code Draft justify the inclusion of regulations of consumer protection law, though initially recognizing that it is a debated topic and that in comparative law there exist many models: that which keeps separate regulations (followed in Italy, Spain, by the Draft to Reform the French Civil Code in the Law of Obligations and Prescription, directed by Professor Pierre Catalá and submitted to the Ministry of Justice in 2005, and in all the Mercosur States (Brazil, Paraguay, Uruguay and Venezuela) as well as in all the Associated States (Bolivia, Chile, Peru, Ecuador and Colombia). And, the model followed by the 2002 reform of the German Civil Code which incorporated a number of statutes specifically applicable to consumer law as well as the Québec Civil Code which also included provisions pertaining to the consumer contracts and adhesion contracts.

The bases for the Draft state as follows: "In the Argentine legal system, the constitutional status of consumer protection law should be born in mind as well as the broad application of these statues to the legal cases and the opinion of the majority of the doctrine. Following these guidelines, it is necessary not only to advance to the unification of the civil and commercial contracts, but also to incorporate consumer contracts."

The bases for the Civil and Commercial Code Draft assume that "The breadth of the regulatory subject matter poses difficulties as for the distinctions and the way in which they are presented" and after ruling out various possible methods, they conclude by stating that "consumer contracts are to be regulated taking into consideration that they are not another special type of contract (for example, sale contracts), but a fragment of the general type of contracts, which has influence on the special

types (for example, consumer sale contract), thus the need to incorporate its regulation to the general part.

This solution is in line with the National Constitution under which the consumer is the subject of fundamental rights, as well as with the special legislation and the extensive case law and doctrine on the matter.

It becomes necessary, then, to regulate the civil contracts and the commercial and consumer contracts, making reference to the general type of consumer contract."

For all these reasons, the Draft recommends including in the Civil Code a series of general principles for the protection of the consumer which will act as a "minimum protection", which – according to the Bases of the Draft – "has important effects:

(a) In the matter of regulation, this means there are no obstacles for a special law to establish superior conditions.
(b) That no special law dealing with similar aspects could derogate such minimum protection without affecting the system. The Code, like any other law, may be modified, but it is much more difficult to do this than it can be done with respect to any other special law. Therefore, such "minimum" will act as solid protection.
(c) The benefit as for the coherence of the system is to be considered as well because there are general rules on prescription, termination, civil liability, contracts in the Civil Code which supplement the special legislation displaying a common normative language.
(d) In the field of interpretation, a "dialogue of sources" is defined, by virtue of which the Code recovers a central role in the interaction with the other sources.

The interpreter of a special law will refer to the Code for the common language of what is not regulated in the special law and, also, to determine the minimum levels of protection in accordance with the interpretation principle more favorable to the consumer.

From this perspective, an integration of the legal system is bought about on a different-level scale comprised by: (a) fundamental rights recognized by the National Constitution; (b) the general principles and rules of minimum protection and the common language of the Code, (c) the existing detailed regulation under the special legislation. The first two levels are stable, whereas the third is flexible and adjustable to the changing circumstances of uses and practices."

### *2.6.3 Family Law*

The basic institutions of family law have always been regulated by the Civil Code. Notwithstanding this, the first significant reform of the Code was the enactment of the law of civil matrimony, Law 2393, on 12th November 1888, though it was regarded as part of the Code.

Unlike other countries in Latin America, there is no Family Code in Argentina and there has never been an idea to have one.

As already pointed out in this paper, family law has been deeply modified in the past years. The laws for the protection of children and adolescents, for the integral protection of women, of equal marriage, of genre equality, etc., in addition to other reforms which were consolidated in the past 15 years of the twentieth century (parental rights and duties, divorce, adoption, etc.) have radically changed the family law which has practically no resemblance to the original regulation of the Civil Code. Such process will be finally consolidated with the enactment of the 2012 Civil and Commercial Code due to the fact that, as we will see in the following paragraph, such Draft envisages relevant modifications in this field.

#### 2.6.3.1 Family Law in the 2012 Civil and Commercial Code Draft

The Draft, which is currently subject to debate in the National Congress, follows the traditional criteria, that is to say, it comprises family law and its main institutions within the body of the Code. It is important to note that even though this branch of the law is the one that has been subjected to major reforms since 1983, and specifically in the last few years with the incorporation of the equal marriage law and the law for the rights of children and adolescents, the Draft deepens its transformation.

In this sense, we could point out the regulation of cohabitation; assisted conception techniques which include third party assisted conception; post mortem fertilization; filiation resulting from assisted conception which is known as conception willingness; divorce without cause; retirement compensatory plans inspired in the French and Spanish Law; adoption which is again regulated within the Code; marriage between same sex couples; rules relating to the blended families are also provided for. And, even though Argentina – as has already been explained – is a federal state in which procedural laws are within the jurisdiction of the provinces, the Civil Code Draft regulates a family procedure on the basis of principles of oral and efficient proceedings.

### *2.6.4 Private International Law and the Civil Code*

The Civil and Commercial Code Draft contains the regulation of private international law of an internal source. As it is pointed out by one of the authors[14] of this chapter of the Draft, the methodology followed is that of the Civil Code of Québec, the German Civil Code and the Civil Code of Peru. The Dutch Civil Code could be

[14] Uzal, María Elsa, "Breve panorama de la reforma del derecho internacional privado", in Rivera, Julio C. (dir.) – Medina, Graciela (coord.), *Comentarios al Proyecto de Código Civil y Comercial de 2012*, Abeledo Perrot, Bs. As., 2012, p. 1233.

added to this list in which Book X devoted to this matter came into effect on January 1st 2012.

It should be noted that the Civil Code had rules of private international law in its Preliminary Title and in a number of topics (contracts, succession) and that there existed in the past drafts of private international law codes following the Swiss model, which were not passed by Congress, though they became a source of inspiration for the concrete solutions proposed in the 2012 Draft.

The Title of Private International Law comprises the regulation of a number of matters but it has not addressed the issues ruled by special statutes. Thus, this Title will have to co-exist with the provisions of private international law in the law of companies, bankruptcy law, maritime law, in the trademarks and intellectual property law, insurance law and the aeronautic code.

The Title commences with a series of "general provisions", covers the international jurisdiction and then contains a Special Part divided into 16 sections (persons, matrimony, cohabitation, alimony and child support, filiation, adoption, parental responsibility, international restitution of children, successions, form of legal acts, contracts, consumer contracts, civil liability, securities, civil liability and prescription).

Professor Uzal points out that the Draft relies on the study of the sources of comparative law, which is evidenced in the solutions given, on the previous analysis of a number of codes and statutes of private international law, either the most modern ones or the classical ones, as well as on domestic or foreign drafts.[15]

## 2.7 Conclusions

As we have already mentioned, the transformation of the private law legislation is of paramount importance. Even though some areas – such as family law – have been subjected to significant changes, there are others such as real estate law, succession law and private international law which had very few adjustments since the Civil Code was enacted. On the other hand, the remarkable influence of the constitutionalization of private law and supranational law calls for the adaptation of the inferior legislation.

Therefore, all the recodification process is admirable.

As for the content of the Code, the Commission has followed criteria which are in general acceptable.

The unification of the civil and commercial code is agreed by the majority of the national doctrine and it was the 1987 Draft and 1998 Draft which paved the way in this direction. It has the Italian and Dutch legislation as precedent. Anyway, we should point out that the commercial law appears with minimum references in the draft, because other than the regulation of securities and some contracts recently

[15] Uzal, ob. cit., p. 1235.

regarded as commercial, there is no reference to the merchant's regulations, the business enterprise is not regarded as subject of mercantile legal relations and there is no mercantile registration discipline. In relation to the other matters, the unification is partial as all the special statutes survive such as those referring to companies – with some modifications – bankruptcy, insurance, credit card, maritime law and the aeronautic code, etc.

The introduction of regulations on consumer law also follows the German model; as we have seen, other civil codes have incorporated a few rules on the subject which form the basis of the consumer protection system.

Family law is still within the Code, following our legislative tradition. Both a modernization of family law and its adjustment to the supranational rules are intended. Regardless of the way this is carried out, in my view inappropriate, from the methodological perspective the decision is unquestionable.

The inclusion of private international law in the Code is also a solution with solid precedents in comparative law; the recent example of Holland is relevant. This contributes to a significant evolution in the study of the matter.

Therefore, we can conclude that the recodification proposed follows generally accepted guidelines, with solid precedents in comparative law, which will mean a modernization of concepts in many matters claimed for a long time by the Argentine society. All this, notwithstanding the reasonable controversy that may arise over some of the proposals individually considered.

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