Multicultural Populations and Mixed Legal Systems: Report on the Republic of Argentina to the XXI International Congress of the International Academy of Comparative Law

Informes de la Asociación Argentina de Derecho Comparado al XXI Congreso de la Academia Internacional de Derecho Comparado

Reports from the Argentine Association of Comparative Law to the XXI Congress of the International Academy of Comparative Law

Rapports de l´Association Argentine de Droit Comparé au XXI Congrès de l´Academie internationale de droit comparé

ASOCIACIÓN ARGENTINA DE DERECHO COMPARADO

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REPORTS FROM THE ARGENTINE ASSOCIATION OF COMPARATIVE LAW TO THE XXI CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW

RAPPORTS DE L´ASSOCIATION ARGENTINE DE DROIT COMPARÉ AU XXI CONGRÈS DE L´ACADEMIE INTERNATIONALE DE DROIT COMPARÉ

ASOCIACIÓN ARGENTINA DE DERECHO COMPARADO

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Presentation

The Argentine Association of Comparative Law originated in the creation, in 1946, of the Argentine section of the Société de Législation Comparée, based in Paris, on the initiative of Ignacio Winizky. He brought together a group of eminent Argentine jurists, including Héctor Lafaille, Juan Carlos Rébora, Eduardo Busso, Enrique Martínez Paz and Marcos Satanowsky, among others, to create it.

The reason behind the creation of an association devoted to Comparative Law was to provide, within a climate of academic freedom, the possibility of being in contact with the outside legal world and seeking the greatest number of ties, sources and connections to include the law as part of the foundations of an interdependent and globalized world.

By means of this electronic publication, the Argentine Association of Comparative Law presents the reports of those "national reporters" who are also part of its membership and who will be participating in the "XXI Congress of the International Academy of Comparative Law", to be held this October 2022 in Asunción, Paraguay.

The authors of these reports are, in alphabetical order:

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The impact of Force Majeure on Contractual Obligations under Argentinean Law

Report on the Republic of Argentina to the XXI International Congress of the International Academy of Comparative Law

JUÁREZ FERRER, Martín[1]

I. FORCE MAJEURE NEED NOT BE EXPRESSED BY PARTIES

Argentinean Contract Law is enacted in the Civil and Commercial Code, in force since 2015 (hereinafter, CCC). Under Argentinean Contract Law *cas fortuit* (hereinafter, CF) and *force majeure* (hereinafter, FM) are implied by law (section 955 CCC), and parties do not need to express it in contractual documents.

II. DIFFERENCE BETWEEN CAS FORTUIT AND FORCE MAJEURE

There is no difference between CF and FM in the Argentinean legal system. section 1730, 2nd part CCC clearly indicates that in such Code the terms CF and FM are to be treated as synonyms. Before the enactment of the CCC, Argentinean scholars debated over the differences between both terms, but even the old Civil Code (enacted in 1869) used both as synonyms. Legal scholars recognize than differences can be made between the terms, but they are widely regarded as mere conceptual differences, without any impact on the legal consequences.[2]

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1 Universidad Nacional de Córdoba, Universidad Siglo 21, Universidad Católica de Córdoba.

2 PIZARRO, R. Daniel and VALLESPINOS, C. Gustavo. *Tratado de Obligaciones.* Buenos Aires, Rubinzal Culzoni, 2017, V.3, p. 46. BORDA, Guillermo A. *Tratado de Derecho Civil Argentino. Obligaciones.* Buenos Aires, Perrot, 1971 (3rd Ed.), p. 111 indicates that Argentine courts have never made any difference between CF and FM and neither have national legal scholars. LLAMBIAS, Jorge J. *Tratado de Derecho Civil Argentino. Obligaciones.* Buenos Aires, Perrot, 1973, T. I, p.233.

III. FACTUAL CIRCUMSTANCES IN FORCE MAJEURE

A factual circumstance should be considered as FM in two cases: first if the circumstance was not foreseeable at the time of the execution of the contract (*unpredictability*); second if the circumstance was foreseeable but it was not avoidable or preventable (*inevitability*).

Any of these factual circumstances must be present for the situation to be considered as a FM.

IV. CRITERIA FOR UNPREDICTABILITY AND INEVITABILITY

In the Argentinean legal system both unpredictability and inevitability receive the same treatment. The criterion that a judge or a court should use to determine the existence of either are the same.

To be considered as an FM, the factual situation should be, in the first place, unforeseeable or unpredictable, objectively considered, according to the normal course of events. There is no need for the event to be absolutely unforeseeable, but merely not imaginable in the factual context.[3] In the second place the situation should be unavoidable or inevitable, also objectively considered; it is widely considered that courts should be strict on the appreciation of this inevitability.[4] This is the most important requirement for a case to be considered as FM, because it the event is foreseeable but inevitable it still can be considered as FM.[5]

In the third place, the factual situation must have an influence on the current situation, and eventualities and contingencies are not considered as FM.

In the fourth place, the factual circumstance must be external to the debtor, and they should neither cause nor be in control of the situation.

In the fifth place the obstacle should appear after the obligation is created, because if it were contemporary, the obligation would not be considered as created.

Finally, the obstacle should impose an unsurmountable obstacle to the payment of the obligation (arg. section 955 CCC)

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3 BORDA, op. cit., p. 113.

4 BORDA, op. cit.p. 114

5 TRIGO REPRESAS, Félix A. *"Casus" y falta de culpa.* Responsabilidad Civil, Doctrinas Esenciales, v. II, 1087.

In any case the personal circumstances of the debtor are to be considered as FM, except for the case of *intuitu personae* obligations.

V. TIME OF THE EVENT TO BE CONSIDERED AS FORCE MAJEURE

In the Argentinian legal system, the time of occurrence of the event considered as FM is legally relevant. If the obstacle is contemporary with the creation of the obligation, then the obligation is considered unborn, because the obligation would lack one of its essential requirements. Then, there would not be FM, as the obligation would not be born.

On the contrary, when the obstacle or the event regarded as FM appears after the execution of the contract, then it is considered as FM, and it causes the impossibility of fulfilment. (section 955 CCC).

VI. THE EFFECT OF FORCE MAJEURE ON CONTRACTUAL OBLIGATIONS

According to section 955 CCC, FM must cause the objective, absolute, definitive and *superviniens* impossibility of fulfilment of the obligations. Given such factual impossibility caused by FM, the effect is the extinction of the obligation for the debtor, without any liability. The debtor should only give back everything they received under the contract.

In the Argentinian legal system, the party that suffered FM and intends to be released from its obligation should invoke FM and prove it (arg. section 1734 CCC).

VII. EXTRAORDINARY DIFFICULTIES THAT QUALIFY AS FORCE MAJEURE

The Argentinian legal system does not recognize a separate category of "extraordinary difficulties" within the FM cases. Notwithstanding, there are certain factual circumstances that have been regarded as FM even when they did not produce an absolute impossibility.

Included in such group are climatic phenomena which amount to extraordinary and out of the normal course of events; illness of the debt-

or impeding fulfilment in *intuitu personae* obligations; war impeding fulfilment of the obligation;[6] revolution;[7] strike (if it is generalized or includes a complete group of workers or a big number of unions, especially if it is declared illegal and includes specialized workers which are difficult to replace);[8] and, in some and very limited cases, economic difficulties originating in some other countries that have an impact on the domestic market.

The following are not considered to be extraordinary difficulties and do not qualify as FM: simple difficulties on the fulfilment of the obligation; breaking of industrial machinery; minor weather phenomena such as fog and misty rain; simple theft; illness of the debtor in obligations that are not *intuitu personae;* plagues or pestilences (unless extraordinary); robbery of money in a safe box.

VIII. FORCE MAJEURE: TEMPORARY OR PERMANTENT?

In the Argentinian legal system, the extinction of the obligation only occurs if FM is permanent. On the contrary, if FM is only temporary (arg. section 956 CCC), the extinction of the obligations only occurs if the fulfilment term is essential, or if the duration of the obstacle is capable to frustrate the creditor's interest.

IX. MORAL IMPOSSIBILITY AS FORCE MAJEURE

The expression moral impossibility has not been frequently used in the Argentine legal system in relation to FM events, but legal scholars state that impossibility can be caused not only by material obstacles but also for moral impossibility, citing traditional French legal doctrine (Mazeaud Brothers).[9]

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6 BORDA, op. cit., p. 116, says that war itself is not FM, but only if it creates unsurmountable difficulties.

7 BORDA, op. cit. , p. 116, indicates that war requirements to be considered as FM apply to revolutions, and mentions the following decisions: Commercial Law Court of Appeals of Federal Capital, 27.11.25, published in JA 18-728.

8 PIZARRO, op. cit., p. 58.

9 LLAMBÍAS, op. cit., p. 239.

On the contrary, it has been used by courts in two sets of cases: first, in cases where the party who pays his debt does not have proof of payment, because of the personal or familiar links with the party who receives the payment;[10] second, it has been used as a ground for divorce in marriages.[11] The expression has also been used in an isolated way to refer to non-physical obstacles to perform certain acts that would benefit the party itself,[12] or acts that can be considered, in their context, supererogatory.[13]

X. DEFAULT AND FORCE MAJEURE

In the Argentine legal system, a debtor in default should/must support and assume FM (arg. section 1733 inc. c CCC). However, this consequence has precise limits that place/impose some restrictions on its apparent wideness. For the debtor to support the consequences of FM, there must be a causal link between default and FM, because, otherwise, the former is irrelevant.[14]

XI. FORCE MAJEURE AND BURDEN OF PROOF

In the Argentinie legal system, section 1734 CCC indicates that the party who tries to extinct their obligations must invoke and prove the existence of FM.

XII. WAIVER OF FORCE MAJEURE

In the Argentine legal system, a party can waive their right to invoke FM and this waiver is valid (arg. Section 1733 inc. a CCC), if and only

10 National Court of Appeals on Civil Law, Sala E, *K., J. M. v. M., J. M.,* 17.5.11, published in SJA 21.12.2011.

11 National Court of Appeals on Civil Law, Sala J, *L., G. D. v. R., S.M.,* 28.12.2010, published in SJA 22.6. 2011

12 National Court of Appeals on Commercial Law, Sala A, *Interpublic Argentina SRL v. Agulla y Bacetti S.A.,* 8.4.10, La Ley Online, cita TR LA LEY 7006767.

13 Salta Court of Appeals on Civil and Commercial Law, Sala III, *S., M. L. v. Instituto,* 14.3.11, published in DJ 10.8.11, 85.

14 PIZARRO, op. cit., p. 75.

if the contract is *paritario*, i.e., between parties that have similar bargaining power (hereinafter non consumer contracts, or NCC). There is one major exception in contracts in which one of the parties is a consumer or user, which are regulated by the Consumer Defense Act of 1994 (Ley 24.240, hereinafter LDC) and section 1092 CCC and subsequent sections.

Waiver of FM cannot be inferred because it falls under the rule against inference of renunciation (section 948 CCC), even if the relevant party assumes certain risks and even less because of the purchase of an insurance.

In the Argentinian legal system, a waiver of FM can be considered valid in a non-consumer contract, or even in a consumer contract, if the professional party can prove that the consumer gained some particular advantage that equates with the waiver.[15]

XIII. FORCE MAJEURE AND MITIGATION

In the Argentinian legal system, there is no explicit duty of mitigation related to the occurrence of FM. Notwithstanding, there is a general duty of mitigation that is explicit for every person, and it arises from section 1710 inc. b CCC, and includes the duty of taking measures to avoid the production of harm and to diminish its magnitude.

This duty is widely regarded as derived from the *bona fide* principle that is of great importance in Argentinean legal system.

XIV. FORCE MAJEURE AND OTHER LEGAL CONCEPTS

In the Argentinean legal system, FM can be distinguished from hardship and frustration of purpose. Hardship is regulated in section 1091 CCC, and its factual platform includes extraordinary alteration of the contractual circumstances. Different from FM, it gives the affected party the right to terminate the contract totally or partially, or to adjust its terms to the new situation to maintain its economic balance, but in all cases fulfilment of obligations is still possible. Hardship only applies to contractual obligations, but FM can apply both to contractual obligations as an exculpatory circumstance in Tort Law.

15 PIZARRO, op. cit.

Frustration of purpose is a legal concept that allows the affected party to terminate the contract if the frustration arises from an extraordinary change of circumstances, which is both external to the parties and exceeds the ordinary risk of the contract. Like hardship, it also has an extraordinary change of circumstances as a factual case, and they also can be regarded as special cases of FM. However, particular rules make frustration of purpose different from FM and its consequences because it allows the affected party to terminate the contract.

XV. COVID-19 AND FORCE MAJEURE

The Argentinian legal system had at least two particular contractual reactions, and one that can be considered as general.

In general, the COVID-19 pandemic/epidemic was widely considered as a case of FM, and it was used to allow affected parties to extinguish their obligations in the way that FM does.

In particular, there were two sets of regulations for particular types of contracts. Presidential Decree #319/2020 included a set of special reliefs and regulations for mortgages, including freezing of payments to the price before COVID-19, suspension of foreclosures and auctions. Presidential Decree #320/2020 included a set of special reliefs and regulations for housing rentals: it included the possibility of suspending payments, freezing of price of payments, suspension of executions, foreclosures, and evictions.

XVI. EVENTS USUALLY INCLUDED IN CONTRACTUAL FORCE MAJEURE CLAUSES

In the Argentinian legal system, the factual circumstances usually included under the FM clauses are: earthquakes, war, revolution, epidemics, acts of terrorism, takings, limits or prohibitions of acts of import and export of goods.

XVII. FACTUAL CIRCUMSTANCES CONSIDERED BY COURTS AS CASES OF FORCE MAJEURE

Here we will make a short review of the cases that have been considered

-or not- by the national courts as cases of FM.

1. ACT OF GOD. This expression has not been widely used by courts in Argentina.

2. ECONOMIC CRISES. Legal scholars in the Argentinian legal system tend to be severe in the appreciation of economic crises as FM, probably because of the recurrence of such phenomenon in Argentina. These crises can be considered as FM if they originated in foreign countries and their repercussion is global (v. gr. Tequila Crisis of 1995).[16] Have economic crises been considered as *force majeure* events? If so, under what circumstances?

3. ECONOMIC DIFFICULTIES OF THE DEBTOR

a. Economic difficulties of the debtor have not been usually considered as FM, and a probable explanation for that is the objective criteria that governs FM in Argentinean legal system.

b. However, some authors consider that the objective criteria may become flexible to admission of the economic difficulties of the debtor in case such difficulties arise from facts specific and external to the debtor.[17]

4. REGULATORY CHANGES

a. TAKINGS. Takings have been considered as FM if they impede fulfilment of the contract, e. g. if the contract is a sale of a certain thing or product;[18] takings are not considered FM if the taking were foreseeable (for instance, because of plans of constructions of a highway).

b. EXTENSION OF HOUSING RENTALS. Such extensions have been considered as FM.[19]

c .CONTROL MEASURES are not considered as FM if they

16 PIZARRO, op. cit., p. 60.

17 MAYO, Jorge A. *La imposibilidad de cumplimiento objetiva y subjetiva. Absoluta y relativa.* Revista de Derecho Privado y Comunitario, 1998.

18 BORDA, op. cit., p. 119, mentions the following decisions: Civil Law Court of Appeals of Federal Capital, 22.6.51, published in JA 1951-IV, 245; Civil Law Court of Appeals of Federal Capital, 31.10.51, published in JA 1952-I, 179

19 BORDA, op. cit., p. 119, mentions the following decisions: Civil Law Court of Appeals of Federal Capital, Sala 1st, 1.4.49, published in LL 54-299.

only pose surmountable obstacles to the fulfilment of contractual obligations. The same criteria apply to increases or changes in tariffs or import duties.

5. STRIKES AND LOCKOUTS

a. Ancient case law considered strikes were not FM. Newer cases have reviewed these criteria and made more flexible appreciation of strikes in order to consider them as FM.

b. General strikes have been considered as FM.[20]

c. Partial strikes can be considered as FM if courts consider that it constitutes a severe obstacle to fulfillment of obligations.[21]

Illegal strikes have also been considered as FM.[22]

e. Banking strikes have not been considered as FM impeding fulfilment of monetary obligations.[23]

f. Strikes related to a single factory are not considered to be FM, because they are external to debtor.[24] For some authors it depends, also, on the legality or illegality of the strike.[25]

6. FORCE MAJEURE AND PUBLIC AUTHORITIES

a. Most of Argentine legal scholars tend to consider acts of authorities as FM, including takings and bans on import and export.[26]

b. Some other authors consider such acts as third-party acts that

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20 BORDA, op. cit. , p. 121, mentions the following decisions: Civil Law Court of Appeals of Federal Capital, 13.3.31, published in JA 37-1621; Commercial Law Court of Appeals of Federal Capital, 12.2.20, published in JA 4, 55.

21 BORDA, op. cit. , p. 121, mentions the following decisions: Civil Law Court of Appeals of Federal Capital, Sala C, 31.12.52, published in JA 1953-II, 46.

22 BORDA, op. cit. , p. 121, mentions the following decisions: Federal Court of Appeals of Federal Capital, 30.12.53, published in LL 74-343.

23 BORDA, op. cit. , p. 121, mentions the following decisions: Federal Court of Appeals of Federal Capital, 28.4.61.

24 TALE, Camilo. *Curso de Obligaciones.* Córdoba, Ed. Trejo y Sanabria, 2019, T. 2, p. 243.

25 AGOGLIA, María, BORÁGINA, Juan C. y MEZA, Jorge A. *La exoneración de la responsabilidad contractual. La causa extraña no imputable.* Revista de Derecho Privado y Comunitario, 1998.

26 PIZARRO, op. cit. , p. 59.

break causal links, but not constitute strictly FM.[27] In any case, such acts can be considered as unpredictable and unforeseeable events, but they are not FM.

c. If the acts are dictated/ordered by courts, they are not considered as events of FM.[28]

7. ILLNESS OF DEBTOR. This factual circumstance can be considered in different ways if the obligation to be fulfilled is an *intuitu personae* obligation

a. In case of *intuitu personae* obligations illness of debtor can be considered as FM if it hampers fulfilment of the obligation. In some cases, even in this type of obligations, illness is not considered to be a complete FM, in cases where the cost of default is bigger that the cost of replacement, even with some other debtor.[29]

b. In other obligations, illnesses are not to be considered as FM unless unpredictable and inevitable. In these cases, obligations can always be performed by some other person, so it would be extremely rare for an illness to be considered as FM.

c. Illness of a person that is a close relative of the debtor has not been considered as an FM event. Has the illness of the debtor been considered as a *force majeure* event that releases the debtor from his/her personal as well as pecuniary obligations?

8. NATURAL EVENTS

a. Some weather phenomena are not considered as FM since they are normal expressions of Nature, e.g., rain, winds, swelling of rivers,[30] unless their extraordinary features can be considered as

27 AGOGLIA, María, BORÁGINA, Juan C. y MEZA, Jorge A. *La exoneración de la responsabilidad contractual. La causa extraña no imputable.* Revista de Derecho Privado y Comunitario, 1998.

28 LLAMBÍAS, op. cit., p. 244.

29 TALE, Camilo. *Curso de Obligaciones.* Córdoba, Ed. Trejo y Sanabria, 2019, T. 2, p. 242.

30 BORDA, op. cit. , p. 115, mentions the following decisions: National Court of Appeal on Civil Law (hereinafter CNCiv), Sala D, 2.10.62, published in LL 111-29; CNCIV, Sala C, 17.10.63, in LL 114-371; National Court of Appeal on Commercial Law (hereinafter CNCom), 3.8.38, LL 11-633.

unforeseeable.[31]

b. Strong wind in maritime navigation is not considered FM.[32] Have natural events (rain, storm, wind, floods, earthquakes, etc.) been considered as *force majeure* events? If so, under what circumstances?

31 BORDA, op. cit. , p. 115, mentions the following decisions: Federal Court of Appeals of Federal Capital, 9.6.33, published in JA 42-407. TRIGO REPRESAS, Félix A. *El caso fortuito como eximente en la responsabilidad por riesgo de la cosa.* LL 1989-D, 457.

32 BORDA, op. cit., p. 116, mentions the following decisions: Federal Court of Appeals on Civil, Commercial and Criminal Law of Federal Capital, 3.4.56, published in JA 1956-IV, 5.

Protection of the Adult and Respect for His or Her Autonomy

Report on the Republic of Argentina to the XXI International Congress of the International Academy of Comparative Law

MEDINA, Graciela[1]

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1 University of Buenos Aires.

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I. OVERVIEW OF THE LEGAL SYSTEM

Argentina, like many other countries, faces the serious demographic

[2] https://www.medicinabuenosaires.com/indices-de-2020/volumen-80-ano-2020-s-3-indice/guias_eticas/

problem presented by the relatively low birth rate, the high unemployment rate and the aging of a part of the population, which increases its average life every year.

Population ageing (i.e. the increase in the percentage of older people in the global population) is the consequence of considerable progress made in the economic, social and medical fields.

This increase in the average life is very beneficial for the human being but have problems in terms of respect for their human rights and that often in old age older adults are in a situation of vulnerability and dependence.

Old age should not be visualized as a single biological process; on the contrary, it must be approached from the general framework of public policies and legislation. The progressive ageing of the world's population poses the problem of keeping the elderly within society, finding them the place that they should occupy for the good of the community for their dignity and abilities.

The most vulnerable groups in contemporary society are children, women, the disabled and the elderly. The first three have international conventions that protect them while older adults lack them so far.

The international community works actively for its dictation with the conviction that in the struggle for human rights greater achievements are obtained if the community of nations agrees to make effective the rights of those who need it most.

1. Constitutional right

The study of the rights of the elderly must start from the Argentina Constitution since it recognizes the basic rights of citizens and the guarantees against public power.

The elders were not mentioned in the original text of the Argentine Constitution sanctioned in 1853.

In Argentina, the National Constitution of 1949 incorporated in its article 37 the "rights of old age".

Article 37 of the Constitution of 1949 recognized the following rights: to assistance, to housing, to food, to clothing, to the care of physical health, to the care of moral health, to leisure, to work, to the tranquility, respect and consideration of their fellowmen.

The Constitution of 1949 was reformed in 1957. When this Consti-

tution was repealed in 1957, the rights of old age disappeared, only the mention of social security benefits with a comprehensive and inalienable character remained in article 14 bis.

The 1994 Argentine Constitution was reformed.

In the 1994 Argentine Constitution expressly mentions the "elderly" among the powers of Congress introduced that legislating and promoting measures of positive action that guarantee real equality of opportunities and treatment and the full enjoyment of the rights recognized by this Constitution and the current International Treaties on Human Rights, in particular The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Rights, Social and Cultural, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

Most provincial constitutions have provided for rules for the protection of old age. The Constitution of Buenos Aires of 1994 in its art. 36; Catamarca of 1988 in article 65; Chaco of 1994 in art. 35; Article 41 of the Autonomous City of Buenos Aires of 1996; Formosa 2003 in art. 71; Jujuy of 1986 in its article 49; Chubut of 1994 in article 29; La Rioja of 1994 in its article 37; 1988 Missions in its article 37; Rio Negro of 1988 in its article 35; Santiago del Estero of 2005 in its article 34; Article 35 of 1998; San Juan of 1986 in its article 57; Santa Fe of 1962 in its article 23; Santa Cruz of 1998 in its article 150; Saint Louis of 1987 in its article 51; Tierra del Fuego of 1991 in art. 21; Tucumán of 2006 in its article 40.

2. International Framework

3. The Inter-American Convention on protecting the human rights of older persons

So far there is no binding international convention, but the Member States of the Organization of American States (OAS) approved on June 15, 2015 the first **Inter-American Convention on protecting the human rights of older persons** in the General Assembly of the institution, and immediately signed by the governments of Argentina, Brazil,

Chile, Costa Rica and Uruguay at the headquarters of the hemispheric organization in Washington DC.

The convention was adopted taking into account the Provisions of the United Nations Principles for Older Persons (1991); the Proclamation on Ageing (1992); the Political Declaration and the Madrid Plan of Action on Ageing (2002), as well as regional instruments such as the Regional Implementation Strategy for Latin America and the Caribbean of the Madrid International Plan of Action on Ageing (2003); the Declaration of Brasilia for the Latin American and Caribbean region (2007), the Declaration of Commitment of Port of Spain (2009) and the Charter of San José on the Rights of Older Persons in Latin America and the Caribbean (2012).

The purpose of the Convention – the first regional instrument of its kind in the world – is to promote, protect and ensure the recognition and full enjoyment of the exercise, under conditions of equality, of all human rights and fundamental freedoms of older persons, to contribute to their full inclusion, integration and participation in society. The starting point of the Convention is the recognition that all existing human rights and fundamental freedoms apply to older persons, and that they should fully enjoy them on an equal basis with others. It is a very important step for everyone.

Currently, people aged 60 or over in the Americas account for 14 percent of the hemisphere's total population (more than 135 million people). By 2030, about two out of five people will be 60 or older, and in total there will be more than 215 million seniors in the Americas. The Convention will strengthen the legal obligations to respect, promote and fulfil these human rights of older persons. Its ratification obliges States to adopt measures to guarantee the elderly differential and preferential treatment in all areas.

The text of the Convention is structured in a Preamble and VII Chapters, which address: the first, its object, scope of application and definitions, Chapter II and III refers to the general principles and obligations of States, The IV includes the protected rights, these are: equality and non-discrimination on grounds of age; right to life and dignity in old age; independence and autonomy; security and a life free from violence; not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; to provide free and informed consent in the field of health; rights of older persons receiving long-term services,

personal freedom, expression, opinion and access to information, nationality and freedom of movement, right to privacy and intimacy, social security, work, health, education, culture, recreation, recreation and sport, right to property, housing, healthy environment, accessibility and personal mobility political rights, and in situations of humanitarian risk and emergency and, finally, equal recognition as a person before the law. There is a chapter devoted exclusively to awareness-raising and the last two chapters set out the follow-up mechanisms, including a system of individual petitions and, finally, the general provisions on entry into force, reservations, complaints, deposit and amendments.

The Inter American Convention on the Protection of the Rights of Older Persons becomes the new standard of the American continent, thus setting a precedent worldwide.

It entered into force in October 2017 after the Parliaments of two countries of the continent ratified it.

Argentina ratified the convention by the law 27360 sanctioned on May 31, 2017 establishes some definitions that need to be remembered, as follows:

The "Older person" is defined by the Convention as "one of 60 years or more, unless the domestic law determines a base age lower or higher, provided that this is not greater than 65 years. This concept includes, among others, that of an older adult.

The"Old age": is defined as Social construct of the last stage of the life course"

The"Ageing" is a gradual process that develops over the course of life and entails biological, physiological, psychosocial, and functional changes with varying consequences, which are associated with permanent and dynamic interactions between the individual and their environment.

After recalling the enlightening concepts established in the Convention that seeks to avoid confusion in its interpretation, we will refer to the way it refers to the rights to equality, non-discrimination, work and health to which we will later refer.

3.1 Equality and non-discrimination on grounds of age

The Inter American Convention establishes a specific prohibition of age discrimination in old age. In this regard, it establishes the specific obli-

gation of states parties to develop specific approaches in their policies, plans and legislation on ageing and old age, in relation to older persons in vulnerable conditions and those who are victims of multiple discrimination including women, persons with disabilities, persons of diverse sexual orientations and gender identities, migrants, persons in situations of poverty or social marginalization, people of African descent and persons belonging to indigenous peoples, the homeless, persons deprived of their liberty, persons belonging to traditional peoples, persons belonging to ethnic, racial, national, linguistic, religious and rural groups, among others.

3.2 Right to life and dignity in old age

The Inter American Convention establishes the obligation to guarantee older persons the effective enjoyment of the right to life and the right to live in dignity in old age until the end of their days, on an equal basis with other sectors of the population.

To this end, it determines that public and private institutions offer the elderly non-discriminatory access to comprehensive care, including palliative care, and that they avoid isolation and properly manage problems related to the fear of death of the terminally ill, pain, and avoid unnecessary suffering, and futile and useless interventions, in accordance with the right of the older person to express informed consent.

3.3 Right to provide consent, free and informed in the field of health

The elderly person has the inalienable right to express their free and informed consent in the field of health. The denial of this right constitutes a form of violation of the human rights of the elderly.

In cases of a life-threatening medical emergency and where it is not possible to obtain informed consent, the exceptions established in accordance with national law may apply.

The older person has the right to accept, refuse to receive or voluntarily interrupt medical or surgical treatments, including those of traditional, alternative and complementary medicine, research, medical or scientific experiments, whether of a physical or mental nature, and to receive clear and timely information about the possible consequences

and risks of such a decision.

By acceding to the Convention, the States Parties undertake to establish a process through which older persons may expressly express their advance directive and instructions regarding health care interventions, including palliative care. In these cases, this advance directive may be expressed, modified or extended at any time only by the elderly person, through legally binding instruments, in accordance with national legislation.

3.4 Right to privacy and intimacy

The Inter American Convention establishes that the elderly person has the right to privacy and intimacy and not to be subjected to arbitrary or illegal interference in their private life, family, home or domestic unit, or any area in which they operate as well as in their correspondence or any other type of communication.

In this regard, the elderly person has the right not to be subjected to attacks against their dignity, honor and reputation, and to privacy in acts of hygiene or in the activities they carry out, regardless of the field in which they operate.

3.5 Right to work

Older persons have the right to decent and dignified work and to equal opportunities and treatment with other workers, regardless of their age. In this regard, those who accede to the convention must adopt measures to prevent employment discrimination against older persons. As far as work is concerned, any distinction which is not based on the requirements inherent in the nature of the position is prohibited, in accordance with national legislation and in a manner appropriate to local conditions.

3.6 Right to health

The elderly person has the right to his physical and mental health, without any discrimination.

4. The national rules on the protection of adult

4.1 "Older person" in the Civil and Commercial Code

Argentina sanctioned a Civil and Commercial Code in 2015. This Code replaced the Civil Code of 1869 and the Commercial Code of 1862.

The Civil and Commercial Code does not regulate "Older person" specifically, as an age group to be protected, but there are various rules that indirectly address the issue. We will cite some, as an example:

Article 1 requires the resolution of cases governed by the Code of the National Constitution and human rights treaties to which the Republic is a party. This obviously includes the rules that protect the elderly.

Articles 32 to 43 allow to restrict the capacity and provide support to people who have a permanent or prolonged mental alteration. That alteration may be given by senility.

Article 332 allows to demand the nullity or modification of a legal act when the parties to a legal business exploiting the psychological weakness of the other, obtain an obviously disproportionate and unjustified patrimonial sale. Thus, an assumption is incorporated into the injury vice that can protect older people with mental weakness.

4.2 Capacity of Older person. General Principle in the Civil and Commercial Code.

Article 23 of the Civil and Commercial Code establishes that every human person may exercise his or her rights by himself, except for the limitations expressly provided for in this Code and in a court judgment.

The general principle in this area is full capacity of older person, which can only be limited by the provisions of the Code (art. 24 CCyCN) or in other laws, or arise from a court ruling (arts. 38 and 49 CCyCN).

II. STATE ORDERED MEASURES.

1. Restricted capacity or incapable person

The basis of the restrictions on the capacity of the elderly person is the psychic or mental ineptitude of the subject for the full exercise of their rights; these are the cases of people of restricted capacity or incapable persons.

People of restricted capacity have support to exercise their rights, incapable people have representatives who exercise their rights.

2. Protection and support system

The system of protection of persons with restricted capacity and incapacitated persons differs from that provided for in the previous system.

In the repealed Civil Code, the system of representation prevailed in which the incapacitated person did not exercise his legal prerogatives by himself, but they were carried out by his legal representative in all the legal acts that he had to grant.

Currently, the CCyC provides for representation as a form of substitution of the will that is exceptional and a broad system of assistance that must be adapted with the supports that, for each case, the judge determines. We will briefly look at the relevant aspects of each of them.

3. Persons with restricted capacity

Persons with restricted capacity are those who suffer from addiction or permanent or prolonged mental alternation, of sufficient gravity, provided that a judge considers that the exercise of their full capacity may result in damage to their person or property (art. 32 CCyCN).

These persons retain their capacity, but the sentence may restrict it for certain acts; in relation to such acts, the judge must designate the necessary support(s), specifying the functions with reasonable accommodations based on the needs and circumstances of the person.

Support serves an assistive function.

4. The incapable

Judges may declare the absolute incapacity of the older person who is absolutely unable to interact with their environment and express their will by any means, means or appropriate format and the support system is ineffective.

In case of absolute incapacity the representative is the curator.

The appointment of the curator is provided for in Articles 138 to 140 of the CCyCN.

The representation of the incapacitated is legal (established by the Code or by special law), necessary (the acts must have the intervention of the representative) and dual since it is complemented by the action of the Public Prosecutor's Office (art. 103 CCyCN).

5. Assistance with supports

Older person with restricted capacity are assisted with the supports designated in the respective judgment and in other special laws (art. 102 CCyCN).

Support consists of any judicial or extrajudicial measure that facilitates the person's decision-making to direct his person, administer his assets and celebrate legal acts in general (art. 43 CCyCN).

These supports may be entrusted to persons or institutions whose mission will not be to supplant the will of the assisted person, but precisely the opposite, they must promote their autonomy and favor decisions that respond to the preferences and interests of the protected person (art. 32 CCyCN).

Thus, when issuing the sentence of restriction of capacity, the judge designates the necessary supports and establishes in each case the task or function that will be assigned, the way to carry it out and the consequences derived from its non-compliance. Therefore, the support system is presented as a flexible and adequate form of protection to the circumstances of each person (their family and social reality).

6. Judicial control

The exercise of representation and assistance is subject to judicial review, since in all cases it is essentially a question of protecting the inter-

ests of the older person, the incapacitated or the person with restricted capacity, protecting them from the damages that may be caused to their persons or property and facilitating their autonomy.

Assistants and supporters in restricted capacity are subject to judicial control to avoid possible conflicts of interest or undue influence (art. 43 CCyCN).

7. Basic principles for capacity restriction

Art. 31 CCYCN sets out the basic principles for the restriction of incapacity, these constitute the guidelines that the judge must comply with:

7.1 The general capacity of exercise of the human person is presumed, even when he is interned in a care establishment

The principle applies even when the person is interned in a care establishment, since it should not be forgotten that the factual assumptions that enable on the one hand, the internment of a person, and on the other, the restrictions on legal capacity, are different and should not be a consequence of the other.

7.2 Limitations on capacity are exceptional in nature and are always imposed for the benefit of the individual

Limits on capacity are always the exception and are imposed to benefit the person not to punish him; the idea is to take care not only of the patrimony but of the person who suffers a decrease in his mental faculties or another disability that requires protection.

Inter-american convention on protecting the human rights of older persons recognize the right of older persons to make decisions, to determine their life plans, to lead an autonomous and independent life in keeping with their traditions and beliefs on an equal basis, and to be afforded access to mechanisms enabling them to exercise their rights.

7.3 State intervention is always interdisciplinary in nature, both in

the treatment and in the judicial process

Declarations of incapacity in the repealed code were left in the hands of the judge who was based on reports from psychiatrists.

The Civil and Commercial Code gives strength to interdisciplinary teams not only in relation to the diagnosis and treatment of the person, but fundamentally in relation to hospitalization.

The new Code has a tendency that has been called "antipsychiatry" and supports the "social model" in the treatment of mental illness. This position preaches a new concept of mental illness, as well as the non-exclusive role of physicians in their determination.

The law without dispensing with doctors also resorts to the opinion of other professionals, to declare the restriction on the capacity of the elderly.

7.4 The person has the right to receive information through means and technologies appropriate to its understanding

This provision is consistent with the Convention on Persons with Disabilities, which in its article 2 provides that "communication" for the purposes of the satisfaction of the rights recognized in the treaty includes: languages, text display, Braille, tactile communication, macro types, easily accessible multimedia devices, as well as written language, auditory systems, plain language, digitized voice media and other augmentative or alternative modes, media and formats of communication, including easily accessible information and communications technology. "Language" means both oral language and sign language and other forms of nonverbal communication.

The Code has sought to comply with the provisions of the Convention, which also obliges the promotion of other appropriate forms of assistance and support for persons with disabilities to ensure their access to information (art. 9 inc. f CRPD). The idea is that the difficulties in communication that an older adult may have do not mean ignoring them or not taking into account their opinions.

Inter-American convention on protecting the human rights of older persons, provides in article 11 that "*Older persons have the inalienable right to express their free and informed consent on health matters. Denial of that right constitutes a form of violation of the human rights of*

older persons."

In order to ensure the right of older persons to express their prior and informed consent in a voluntary, free, and explicit manner to any medical decision, treatment, procedure, or research in the area of health, and the right to modify or revoke such consent is necessary to prepare and enforce appropriate and effective mechanisms to prevent abuse and strengthen the capacity of older persons to fully understand existing treatment options and their risks and benefits.

Those mechanisms must ensure that the information provided is appropriate, clear and timely, available on a non-discriminatory basis in an accessible and easily understood form, and commensurate with the older person's cultural identity, level of education, and communication needs.

7.5 The person has the right to participate in the judicial process with legal assistance, which must be provided by the State, if he or she lacks the means

As in the case of older person, the Code seeks to promote the personal autonomy of persons with disabilities so that they can express themselves with the assistance of a lawyer, the principle is repeated in the second paragraph of article 36 CCyC

When the person has not resources, the lawyer must be provided by the State. At this point we must remember that the lack of resources on the part of the Judicial or Executive Branch, often make the good intentions of the law fall into a dead letter.

7.6 Therapeutic alternatives that are less restrictive of rights and freedoms should be prioritized

The Mental Health Act establishes the right of every person with mental illness to be treated with the therapeutic alternative that least restricts their rights and freedoms, promoting family, work and community integration (art. 7 inc. d). The CCyC reaffirms that same principle.

8. Older person who may have their ability restricted

The requirements for the restriction of capacity to proceed are set out in the first paragraph of Article 32 of the CCyC and are as follows:

8.1 Suffering from an addiction or a permanent or prolonged mental disorder of sufficient severity

The Code establishes that the first thing that must be proven to restrict the capacity is that the person suffers from an addiction (for example to drugs) or suffers from a mental illness of sufficient severity. Once this is proven, the judge must propose the necessary support and protection measures, but without that budget there can be no restriction.

That addiction or mental alteration must not be temporary or transient, an isolated or transient condition can never give rise even when that circumstance causes a hospitalization.

8.2 That the exercise of full capacity may result in damage to his person or property

The existence of addiction or mental alteration must affect the person or the administration of their assets.

The judge must evaluate not only the incidence of mental illness in the management of the assets of the person involved but also what aspects of his personal life are affected. This will involve interviewing the person and their family environment, requiring the opinion of the interdisciplinary team on the best form of protection and any other measure that serves to designate the supports required by the interested party.

9. The support system

Article 32 CCyCN states: In relation to such acts, the judge must designate the necessary support or supports provided for in article 43, specifying the functions with reasonable accommodations according to the needs and circumstances of the person. The designated support(s) must promote autonomy and encourage decisions that respond to the preferences of the protected person.

The restriction of capacity implies a system of assistance to the af-

fected person that always tends to preserve, to the extent of its concrete possibilities, the greatest autonomy in decision-making. Therefore, a system of "supports" is created that the judge can design "tailored" to the case he has to judge.

We will see the characteristics of this system when commenting on the scope of the sentence of restriction to capacity.

10. Incapable people

10.1 Budget to be declared incapable

As we have seen, article 32 of the CCyCN in its last paragraph establishes, as an exception, the possibility of declaring incapacity when the person is absolutely unable to interact with his environment and express his will by any means, means or appropriate format.

To be declared incapable the person must not show any obvious sign of awareness of himself or the environment and be unable to interact with others or react to appropriate stimuli. To this criterion must be added another requirement required by the Code: the insufficiency or ineffectiveness of the support system.

10.2 Criticism of the incorporation of this category

This solution of the Code has been criticized by a sector of the doctrine, which considers that the declaration of incapacity would violate the provisions of article 12 of the Convention on the Rights of Persons with Disabilities. It has also been argued that Argentina could incur international responsibility for the violation of a treaty.

The truth is that, apart from recognizing equality in the exercise of human rights for older person with any type of disability and fundamentally, the need to respect their self-determination, there are cases where it is totally impossible and even inappropriate to think about any support or assistance system because the disabled is totally isolated from the world by their own condition.

Think of a person absolutely unconscious from having suffered a stroke who has him bedridden without being able to express himself and

without reaction to any stimulus. The legal system must intervene there by declaring incapacity; it is not a question of discriminating against him or disregarding his human rights, but of protecting him in his civil life, since it is clear that such a person cannot enter into any legal business by himself and the legal system cannot disregard that reality.

The declaration of incapacity, in the case that we are analyzing, is not a punishment but the best protection that the Law can grant to a person, who is also offered the possibility of leaving advance medical directives in anticipation of his own disability (art. 60), as we will explain in the chapter dedicated to very personal rights.

11. The trial of restriction of capacity or declaration of incapacity

Trial of restriction of capacity shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will, and preferences of older persons, are free of conflict of interest and undue influence, are proportional and tailored to older persons' circumstances, apply for the shortest time possible, and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect older persons' rights and interests.

11.1 People who can apply

Article 33 states: The following are entitled to request a declaration of incapacity and restricted capacity:

> *a. the person concerned himself;*
>
> *b. the spouse who is not de facto separated and the cohabitant for as long as the cohabitation has not ceased;*
>
> *c. relatives within the fourth degree; if by affinity, within the second degree;*
>
> *d. the Public Prosecutor's Office.*

The declaration of incapacity or restricted capacity cannot be made

ex officio by the judge; the Code is responsible for determining who is entitled:

11.1.1 The interested party himself

This is a novelty introduced by the CCyC; in the previous regime this possibility was not included, but the majority doctrine understood that the interested party had an implicit legitimacy. The interested party can appear before the judge without a lawyer, then the judge must indicate that he has the right to appoint one (art. 36 CCyC).

11.1.2 The spouse who is not de facto separated and the cohabitant for as long as the cohabitation has not ceased.

Not only is the spouse included while living with the person suffering from addiction or mental alteration but also the cohabitant. This last reference refers to the union based on affective relationships of a singular, public, notorious, stable and permanent nature of two people who live together and share a common life project, whether of the same or different sex (art. 509 CCyC).

11.1.3 Relatives

Included are those within the fourth degree, whether they are related by nature, by assisted human reproduction methods or by adoption (e.g. parents, children, siblings, grandparents, grandchildren); if they were by affinity, only those in the second degree are included (e.g. father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law).

11.1.4 The Public Prosecutor's Office

Officials acting in the orbit of the Public Prosecutor's Office, in the manner organized in each province (official curators, advisers to the incapacitated, etc.), may make the complaint when the interested party cannot do so, when there are no relatives to initiate it or when it is a friend or another person not legitimized who approaches the concern.

11.2 Competent judge

Article 36 CCyC establishes that the request for a declaration of incapacity or restriction of capacity must be filed "before the judge corresponding to his domicile or the place of his internment".

The rule aims to ensure the immediacy of the judge and that it is the closest to the place where the person in whose interest the process is carried out is located, who takes quick intervention in the trial.

This has been the criterion followed by the Supreme Court of Justice in two famous rulings (Duarte and Tufano). The idea is to avoid that a competition contest (in which two judges argue with each other who is responsible for the file), puts in a situation of helplessness the person whose reality must be addressed quickly and effectively.

11.3 Stakeholder involvement in the process

Unlike what happened in the Civil Code where a curator "ad litem" (for the process) who represented him in the trial, the CCyC establishes in art. 36: The person in whose interest the process is carried out is a party and can provide all the evidence that makes his defense.

Thus, the interested party is part of the process and can provide the evidence to defend himself against the petition initiated by another. The person who requested the statement may also provide all kinds of evidence to prove the facts invoked.

If the person who assumes the status of party to the trial has appeared without a lawyer, the article stipulates that one must be appointed to represent her and provide her with legal assistance. According to the principles established in article 31, if it lacks economic resources, it is the State that must provide legal representation.

11.4 Precautionary measures

Article 34 CCyC states: During the process, the judge must order the necessary measures to guarantee the personal and economic rights of the person. In such a case, the decision must determine which acts require the assistance of one or more supports, and which require the representation of a curator. You can also designate support networks for people who act with specific functions as the case may be.

The repealed regime only provided for a rule aimed at protecting the property of the alleged insane. It was the appointment of a curator of the goods (ad bona). Now, the CCyC establishes that the judge can take all precautionary measures that tend to protect the person for whose benefit the process of restriction of capacity was initiated and those measures can be aimed at preserving his patrimony as well as the care of his person.

These measures are issued provisionally, until the judgment is handed down and there the judge decides the definitive protection regime. The rule allows the judge to designate support for the performance of certain acts and according to the needs of the interested party.

11.5 The personal interview with the judge

The Code establishes a requirement that, regardless of whether it is provided for in the procedural codes, becomes an obligation established by the substantive legislation: The judge must guarantee immediacy with the interested party during the process and interview him personally before issuing any decision, ensuring the accessibility and reasonable adjustments of the procedure according to the situation of the latter. The Public Prosecutor's Office and at least one lawyer who provides assistance to the interested party must be present at the hearings (art. 35 CCyC).

Thus, the interview with the interested party is not optional but an obligation of the judge; the judge must know who he is trying to protect before issuing the decision provided for in the assistance system. This direct contact should serve the judge to see the preferences of the subject who motivates the process, inquire about their family environment and their specific needs.

The immediacy of the judge is an obligation that must be respected throughout the process; he should review the evidence and make contact with the interdisciplinary team and the Public Prosecutor's Office. The idea of the legislator is that the magistrate has an active role in this type of trial and that this protagonism is not reduced to a formal interview with the interested party before issuing the sentence.

11.6 Content of the judgment

Article 37 CCyC prescribes what the content of the judgment should be: The judgment must be pronounced on the following aspects related to the person in whose interest the process is being followed:

a. diagnosis and prognosis;

b. time when the situation manifested itself; existing personal, family and social resources;

c. Regime for the protection, assistance and promotion of the greatest possible autonomy.

To be issued, the opinion of an interdisciplinary team is essential. Let's analyze the points on which the judge must rule.

11.6.1 Diagnosis and prognosis

The sentence, guided by the opinion of the interdisciplinary team, must describe the pathology that justifies the restriction of capacity. The prognosis (the possible evolution of this pathology) and how it will impact on life in relation to the person involved, acquires great importance so that the judge can decide the concrete supports that the person needs restricted in his capacity.

11.6.2 Time when the situation manifested itself

It is extremely important to establish the time when mental alteration manifested itself because, as we will see, this will influence the validity or nullity of the legal acts concluded by the person prior to the registration of the judgment in the Registry of Civil Status and Capacity of Persons.

11.6.3 Personal, family and social resources

The immediacy imposed by the Code obliges the magistrate to determine the economic resources and assets of the person whose capacity is restricted to preserve them from incorrect administration by the affected party.

The judge must also evaluate the personal resources of the affected

person (his specific degree of discernment, his education or intellectual training, etc.), and the family and social resources he possesses (family support, his friends, the institutions to which he attends or can assist him, etc.) to establish the necessary supports and safeguards.

11.6.4 Regime for the protection, assistance and promotion of the greatest possible autonomy

As we will see when dealing with support systems, the CCyC establishes a wide margin of choice of the assistance system that is advisable for each specific subject, always trying to cause the least restriction to the personal autonomy of the affected. In the exceptional case of declaring incapacity, you must designate the appropriate conservatorship system for the case.

11.6.5 Scope of the judgment

As for the scope of the sentence, the judge must rule on: The extent and scope of the restriction and specify the functions and acts that are limited, ensuring that the impact on personal autonomy is as little as possible. Likewise, it must designate one or more support persons or curators in accordance with the provisions of article 32 of this Code and indicate the conditions of validity of the specific acts subject to the restriction with indication of the person or persons involved and the modality of their action (art. 38 CCyC).

11.6.6 Extension of the restriction on capacity

One of the principles of the current regime is to respect the greatest possible autonomy of the subject. Hence, starting from the presumption of his capacity, the judge has to clearly establish which are the acts that cannot be carried out by those who are restricted in their capacity; any other legal act not mentioned in the judgment is validly exercised by the person concerned.

These limitations may concern patrimonial acts (e.g. usually entering into all or some type of contract, etc.), very personal rights (e.g. having your image or your own body).

11.6.7 The functions of the supports or appoint curators

The judge decides not only the protection system (assistance through supports or representation through the conservatorship) but also details the specific functions that must be fulfilled by those who provide the support or appoint one or more curators if they are incapable persons.

The supports and curators protect and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons.

11.6.8 Conditions for the validity of acts

Apart from establishing the functions of the supporters or curators, the judge establishes the legal consequences of not proceeding as indicated in the sentence. That is, the judgment must establish the degree of ineffectiveness of the act that does not meet the condition imposed in the decision.

The breadth of the rule allows the judge to determine sanctions other than nullity, for example, the infringement of certain forms of support could generate (in the terms of the judgment) a fine in favor of the protected person.

III. VOLUNTARY MEASURES

1. General Overview

The Argentine system Legislate admits voluntary measures, allowing the adult him/herself to appoint representatives/support persons for the event of his or her incapacity or/and, to give instructions or express wishes concerning issues that may arise in the event of such incapacity

The voluntary measures normally are advance directive.

Advances directives are a written statement of a person's wishes regarding medical treatment, often including a living will, made to ensure those wishes are carried out should the person be unable to communicate them to a doctor.

According to the Supreme Court of the United States, one of the advantages of advance directives is that they give people the comfort

of knowing their preferences have been stated and are available to their families and doctors, and the peace of mind that comes from knowing they will be able to communicate with their families and doctors through a directive based on their personal philosophy, so that decisions can be taken without regret or remorse.

The CCyC in its art. 60 refers to the Advance Medical Directives, providing: "The fully capable person may anticipate directives and confer a mandate regarding his health and in anticipation of his own disability. It may also designate the person or persons who are to express consent to medical acts and to exercise their conservatorship. Directives involving the development of euthanasia practices are considered unwritten. This declaration of will can be freely revoked at any time."

We understand that the CCyC rule is very valuable because it not only provides for advance medical directives, but also authorizes to give a mandate for the disability itself. This mandate, unlike what happens with ordinary mandates, not extinguish with the incapacity of the principal, but assumes effectiveness when the person is declared incapable or of restricted capacity or is in such a condition that he cannot express his will.

2. Capacity

All the persons after 13 years have the capacity to appoint representatives/support persons for the event of his or her incapacity or/and, to give instructions or express wishes concerning issues that may arise in the event of such incapacity.

The adult has this possibility, but Article 60 requires that the person be a "fully capable person".

This provision raises interpretative problems as regards persons with restricted capacity or ageing persons.

The persons with restricted capacity, we understand that the scope of the restriction on their capacity that the judge orders must be considered.

It is that although article 60 requires "full capacity", the principles that govern the matter should not lead to disregard the right of a subject who is able to do so and whose capacity has not been restricted in these aspects, to anticipate their directives on health.

"Ageing" is a gradual process that develops over the course of life

and entails biological, physiological, psychosocial, and functional changes with varying consequences, which are associated with permanent and dynamic interactions between the individual and their environment.

Ageing represents a normal biological state inherent in the very process of life, in which that normality translates into declines and changes, both psychic and physical, of a quantitative and harmonious nature that, being typical of that state, cannot be judged as pathological symptoms.

Thus, by way of illustration, it has been said that the limitations that occur at this stage include the sensory (visual and auditory), consciousness, logical and conative thinking (they are scarcely impulsive and initiatory); in addition, self-affectivity is exalted. Senescence thus brings a psychophysical picture of mutations that determine unprecedented manifestations of behavior, but that are expressions of a normal biological process. So much so that it could even be said that the abnormal thing would be that such changes did not manifest themselves.

In short, senescence does not mean lack of health, but health with its own meaning, and in this order of ideas it has been rightly ruled that the weak aspects of the psyche of an elderly person are not the indications of mental imbalance, but of the psychic normality of an elderly person.

These considerations lead us to warn that if the restriction of the capacity of simple ageing were allowed, the personality would be seriously affected in an aspect of such importance as that of voluntary measures.

Thus, the legitimate decisions, conveniences and preferences of the elderly would be subject to the approval or censure of those who could undertake, or not, processes of disqualification, depending on the docility or independence of those.

Since the Inter-American Convention on the Human Rights of Older Persons has been in force in Argentina, the autonomy of these persons must be respected to the greatest extent possible.

Article 11 of the Inter-American Convention specifically alludes to the following obligation: “States Parties shall also establish a procedure that enables older persons to expressly indicate in advance their will and instructions with regard to health care interventions, including palliative care.

Article 11 of the Inter-American Convention must be interpreted in the light of article 6 on the right to life and dignity in old age. In this

framework, advance directives are part of the kind of legislation that favours palliative and end-of-life care. The intention is not to prolong or shorten life but to respect the natural moment of death.

3. Formalities

The Law of Dignified Death – 26. 742 - approved by Congress in May 2012, establishes a rule on form that says: "The declaration of will must be formalized in writing before a notary public or courts of first instance, for which the presence of two witnesses will be required. Such declaration may be revoked at any time by the person who made it."

The witnesses, whatever the means by which they are extended, in the same text of the Advance Directives must pronounce on their knowledge about the capacity, competence and discernment of the patient at the time of issuing them, and sign them, without prejudice to the duty of the granting patient himself to also manifest that circumstance, in addition to the fact that he is a capable person and of legal age.

Local legislation has created registers of advance directives or acts of self-protection to facilitate the proof of the authenticity of the document and guarantee, through its registration, the knowledge of the subjects called to intervene (see Law 14.154 of the Pcia. de Bs. As.; Law 6212 of the Pcia. of Chaco; Law 4263 of Río Negro, Law 2611 of Neuquén).

4. Measures

Argentine legislation on advance directives allows:

- Make decisions directly related to future health care forecasts.
- Grant directives in anticipation of one's own incapacity.
- To give mandate to another person to have effects in case of incapacity of the principal
- Provide that a certain mandate retains or acquires validity in such supposed.
- Appoint the person who, if necessary, expresses consent to medical acts.
- Appoint the curator in case of disability. This designation "must be

judicially approved."

• Provide directives in anticipation of one's own incapacity.

• Durable power of attorney for health care/Medical power of attorney

The most common advance directives are:

• The living will.

• Durable power of attorney for health care/Medical power of attorney.

• POLST (Physician Orders for Life-Sustaining Treatment)

• Do not resuscitate (DNR) orders.

• Organ and tissue donation.

5. Limits

The instructions or express wishes concerning issues that may arise in the event of such incapacity have two limits.

The first limit is that they cannot order euthanasic practices[3] because they will be considered unwritten.

This limitation obliges us to determine when a practice is euthanasic, this is only possible to specify through jurisprudential analysis.

In this regard it has been decided that. Advance directives made by a terminal patient,

Expressing its firm desire not to be subjected to any medical practice that involves suffering and useless prolongation of life, it has full validity within the constitutional legal system and must be respected by the health institution. This by virtue of the guidelines given by Law 26.529 and the provisions of the CSJN in the "Albarracini" case (Juzg. Correct. N° 4 Mar del Plata, 5/7/2012, dictated by Dr. Hooft, LA LEY, 2012-D, 668; DFyP 2012 [December], 229, with note by Nelly A. Taiana de Brandi).

The right legitimately exercised by a patient to refuse or refuse certain medical interventions or treatments is not included in the concept

3 There are 4 main types of euthanasia, i.e., **active, passive, indirect, and physician-assisted suicide**. Active euthanasia involves "the direct administration of a lethal substance to the patient by another party with merciful intent" This is forbidden in Argentine peanl law.

of euthanasia practices, since if his death occurs, it will be caused as a direct consequence of his ailment (Juzg. Correct. N 4, THE LAW, 2012-D, 668; DFyP 2012 [December], 229).

The second limit is given by public order, in this sense instructions that threaten general public health such as the refusal to receive mandatory vaccines would not be valid.

6. Advance directives binding

The Patient Rights Act requires physicians to accept advance directives. This is a solution that is present in some other laws, such as the German one, but in French legislation they are only "taken into account".

This difference is due to one of the objections raised is the possible lack of timeliness of the directives at the time when the person is effectively unable to express his will. It is that, of course, years can pass between the moment in which a directive is issued and the one in which they become relevant. So, between one and the other there may have been scientific advances, but they can also mediate changes in personality, family situation or any other circumstances of the infinite that surround a person and lead him to accept or reject a medical treatment.

[4]The Argentine Supreme Court has accepted the immediate application of the advance directives saying that to the extent that the decisions made by patients regarding the continuity of medical treatments conform to the assumptions and requirements established in Law 26.529, the guarantees and safeguards enshrined in Laws 26.061 are satisfied, 26.378 and 26.657 and there are no disputes regarding the expression of will in the decision-making process, prior judicial authorization should not be required for the exercise of the right to self-determination; this is corroborated by the parliamentary background that reflects the manifestation of different legislators to avoid the judicialization of patients' decisions.

7. The power of the representant

Argentina's Supreme Court has said that "According to article 21 of Law 24.193, those who can transmit the informed consent of the patient

4 Corte Suprema de Justicia de la Nación d., m. a. s/ declaración de incapacidad • 07/07/201. cita: tr laley ar/jur/24366/2015.

prevented from expressing by themselves and in full the decision to continue medical treatment or the cessation of life support do not act on the basis of their own convictions, but testifying to the will of the latter; they decide neither "in the place" of the patient nor "for" the patient, but by communicating their will; the decision cannot and should not respond to feelings of compassion or judgment that the person designated by law forms about the patient's quality of life; nor can it be based on utilitarian criteria that disregard that every person is an end in itself; it must reflect the will of those who are deprived of conscience and their personal way of conceiving for themselves their personal and non-transferable idea of human dignity, guaranteeing their self-determination[5]."

Whereas, in the same vein, the European Court of Human Rights, in the aforementioned "Lambert" case, stressed that the patient is the main party in the decision-making process and that his consent must remain at the centre of the latter; this is true even when the patient is unable to express his wishes. The Council of Europe's Guide to decision-making regarding Medical Treatment in End-of-Life Situations recommends that the patient should participate in the decision-making process through any wishes expressed above that may have been entrusted orally to a family member.

8. The termination of measure

The patient may revoke these directives at any time, leaving a written record, with the same modality with which he granted them or the others authorized by the Laws

If the patient, did not have these modalities available at the time of deciding the revocation, because he is in an emergency situation or hospitalized, your verbal revocation decision will be documented, with the presence of at least TWO (2) witnesses and their respective rubrics in the medical record, in addition to the signature of the treating professional.

5 Corte Suprema de Justicia de la Nación d., m. a. s/ declaración de incapacidad • 07/07/201. cita: tr laley ar/jur/24366/2015.

IV. EX LEGE REPRESENTATION

This section concerns ex lege measures, allowing other persons to ex lege (by operation of law) act on behalf of the adult, requiring neither a decision by a competent authority nor a voluntary measure by the adult.

1. Specific provisions for ex lege representation of vulnerable adults

Argentina legislation has a case of ex lege representation in article 59 of the Civil Code that says If the person is absolutely unable to express his will at the time of the medical attention and has not expressed it in advance, the consent it can be granted by the legal representative, the support, the spouse, the cohabitant, the relative or the relative who accompanies the patient, provided that there is an emergency situation with a certain and imminent risk of a serious evil for his life or health.

2. Inability of the patient to give medical consent

If the adult is absolutely unable to give his consent, and has not advanced it in the manner provided for in article 60 of the CCyC, it can be given by his legal representative, the support, the spouse or cohabitant, the relative or the relative who accompanies him. When there is an emergency, with a certain and imminent risk of a serious illness for the life or health of the patient. In the absence of the aforementioned persons, the doctor may dispense with it, as long as his action is urgent to avoid a serious evil to the patient.

Article 59 of the code accepts, like Law 26.742, that the patient unable to give informed consent because of his physical or mental state, may be given by the persons mentioned in article 21 of the Law on Transplantation of Organs and Anatomical Materials (art. 6, law 26.742).

This acceptance of the ex lege representation responds to the recognition that, in practice, in many cases the patient is in a state of unconsciousness or for some other physical or mental reason unable or unable to give consent. In turn, the existence of advance directives from the patient himself is still scarce.

In this way, the law establishes a mechanism to guarantee the effective realization of the right to personal liberty provided for in the National Constitution and in international instruments, and regulated

by article 2, paragraph of Law 26.529, modified by Law 26.742. Thus, the norm leaves the decision on the acceptance and rejection of medical and biological treatments in the patient and, in the event that it is necessary to reconstruct what is his will, in his family environment, free of interference from the State or third parties. The law understands that family members are the ones who are in the best position to know what the patient's will would be. Indeed, they are the ones who know his preferences and beliefs, and with whom it is likely that he has discussed these issues and expressed his opinions about them.

3. Ex lege representative order

Consent may be given by the following persons, in the order in which they are listed, if they are in the place:

a) The non-divorced spouse who lived with the deceased, or the person who, without being his spouse, lived with the deceased in a conjugal relationship no less than three (3) years, immediately, continuously and uninterruptedly.

b) Any of the children over the age of eighteen;

c) Either parent.

d) Any of the older siblings of eighteen years.

e) Any of the grandchildren over the age of eighteen.

f) Any of the grandparents.

g) Any blood relative up to and including the fourth degree.

h) Any relative by affinity up to and including the second degree.

In the case of persons placed in the same degree within the order established in this article, the opposition of only one of them will eliminate the possibility of the other.

The family link will be accredited, in the absence of other evidence, by means of an affidavit, which will have the character of a public instrument, and the respective documentation must be accompanied within forty-eight (48) hours.

Dispensing with consent by other legal provisions. Vaccines.

The article . 9 of Law 26.529 provides as an exception the need for consent of the person the "serious danger to public praise".

Law 22.909 establishes a "General regime for vaccinations against

diseases preventable by this means", providing for the mandatory supply to all the inhabitants of the country of those included in the payroll prepared by the health authority. Such an obligation is not

It is at odds with the protection of autonomy and private life enshrined in article 19 CN, since as the National Supreme Court has said, vaccination affects the rights of third parties, by putting at risk the health of the entire community.

V. COVID and Senior Rights

1. Pandemic Resolution and Human Rights in the Americas

The Inter-American Commission on Human Rights (IACHR) adopted Resolution No. 01/20 Pandemic and Human Rights in the Americas on April 10, 2020, in the face of the unprecedented global health emergency facing the Americas and the world, caused by the rapid spread global virus COVID-19.

In the special section of recommendations, it refers specifically to older people in order to ensure respect for them as full subjects of law, in accordance with human rights standards, in the face of the COVID-19 pandemic, making the following recommendations:

- Adopt the necessary measures in order to avoid infections, prioritize medical care, and avoid aging, guaranteeing the right to give consent in the field of health and facilitating means of family contact.
- Guarantee their access to public services and essential goods with a differential and preferential treatment for older people, identifying and eliminating obstacles, and addressing the digital divide.

2. Criterion for rationalizing health care

From the point of view of public health, there are those who argue that age is an objective and efficient criterion for rationalizing health care; those who defend this position, from a utilitarian criterion, affirm that it is not that the lives of some are worth less than those of others, what is involved is to distribute resources efficiently and fairly. This criterion

can play a leading role in the context of a pandemic.

The criterion of age can therefore only be used to priorities, but not to deny or limit health care and the use of certain life support measures. [6] This, in addition, being an ethical duty, is a legal obligation, real equality of opportunities and treatment; and the full enjoyment and exercise of the rights recognized by the Constitution and by the international treaties in force must be recognized to the elderly by virtue of the provisions of article 75, inc. 22 of the CN. Article 5 of the Inter-American Convention on the Protection of the Rights of Older Persons (Law 27.360) states: "Age discrimination in old age is prohibited by this Convention"[7].

For the purposes of the Convention (art. 2), "abandonment" means the failure, deliberate or not, to comprehensively meet the needs of an older person who endangers his or her life or physical, mental or moral integrity; and by "palliative care" the active, comprehensive and interdisciplinary care and care of patients whose disease does not respond to curative treatment or suffer avoidable pain, in order to improve their quality of life until the end of their days. It is the right of older persons to access a process to express their advance directive or instructions regarding health interventions (art. 11).

3. End-of-life decisions

The most serious cases of patients affected by COVID-19 have generated the resurgence of issues related to decision-making at the end of life. In this regard, as we have pointed out before, leaving aside the actions or omissions that are directly aimed at causing the death of a person, which are bioethically reprehensible and prohibited in Argentina, the main problem arises with the legitimacy of the rejection of forms of therapeutic bitterness. In this regard, we remember that it is legitimate to reject a treatment that is presented as disproportionate in a terminal patient before the possibilities of improvement, when death is imminent

6 D LAFFERRIERE, Jorge N., El COVID-19, la bioética y los derechos humanos: principios y cuestiones en juego, LA LEY 09/04/2020, 21.

7 The Preamble to the Convention emphasizes that older persons have the same human rights and fundamental freedoms as other persons, and that these rights, including the right not to be subjected to age-based discrimination or violence, derive from the dignity and equality inherent in every human being.

and irreversible and the treatment only implies a prolongation of the agony.

4. Ethical guidelines for the care of older adults in the covid pandemic[8]

UNESCO Bioethics Network for Latin America and the Caribbean, Argentine Society of Medicine (SAM), Argentine Association of Medicine and Palliative Care (AAMYCP), Argentine Society of Intensive Care (SATI), Argentine Society of Emergencies (SAE), Argentine Society of General Internal Medicine (SAMIG), Association of Internal Medicine of Rosario (AMIR), Sociedad de Medicine Interna De Santa Fe (SMISF), Consejo Argentina de Resuscitation (CAR), Sociedad Scientific de Emergentología Argentina (SCEA), Sociedad Argentina de Gerontology y Geriatric (SAGG), Asociación de Medicine Interna de Venado Tuerto (AMIVET), Consejo Palliative Care de la SAM, Society de Medicine Interna Pergamino (SMIP), Society of Internal Medicine of the Atlantic Coast (SoMICA), Society of Internal Medicine of La Plata (SMILP), Society of Internal Medicine of Córdoba (SMICBA); established the following principles for the treatment of older adults in Argentina during the COVID 19 Pandemic.

The guidelines on resource allocation ethics, triage processes with criteria for admission and discharge from critical care units and palliative care during the pandemic were prepared by bioethicists and specialists linked to the end of life: clinicians, geriatricians, intensivists, experts in palliative care and cardiopulmonary resuscitation.

These guidelines recommend general criteria for the allocation of resources based on bioethical considerations, rooted in Human Rights and based on the value of the dignity of the human person and substantial principles such as solidarity, justice and equity.

The guidelines are recommendations of general scope and their usefulness is to accompany and sustain the technical and scientific decisions made by the different specialists in the care of the critical patient, but given the dynamic nature of the pandemic, a process of permanent review and readaptation of the recommendations must be ensured.

8 https://www.medicinabuenosaires.com/indices-de-2020/volumen-80-ano-2020-s-3-indice/guias_eticas/

5. Admission and exclusion criteria for admission to Intensive Care Units

Assessments of certain disabilities, mental and/or physical, should not be used in isolation for admission to the ICU, in the same way as the prognoses associated with disability-free survival.

Age considered in isolation should not be considered as an independent criterion for admission to the ICU.

Any limitation of those set out in the previous two paragraphs would be contrary to the International Convention on the Rights of Persons with Disabilities and the Convention on Older Adults.

6. Criteria for abstention, assignment and withdrawal from mechanical ventilation (MRA)

In those cases where patients have the same prognosis and probability of recovery, the morally neutral alternative is random assignment, that is, by a process of choice by chance or lottery.

The allocation criteria based on positive discrimination promote the prioritization of children, adolescents and pregnant people in the access and use of MRA.

In summary, the following circumstances could be detailed where the withdrawal would be mandatory:

1. When there is no evidence of having obtained the desired effectiveness (absence of response in the replacement of the organ or function) or there are events that allow us to presume that it would not be obtained in the future.

2. When it is only a question of maintaining and prolonging a picture of permanent and irreversible unconsciousness.

3. When suffering is inevitable and disproportionate to medical benefit.

4. When the presence of manifest irreversibility of the clinical picture, due to the successive claudication of vital organs, leads to the estimation that the use of more and greater procedures will not serve the best interests of the patient.

In the process of removing the support, situations must be foreseen where the agony can be prolonged. To this end, protocols must be implemented to ensure proper communication to families and relatives,

actions to mitigate suffering and ensure comfort and foresight of the patient's referral areas, through the implementation of palliative care.

In cases of divergence between the triage team and the treating physicians, the expeditious intervention of the Bioethics Committee is recommended.

7. Palliative care

Institutions that care for critical patients affected by COVID-19 must provide palliative care, either by having a specialized service, or by providing the same in the general sector where they are clinically assisted, providing continuous provision of elements and medications that guarantee the performance of palliative care according to the standards of the specialty.

"Palliative care": is Active, comprehensive, and interdisciplinary care and treatment of patients whose illness is not responding to curative treatment or who are suffering avoidable pain, in order to improve their quality of life until the last day of their lives.

Central to palliative care is control of pain, of other symptoms, and of the social, psychological, and spiritual problems of the older person. It includes the patient, their environment, and their family. It affirms life and considers death a normal process, neither hastening nor delaying it

The role of palliative care teams is fundamental during the course of the epidemic, especially in the comprehensive and continuous care of those patients not admitted or removed from the ICU.

Access to palliative care is a legal obligation of States after the adoption of the InterAmerican Convention on Protecting the Human Rights of Older Persons.

Consistently with this, the Special Rapporteur on torture established in a 2013 report that denying pain relief could constitute inhuman and degrading treatment, according to the definition of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations, 2013).

VI. CRITICAL REFLECTION

Argentine approved the Inter-American Convention on the Protection

of the Human Rights of Older Persons in order to promote, protect, and ensure the recognition and full enjoyment and exercise, under conditions of equality, of all human rights and fundamental freedoms of the elderly, in order to contribute to their full inclusion, integration, and participation in society.

The Convention, is very important among other rights, establishes the right to care for the elderly, the need to incorporate and give priority to the issue of aging in public policies, the importance of facilitating the formulation and compliance with laws and programs for the prevention of abuse, abandonment, neglect, mistreatment, and violence against the elderly, and the need to have national mechanisms that protect their human rights and fundamental freedoms.

Under this legally binding instrument, Argentina is committing to advance an institutional framework that secures the protection of the rights of the elderly aimed at their integral development. to achieve this goal, the government of Argentina will need to focus on formulating, executing, and evaluating public policy; undertaking comprehensive action; and engaging in constant monitoring to ensure that the commitments established in the convention are fulfilled.

Argentine legislation need enact special laws to protect the elderly in compliance with its mandates, especially those related to social protection systems and strengthening public policies that sustain and promote relevant care for older adults.

The concept of a society for all ages, which dates back to the Program of Action adopted at the World Summit for Social Development, held in Copenhagen in 1995, advances the idea that everyone has rights and responsibilities and has an active role to play in the community. This idea is not time-bound or geographically limited and reinforces the view that present and future generations have the right to social equality and justice.

Rapid population ageing in Argentina brings with it multiple challenges and calls for steps to guarantee the fair distribution of resources in order to meet the needs of all age groups. It also requires a change in attitudes, policies and practices to improve older persons quality of life. In this context, the effective inclusion of older persons has to do with equitable access to different services and social and economic benefits, as well as the guarantee of their rights. New opportunities must be created to promote intergenerational solidarity. Hence, it is essential

to move towards more inclusive societies that provide care as well as being enabling.

International Commercial Court

Report on the Republic of Argentina to the XXI International Congress of the International Academy of Comparative Law

NOODT TAQUELA, María Blanca[1]

1. GENERAL BACKGROUND INFORMATION.

1.1 CROSS-BORDER TRADE AND COMMERCE. (question1.1)

Argentina's trade openness ratio - aggregate value of imports and exports of a given period divided by Gross Domestic Product (GDP) of same period - has ranged between 30% and 40% for the past ten years, as measured by the national accounts of the country. This index, that shows the overall impact of foreign trade on the country, shows that exports and imports are crucial for the Argentine economy.

In addition, the industrial sector, highly protected by import tariffs on final goods, is highly dependent on imports of intermediate and capital goods that the country doesn't produce. Besides, high tax rates are charged on agricultural exports, an economic activity in which the country has a large competitive advantage.

Export taxes that are mainly charged on primary exports, (i.e. agricultural goods, hydrocarbons and mining) and import tariffs make up around 15% of the total tax collection of the federal government.[2]

The country is a member of MERCOSUR,[3] a Customs Union formed by Argentina, Brazil, Paraguay and Uruguay, created in 1991. Since its creation, MERCOSUR's main objective has been to promote

1* Professor of Private International Law, University of Buenos Aires. Professor of the Hague Academy of International Law in the 2012 Session.

2 See: https://data.imf.org/regular.aspx?key=61545852 .These statistics and its analysis has been provided by Professor of Economy Francisco Mondolfo, to whom we are very grateful.

3 MERCOSUR is the acronym in Spanish of Southern Common Market, that is *Mercado Común del Sur*.

a common space that generates business and investment opportunities through the competitive integration of national economies into the international market. [4] Argentina's cross-border trade has significantly increased since the creation of this regional integration process, especially with Brazil.

In general terms, Argentina's main exports are sent to Brazil, China, Chile, Netherlands and India. The goods that Argentina import come mainly from China, Brazil, United States of America, Germany and Thailand.[5]

1.2. DISPUTE RESOLUTION. (questions 1.2 to 1.4)

Litigation is the most extended dispute resolution mechanism used in Argentina; yet mediation has been widely utilised since the last decade of the 20th century. As the country has a federal government system, each province and the Autonomous City of Buenos Aires may provide for dispute resolution in different ways.

Mediation proceedings must be followed previous to litigation in some provinces and also in the Autonomous City of Buenos Aires. [6] In this City, mediation was introduced as a binding procedure by Act 24.573, enacted on 4 October 1995, later superseded by Act 26.589, enacted on 15 April 2010, which mantaines the binding character of mediaton.[7]

Arbitration is also accepted in domestic and international disputes, but it is not so often used in domestic disputes. Until 2018 Argentina had very ancient provisions on commercial arbitration; in 2018 the country enacted Act 27.449 on International Commercial Arbitration,[8] that follows the UNCITRAL Model Law, with various additions.

In 2015 a new Civil and Commercial Code entered into force in

4 https://www.mercosur.int/en/about-mercosur/mercosur-in-brief/

5 https://www.investargentina.org.ar/

6 It is possible to get information about the Mediation Acts of each of the 23 Argentine Provinces and the Autonomous City of Buenos Aires in the official website http://www.infoleg.gob.ar/

7 Act 26.589, in force at 23 February 2022 is available only in Spanish at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/165000-169999/166999/texact.htm

8 Act 27.449, in force at 23 February 2022 is available only in Spanish at: http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=312719

Argentina; the new Code has a chapter number 29 on "Arbitration contracts" within the Book of Contracts, in Sections 1649 to 1665. Nowadays these rules apply in situations of domestic arbitration, as far as the Act 27.449 applies to international commercial arbitration.

Almost all of the Civil and Commercial Procedure Codes of each of the Provinces and the Autonomous City of Buenos Aires – a number of 24 Procedure Codes - have provisions on arbitration that may also be applicable.

This overlay of federal and provincial rules may generate conflicts, but there is not enough case law on this particular subject.

1.3. ARBITRATION.

Arbitration is the most popular dispute resolution mechanism for the resolution of cross-border commercial disputes, in particular when the contract or business implies a substantial amount of money. In fact, an arbitration clause is always included in large contracts.

1.4 LITIGATION.

On the other hand, litigation is the least popular mechanism for solving international commercial disputes. Even so, as almost all arbitral awards are subject to judicial control,[9] some lawyers and business men, are reluctant to include an arbitration clause in their contracts because the loosing party in the arbitration procedings could probably claim for setting aside the award and after that, it could oppose to enforcement of the award.

1.5. CROSS-BORDER COMMERCIAL DISPUTES. (question 1.5)

Unfortunately, there are not statistics that allow us to ascertain the percentage of disputes that are resolved in Argentina which are cross-border commercial disputes. This lack of information is due to the fact that both domestic and international cases are litigated at the same courts

9 D.P.Fernández Arroyo, 'Una jurisdicción especializada en comercio internacional', in E.Levy Yeyati (ed), *100 políticas para la Argentina del 2030,* Ciudad de Lectores, Ciudad Autónoma de Buenos Aires, 2017, 276, 277.

and arbitral tribunals, without registration of the character of the claim.

For the same reasons it is not possible to know certainly whether the percentage of cross-border commercial disputes have decreased or increased over time. However, the overall impression is that cross-border disputes have increased over time and that they will continue increasing. In addition, the enactement in 2018 of the International Arbitration Act makes Argentina a more attractive place to be chosen as seat of arbitration.

2. INTERNATIONAL COMMERCIAL COURT ('ICL').

As there are not International Commercial Courts (ICL) established in Argentina, I shall refer to different proposals that have been formulated by specialists. (question 2.1)

2.1. GOLDSCHMIDT'S PROPOSAL.

Werner Goldschmidt suggested the establishment of autonomous courts with specialised judges, for the adjudication of private international law cases. In the seventies of the last century, the mentioned German-Argentine author, borned in Berlin, that lived and teached in Argentina for decades,[10] said emphatically that the judicial autonomy of Private International Law was a must.[11]

His proposal was not exclusive for international commercial claims, but for all Private International Law cases.

2.2 FERNÁNDEZ ARROYO'S PROPOSALS.

Diego P.Fernández Arroyo proposed in 2017 the creation of specific 'competences' for solving international commercial cases, constituted as part of the National Court system. His suggestions were focused on the courts of the Autonomous City of Buenos Aires, were most of the

10 W.Goldschmidt was borned in Berlin in 1910 and died in Buenos Aires in 1987.

11 W.Goldschmidt *Derecho internacional privado. Derecho de la tolerancia*, 4th ed., Depalma, Buenos Aires, 1982, parag. 24 and 26, pp.21-22. The proposal was suggested also in previous editions of the seventies.

cross-border disputes are litigated.[12]

The main rationale of his proposal is the need of specialisation of judges that deal with international commercial cases; in fact he suggests the need of specialisation of all the parties that work with international transactions.[13]

In addition, Fernández Arroyo highlighted the great internasionalisation of the Argentine's legal system; the country has approved numerous international treaties and all these treaties have priority over national rules.[14] The Argentine Constitution, as amended in 1994, recognises this priority, under section 75. 22.[15]

This author considers that specialised commercial courts should be established at first instance courts and also at Courts of Appeal and even at the National Supreme Court of Justice.

As a minimal proposal, Fernández Arroyo encouraged the nomination of an expert, at any stage of judicial tribunals, who could be in charge of all the international commerce and arbitration cases.[16]

The importance of ICL was also highlighted by Diego P. Fernández Arroyo at the Hague Academy of International Law in 2019, as Professor of the General Course of Private International Law.[17]

2.3. NOODT TAQUELA'S PROPOSAL.

I personally suggested the creation of International Commercial Courts

12 D.P.Fernández Arroyo, 'Una jurisdicción especializada en comercio internacional', in E.Levy Yeyati (ed), *100 políticas para la Argentina del 2030,* Ciudad de Lectores, Ciudad Autónoma de Buenos Aires, 2017, 276, 278. a

13 D.P.Fernández Arroyo, 'Una jurisdicción especializada en comercio internacional', in E.Levy Yeyati (ed), *100 políticas para la Argentina del 2030,* Ciudad de Lectores, Ciudad Autónoma de Buenos Aires, 2017, 276, 277.

14 D.P.Fernández Arroyo, 'Una jurisdicción especializada en comercio internacional', in E.Levy Yeyati (ed), *100 políticas para la Argentina del 2030,* Ciudad de Lectores, Ciudad Autónoma de Buenos Aires, 2017, 276, 278.

15 See: http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm, Argentine National Constitution, section 75. 22, only in Spanish.

16 See: D.P.Fernández Arroyo, 'Una jurisdicción especializada en comercio internacional', in E.Levy Yeyati (ed) *100 políticas para la Argentina del 2030*, Ciudad de Lectores, Ciudad Autónoma de Buenos Aires, 2017, 276, 278.

17 D.P.Fernández Arroyo, '*La traversée du miroir : la progressive dénationalisation du droit international privé'*, The Hague, August 5 to 16, 2019.

or Private international law courts in general, at the **XXXI** Argentine Congress of International Law, that took place in Córdoba, Argentina, in 2019.[18] I understand –as explained in that opportunity - that the plurality of applicable sources, among other reasons, in addition to the complexity of Private international law, generate the need to establish specialised courts to solve this kind of claims.[19]

We also proposed in that opportunity that the nomination of counsels on Private international law, in each jurisdiction, may be very useful until the establishment of ICL could be done.

The idea is that the courts must ask for the counsel's opinion in any Private international law situation. The counsel's opinion should not be binding for the court, but in case that the judge decides contrary to counsel's opinion, the judgment must be justified in relation with this point.

The counsel's task should be to inform about the applicable international treaties and other applicable rules of law, wether domestic or international. In addition, he or she may provide case law and authorities on the subject matter of the claim.

The advantages of this method are numerous and the costs that counsel's nomination may imply is negligible, in particular compared with the establishment of ICL.

The nomination of counsels in Private international law, is similar to Fernández Arroyo's minimal proposal. The need of experts called to adjudicate or at least to give an opinion on Private international law claims is increasing day by day.

The **XXXI** Argentine Congress of International Law adopted the suggestion of creation of International Commercial Courts in its Conclusions adopted in the plenary session of all the members of the Association.[20]

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18 The Congress was organised by the Argentine Association of International Law (Asociación Argentina de Derecho Internacional) https://aadi.org.ar/index.php

19 The presentation at the Congress, that took place on September 4 to 7, 2019, was published afterwards: M.B.Noodt Taquela, '¿Tribunales especializados o asesores en Derecho internacional privado?'(2020), *Revista La Ley*, Buenos Aires, 2020-F, pp. 670-74.

20 Conclusion number 12 of the Private International Law Section.

2.4. APPOINTEMENT OF JUDGES IN ARGENTINA. (questions 2.12 and 2.13).

I would like to mention some provisions of the Argetine legal order that must be taken in account in case that the country would decide to establish ICL. The main problem may appear with the National Constitutional Section [21] that rules on the Judiciary Counsel. Selection of judges – three candidates to be nominated by the Republic's President with the conformity of the Senate [22] – is the responsibility of the Judiciary Counsel. This selection must be done through public competition, with the requirements of the special law that rules this state organisation.[23]

The requirements for appointment as national judge are provided for by the Judiciary Counsel Law, that is Act 24.937 enacted in 1999 (section 13) amended by Act 26.855 of 2013 (section 9). If Argentina decides to establish ICL, the Act that create the ICL would partially derogate these provisions.

It is important to keep in mind that provincial judges are nominated by the provincial authorities, under the Constitution and local laws of each Province.

In general, judges must have a law degree and some years of practice as lawyer or in the Judiciary. In addition, judges cannot practice as lawyers simultaniosly with the exercise of their functions. The prohibition is regulated by the National Judiciary Organisation Law, Act 1285/1958 (section 9). [24]

2.5. FOREIGN LAWYERS AND LEGAL EXPERTS (questions 2.

21 Argentine National Constitutional, Section 114, as amended in 1994. Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm, only in Spanish.

22 Argentine National Constitutional, Section 99. 4, as amended in 1994. Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm, only in Spanish.

23 See: Act 24.937 enacted in 1999, amended by Act 26.855 of 2013 https://consejomagistratura.gov.ar/ Also available at: http://www.saij.gob.ar/legislacion/ley-nacional-24937-consejo_magistratura.htm?6

24 The National Judiciary Organisation Law, Act 1.285/1958 was amended by Act 21.341 of 1976 and is available at: http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=37915

16 and 2.17).

Argentina does not admit that foreign lawyers represent parties in litigation at a national or provincial court. The Autonomous City of Buenos Aires – as Federal District – and each Province has it own regulation, some of them enacted by Bar Associations of each jurisdiction.[25]

The Bar Association of the Autonomous City of Buenos Aires was established in 1985 under Act 23.187. This Act rules the requirements for practicising as a lawyer in the Federal District of Buenos Aires; one of them is the registration in the Buenos Aires Bar Association.

Thus, the Bar Association of the Autonomous City of Buenos Aires, opposes to any participation of foreign lawyers in the City, even in international claims. This was the case with various claims that were settled as consequence of an aircraft crash produced in Uruguay in 1997; while the airplane had Argentine flag and the motors of the airplane were manufactured in the United States of America. Thus, there were claims prosecuted in the United States of America and also in Argentina.

The claims presented in Argentina by some fifty families of death passengers were prosecuted by Argentine lawyers, accredited by the Bar Association of the Autonomous City of Buenos Aires. Notwithstanding the participation of Argentine lawyers, the Bar Association objected in 2000 and 2002 the presence of lawyers from United States of America, in the mediation hearings and in several meetings with the families of the death passengers, that took place in Buenos Aires. The Bar Association claimed that the fee agreements between lawyers of Chicago, Illinois, and each family of the death passengers were void, in spite of the fact that those agreements were celebrated with the object to settle claims for damages in the United States of America. After some months of litigation, finally the claims were settled by agreement, and this is the reason why there are neither official records of these litigation, nor published judgments.

The rejection of the participation of foreign lawyers in 2000 and 2002, is likely to be the position of the Buenos Aires Bar Association and others provincial Bar Associations. Nevertheless, the enactment of a National Act that establish ICL and provide for the nomination of foreign lawyers as judges and counsels, would be enough to come to an end the objections of Bar Associations.

25 The Ethic Codes are enacted by each Bar Associations. The one of the City of Buenos Aires is available at: https://www.cpacf.org.ar/inst_codigo_etica.php

Multicultural Populations and Mixed Legal Systems

Report on the Republic of Argentina to the XXI International Congress of the International Academy of Comparative Law

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The contents of this report was extracted *verbatim* from earlier works, namely, from Agustín Parise, *Legal Transplants and Codification: Exploring the North American Sources of the Civil Code of Argentina (1871), in* Informes de la Asociación Argentina de Derecho Comparado al XVIII Congreso de la Academia Internacional de Derecho Comparado 267 (2010); Agustín Parise, *Migration and Law. Report on the Republic of Argentina*, *in* Informes de la Asociación Argentina de Derecho Comparado al XIX Congreso de la Academia Internacional de Derecho Comparado 225 (2014); Julieta Marotta & Agustín Parise, *On Codes, Marriage, and Access to Justice: Recent Developments in the Law of Argentina*, 7 J. Civ. L. Stud. 237 (2014); Agustín Parise, *Judicial Decision-Making in Latin America: Unveiling the Dynamic Role of the Argentine Supreme Court*, *in* Legislators, Judges, and Professors 151 (J. Basedow, H. Fleischer & R. Zimmermann eds., 2016); Agustín Parise, Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th-20th Centuries) (2017); Agustín Parise, *The Argentine Civil and Commercial Code (2015): Igniting a Third Generation of Codes for Latin America*, 3/2017 Zeitschrift für Europäisches Privatrecht 639 (2017); Agustín Parise, *Sources of Law and Legal History*, *in* Introduction to the Law of Argentina 1 (U. Basset ed., 2018); Agustín Parise, *Influence of the Louisiana Civil Code of 1825 in Latin-American Codification Movements: The References to Louisiana Provisions in the Argentine Civil Code of 1871*, 35 Tul. Eur. & Civ. L.F. 33 (2020); Julieta Marotta & Agustín Parise, *Public and Private Intermingled: Changes in the Family and Property Laws of Argentina*, 13 J. Civ. L. Stud. 383 (2020); Agustín Parise, *Legal Education in Argentina: A Plea for Comparative Law in a Multicultural Environment,* 81 La. L. Rev. 1275 (2021).

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I. Introduction

The Republic of Argentina (Argentina) has a population that can be deemed multicultural, and the legal system in this South American country responds to the particular needs of its evolving society. Indigenous peoples live in Argentina. Further, Argentina is traditionally considered an "immigration" country,[2] having welcomed immigration for

this report.

References to Argentine legislation include amendments and modifications, even when the original numbers of legislation are preserved for citation purposes. When available, references are provided also to electronic sources, where readers, beyond the borders of Argentina, can easily retrieve the official texts of the referred legislation. When citing journal articles, the numbers in square brackets indicate pin-points in the online version of the respective journal. All websites were last visited on 12 April 2022.

2 This condition is shared with, amongst other countries, Australia, Canada, and the US. See Lawrence M. Friedman, *The Shattered Mirror: Identity, Authority, and Law*, 58 Wash. & Lee L. Rev. 23, 40 (2001).

more than 200 years. The latest National Census, from 2010,[3] indicated that Argentina had 40.1 million inhabitants,[4] of which 2.4% were indigenous peoples[5] and 4.5% were foreigners,[6] mostly from neighbouring countries (*e.g.*, Bolivia, Paraguay, and Peru).[7] The origins of immigrants to Argentina changed throughout time. Immigrants arrived, at different time periods, from Europe, from other Latin American countries, and to a lesser extent, from Africa and Asia.[8] The degree to which immigration was welcomed also changed in the country: at times being restrictive, while at other times being open and flexible.[9] Immigration should be

3 For detailed and official information on the 2010 National Census, see https://www.indec.gob.ar/indec/web/Nivel4-Tema-2-41-135.
A national census was scheduled for 2020, yet it was postponed to May 2022 because of the Covid-19 pandemic. See *El Gobierno oficializó cuándo se hará el demorado Censo Nacional 2020: será feriado*, La Nación (25 Jan. 2022), *available at* https://www.lanacion.com.ar/politica/el-gobierno-oficializo-cuando-se-hara-el-demorado-censo-nacional-2020-sera-feriado-nid25012022/.

4 A total of 40117096 inhabitants. See *Cuardo P1*, *available at* https://www.indec.gob.ar/indec/web/Nivel4-CensoNacional-999-999-Censo-2010.

5 A total of 955032 inhabitants. See *Cuadro P44*, *available at* https://www.indec.gob.ar/indec/web/Nivel4-CensoNacional-999-999-Censo-2010.

6 Diego R. Morales, *Derechos humanos de los migrantes en Argentina: Apuntes sobre nuevas perspectivas jurisprudenciales,* 1.2 Revista Derecho Público 345, 345 (2012).

7 Inadi, Buenas Prácticas en la Comunicación Pública: Informes Inadi Migrantes 4, *available at* http://inadi.gob.ar/comunicacion/informes/migrantes/. For recent studies on the migration mainly from neighbouring countries, see El impacto de la migraciones en Argentina, Cuadernos Migratorios No. 2 (2012), *available at* http://www.migraciones.gov.ar/pdf_varios/campana_grafica/OIM-Cuadernos-Migratorios-Nro2-El-impacto-de-las-Migraciones-en-Argentina.pdf.

8 Morales, *supra* note 5, at 345; Barbara Hines, *An Overview of Argentine Immigration Law*, 9 Ind. Int'l & Comp. L. Rev. 395, 397-398 (1999) [hereinafter Hines, *An Overview*]; and Barbara Hines, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 Cornell Int'l L.J. 471, 474 (2010) [hereinafter Hines, *The Right to Migrate*]. The very complete works of Hines have been of constant reference by the author of this report.
See also Santiago del Carril, *LatAm Immigrants Change Country's Face*, Buenos Aires Herald (9 Feb 2014), *available at* http://www.buenosairesherald.com/article/151685/latam-immigrants-change-country%E2%80%99s-face.

9 María Cristina Rodríguez de Taborda, *Doscientos años de inmigración en Argentina (1810-2010)*, La Ley Online at [1]; and Donald S. Castro, The Development and Politics of Argentine Immigration Policy 1852-1914: To Govern Is To Populate 257-266 (1991).

regarded a dynamic social phenomenon, in which both the countries and the international community tend to adapt to different scenarios.[10]

This report is divided into three parts and it addresses the interaction of a multicultural population within the legal system of Argentina. Firstly, it addresses the historical reasons for multiculturalism in Argentina. There, indigenous peoples and immigration are two pillars that help explain the current multiculturalism. Secondly, it focuses on the reception of a framework for the multicultural population in Argentina. Attention is devoted to the reception in the Argentine Constitution, in the Argentine Civil and Commercial Code, and in special legislation. Thirdly, it looks at the circulation of legal ideas and models in Argentina. Legal transplantation occupies an important place in this part of the report, and two snapshots are provided to visualize legal borrowings: codification and court decisions. Finally, brief closing remarks aim to provide unity to the topics addressed in the previous parts.

II. Evolution

The current territory of Argentina was formerly a possession of the Spanish crown in America. Historically, it has been referred to as Río de la Plata, named after the main river artery that crosses through the territory, and that serves as a channel for commerce and transportation with the northern regions of South America. In 1516, Juan Díaz de Solís led the first European expedition that arrived at Río de la Plata.[11] In 1776, the territory mainly consisted of the newly created Viceroyalty of Río de la Plata.[12] During the following century, the inhabitants of Río de la Plata joined the other independence movements that arose in South America as a result mainly of the deposition of the Spanish King Fernando VII.[13] In May 1810, a short but intense revolution overthrew the local Viceroy, who was then replaced by members of a first *jun-*

10 Rodríguez de Taborda, *supra* note 8, at 5.

11 David Rock, Argentina, 1516-1987: From Spanish Colonization to Alfonsín 8 (rev. ed., 1987).

12 Daniel K. Lewis, The History of Argentina 31 (2003).

13 William Warren Sweet, A History of Latin America 140-146 (rev. ed., 1929).

ta.[14] Independence was finally declared on 9 July 1816.[15] The Argentine Constitution was signed in 1853 and was based, amongst others, on Spanish antecedents and US constitutional principles.[16] That constitution adopted a federal system of government with a tri-partite division of powers, encompassing a legislature, a judicial branch, and an executive office led by a president.[17]

A. Indigenous Peoples

Indigenous peoples–also referred to by part of the legal literature as *Indians*, *American Indians,* or *Native Americans*[18]–had shaped their own cultures through centuries.[19] These groups had no homogenous culture or legal precepts, and generalizations should therefore be avoided.[20] They considered their living space a holy land, being the central point of, amongst other things, their lives, religion, and culture.[21] Indigenous peoples in the Americas had, in the words of Alfonso García-Gallo, a "mosaic of different legal systems [*derechos*]."[22] Those legal systems

14 Amongst the copious bibliography on the periods covering the Argentine revolution and independence, see the early and widely circulated–though also contested–account by Luis L. Domínguez (Luis L. Domínguez, Historia Argentina 201-238 (1861)).

15 *Id.* at 398-411.

16 Viviana Kluger, *Argentina, in* 1 The Oxford International Encyclopedia of Legal History 215, 216 (Stanley N. Katz ed., 2009).

17 See the complete text of the Constitution of 1853, available at *Constitución de la Confederación Argentina*, 1852-1880 A.D.L.A. 9-52 (Arg.).

18 A report by the American Law Institute indicated that indigenous peoples in North America preferred to be identified by their tribal name, rather than by a generic term such as Indian. American Law Institute, Restatement of the Law Third: The Law of American Indians. Discussion Draft No. 2 (April 24, 2014) 26 (2014).

19 Jorge Horacio Alterini et al., Propiedad Indígena 14 (2005).

20 See, for example, *id.* at 11.

21 Angela R. Riley, *The History of Native American Lands and the Supreme Court,* 38 Journal of Supreme Court History 369, 369 (2013).

22 Alfonso García-Gallo, *El pluralismo jurídico en la América española*, *in* Alfonso García-Gallo, Los orígenes Españoles de las Instituciones Americanas: Estudios de Derecho Indiano 299, 300 (1987). See also Abelardo Levaggi, *La réception du système juridique espagnol par les systèmes indigènes en Amérique*, *in* La Réception des Systèmes juridiques: implantations et destins 331, 334 (Michel Doucet & Jacques Vanderlinden eds., 1994).

had reached different degrees of development, depending on the different groups.[23] The knowledge of the different components of that mosaic is limited and incomplete, in part because there is a significant lack of written sources for the period that preceded the arrival of the Iberian settlers.[24] It should be noted that the lack of written sources did not imply that indigenous peoples lacked laws and were ruled only by customs, because the fact of having oral or written legal precepts was indeed indifferent.[25] Even when in some cases no written techniques were implemented to record legal precepts, laws were preserved by means of accounts and memory.[26]

There were at least 58 groups of indigenous peoples that lived in the present-day territory of Argentina (*e.g.*, Matacos, Quilmes).[27] The family and property structure of each group depended on their production techniques and development.[28] There were three types of land relations for these groups: (i) in the North-Western part, some groups were under the control of the Inca, and therefore had the *ayllu* tracts, with one of the three areas reserved for the community;[29] (ii) in the North-Eastern part, some tracts were divided for the use of families individually and other tracts were divided for the use of the community at large;[30] and (iii) in the Central-South part, a number of nomad groups benefited from hunting, fishing, and gathering.[31] In the period prior to the arrival of the

23 Katherine A. Hermes, *The Law of Native Americans, to 1815*, *in* 1 The Cambridge history of law in America 32, 38 (Michael Grossberg & Christopher L. Tomlins eds., 2008).

24 Levaggi, *supra* note 21, at 334. See also M.C. Mirow, Latin American Law: A History of Private Law and Institutions in Spanish America 1 (2004).

25 Levaggi, *supra* note 21, at 336. See also Hermes, *supra* note 22, at 38 (regarding the existence of law for indigenous peoples in North America).

26 Ricardo D. Rabinovich-Berkman, Principios generales del derecho latinoamericano 219 (2006).

27 Carlos O. Bunge, 1 Historia del Derecho Argentino 31-33 (1912-1913). For information on the different groups that inhabited the territory of present-day Argentina, see, amongst others, Alterini et al., *supra* note 18, at 14-39.

28 Bunge, *supra* note 26, at 53.

29 Marzia Rosti, *Gli indios e la terra nell'attuale Costituzione argentina*, *in* Un giudice e due leggi: pluralismo normativo e conflitti agrari in sud America 75, 78 (Mario G. Losano ed., 2004).

30 *Id.*

31 *Id.*

Spaniards, the groups in the present-day Argentine territory had a tendency towards holding land in common, while individual property was mainly reserved to movables.[32] It should be noted that several groups inhabited areas that spread between the present-day territories of both Argentina and Chile (*e.g.*, Selk'nam, Mapuche).[33]

Indigenous peoples and their property were in a state of vulnerability during the period that followed independence from Spain.[34] Indigenous peoples and other inhabitants of Argentina were not treated in an equal manner, even when national laws pointed to equality.[35] The republican period saw efforts to gain lands that were in hands of indigenous peoples. For example, in the 1870s, General Julio A. Roca led a military campaign that undertook the "conquest of the wilderness" (*Conquista del Desierto*).[36] That campaign brought to an end the gravitational presence of indigenous peoples in the territory, a presence that had accompanied the Spanish colonial and the earlier republican periods.[37] That campaign further injected indigenous peoples into the labour market, for a diversity of activities.[38] Argentina explored other means to "assimilate" (*asimilación*) indigenous peoples to the rest of the inhabitants.[39] These included, amongst others, the establishment of religious missions and the donation of lands to specific groups.[40]

Changes to the land relations of indigenous peoples were experienced during the centuries that followed. For example, mainly during the final part of the nineteenth century, the emergence of a liberal paradigm of ownership motivated the elimination of many of the

32 Alterini et al., *supra* note 18, at 40.

33 For information on the indigenous peoples of Argentina and Chile, see Jorge Hidalgo, *The Indians of southern South America in the middle of the sixteenth century, in* 1 The Cambridge History of Latin America 91 (Leslie Bethell ed., 1997).

34 Abelardo Levaggi, *Tratamiento legal y jurisprudencial del aborigen en la Argentina durante el siglo XIX*, *in* El aborigen y el derecho en el pasado y el presente 245, 261 (Abelardo Levaggi coord., 1990).

35 *Id.*

36 Rock, *supra* note 10, at 154.

37 Tulio Halperín Donghi, Una nación para el desierto argentino 138 (1992, rep.).

38 Levaggi, *supra* note 33, at 266.

39 *Id.* at 269.

40 *Id.*

holdings in common, aiming to enhance the individualistic character of ownership.[41] Even later, mainly starting during the last decades of the twentieth century, at the time a social function paradigm had already gained grounding, other changes emerged. National and international efforts were undertaken to recognize rights in land of indigenous peoples. In the Latin American context, several national constitutions started to deal with property relations of indigenous peoples.[42] In addition, the Inter-American Commission on Human Rights alerted that when property of indigenous groups was not recognized the cultural and spiritual development of the groups was affected.[43] In similar lines, the Inter-American Court of Human Rights ruled that the protection of property as stated in the American Convention on Human Rights (1969) included the rights of indigenous peoples within the framework of communal property.[44] Another important change was provided by the incorporation of the Indigenous and Tribal Peoples Convention (1989) of the International Labour Organization into the framework of several Latin American jurisdictions.[45] These changes pointed also towards the constitutionalization of private law.

B. Immigration

Immigration shaped Argentina during more than 200 years.[46] Until the second half of the twentieth century, immigrants arrived mainly from

41 *Id.* at 260.

42 Pablo María Corna & Carlos Alberto Fossaceca, *La propiedad indígena comunitaria: un análisis crítico del articulado del Proyecto de Código Civil y Comercial Unificado*, 249 El Derecho 789 (2012).

43 Irene Pujol de Zizzias, *La propiedad indígena en el Proyecto de reforma del Código Civil y Comercial*, 2012-IV Jurisprudencia Argentina [11] (2012).

44 *Id.*; Inter-American Commission on Human Rights, Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales: normas y jurisprudencia del sistema interamericano de derechos humanos (OEA/Ser.L/V/II. Doc. 56/09); Juan Manuel Salgado, *La exclusión de las normas sobre pueblos indígenas del Proyecto de Código Civil y Comercial de la Nación, aprobado por el Senado*, 2014-III Jurisprudencia Argentina [1] (2014).

45 Inter-American Commission on Human Rights, *supra* note 43, at 6.

46 Ivanna Opacak & Matías Eidem, *"Ningún ser humano es ilegal" Un paso adelante respecto de la cuestión migratoria*, El Dial. Suplemento Penal y Procesal Penal [1] (16 August 2011).

Europe.[47] Starting in the second half of that century, immigration shifted towards inhabitants arriving primarily from neighbouring Latin American countries,[48] who decided to migrate to Argentina as a result of diverse internal and external factors. Those Argentine immigration trends and shifts were accompanied by immigration policies and legislation.

The Argentine Constitution of 1853 encapsulated the immigration policies developed during the first half of the nineteenth century. It articulated immigration and economic policies, expecting the arrival of European immigrants.[49] Article 25 of the Argentine Constitution stated that "the Federal Government shall foster European immigration."[50] Articles 14 and 20 of that same text were fundamental when granting equal rights.[51] The former enumerated fundamental rights of all inhabitants, including foreigners;[52] while the latter recognized all civil rights, also to foreigners.[53] The three articles were adopted, preserving the same article-numbers, by the 1994 reform to the constitutional text. Immigration policies still required the enactment of a specific national law. Law 817[54] was a reaction to that need, and was adopted during the presidency of Nicolás Avellaneda.[55] That 1876 law welcomed European

47 Andrés Solimano, Development Cycles, Political Regimes and International Migration: Argentina in the Twentieth Century 23 (Serie Macroeconomía del Desarrollo 22 2003); and Fernando J. Devoto, Historia de la Inmigración en la Argentina 389-432 (2003).

48 Solimano, *supra* note 46, at 20-22; and Devoto, *supra* note 46, at 433.

49 Nora Pérez Vichich, *Los trabajadores migrantes en la nueva ley de migraciones: De objeto de normas a sujetos de Derecho*, *in* Migración: Un derecho humano 137, 139 (Rubén Giustiniani ed., 2004).

50 See the text of 1853, in Spanish, in *Constitución de la Confederación Argentina*, *supra* note 16, at 14.
See also, María Angélica Gelli, Constitución de la Nación Argentina: Comentada y Concordada 241-242 (2 ed., 2004); and Hines, *The Right to Migrate*, *supra* note 7, at 476.

51 Hines, *The Right to Migrate*, *supra* note 7, at 477.

52 See the text of 1853, in Spanish, in *Constitución de la Confederación Argentina*, *supra* note 16, at 11. See also, Gelli, *supra* note 49, at 64-116.

53 See the text of 1853, in Spanish, in *Constitución de la Confederación Argentina*, *supra* note 16, at 13. See also, Gelli, *supra* note 49, at 208-214.

54 Law 817, *available at* http://archivohistorico.educ.ar/sites/default/files/III_20.pdf.

55 On the context in which the law was enacted, see Carlos Guillermo Frontera, *Las ideas sobre inmigración en el debate de la Ley No 817 y en los periódicos de la época*,

immigration,[56] and replicated the protection of foreigners as enshrined in the Argentine Constitution.[57] The implementation of the immigration policies, together with the text of the Argentine Constitution and of the new law, resulted in the arrival of 600.000 permanent immigrants in the period 1881-1890 and of 1.1 million in the period 1901-1910.[58] No other Latin American country received more immigrants than Argentina at that time.[59] Law 817 was in force for more than a century, until it was replaced during the *de facto* regime of Jorge Rafael Videla.[60] Multiple enactments took place in Argentina during those 100 years, reacting to the needs of society, adapting to changes triggered by, amongst others, the impact of the two Great Wars[61] and the emergence of socialization movements.[62]

In the 1970s, with the reestablishment of a *de facto* regime, a tight control on population, including foreigners, was implemented.[63] That control required the enactment of new immigration laws.[64] Accordingly, Decree-Law 22439 was adopted in 1981, during the government of Videla.[65] The text provided the new tenets for migration in Argen-

16 Revista de Historia del Derecho 287 (1988).

56 Victoria Slater, *"To Govern Is To Populate": Argentine Immigration Law and what it can suggest for the United States,* 31 Hous. J. Int'l L. 693, 702 (2009).

57 Hines, *The Right to Migrate*, *supra* note 7, at 479.

58 Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 Am. U. L. Rev. 1483, 1541 (1997).

59 Castro, *supra* note 8, at 4. See also the relevant statistics at 267.

60 Frontera, *supra* note 54, at 305.

61 The two Great Wars motivated changes in the Argentine immigration policies. Those new policies became more defensive or restrictive in nature. See Slater, *supra* note 55, at 702.

62 Early twentieth-century industrialization resulted in new interaction amongst actors, many of them being immigrant workers from Europe. That new interaction lacked of economic and normative frameworks, and eventually triggered social unrest and strikes. See Pérez Vichich, *supra* note 48, at 140. See also, Marcela Aspell, *La Ley 4144 "de residencia": antecedentes - sanción - aplicación*, 25 Revista del Instituto de Historia del Derecho Ricardo Levene 11, 12 (1979).

63 Pérez Vichich, *supra* note 48, at 142.

64 *Id.*

65 Decree-Law 22439/1981, *available at* http://www.infojus.gov.ar/legislacion/ley-nacional-22439-ley_general_migraciones_fomento.htm?7.

tina.[66] Its restrictive regulations forced high numbers of foreigners to stay illegally in the country:[67] close to 800.000 foreigners, mainly from neighbouring countries, held by then an *irregular* status in Argentina.[68] The decree-law did not recognize fundamental rights to immigrants, because, for example, foreigners with no legal resident status had no access to education or healthcare services.[69] In addition, the National Migration Agency could instruct the detention and expulsion of foreigners with no intervention from the judiciary.[70] The enactment of the *de facto* regime replaced Law 817. The *de facto* enactment was still applied, with minor changes,[71] even when democratic governments were re-established in Argentina.[72] Decree-Law 22439 was replaced in Argentina only in 2004. Law 25871 of 2003[73] currently provides the

66 For more information on the Decree-Law 22439, see Hines, *An Overview*, *supra* note 7, at 417-420.

67 Slater, *supra* note 55, at 704.

68 FIDH & CELS, Argentina: Avances y asignaturas pendientes en la consolidación de una política migratoria basada en los derechos humanos 5 (No. 559e, Feb. 2011). This very complete work of *Federación Internacional de Derechos Humanos* (FIDH) and *Centro de Estudios Legales y Sociales* (CELS) has been an especially useful source for the author of this report.

69 María de las Nieves Cenicacelaya, *Algunas notas sobre la ley 25.871*, 3:36 Anales: Revista de la Facultad de Ciencias Jurídicas y Sociales de la Universidad Nacional de la Plata 767, 767 (2005).

70 *Id.*

71 Laura Etel Papo & Liliana Noemí González, *El trabajador migrante irregular frente a los tratados de derechos humanos. Derecho a la libertad sindical,* V:9-10 Revista Latinoamericana de Derecho 235, 236-237 (2008).

72 Hines, *The Right to Migrate*, *supra* note 7, at 480.

73 Law 25871, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/90000-94999/92016/texact.htm. See Hines, *The Right to Migrate*, *supra* note 7. See also José Nicasio Dibur, *El artículo 64 de la Ley de Política Migratoria Argentina: Una norma inconstitucional*, 2005-C La Ley 224, [9] (2005).
There was scholarly and jurisprudential debate regarding the time when the law was deemed enforceable. According to article 122, the law took effect since its publication in the Official Gazette (it was published on 21 January 2004). Article 124, however, states that the previous laws would apply until Law 25871 would be subject to implementation. See José María Curá, *Cuando de ingresar, permanecer y egresar del país se trata,* 2004-B La Ley 1437 (2004); and Agustín Gordillo, *El inmigrante irregular en la ley 25.871: Otra modificación transversal al derecho argentino,* 2004-B La Ley 1123 (2004). See also, the decision of the Argentine Supreme Court in *Maseda López, José Luis s/hábeas corpus en favor de Dong Cun Feng* (26 Sept. 2006).

main legal framework for immigration in Argentina,[74] it aims to grant a human right status to migration,[75] and it aims to harmonize the internal normative framework with the international conventions subscribed to by the country.[76] However, changes are still pending in order to protect the vulnerable groups that may fall outside the protection of the law.[77]

III. Reception

Argentina may be deemed a multicultural and multi-ethnic jurisdiction that invites for dialogue amongst members of society.[78] Already the Preamble of the Argentine Constitution states that the constitutional text aims "to form a national union, guarantee justice, secure domestic peace, provide for the common defense [sic], promote the general welfare and secure the blessings of liberty to ourselves [*i.e.*, Argentines], to our posterity, *and to all men of the world who wish to dwell on argentine soil*. . . ."[79] The final passage, especially, creates an open social

74 Decree 616/2010 aimed to fulfil the required implementation of Law 25871, and the study of the latter law demands the study of the former decree. Decree 616/2010, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/165000-169999/167004/norma.htm.

75 J. Brian Johns, *Felling the Void: Incorporating International Human Rights Protections into United States Immigration Policy*, 43 Rutgers L.J. 541, 571 (2013); and Hines, *The Right to Migrate*, *supra* note 7, at 472.

76 Alejandro O. Tazza, *Ley 25.871. Extranjeros. Política migratoria*, 2004-E Anales de Legislación Argentina (2004).

77 Morales, *supra* note 5, at 358.

78 Gustavo Adolfo Luque & Lucía Graciela Riveros, Alumnos extranjeros en las universidades argentinas 26 (2009); and *Diversidad cultural*, Estudiá en Argentina, *available at* https://estudia-en-argentina.com.ar/category/diversidad-cultural/.

79 Emphasis added. The Preamble in an English translation reads:

> We, the representatives of the people of the Argentine Nation, gathered in General Constituent Assembly by the will and election of the Provinces which compose it, in fulfillment of pre-existing pacts, in order to form a national union, guarantee justice, secure domestic peace, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves, to our posterity, and to all men of the world who wish to dwell on argentine soil: invoking the protection of God, source of all reason and justice: do ordain, decree, and establish this Constitution for the Argentine Nation.

contract for those who want to subscribe to it, and ultimately fosters the progress of social diversity.[80]

A. Constitution

Multiculturalism gained constitutional standing in several Latin American constitutions mainly during the 1990s.[81] These texts use different terms to refer to the presence of multicultural elements, recognizing their presence to different extents.[82] Argentina was no exception to this shift, though earlier efforts can be traced in that path for change. For example, the twentieth century brought changes to constitutional law in Argentina.[83] In 1949, during the presidency of Juan Domingo Perón, a reform to the constitutional text was implemented, incorporating social-protection ideas that had developed during the first half of that century.[84] That reform, however, was overruled in 1956.[85] The following

National Constitution of the Argentine Republic, Political Database of the Americas (July 16, 2008), http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html.

80 Gelli, *supra* note 49, at 5.

81 See, for example, Argentina (1994), Bolivia (1994), Brazil (1998), Colombia (1991), Ecuador (1998), Guatemala (1985), Paraguay (1992), and Peru (1993), as mentioned by Pablo Iannello, *Pluralismo jurídico, in* 1 Enciclopedia de Filosofía y Teoría del Derecho 767, 782 (Jorge Luis Fabra Zamora & Álvaro Núñez Vaquero coord., 2015). See also Brian Z. Tamanaha, Legal Pluralism Explained: History, Theory, Consequences 90 (2021); Harold Esteban Laguna Delgado et al., *Origen y evolución del pluralismo jurídico en américa latina, como una visión crítica desde la perspectiva del derecho comparado*, 12:5 Revista Universidad y Sociedad 381, 382 (2020); Rosembert Ariza Santamaría, *El pluralismo jurídico en América Latina y la nueva fase del colonialismo jurídico en los estados constitucionales*, 1:1 InSURgência: revista de direitos e movimentos sociais 165, 175-176 (2015); and Víctor Abramovich, *Poderes regulatorios estatales en el pluralismo jurídico global,* 11 Revista Derecho Público (SAIJ) [2] (2015).

82 Víctor Bazán, *De ciertos problemas y retos que afrontan el Estado constitucional y la protección de los derechos fundamentales en Latinoamérica,* 2011 El Derecho – Constitucional 565, [16] (2011).

83 See generally Agustín Parise, *La Carta Fundamental de los argentinos: Desde lo intrínseco, un siglo y medio después*, *in* Essays in Honor of Saúl Litvinoff 659 (Olivier Moréteau et al. eds. 2008). *n.b.*, there were changes also in the late nineteenth century.

84 Benjamín Burgos, Curso de Derecho Constitucional 72 *et seq.* (2001).

85 *Id.*

year, amendments incorporated the text of article 14 *bis*, which reinstated social rights.[86] That century continued providing changes to the text of the Argentine Constitution.[87] The *de facto* regimes introduced changes to the text in 1966, 1972, and 1976.[88] Finally, in 1994, during the democratic government of Carlos Saúl Menem, the latest reform to the Argentine Constitution took place.[89] Amongst other changes, that reform grants, by means of article 75, paragraph 22, constitutional status to a selection of international treaties subscribed by Argentina.[90]

Article 75, paragraph 19, states that the National Congress has to "enact laws protecting the cultural identity and plurality."[91] Social dy-

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 Article 75, paragraph 22 of the Argentine Constitution reads in an English translation:

> Congress is empowered:
>
> [. . .]
>
> 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.
>
> *National Constitution of the Argentine Republic, supra* note 78.

91 See the text of article 75, paragraph 19, in an English translation, at *National Constitution of the Argentine Republic, supra* note 78.

namics entail changes to the contents of cultural values, and these must be respected by subscribing to cultural pluralism.[92] After all, identity must evolve freely in a culture that deems to be plural.[93]

Multiculturalism is addressed expressly in the Argentine Constitution in the context of indigenous peoples. Article 75, paragraph 17, of the constitutional text indicates that the National Congress has:

> To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina. To guarantee respect for the identity and the right to bilingual and intercultural education; to recognize the legal capacity of their communities, and the community possession and ownership of the lands they traditionally occupy; and to regulate the granting of other lands adequate and sufficient for human development; none of them shall be sold, transmitted or subject to liens or attachments. To guarantee their participation in issues related to their natural resources and in other interests affecting them. The provinces may jointly exercise these powers.[94]

This provision addresses rights on land, a topic that is of paramount importance for indigenous peoples. In addition, it offers personal rights for indigenous peoples to attain a bilingual and intercultural education that the Legislative branch has to assure.[95] Scholars point that this provision welcomes legal pluralism in Argentina, by recognizing the ethnic and cultural pre-existence of indigenous peoples.[96]

The Argentine Constitution always welcomed and encouraged immigration. The Preamble, together with several articles (*e.g.*, 14, 20, and 25), states the constitutional protection and the enjoyment of rights for immigrants. Article 75, paragraph 22, introduces additional rights to immigrants by recognizing the constitutional standing of a selection

92 Gregorio Badeni, Manual de Derecho Constitucional § 538 (2011).

93 *Id.*

94 *National Constitution of the Argentine Republic*, *supra* note 78; *see also* Gelli, *supra* note 49, at 111.
See also Rosembert Ariza Santamaría, *Derecho Aplicable, in* Elementos y técnicas de pluralismo jurídico: Manual para operadores de justicia 43, 47 (Juan Carlos Martínez et al. coord., 2012).

95 Leading scholars have extended that right to all inhabitants, beyond indigenous peoples. Gelli, *supra* note 49, at 111.

96 María V. González de Prada, Contrato y reciprocidad: Hacia un derecho intercultural 260 (2018).

of international treaties.[97] For example, Argentina recognizes constitutional standing to the International Covenant on Civil and Political Rights (1976). The latter, in article 16, states that "everyone shall have the right to recognition everywhere as a person before the law."[98] The American Declaration of the Rights and Duties of Man (1948), also receives constitutional standing, and it acknowledges that the "American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality."[99]

B. Civil and Commercial Code

Multiculturalism is included within national codes in Argentina. For example, the 2015 Argentine Civil and Commercial Code (ACCC)[100] welcomes multiculturalism, while offering interplay of private and public law. This is made palpable in the *exposé des motifs* by the drafters of that new code of private law. The nineteenth-century commercial (1862) and civil (1871) codes had undergone extensive revision and had been subject to de-codification; while re-codification efforts were launched since the 1980s, aiming to unify civil and commercial law in a single fabric. Resilience is a characteristic of codification: codes are indeed able to adapt to different societal needs at different times and places.[101] Further, codes can be deemed fundamental *corpora* that shape law and society, and changes were introduced to the Argentine legal framework by means of the adoption of the long-awaited ACCC.

The drafters of the ACCC refer in their *exposé* to a number of tenets

97 See *supra* footnote 89, and accompanying text. Papo & González, *supra* note 70, at 241-249; and Slater, *supra* note 55, at 705-707.

98 International Covenant on Civil and Political Rights, *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. See also Dibur, *supra* note 72, at [6].

99 American Declaration of the Rights and Duties of Man, *available at* http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm See also Dibur, *supra* note 72, at [6].

100 Law 26994, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/texact.htm.

101 Agustín Parise & Lars van Vliet, *Preface*, *in* Re- De- Co-dification? New Insights on the Codification of Private Law vii, ix (Agustín Parise & Lars van Vliet eds. 2018).

that are present in the new text.[102] The *exposé* speaks of a code with a Latin American cultural identity. For example, the members of the Codifying Commission, represented by Ricardo Luis Lorenzetti, state clearly that their code has a "Latin American cultural identity."[103] They also state that the code has "a conception oriented towards the integration with the Latin American cultural block [and] that [that] is a relevant change."[104] The drafters further mention that they "incorporated notions that were proper of the Latin American culture, together with a series of criteria that are considered common to the region."[105] This same *exposé* mentions that the Codifying Commission invited for participation of Argentine and Latin American experts who were involved in the activities of a number of working groups.[106] The Codifying Commission further notes in the *exposé* whenever a proposal clearly differs from the Latin American tradition.[107] A second tenet refers to a code for a multicultural society. The Codifying Commission advocates for the autonomy, equality, non-discrimination, and absolute respect for individ-

102 See the complete text of the *exposé des motifs* in Fundamentos del Anteproyecto de Código Civil y Comercial de la Nación, *available at* https://web.archive.org/web/20140903164039/http://www.nuevocodigocivil.com/pdf/Fundamentos-del-Proyecto.pdf [hereinafter, Fundamentos del Anteproyecto]. See also Augusto C. Belluscio, *Le Code civil et commercial argentin de 2014 (Aperçu général et droit des personnes et de la famille),* 3 Revue internationale de droit comparé 663 (2015).
It is worth noting that the exposé of the ACCC refers to a real right for communitarian property of indigenous peoples. That real right, however, was ultimately removed from the ACCC. Its inclusion would have been in line with the tenet that calls for a code with a new paradigm of property law. Furthermore, it would have offered another example of the constitutionalization of private law. The definition was included in article 2028 of the draft by the Codifying Commission. Liliana Abreut de Begher, *La propiedad comunitaria indígena. Comentario del Anteproyecto de Código*, La Ley 1 (7 June 2012).
See also Liliana Abreut de Begher, *El derecho real de propiedad comunitaria indígena*, La Ley 1 (11 Oct. 2013); Pujol de Zizzias, *supra* note 42; and Salgado, *supra* note 43, at [3-5].

103 Fundamentos del Anteproyecto, *supra* note 101, at 4.

104 *Id.*

105 *Id.*

106 *Id.* at 7.

107 *Id.* at 178. For example, the *exposé* on punitive damages states that these damages are culturally distant from continental Europe and Latin America

ualities within the framework offered by a multicultural society.[108] The twenty-first century indeed presents an Argentine society that may be defined as diverse and multicultural.[109]

A tenet that is closely connected to the fading divide of private and public law refers to a code that acknowledges the constitutionalization of private law.[110] The ACCC offers a community between private law and public law, especially with the Argentine Constitution.[111] For example, the articulation is sensed between a public law system that defends human rights and equality and a private law system of contract law that offers adequate consumer protection.[112] This community of systems has long been sought for by a number of Argentine scholars.[113] The *exposé* states along those lines that "it may be affirmed that a reconstruction of the coherence of the human rights system with private law exists."[114] A number of provisions of the ACCC, therefore, find grounding in the Argentine Constitution and in supranational law.[115] The ACCC accordingly indicates that "the situations ruled by this code must be resolved according to the applicable laws, according to the Argentine Constitution, and to the human rights treaties subscribed by Argentina."[116] Furthermore, the ACCC notes that "the law must be interpreted according to the letter, the aims, the analogous laws, the dispositions that derive from human rights treaties, the juridical principles and values, in a way

108 Luis Alberto Valente, *El nuevo derecho civil y ética de los vulnerables*, 12:45 Revista Anales de la Facultad de Ciencias Jurídicas y Sociales 1 [2] (2015).

109 Oscar E. Garay, *Protección de la persona y temas de la salud en el Código Civil y Comercial,* La Ley [2] (17 Nov. 2014).

110 Julio César Rivera, *La constitucionalización del derecho privado en el proyecto de código civil y comercial, in* Comentarios al Proyecto de Código Civil y Comercial de la Nación 2012 1, 8 (Julio César Rivera ed., 2012).

111 Fundamentos del Anteproyecto, *supra* note 101, at 4. See Rivera, *supra* note 109, at 8; and Miriam Smayevsky & Marcela A. Penna, *Los derechos reales en el siglo XXI*, La Ley 1, 4 (10 Apr. 2015).

112 Miguel Carlos Araya, *El contenido del derecho comercial a partir del Código Civil y Comercial,* La Ley 1, 3-4 (20 Apr. 2015); and Eduardo M. Favier Dubois, *La "autonomía" y los contenidos del Derecho Comercial a partir del Código unificado*, La Ley 1, 8 (2 Feb. 2015).

113 Fundamentos del Anteproyecto, *supra* note 101, at 4.

114 *Id*. See Rivera, *supra* note 109, at 8.

115 Rivera, *supra* note 109, at 21.

116 Law 26994, *supra* note 99, at article 1.

that is coherent with the entire system."[117] The Argentine Constitution is now at the centre of the system, and–as mentioned before–a selection of treaties has become part of the internal system.[118] The ACCC aims to adapt the civil and commercial law to the Argentine Constitution and to supranational human rights.[119] Thus, the new text places all human beings at the centre, protecting all people regardless of their condition, and is able to constitutionalize civil and commercial law according to the human rights that were included in the 1994 constitutional reform.[120]

Another tenet of the ACCC refers to a code of equality. Again, the central place in codification is now occupied by the human being who must be treated equally.[121] Equality does not distinguish according to sex, religion, place of origin, or wealth:[122] it has a universal dimension in the ACCC.[123] Two other tenets refer to a code that is based on a non-discriminatory paradigm, and to a code of individual rights and of rights with a collective impact (*incidencia colectiva*). The non-discriminatory text addresses both types of rights according to the Argentine Constitution.[124] The drafters mention that most codes only regulate individual rights. However, the ACCC gives significant importance to rights with a collective impact (*e.g.*, the right to a healthy environment, the right to non-discrimination), keeping them in line with the Argentine Constitution.[125] Individual rights and rights with a collective impact

117 *Id.* at article 2. See Héctor P. Recalde et al., *Precisiones sobre el Código Civil y Comercial y el Derecho Laboral*, La Ley 1, 1 (10 Nov. 2014).

118 *Id.*

119 Julio César Rivera, *Aplicación del Código Civil y Comercial a las relaciones preexistentes y a los procesos judiciales en trámite Algunas propuestas,* La Ley 1, 2 (17 June 2015).

120 Garay, *supra* note 108, at [1].

121 *Id*.

122 *Ida*.

123 *Id*. at [9].

124 It should be noted, however, that some scholars claim that this tenet is not fully present when dealing with the rights of indigenous peoples. See Pamela Cacciavillani, *¿Un código para una sociedad multicultural? Algunas reflexiones histórico-jurídicas sobre el proceso de unificación de los códigos civil y comercial en Argentina,* 9 Revista Electrónica del Instituto de Investigaciones "Ambrosio L. Gioja" 25, 32 (2015).

125 See the text of articles 41 and 43, in an English translation, at *National Constitution of the Argentine Republic, supra* note 78.

are both explicitly mentioned in the ACCC.[126]

The division between private and public law becomes blurry in family relations. The more legislators focus on preserving the equality of all members of society and on protecting the principle of non-discrimination, the more private and public law become cooperative and complementary.[127] Family relations preserve in Argentina their importance as a social institution and strengthen the principle of equality and non-discrimination recognized at constitutional and international levels.[128] The Codifying Commission gave pre-eminence to a code with express principles that represent a multicultural society;[129] and, as indicated in the *exposé*, the ACCC represents a "democratization of the family,"[130] recognizing the different types of families that individuals may form.[131] Family relations in the ACCC are hence defined by the current culture of the Argentine society and not by a natural principle.[132]

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126 Law 26994, *supra* note 99, at article 14. See Lidia M. R. Garrido Caordobera, *Derechos individuales y de incidencia colectiva en el Código Civil y Comercial*, La Ley 1, 6 (10 Feb. 2015).

127 2 Código Civil y Comercial de la Nación Comentado 567-571 (Ricardo Luis Lorenzetti ed., 2015).

128 For an analysis on how the principle of equality–as incorporated into the family law provisions of the ACCC–addresses all sectors of Argentine society, see Julio César Rivera, *La proyectada recodificación del derecho de familia*, 4 Revista de Derecho de Familia y de las Personas 3 (2012).

129 Fundamentos del Anteproyecto, *supra* note 101, at 5; and Aída Kemelmajer de Carlucci, *Las nuevas realidades familiares en el Código Civil y Comercial argentino de 2014*, La Ley 1, 2 (8 Oct. 2014).

130 Fundamentos del Anteproyecto, *supra* note 101, at 60.

131 Marisa Herrera, *Panorama general del derecho de las familias en el Código Civil y Comercial. Reformar para transformar,* La Ley Suplemento Especial Nuevo Código Civil y Comercial 2014, 39 (17 Nov. 2014).
For a critical note on how the "democratization of the family" in the ACCC fails to recognize and protect vulnerable parties in family relations, see Úrsula C. Basset, *El abuso en las relaciones de familia*, ED-DCCLXIII-778 1 (3 Mar. 2019).

132 Kemelmajer de Carlucci, *supra* note 128, at 1. This approach also affected the understanding of damages within family relations, see Úrsula C. Basset, *Admisibilidad de los daños en las relaciones de familia: De la inmunidad a la postfamilia*, ED-DCCLXXVII-479 1 (1 June 2018).
For a critical note on the individualistic approach that the ACCC takes on the family as a social institution, see Eduardo José Cárdenas, *La familia en el Proyecto de Código Civil,* La Ley 1 (15 Aug. 2012).

Drafters of the ACCC aimed to preserve equality amongst all members of society and to protect the principle of non-discrimination when addressing family relations. The ACCC considers family as an institution defined by culture, which is in line with article 14 *bis* of the Argentine Constitution.[133] The latter article considers family as an institution independent from the formal act of marriage.[134] Furthermore, the approach to family relations taken by the ACCC represents the views adopted by the Inter-American Court of Human Rights, which recognizes family as an institution that can take different forms.[135] Hence, the approach to family relations democratizes the concept of family and uses public law to give grounds to its foundational principles. The cooperation and complementarity of private and public law is therefore palpable in the ACCC. After all, families play a fundamental role as a social institution within a code that is aimed at a multicultural society.

The ACCC was enacted within a framework in which multiple sources of normative production coexist. There is pluralism, where pre-established rules and regulations coexist (*e.g.*, local, national, regional, transnational, supranational).[136] In a different context, Jacques Vanderlinden correctly stated that "regulatory orders are, in every society, multiple and diverse,"[137] to then add that "the reference to a dominant (or even exclusive) regulatory order raises the problem of possible conflicts between them, conflicts of which the individual will be the battlefield."[138]

133 See the text of article 14 *bis*, in an English translation, at *National Constitution of the Argentine Republic, supra* note 78.

134 Gelli, *supra* note 49, at 129; and Fundamentos del Anteproyecto, *supra* note 101, at 59-60.

135 Kemelmajer de Carlucci, *supra* note 128, at 2; and Silvana Ballarin, *Las relaciones de familia: ¿árbol o rizoma?,* 96 Derecho de Familia: Revista Interdisciplinaria de Doctrina y Jurisprudencia 3 (2020).

136 Gonzalo Sozzo, *Las tratativas contractuales, in* Derecho privado del siglo XXI. 3 Contratos. Empresa 29-30 (Miguel Á. Ciuro Caldani & Noemí L. Nicolau dir. 2021).

137 Jacques Vanderlinden, *Return to Legal Pluralism - Twenty Years Later*, 21:28 Journal of Legal Pluralism and Unofficial Law 149, 151 (1989).

138 *Id.*

C. Special Legislation

Multiculturalism is also present in special legislation in Latin America.[139] The rights of indigenous peoples in Argentina serve as an illustration of that presence. The main framework of rights of indigenous peoples is present in Law 23302 of 1985[140] and the required implementation decree (*decreto reglamentario*) of 1989.[141] That law deals with the Argentine general policy related to indigenous peoples and must be studied in conjunction with other instruments. At an international level, for example, and as already mentioned, Argentina incorporated into its framework the Indigenous and Tribal Peoples Convention (1989) of the International Labour Organization.[142] Further, Argentina approved the UN Declaration on the Rights of Indigenous Peoples (2007)[143] and, being a member of the Organization of American States, welcomed the American Declaration on the Rights of Indigenous Peoples (2016).[144] At a national level, Argentina enacted other provisions both with a federal and provincial scope.[145] At a regional level, it is worth noting–once

139 Tamar Herzog stated that, starting in the 1980s, "most Latin American states moved to institute either in their constitutions, or in particular laws, some measure of legal pluralism." Tamar Herzog, *Latin American Legal Pluralism: The Old and The New,* 50 Quaderni fiorentini per la storia del pensiero giuridico moderno 705, 705 (2021).

140 Law 23302, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/23790/texact.htm. See Corna & Fossaceca, *supra* note 41, at 789.

141 Decree No. 155/1989, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/155000-159999/155713/texact.htm.

142 Law 24071, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/470/norma.htm. See Álvaro B. Flores, *La regulación de las limitaciones al dominio en razón del interés público en el Proyecto de Código Civil y Comercial,* Jurisprudencia Argentina 1, [9] (31 July 2013).

143 See paragraph 2 of the motivations of Joint Resolution 1-E/2017, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/280000-284999/280420/norma.htm. See also Iride Isabel Grillo, *Caminando el siglo XXI. Muchas leyes y poca justicia. Reflexiones sobre el Anteproyecto de Código Civil en materia de pueblos indígenas argentinos*, El Derecho - Constitucional 568, [5] (2012).

144 American Declaration on the Rights of Indigenous Peoples, *available at* https://www.oas.org/en/sare/documents/DecAmIND.pdf.

145 Pablo M. Macarón, Propiedad indígena: Reivindicación de tierras ancestrales 334-335 (2017). See also the repository *available at* https://www.argentina.gob.ar/derechoshumanos/inai/normativa.

more–that new efforts took place within a broader context, since several jurisdictions at a similar time period started to deal with property relations of indigenous peoples.[146]

Rights of indigenous peoples are recognized by means of Law 23302. This recognition alerts on a policy shift, when compared with two previous stages of the rights of indigenous peoples in Argentina. A first stage was marked by state efforts that pursued extermination of indigenous peoples, alternatively forcing members of these groups to "assimilate" to the rest of the population. That stage did not recognize equal rights to indigenous peoples. A second stage of the rights of indigenous peoples left behind extermination and focussed on the "assimilation" of the culture of the indigenous peoples to that offered by the central model.[147] Accordingly, Argentina gradually moved from a denial to the current reception of rights.[148]

Law 23302 addresses the Argentine current policy on indigenous peoples. It states, in article 1, that Argentina cares for and supports indigenous peoples and communities. It further points to the full participation of indigenous peoples in the Argentine socioeconomic and cultural process, respecting their own values and modalities. That same article calls for plans that would allow for access to ownership of land and for the promotion of, amongst others, agricultural, mining, or industrial activities of indigenous peoples. Finally, this seminal article points to plans towards the preservation of cultural aspects of indigenous peoples in education and to healthcare for members of these groups. The article indeed offers a holistic approach to the current policy.

The Argentine policy on indigenous peoples–as addressed in Law 23302–deals with diverse aspects. For example, a National Institute of Affairs of Indigenous Peoples (*Instituto Nacional de Asuntos Indigenas,* INAI)[149] was established according to article 5 of Law 23302.[150] The

146 Corna & Fossaceca, *supra* note 139.

147 Juan Cianciardo, *Universalidad, multiculturalismo y derechos de los pueblos originarios. Una aproximación desde el caso argentino,* 23:18 Díkaion 205, 209-219 (2009).

148 *Id.* at 209.

149 For more information on the INAI, see https://www.argentina.gob.ar/derechoshumanos/inai.

150 See generally Decree 155/1989, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/155000-159999/155713/texact.htm.

INAI is involved in matters that relate to ownership of land, amongst other activities.[151] The policy also deals with the allotting of suitable and sufficient lands to communities.[152] It calls for allotting land that should be suitable for, amongst others, agricultural, mining, or industrial exploitation, according to the modalities of each community.[153] Further, the land must be located in the place where communities live, and if necessary, in the closest areas most suitable for their flourishing.[154] The policy, in a holistic manner, also addresses education,[155] healthcare,[156] social security,[157] and housing.[158]

Rights on land–as mentioned before in this report–are of paramount importance for indigenous peoples. Law 26160[159] of 2006 declared a four-year period of emergency in terms of possession and ownership of lands traditionally occupied by indigenous communities.[160] Enforcement of court decisions and of procedural or administrative acts whose purpose is the eviction from lands is suspended during that period. This law triggered opposing opinions amongst different actors due to its limitations to a pillar of private law.[161]

Scholars point that there is a gap between law in the books and law in action, when looking at rights of indigenous peoples in Argentina.[162] This gap leads towards–amongst other aspects–the so-called "right to

151 *Id.* at articles 21-24.

152 Law 23302, *supra* note 139, at articles 7-13.

153 *Id.* at article 7.

154 *Id.*

155 *Id.* at articles 14-17.

156 *Id.* at articles 18-21.

157 *Id.* at article 22.

158 *Id.* at articles 23-23 *bis*.

159 Law 26160, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/120000-124999/122499/texact.htm.

160 The term was extended until 23 November 2025. See article 1 of Decree 805/2021, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/355000-359999/356886/norma.htm.

161 See, for example, Carlos Santiago Lorda, *Comunidades indígenas. Tierras ocupadas. Suspensión de desalojos,* ED-DCCLXXVII-243 (25 Apr. 2018).

162 Macarón, *supra* note 144, at 338. See also Grillo, *supra* note 142, at [3]; and Iride Isabel Grillo, *Pueblos originarios y tutela constitucional efectiva,* ED-DCCLXXII-389 [1-3] (14 July 2011).

their own rights" (*derecho al propio perecho*),[163] which has been addressed by courts in Argentina. The "right to their own rights" relates to attaining a degree of compatibility or coordination between the traditions and customs of indigenous peoples and the provisions established in the central legal system.[164] Conflicting positions are palpable in criminal law, for example, if a provision is more or less favourable for the accused.[165] Two court decisions in the case *Ruíz, José Fabián*[166] merit special attention since they show how courts can deal with this right in Argentina. Ruíz, a male member of the Wichí indigenous peoples, was accused of raping the nine-year-old daughter of his partner.[167] In 2006, a high court in the province of Salta declared that a decision in the case should attend the ethnic and cultural identity of the accused. It further stated that an anthropological report and statements of members of the Wichí community had been disregarded by the lower courts.[168] In 2016, the accused was ultimately found guilty of rape in light of the Argentine Criminal Code, regardless of the customs or practices of the Wichí community.[169] This case points to the presence of legal pluralism, with the coexistence of two systems: state criminal law condemns the act of the accused while the same act is accepted by the indigenous community.[170] This shows how different interpretations can be given to the "right to their own rights."

IV. Circulation

Legal ideas and models tend to circulate. Jurists have been, and are,

163 Cianciardo, *supra* note 146, at 220.

164 *Id.* at 232-233.

165 *Id.* at 233.

166 See the decisions in the cases *28.526/06 CJS* and *3399/5 Juzgado de Instrucción de 2da. nominación, Norte, Tartagal*.

167 For an analysis of the case, in light of the "right to their own rights," see Cianciardo, *supra* note 146, at 233-238. See also Ana Dominga Huentelaf & Nora Trinidad Aravena, *La garantía constitucional del respeto a la identidad cultural en el proceso penal. Fallo de la Corte de Justicia de Salta*, MJ-DOC-3073-AR (7 Feb. 2007).

168 See also Cianciardo, *supra* note 146, at 233.

169 See María-Cruz La Chica, *Indígena, mujer y niña: grupos en situación de vulnerabilidad en un contexto multicultural*, 61 Debate Feminista 134, 139-143 (2021).

170 Iannello, *supra* note 80, at 788.

familiar with the concept of borrowing ideas. Alan Watson, before developing his theory on legal transplants, briefly defines these as "the moving of a rule or a system of law from one country to another, or from one people to another."[171] This moving of provisions will make the recipient of the provision the new owner, and in turn, the recipient makes the borrowed provision new: when the original provision interacts with the *ethos* of the recipient society, the interaction results in a body of its own.

The American continent has been subject to many legal transplants. The first transplant was the transportation of Castilian law to the Hispanic possessions in the early sixteenth century.[172] Many transplants followed since then, both at intercontinental and intracontinental levels. Latin American jurisdictions turned to transplantation when creating their systems of law.[173] That transplantation benefited from European sources, and eventually developed into a common set of secondary sources and methodologies for the endeavours in civil law.[174] Yet, there was also vernacular circulation in Latin America. For example, during the codification period, the adoption of code provisions from other Latin American jurisdictions was also very common,[175] resulting in pollination,[176] such as the ones experienced by borrowings from the civil codes of Argentina and Chile.

Argentina inherited the continental European system of law[177] from Spain. In public law, however, especially in constitutional law, it considered elements of the US model.[178] Even when Argentine sources are

171 Alan Watson, Legal Transplants: An Approach to Comparative Law 21 (2 ed., 1993).

172 See Alfonso García-Gallo, 1 Manual de Historia del Derecho Español 103 (10 ed., 1984).

173 Mirow, *supra* note 23, at 133.

174 *Id.* at 142.

175 Bernardino Bravo Lira, Derecho Común y Derecho Propio en el Nuevo Mundo 51 (1989)

176 Alejandro Guzmán Brito, La codificación civil en Iberoamérica. Siglos XIX y XX 252-254 (2000).

177 The terms Civil Law, Romano-Germanic, and Continental European can be used indistinctly in this report to refer to the prevailing system in Argentina.

178 Ricardo Zorraquín Becú, *La recepción de los derechos extranjeros en la Argentina durante el siglo XIX*, 4 Revista de Historia del Derecho 325, 357 (1976).

generally traced to Roman, Spanish or French sources, other sources should not be overlooked. The National Congress has the power to enact substantive law (*e.g.*, civil and commercial code, criminal code),[179] while provinces preserve the power to enact their procedural codes. Further, provinces enact their own constitutions in accordance with the Argentine Constitution, and ensure administration of justice and municipal regimes.[180] The Argentine Constitution is at the vertex of the hierarchy of the Argentine legal framework.[181] In 1994, as mentioned before, the latest reform to the Argentine Constitution took place, and granted, by means of article 75, paragraph 22, constitutional status to a selection of international treaties. In addition, it should be noted that federal legislation prevails over provincial legislation.[182]

This section of the report will offer two snapshots of legal transplants in Argentina, serving as illustrations. Even when Argentina should not be deemed a mixed legal system, a degree of *mixité*[183] could be sensed from the legal borrowings as presented in these snapshots.

A. Codification

Legal borrowings were explored in the preparation of the ACCC, and contract law offers a fertile ground to explore a degree of *mixité*. Globalization had triggered significant changes in contract law in Argentina, motivating a need to adapt to new realities by means of different business structures, ultimately surpassing the classical models.[184] There

179 See the text of article 75, paragraph 12, in an English translation, at *National Constitution of the Argentine Republic, supra* note 78.

180 See the text of articles 5, 28, 123, in an English translation, at *id.* See also Julieta Marotta, Access to Justice and Legal Empowerment of Victims of Domestic Violence through Legal Organizations in the City of Buenos Aires: A Qualitative Empirical Legal Study 44-45 (2017).

181 See the text of article 31, in an English translation, at *National Constitution of the Argentine Republic, supra* note 78; and Gelli, *supra* note 49, at 284-295.

182 See the text of articles 5 and 31, in an English translation, at *National Constitution of the Argentine Republic, supra* note 78. See also Julio C. Rivera, 1 Instituciones de Derecho Civil–Parte General 129 (3 ed., 2004).

183 The term *mixité* is used in this report with the extent presented by the General Rapporteur in the Questionnaire dated 24 April 2021.

184 Mauricio Boretto, *Los llamados "contratos de distribución" en el Código Civil y*

was a need to include contractual models that had emerged from custom and practice, special legislation, and from the will of the parties.[185]

The ACCC includes provisions that were influenced by local, regional, and global laws.[186] In some provisions the influence is traced to local doctrine and court decisions, in others the influence is found in the laws of Mercosur member states, while in others the influence is clearly global.[187] For example, contract law provisions in the ACCC have been subject to global influences.[188] Further, contract law provisions aim at attaining a Latin American cultural identity. Accordingly, the *exposé* mentions that "the different options [in contract law] were extensively debated in the [Codifying] Commission amongst the jurists who contributed and that they adopted the method they considered most adequate for the Argentine and Latin American legal tradition."[189]

The *exposé* provides examples of the circulation of legal ideas and models. An example of harmonization efforts is found in the part dealing with consumer contracts. There, amongst other provisions, the drafters refer to the consumer laws in Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela, and further references are made to the Unidroit Principles and to the codes of Quebec and the Netherlands.[190] The *exposé* in its part on agency provides references to principles, such as Unidroit, and to the texts of the Pavia Group and PECL.[191] Article 2651 of the ACCC helps visualize the interest for a globalist code. This article addresses freedom of contract, and paragraph d of the article states that "generally accepted commercial practices, custom, and principles of commercial international law are

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Comercial, La Ley [1] (6 Nov. 2014).

185 Jonathan M. Brodsky & Enzo E. Donato Brun, *Aspectos generales de los contratos en el Proyecto de Código Civil y Comercial de la Nación*, I:1 Revista En Letra, 79 83 (2014).

186 Gonzalo Sozzo, *Bajo la influencia del derecho contractual global: la "responsabilidad precontractual" en los contratos negociados en el Nuevo Código Civil y Comercial, in* 3 Tratado de Derecho de Daños § 3 (Sebastián Picasso & Luis R.J. Sáenz dir., 2019).

187 *Id.*

188 *Id.*

189 Fundamentos del Anteproyecto, *supra* note 101, at 100.

190 *Id.* at 115 *et seq.*

191 *Id.* at 53.

applicable when parties refer to them in their contracts."[192] Therefore, harmonizing instruments now fulfil an important updating function in Argentina.[193] The ACCC is thus placed within a global context. Further, the ACCC encapsulates a modern theory of contract law, departing to some extent from the national legal tradition and reaching out to novel institutions that may help better address conflicts amongst parties.[194] Corollary, the sources of the ACCC in contract law include the previous re-codification attempts in Argentina,[195] and amongst others, the codes of Italy and Quebec, CISG, and the already mentioned Unidroit Principles.[196]

B. Court Decisions

A degree of *mixité* may also emerge from the decisions of the Argentine Supreme Court. The highest court in Argentina has had a long tradition benefiting from the use of comparative law. After all, as Justice Ruth Bader Ginsburg of the US Supreme Court stated, comparative law involves "sharing with and learning from others."[197] Argentine courts have frequently reached out to foreign law, especially in constitutional law matters. [198] It is therefore not rare to encounter references to foreign

192 Law 26994, *supra* note 99, at article 2651.

193 Silvio J. Battello Calderón, El orden público en el derecho internacional privado del Mercosur, 2012, 167.

194 Esteban R. Hess, *Primeras aproximaciones a la parte general del nuevo Código Civil y Comercial de la Nación, aprobado por Ley 26994/2014*, 29 Cartapacio de Derecho 1 [15] (2016).

195 For example, for an overview of contract law in the 1998 draft, see generally Noemí L. Nicolau et al., *Reflexiones sobre el proyecto de código civil de 1998 en materia contractual*, Responsabilidad Civil y Seguros 239 (2000).

196 José M. Gastaldi & José M. Gastaldi, *Los contratos en general, in* Comentarios al Proyecto de Código Civil y Comercial de la Nación 2012 523, 525 (Julio C. Rivera coord., 2012).

197 Ruth Bader Ginsburg, "*A decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication* (1 Apr. 2005), *available at* www.asil.org/events/AM05/ginsburg050401.html, cited by Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 Harv. J.L. & Pub. Pol'y 653, 654 (2009).

198 Graciela Rodriguez-Ferrand, *The Impact of Foreign Law on Domestic Judgments: Argentina* (March 2010), *available at* www.loc.gov/law/help/domestic-

cases in an Argentine decision.[199]

The Argentine Supreme Court used to look–and still looks–at the US Supreme Court. Jonathan M. Miller has proved that US rules experienced authority in Argentina as they were considered a prestigious foreign model during the nineteenth century.[200] The North-American authority seemed to guarantee that a local court would enjoy immediate support whenever it invoked US law and practice.[201] The US constitutional model quickly became an instrument of faith,[202] though already in the early twentieth century the Argentine Supreme Court had developed its own jurisprudence and had started to abandon the cultural dependency on the US.[203]

The Argentine Supreme Court used to cite–and still occasionally cites–US cases, when lacking precedents in a specific area.[204] References naturally were not–and are not–made only to US law. International human right treaties have also become authoritative in Argentina. Authority has been sought by the Argentine Supreme Court in those instruments, especially starting from the 1990s onwards, when those

judgment/argentina.php; and Zorraquín Becú, *supra* note 177, at 359.

199 Rodriguez-Ferrand, *supra* note 197.

200 *Id.*

201 Jonathan M. Miller, *Courts and the Creation of a "Spirit of Moderation": Judicial Protection of Revolutionaries in Argentina, 1863–1929*, 20 Hastings Int'l & Comp. L. Rev. 231, 236 (1997).

202 Miller, *supra* note 57, at 1485; and Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 Int'l J. Const. L. 269, 277 (2003).

203 Zorraquín Becú, *supra* note 177, at 346.

204 On the use of US cases by the Argentine Supreme Court see, amongst others, Rosenkrantz, *supra* note 201, at 270-276, 290-291; Abelardo Levaggi, *La interpretación del derecho en la Argentina en el siglo XIX*, 7 Revista de Historia del Derecho 23, 104 (1979); and Gregorio Badeni, *Las doctrinas "Campillay" y de la "real malicia" en la jurisprudencia de la Corte Suprema de Justicia*, 2000-C La Ley 1244 [11] (2000). References to US cases by the Argentine high court have occasionally been incorrect, inadvertently or not. See Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 Am. J. Comp. L. 839, 880-882 (2003); and Santiago L. Capparelli & Mario A. Capparelli, *El caso "Bustos": su lamentable alejamiento de "Smith" y "Provincia de San Luis" y su equivocado sustento en fallos de la Suprema Corte Norteamericana*, La Ley Suplemento Actualidad 1, [1–6] (12 Apr. 2005).

instruments helped local decisions to attain legitimacy.[205] Also, the decisions of the Inter-American Court of Human Rights have started to be considered authorities.[206] In the 2000s, the Argentine Supreme Court showed a growing tendency to offer reasons for its decisions based on international precedents, even making these foreign precedents a reason to trigger local changes.[207] The net is also cast towards Europe. For example, in the 1994 case of *Cafés La Virginia*[208]–that impacted on the activities dealing with Mercosur–the Argentine Supreme Court cited the European case of *Van Gend & Loos*.[209]

In private law references are also made to French scholars and the authors dealing with the different codes; and to French, German, and Italian decisions.[210] Spanish works have also, naturally, been mentioned by the Argentine Supreme Court.[211] Other decisions have mentioned, for example, the works of Jeremy Bentham, Friedrich Carl von Savigny, and Johannes Voet, and the Latin American works of Augusto Teixeira de Freitas.[212] An Argentine scholar mentioned in 2012 that the citations to international law have become an uncontainable fashion for the Argentine Supreme Court, and that such a fashion encompasses se-

205 Miller*, supra* note 203, at 865.

206 Carlos María Folco*, Apuntes sobre Derechos Humanos, celeridad procesal y la doctrina prospectiva en la jurisprudencia de Corte*, 2010-E La Ley 812, [4] (2010).

207 Alberto B. Bianchi, *El derecho constitucional en la jurisprudencia de la Corte Suprema entre 2003 y 2007*, 2008-B La Ley 717, [36-38] (2008); and Germán González Campaña, *Efectos de la jurisprudencia internacional en el derecho argentino (crisis de la supremacía constitucional), in* Cortes Supremas: Funciones y recursos extraordinarios 409, 453 (Eduardo Oteiza coord., 2011).

208 CSJN 13 Oct. 1994, *Cafés La Virginia S.A.*–apelación (por denegación de repetición), Fallos 317:1287.

209 § 29 of the vote of Justice Antonio Boggiano. See also Alfonso Santiago, *Actualidad en la jurisprudencia de derecho constitucional la Corte Suprema desde el pacto de Olivos hasta nuestros días–Principales fallos institucionales 1994-1999*, 2000-A La Ley 1069, [36] (2000); and Jacquelina E. Brizzio & José Emilio Ortega*, Integración y solución de conflictos: perspectivas y propuestas para el Mercosur*, 1999-2 Revista de Derecho del Mercosur 67, [14-15] (1999).

210 Levaggi*, supra* note 203, at 105-107; Zorraquín Becú, *supra* note 177, at 359; and Rodriguez-Ferrand, *supra* note 197.

211 Levaggi*, supra* note 203, at 105-107.

212 *Id.*

rious risks.[213] It can be concluded–together with Alfredo M. Vítolo–that Argentina experiences a trend of "precedent shopping."[214]

V. Closing Remarks

Law is a social science that is subject to change. It adapts to the needs of particular societies in different times and periods. This report engaged in an exercise that aimed to help explain the interaction of a multicultural population within the legal system of Argentina, at different periods.

The report initially addressed the historical reasons for multiculturalism in Argentina. Independence was declared in 1816 in Argentina, and since then, a plethora of actions shaped two pillars of multiculturalism in Argentina. On the one hand, policies were implemented in regards to indigenous peoples and their rights, shifting from extermination, to "assimilation," to recognition. On the other hand, being Argentina an "immigration" country, millions of inhabitants were welcomed to Argentina, with policies there also shifting, at times being restrictive, while at other times being open and flexible.

The report then focused on the existing framework for the multicultural population in Argentina. The topic there was approached at three levels. Firstly, the report looked at the shifts in constitutional texts, with special attention to the 1994 reform that granted constitutional status to a selection of international treaties subscribed by Argentina. Secondly, the report looked at the 2015 code of private law and the tenets presented by the Codifying Commission in its *exposé*, pointing to multiculturalism. Thirdly, the report looked at the special legislation that offers a framework to the rights of ingenious peoples, both local and international.

The report finally dealt with the circulation of legal ideas and models in Argentina. Legal transplantation is not a rarity in the Americas, and this report offered two snapshots to illustrate legal borrowings in Argentina. Even when this South American country should not be deemed

213 Manuel J. García-Mansilla, *Un truco de magia constitucional demasiado evidente– Omisiones, debilidades y (Ho)(E)rrores del "Roe v. Wade" argentino*, 4:4 Revista de Derecho de la Familia y de las Personas 173, [6] (2012).

214 Alfredo M. Vítolo, *La Posibilidad de Perdonar a los Responsables de Cometer Crímenes de Lesa Humanidad*, 34:II Anales de la Academia Nacional de Ciencias Políticas 5, 6 (2007), cited by García-Mansilla, *supra* note 212, at [13].

a mixed legal system, a degree of *mixité* is observed when looking at changes in contract law as welcomed in the ACCC and at the use of foreign authorities by the Argentine Supreme Court. Other examples could be explored when looking for *mixité* in Argentina, since, after all, the two snapshots in this report are not exceptional.

This report benefited from approaching multicultural populations with tools from legal history, hence tracing the changes that were experienced in this South American country. Legal history should aim to show how law evolved through successive periods, unveiling its persistent elements and variations.[215] Legal history serves as a means to show the relativity that law experiences because of its evolution and of the shifts regarding, amongst other things, concepts and interpretations.[216] History is intrinsic to law, and hence it is impossible to fully understand the law when neglecting history.[217]

215 Abelardo Levaggi, 1 Manual de Historia del Derecho Argentino (Castellano-Indiano/Nacional) 11 (2d ed, 1996).

216 Víctor Tau Anzoátegui, El Futuro de la Historia Jurídica en las Aulas 86-87 (2010).

217 Levaggi, *supra* note 214, at 4.

Administrative Silence

Report on the Republic of Argentina to the XXI International Congress of the International Academy of Comparative Law

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I. Introduction.

1. Brief Reference to the Argentine Legal System.

As it is established in the first article of the Argentine National Constitution *"The Argentine Nation adopts the federal republican representative form of government…"*.[2] Argentina's political framework is a federal presidential representative democratic republic, in which the president is both head of State and head of government complemented by a multiparty system.

When referring succinctly to the three attributes that constitute Argentina's form of government, although the system designed is representative, since the constitutional reform made in 1994, some forms of semi-direct democracy have been incorporated by article 39 – popular initiative for law projects- and article 40, with two modalities of popular consultation: binding and not binding one. In this respect, it could be sustained that, the representative system stays effective but it has been attenuated.

The republican form refers basically to a political system of division and control of power. According to the National Constitution, the separation of powers is expressed in three different ways: a) the tripartite classic division between three powers: executive, legislative and judicial; b) the federal division that recognizes two territorial orbits of power, one represented by the central, federal and national power,

2 In this sense, the Supreme Court has declared that the representative system and the political parties have reached to be synonymous (Cfr. "Ríos Antonio Jesús", Consid. 15. 310-819, 1987). On the other hand, the Tribunal has elaborated several principles about the relationship between the representative system, the political parties, the electoral system and the electoral college. They are sustained spite of the changes made by the modifications of the Constitution in 1994 in which the last one was eliminated such as "UCR, CFI-Partido Federal y Frejupo", 16 November 1989.

and another for the local or provincial one (which includes the City of Buenos Aires); and c) the division between the constituent power and the constituted powers. These separations of power pretend to avoid the risks that could raise from excessive centralization in the taking of public decisions introducing a system of relationships of power with reciprocal controls, called "checks and balances".

The concept of federalism mentioned means the existence of a state that supposes the presence of different territorial centers with normative capacity which balance the unit of a single state with the plurality and autonomy of many others. However, in the Argentinean Constitution, this system has its own characteristics that differentiate it from the North American model, with three types of relationships in the federal structure: a) subordination of the local states (provinces and the City of Buenos Aires) to the federal state; b) equal representation in the Senate, that represents the balance between the small states and the big ones, collaborating in the legislative government of the Nation; c) and coordination, linked to the distribution of exclusive, delegated and reserved jurisdictions.

2. Control Over Administrative Actions and Omissions. Administrative and Judicial Review.

According to Cambridge dictionary, to control is *"to order, limit, or rule something, or someone's actions or behavior"*[3]. From a legal point of view, it is an act or procedure in which a person or a body duly authorized to do so, examines or supervises an act carried out by another person or body, to verify whether in the preparation and said act, all the requirements demanded by law have been observed.[4]

When we speak about control of the administration in Argentina, we are referring to a situation that pretends to guarantee that the activities and omissions of the Administration respect or comply with the applicable law. That is, the full respect for the National Constitution, the international treaties that have been signed, the legal and regulatory norms, and the general principles of law. In Argentina, this is known as

3 https://dictionary.cambridge.org/es/diccionario/ingles/control

4 Emilio, Fernandez Vazquez, "Diccionario de Derecho Público", Astrea, Buenos Aires, 1981, p.161.

the principle of legality, meaning that the Administration has, necessarily, to act according to the applicable law.

Argentine's supreme law is the National Constitution, issued in 1853, which suffered different modifications over the years. There is however a concept that wasn't modified which is that the federal judges and the Supreme Court review and control the legality and constitutionality of the national administration activity. This is known as a "judicial" system of control over the Administration. This system has also been ratified by the constant jurisprudence of the Supreme Court and constitutes one of the pillars of the republican system.

It should be noted, that the Argentine judicial power controls the Administration, whereas in comparative law there are different ways to exercise this control: the so-called French, administrative, or dual jurisdiction, which consists of attributing the control to an administrative organism, characterized by having independence of criteria and separation of the administration (case of France) and the so-called judicial system, or single jurisdiction, which consists of attributing such control to a judicial organism, that can be exercised by ordinary courts, as is the case of the United Kingdom and the United States of America, or specialized courts, as is the case of Spain, Colombia, Uruguay, and Argentina.

As I have expressed, the National Constitution establishes judicial control over the Administration. Authors in Argentina disagree about the origin of the system. Traditionally, authors have argued that the Argentine judicial system was taken from the United States Constitutional model[5] and others that the judicial system adopted by the National Constitution comes from the medieval Spanish law (in particular the Justice of Aragon) and that it came to Argentina through the Constitution of Cádiz of 1812, whose article 243 is the source of article 109 of the National Constitution.[6]

The main guidelines provided by the Constitution regarding the judicial control over the Administration are:

a) The Supreme Court and federal judges are in charge of controlling the administrative activity, as one of the competencies assigned to

5 Manuel J., García Mansilla and Ricardo, Ramirez Calvo, "Las Fuentes de la Constitución Nacional", Lexis-Nexis, Buenos Aires, 2006.

6 Juan Carlos, Cassagne, "El Principio de Legalidad y el Control Judicial de la Discrecionalidad Administrativa", Marcial Pons, Madrid-Buenos Aires, 2009, p. 57.

them by article 116, which establishes the following: *"The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, except as provided in Section 75, subsection 12, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more Provinces, between one Province and the inhabitants of another Province, between the inhabitants of different Provinces, and between one Province or the inhabitants thereof against a foreign state or citizen"*.

b) The Executive Power is prohibited from (i) participating in cases that are processed before the Judicial Power and (ii) reopening those already decided. These prohibitions come from section 109 which provides that *"In no case may the President of the Nation exercise judicial functions, assume jurisdiction over pending cases, or reopen those already decided"*, taken by Juan Bautista Alberdi, one of the most important influences of the 1853 National Constitution with his book "Bases" which was a project of a Constitution, from the Constitution of the Spanish Monarchy, sanctioned in Cádiz in 1812, which pretends to contain the Executive Power.

The Supreme Court has made, through the years, an interpretation of the judicial control over the Administration. The main principles are the following:

a) the judicial control is not absolute, there are "political matters" that exceed their control. Chronologically, the first case in introducing the concept of "political matters" was "Procurador Fiscal de Santa Fe vs Hué",[7] and the leading case is "Cullen vs Llerena",[8] in which the Supreme Court decided that the intention of the Province of Santa Fe governor to be restituted in his charge, against the intervention disposed of by the federal government, was an act of political matter, whose analysis corresponds exclusively to the Congress and the Executive Power.[9]

b) the Administration cannot exercise constitutionality control;

7 4-311, 320-321 (1867)

8 53-420 (1893).

9 In the United States are known as political questions.

which is reserved to the judicial power.[10]

c) The Administration may exercise jurisdictional functions to the extent that there is subsequent and sufficient judicial control, through which the facts and applicable law are reviewed.[11]

3. Administrative Procedure in Argentina. National Regulation. The Right to Petition Before the Authorities and Obtain an Express Answer.

The administrative procedure is how the Public Administration legally expresses itself. The different organisms that take part in the Public Administration have a formal operation and are subject to certain rules. The procedure is not a random or disorderly set of actions, but, on the contrary, it is a series or sequence of acts through which the activity of the administrative organisms is held.[12] This ordered sequence contains the anticipation of the steps necessary for its advancement and subsequent completion. All this plurality of acts - each of which retains its individuality – are held to solve a specific matter and is how the legal activity of the Administration takes place.

As I have indicated in previous paragraphs, in Argentina, one of the ways the division of power is expressed is by the coexistence of the national and local (provinces and the City of Buenos Aires) power. Both of them have the competence to dictate the applicable law regarding the administrative procedure that their authorities have to comply with.

In this presentation, I will refer only to the national regime. However, in general, there are not many differences between national and local administrative legislation.

The main national legislation, regarding the administrative procedure, is Law No. 19,549, known as administrative procedure national law or LNPA, and Decree No. 1759/72, which contains the general specification regarding the national administrative procedure, and has to be complied with by all national authorities.

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10 The leading case is “Ingenio y Refinería San Martín del Tabacal vs. Provincia de Salta”, 1967.

11 The leading case is “Fernández Arias vs. Poggio”, 1960.

12 Agustín, Gordillo, “Tratado de Derecho Administrativo y Obras Selectas”, FDA, Buenos Aires, 2016.

The Public Administration acts by its own will or at the request of individuals, through various internal and external acts. During the course of administrative procedure, in both cases, individuals formulate requirements of various kinds, which the rules of administrative procedure regulate. On the administered side, the presentations in some cases are intended to establish positions regarding the subject that is debated in the administrative file, and in others to formulate specific requests. All the presentations made by an administered have to be answered by the Administration, as they are covered by the constitutional guarantee of art. 14, which establishes that *"All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: ... to petition the authorities..."*. This right is integrated by the obligation of the authorities to consider and resolve, in a well-founded and reasonable manner, the petitions made. For cases where the Administration does not comply with the obligation to consider and answer all the petitions made, remaining in "silence", the law provides a solution for the administered.

One of the main pillars of the administrative procedure, which is strongly related to the right to petition before the authorities, mentioned in previous paragraphs, is the principle known as adjective due process or administrative due process, part of art. 18 of the National Constitution,[13] and different procedural laws in force at the national and local level, as well as administrative and judicial jurisprudence.

This principle includes the right of the administrated to be heard, to offer and produce evidence, and obtain a well-founded pronouncement. The right to be heard implies the possibility of being able to present defenses and claims before the Administration adopts a certain course

13 *"No inhabitant of the Nation may be punished without previous trial based on a law in force prior to the offense, nor tried by special committees, nor removed from the judges appointed by a law in force prior to the offense. Nobody may be compelled to testify against himself, or be arrested except by virtue of a written warrant issued by a competent authority. The defense at trial of persons and rights may not be violated. The residence may not be trespassed, nor may the written correspondence and private papers be violated; and a law shall determine in which cases and for what reasons the search and seizure shall be allowed. Death penalty for political causes, any kind of tortures and whipping, are forever abolished. The prisons of the Nation shall be healthful and clean, for the security and not for the punishment of the prisoners confined therein; and any measure taken with the pretext of precaution which may lead to mortify them beyond the demands of security, shall render liable the judge who authorizes it".*

of action, or ruling on a matter that may affect a person.

In the national order, this right was expressly recognized in art. 1, inc. f), section 1, of the LNPA, by providing the following: *"Right to be heard. 1) To state the reasons for their claims and defenses before the issuance of acts that refer to their subjective rights or legitimate interests, file appeals and be sponsored and professionally represented. When an express norm allows that the representation in administrative headquarters is exercised by those who are not legal professionals, the legal sponsorship will be obligatory in the cases in which legal questions are raised or debated"*.

The right to be heard includes the right to state the reasons, claims and defenses before the issuance of an act by the administration; filing appeals, claims and complaints; being sponsored and represented by legal professionals; and requesting a hearing.

The right to offer and produce evidence should be widely recognized as a general principle of the administrative procedure. Art. 1, inc. f, section 2, of Law No. 19,549 provides that the administered has the right to *"offer evidence and produce it, if pertinent, the administration having to request and produce the reports and opinions necessary to clarify the facts. All with the comptroller of the interested parties and their professionals, who will be able to present arguments and disclaimers once the probationary period has concluded". In the same sense, art. 46 of Decree No. 1752/72 establishes that "All means of proof will be admitted, except those that are manifestly inappropriate, superfluous or merely delaying".*

Finally, the right to obtain a well-founded decision also integrates the adjective due process principle and allows the administered to demand that the final decision merits the main arguments made by the administered, in case they were conducive to the solution of the case.

The right to obtain a well-founded pronouncement concerns one of the validity requirements of administrative acts, such as the motivation, which consists of the clarification, in a clear, understandable, and sufficient manner, of the reasons that have administration to issue it, and, especially, the expression of the factual and legal antecedents that precede and justify its issuance.

The intervention of the individual takes place through presentations that are added to the administrative file. In those presentations, the interested party can limit himself to fixing his position; in others, the pur-

pose is to obtain a statement from the Administration. In some cases, the presentation takes place in the exercise of the right to petition before the authorities; in others, the presentation responds to the requirements set forth to empower the judicial instance so that the matter submitted for a decision by the Administration is revised by a judge from the judicial power.

The LNPA, together with Decree No. 1759/72, establishes the rule of exhaustion of administrative remedies, which means that a person challenging an administrative decision must first pursue the administrative available remedies before seeking judicial review.

The purpose of the obligation to exhaust the administrative remedies or procedure is that the administration can analyze and review its decisions before proceeding to the judicial instance. The LNPA gave relevance to the general principle according to which the judicial power can review the legitimacy of administrative decisions as long as the administrative procedure or remedies were previously exhausted. Therefore, the possibility to get to the judicial instance is, then, the result of the exhaustion of the administrative instance.

The basis that sustains the importance of exhausting the administrative procedure lies in the affirmation that, especially the procedure related to the filing of appeals, constitutes *"a collaboration for administrative efficiency between the administered and the Administration"*[14] and *"a guarantee for those affected by resolutions of the Administration to the extent that they assure them the possibility of reacting against them and, eventually, eliminating the damage they suffer"*.[15]

The administrative should be seen as an instance in which both the Administration and the administrated benefit, since the former has the possibility of reviewing its error, retracing its steps and correcting itself, while the latter can "collaborate" with the Administration to overcome differences. The administered is better positioned to notice the administrative error because he is the victim who goes to the Administration to jointly find a solution to the disputes.

For those cases in which the authorities do not comply with their obligation to pronounce on the presentations made by the administered,

14 Miguel S., Marienhoff, "Tratado de Derecho Administrativo", Abeledo Perrot, fourth edition, Buenos Aires, 1990, t. I, p. 671.

15 Eduardo, García de Enterría and Tomás Ramón, Fernández, "Curso de Derecho Administrativo", Ed. Civitas, second edition, Madrid, 1988, t. II, p. 436.

was created the Administrative Silence, so that the administered that made a presentation to the authorities does not have to wait until his petition is solved, having the possibility to consider it denied, as I will explain in detail in the following chapter.

II. Administrative Silence in Argentina.

1. Concept. Is There a Legal Definition of Administrative Silence? The Regulation Provided in The National Administrative Procedure Law (LNPA).

All inhabitants have the right to petition before the authorities and have the right to get an express pronunciation from the Administration. For those cases in which authorities do not comply with the aforementioned obligation (expressly consider the presentation made by the administered), the legal system foresees the figure of the Administration's silence or Administrative Silence, to regulate the consequences of omission in the resolution of the petitions and to set the conditions that allow the administered to seek for a judicial review, without having to wait for the Administration to resolve the presentation.

For this reason, art. 10 of the LNPA provides the following: *"The Administration's silence or ambiguity in the face of claims that require a specific pronouncement from it, will be interpreted as negative or rejection. Only through express provision can silence be agreed upon positively. If the special norms do not foresee a specific term for the pronouncement, it may not exceed sixty days. Once the corresponding term has expired, the interested party will require prompt dispatch and if another thirty days elapse without the said resolution, it will be considered that there is silence from the Administration"*.

The foregoing means that art. 10 of the LNPA constitutes a regulation of both the constitutional right to petition before authorities, as well as the obligation to, after an action by the Public Administration, first request its review before the Administration itself, and then be able to request the courts to review it.

There is no doubt that regarding the requests received from the administered, the Administration must make a pronouncement. Precisely,

in case the Administration incurs in an omission resolving the petitions, silence appears as the figure that allows the interested party to presume an answer, enabling the judicial instance, to safeguard its rights.

2. Requirements for the Configuration of the Administrative Silence.

The requirements for the configuration of the silence are the following:

1. The existence of a petition made to the authorities that require an express pronouncement.
2. That there is no provision that the lack of pronouncement gives positive meaning regarding the presentation (positive silence).
3. That sixty (60) administrative business days have elapsed without the pronouncement being issued, unless a shorter period is foreseen.
4. That when the said period has elapsed, a request for prompt dispatch has been submitted, unless a specific regulation exempts it from being submitted.
5. That another thirty (30) administrative business days elapse, without the pronouncement having been issued.

It has to be clarified that according to articles 87 and 91 of Decree No. 1759/72, when an administrative appeal is filed by the administrated, and the deadline the Administration has to issue a pronunciation regarding the presentation elapsed, the petition can be considered by the administered as rejected, without the necessity to present a prompt dispatch, as it is indicated in art. 10 of LNPA in the case of administrative silence. Art. 10 is only applicable to those cases in which there was a petition made to the authorities and it requires an express pronouncement, but is not an administrative appeal.

There are certain situations in which the Administration does not have a specific term to pronounce itself, such as in administrative files in which non-compliance with a certain law or provision applicable to the administered is being evaluated. The Argentine Supreme Court, in the case "Losicer"[16], indicated that the Administration must pronounce

16 335-1126. The criteria settled by the Supreme Court in "Losicer", were replied to in several cases such as "Meynet" (338-601), "Colegio de Escribanos de la Provincia de

within a reasonable time, a concept applicable to administrative procedures as well as judicial processes. The determination if there has been an unjustified delay by the administration in issuing the required pronunciation has to be made by the judicial power, when they intervene in a specific case.

3. Origin and Evolution in Argentina.

Silence of the administration is part of the administrative procedure and it is related to the requirement of exhaustion of the administrative procedure, before seeking a judicial revision.

Among the regulatory rules of the administrative procedure, before the judicial instance, are the rules referring to the inactivity of the Administration and the omission of issuing pronouncements required by citizens. The requirement of the prior administrative claim, exhaustion of the administrative procedure and the need for an express pronouncement, could indefinitely postpone the judicial action against the failure of the Administration to pronounce, if it wasn't for the establishment of silence.

The figure of the silence of the Administration is an expression of the system of guarantees to ensure access to judicial instances. It was established for the first time in France in 1900. In Argentina, Law No. 3,952 on lawsuits against the Nation, also issued in 1900, established the obligation of a prior administrative claim in its art. 2, indicating that if the resolution of the administration delayed for more than six months after the presentation was made the interested party could request prompt dispatch; and if another three months' elapse without the said resolution, the action could be brought directly before the judicial courts.

The administrative procedure law of Spain of 1958, which served as an antecedent of the LNPA, in its art. 38 had a generic formula of administrative silence for the lack of resolution by the Administration of the requests in the following terms: *"when a request is made to the Administration and it does not notify its decision within three months, the interested party may denounce the delay, and after three months have passed from the complaint, you may consider your request rejected, to formulate the corresponding administrative or jurisdictional*

Bs. As." (341-1017), "Espíndola" (342-584), "Escudero" (344-378), "Gomez" (344-1930), "Raco" (344-3230), "Bonder Aaron" (336-2184).

appeal, as appropriate, against this presumed denial, or wait for the express resolution of your request. In any case, the presumed refusal shall not exclude the duty of the Administration to issue a duly founded express resolution".

The LNPA regulates in art. 10 the silence or ambiguity of the Administration for claims that require a specific pronouncement from it, interpreting such conduct as negative. In this way, the silence considered in Law 3,952 as a procedural guarantee that enables the judicial instance to sue the State, in the LNPA is expressed in similar terms by applying to the figure of petitions made to the administration (except for administrative appeals and those that have a special regulation) setting shorter deadlines to have configured the silence.

The LNPA has not been modified since its enactment in 1972. Regarding the national legislation of the silence of the Administration, it has to be noted that, after 1972, there were several new legislations with cases in which silence was given a positive meaning, granting a favorable meaning to the request.

4. Silence of the Administration. Juridical Nature.

Authors have discussed the legal nature of silence, and if it is correct to assign it the status of an administrative act (the final decision in which the administration expresses itself and his will, as long as it produces immediate effects over the administered). Under the LNPA and Decree 1759/72, it is not possible to assign silence the status of an administrative act, as it does not comply with the elements that according to the referred law are essential for its configuration. Art. 8 of the LNPA requires that *"the administrative act is expressly stated and in writing: it will indicate the place or date on which it is issued and will contain the signature of the authority that issues it; only by exception and if circumstances allow it, will it use a different form"*, which does not happen in cases of administrative silence. Also, it does not comply with other requirements of the same law, such as those that oblige the Administration to decide all the requests made, the issuance of the previous opinion of the legal service and the formulation of the motivation (art. 7 of LNPA).

Regarding the legal nature of administrative silence, different proposals have been made. In its origin it was only a fiction for strictly pro-

cedural effects, limited to the opening of the judicial instance. Silence has been considered a tacit act (Zanobini), a presumed act (Alessi), a declaration with typical legal value (Santulli), an ideal fact to establish the subsistence of the law and a legal act (Thesaurus), a material fact (Bodda and Cassese), among other theories.

In light of the function that has been assigned to administrative silence, as a guarantee in favor of the administered that enables him to promote a judicial action, silence is an administrative as a result of which a particular request is considered to be denied.

5. Differences Between the Administrative Silence and Ambiguity of the Administration.

In Argentina, in general, reference is made to the silence or ambiguity of the administration. The incorporation of ambiguity under the same treatment as silence is questionable. In the latter, the Administration issuing an express pronouncement before the deadlines and the presentation of the prompt dispatch allows it to be considered that the request has been denied and enables the judicial instance.

On the contrary, the ambiguity supposes the existence of a pronouncement through an administrative act, against which the request for clarification proceeds due to its ambiguity and that produces the beginning of the terms for its administrative and judicial challenge, that otherwise it will remain firm and consented, with the risk of being applied with the meaning that arises from its text.

6. Negative and Positive Silence of the Administration.

In administrative law, the silence of the Administration, after a request from the individual, has an unequivocal legal meaning, which is the denial of the required, except in the exceptional case in which a provision - legal or contractual – gives the silence a positive meaning. In general, this occurs when the provision itself contemplates the formulation of the petition in advance and due to the circumstances of the case, it is understood that it should be assigned such a positive meaning. It frequently occurs due to the exercise of control and inspection functions. This is the sense of the negative silence and the positive sense.

The possibility of positive silence should be taken into consideration when the law grants a favorable meaning to the request once the legal term has elapsed if the Administration has not made a pronouncement. García de Enterría and Fernández understand that it is an authentic administrative act, although presumed, equivalent for all purposes to an express resolution in an estimated sense. In general, this occurs by the mere passage of time, without requiring the presentation of a prompt dispatch. In any case, as the positive meaning of silence constitutes an exception to the general principle of the negative meaning, it will be up to the specific rules to be followed. Positive silence raises three questions of interest:

• The content of the administrative act: in the case of positive silence, after the legal term has elapsed, the request or claim of the individual is considered accepted. This presumed administrative act, a legal consequence of the inaction of the Administration, does not respond to the proper concept of an administrative act. However, in the face of certain cases of administrative silence (the lack of response in favor or against) the law assimilates it to an administrative act, which allows the administrator to consider his request or position accepted. However, the lack of declaration by the Administration leads to the difficulty in defining the content. In my opinion the content will be determined by the terms of the request presented and that resulting from the applicable regulations.

• The illegitimacy of the administrative act: it may happen that the petition made happened to be inadmissible for reasons of illegitimacy. In this case, it is necessary to consider what is the situation of the presumed administrative act that takes place once the deadline for the Administration's pronouncement has expired. In the case of positive administrative silence, the law presumes that after a certain period, the Administration has responded affirmatively to the request made, with all its legal consequences. Therefore, regarding the illegitimacy, the rules of stability and revocability of administrative acts established by the LNPA in art. 17 are applicable.

• The revocation of the pronouncement of the Administration once the term for issuance has elapsed: the scope of positive silence is

defined in the respective regulation that provides for it. Therefore, if it is established that once the term expires, the individual's request will be considered accepted, the situation will be covered by the general rules provided for the revocation of the regular and irregular administrative acts established in the LNPA. This is so for various reasons: because the application of a certain regime, once established, must be comprehensive; if positive silence is assigned the character of a presumed administrative act, the rights resulting from it are incorporated into the petitioner's assets; legal certainty prevents the unilateral modification of the effects that legally take place.

7. Difference Between Administrative Silence and Administrative Inactivity.

Administrative inactivity takes place when the Administration does not exercise the competence assigned by law. This means that if the law indicates that a certain organism of the Administration (i.e. Energy Secretary) has the competence to pronounce on a certain matter, instead of issuing an express pronunciation, regarding a particular request, they remain silent. It can manifest itself in different ways: (i) by not exercising the competence assigned by law, through the issuance of administrative acts; or, (ii) by failing to pronounce on the requirements that are formulated, either through simple requests, or claims, to comply with the obligation that the administered has present a requirement to the administration, before seeking for judicial intervention.

The inactivity of the Administration takes place when it fails to exercise the competence assigned by law. The LNPA in its art. 3 establishes that competence is the faculties or attributions of the administrative bodies, which result from the provisions of the law (Constitution, laws or regulations). The exercise of the assigned competence constitutes a non-extendable obligation. Faced with the omission in the exercise of its competence, the administered must require the Administration to exercise it, and if the omission persists, he can appeal to the courts.

The silence of the Administration, as regulated in art. 10 of the LNPA, is the effect that the law allows the administered to attribute the failure of the Administration to issue a statement in the face of a

request that is formulated, enabling the administered to seek judicial control, and obtain an express pronouncement. It is a fiction that the law establishes for the benefit of the administered who makes the request, by which once the legal period has elapsed, they can consider that the request has been upheld (positive silence) or rejected (negative silence). Silence is thus a complement to the obligation of the Administration to issue an express pronouncement after the presentation of a requirement by an administered.

8. Administrative Silence and its Effects Regarding Expiration and Prescription.

The administrative procedure is the mechanism through which the administrative function or administrative competencies are exercised, and through which the links between the Administration and administered take place in its various modalities. The rules of the administrative procedure seek to ensure the validity of the principle of legality, which means that the Administration complies with the applicable provisions and regulations in every case.

The administrative procedure normally ends with the issuance of an administrative act. However, the procedure can also end through other anomalous ways, such as administrative silence, resignation, withdrawal, and expiration of the administrative file.

The possibility of submitting the activity of the State to judicial control requires as a general rule the prior submission of the case to the review of the Administration itself. For this, the Administration must pronounce within a certain period, after which the individual may consider the request denied as administrative silence is configured.

Argentine legislation establishes as a general rule that while the review process is in progress before the Administration itself, the expiration period (that in this case means the period the administered has to seek judicial control, after which cannot be exercised) and prescription, are suspended. Bien the Silence of the Administration a power in favor of the administered, it is worth considering its effects over expiration and prescription.

The expiration is a mode of extinction of the administrative procedure, which takes place after a certain period in a state of inactivity of the administrative file. The time elapsed without activity by the ad-

ministered suggests his willingness to abandon the procedure. In this way, for reasons of legal certainty, it is intended to avoid administrative procedures to prolong indefinitely. The cause of the expiration of the administrative file and the administrative requirement is the passage of time without the performance of procedural acts. In Argentine law there are certain periods in which the administered must file appeals for the administrative review of administrative acts, which depending on the case are between ten and fifteen administrative business days. There are also periods for filing judicial review actions, whether for administrative acts or other petitions that have not been admitted by the Administration, which are generally ninety legal business days except in specific cases in which the deadline is reduced to thirty judicial business days. Once the aforementioned periods have expired, if the individual does not make the corresponding presentations, he loses the possibility of doing so, due to the expiration of the corresponding term.

Prescription produces the consolidation of a right or the extinction of the action to exercise a certain right. The first case is known as acquisitive prescription, and the second is known as discharge prescription. In the latter, the passage of time produces the substantial modification of a right due to inaction, who loses the power to compulsively demand it.

Although the LNPA and Decree No. 1759/72 establish a period in which the Administration has to pronounce concerning the requests presented by the administered, the most frequent is that the pronouncement is not issued within the established period. In this situation, one of the possibilities in favor of the individual is to consider that the administrative silence is configured, which as a general rule allows the request to be considered denied –negative silence–, unless a rule gives it a positive meaning –positive silence–.

Regarding administrative actions that take place *"the intervention of a competent organism, will produce the suspension of legal and regulatory deadlines or periods, including those related to prescription, which will restart"*.[17]

9. Administrative and Judicial Remedies Against Administrative

17 LNPA art. 1, e) 9).

Silence. Main Arguments to be Invoked.

When silence is configured, in such a way that it is interpreted that the request has been rejected or denied, because the Administration didn't resolve the request or carried out the procedures leading to the formation of the administrative decision (opinions, transfers, reports, summons, etc.) before the deadline, the administered, who formulated the request or petition, has certain mechanisms or alternatives to, whether through an administrative procedure or a judicial process, obtain an express pronunciation from the authority before which the request was presented, in respect of the right of the administered to petition before authorities and to obtain a well-founded pronouncement, to which we referred previously.

The alternatives available are: (i) the presentation of a request for prompt dispatch, (ii) the filing of a *"recurso de queja"*, or (iii) a judicial action known as *"amparo por mora"*.

I will refer to the main characteristics of each of them.

(i) *Pronto Despacho* (prompt dispatch)

Article 10 of LNPA provides that if there is not a special regulation that provides a specific term for the pronouncement, it may not exceed sixty (60) administrative business days. Once the corresponding term expires, the interested party has to require prompt dispatch and if another thirty (30) administrative business days elapse without the said resolution, it will be considered that there is silence from the Administration, and the individual may then invoke it in his favor to promote the challenging remedies or judicial action as if such a resolution existed.

The administered is not obliged to consider his request denied, having the possibility to continue submitting successive requests for prompt dispatch so that his request is resolved.

(ii) *Recurso de Queja*

Monti, has defined the "recurso de queja" as *"a claim presented before the immediate superior authority of the organism that is intervening in an administrative procedure, when there are processing defects or non-compliance with legal or regulatory deadlines, and provided that such deadlines are not referred to those set for the resolution of an administrative review"*.

It is regulated in article 71 of Decree N° 1759/72.

It is necessary to establish what is being pursued through this remedy. Some of the answers have been given by doctrinaires and jurists such as Cassagne, who for him "the recurso de queja seeks among its purposes, the speed, efficiency and economy of the process, tending to obtain a well-founded decision, within the framework of the adjective due process. Procedural defects necessarily delay the administrative file and must be immediately corrected. Failure to meet deadlines, on the other hand, represents the specific problem of the inactivity of the administration, which this claim seeks to prevent".

The requirements that allow the application of this remedy are 2 (two), the procedural defects on the one hand and the breach of the periods on the other.

- Procedural defect: vices, shortcomings, irregularities, among others, in the procedure that can be minor or serious. For example, the incorrect numbering of an administrative file.
- Failure to comply with the legal and regulatory period: all the terms, and time lapses indicated in the ordinance for the advancement of the stages of the procedure are included. It is important to point out that both the national and provincial regulations exclude the application of the *"recurso de queja"* when it is related to the processing of administrative appeals o reviews.

The *"recurso de queja"* has to be presented directly to the immediate superior authority of the administrative organism that dictated the act that is deemed not issued. That is to say, the intervention of another organism different from the one that was in charge of processing the case. With its interposition, the activity of the immediate superior authority is enabled. This will not be viable if the inactivity comes from the Executive Power (properly speaking, as the highest figure), who does not hold immediate superior authority.

The resolution period is five (5) days, without any other substantiation than the detailed report that will be required if necessary, of the lower organism, trying to avoid the suspension of the main procedure. This means that the superior, if necessary, will require a detailed report to the inferior. On the other hand, it is worth noting that it is an incidental procedure, as established by the laws cited here above, without suspending the administrative procedure that motivated it.

(iii) *Amparo por mora*

The *"amparo por mora"* is a judicial process whose purpose is to obtain a judicial order that forces the Administration to issue an express pronouncement regarding the presentation made by a citizen.

Its regime is provided in art. 28 of Law No. 19,549, which establishes *"Anyone who is part of an administrative file may judicially request the release of a prompt dispatch order. Said order shall be applicable when the administrative authority has allowed the established deadlines to expire and if these do not exist, if a period that exceeds what is reasonable has elapsed without issuing the opinion or the resolution of mere procedure or merits required by the interested party. Once the petition has been presented, the judge will issue an opinion on its origin, taking into account the circumstances of the case, and if it deems it pertinent, it will require the intervening administrative authority to report on the causes of the alleged delay within the period set for it. The judge's decision will be final. Once the request has been answered or the term has expired without it having been evacuated, the case will be resolved, releasing the order if appropriate so that the responsible administrative authority issues an express pronouncement within the reasonable period that is established according to the nature and complexity of the opinion or pending procedures"*.

This judicial process has its constitutional basis on the right to petition to the authorities of which all citizens are holders, established in art. 14 of the National Constitution, art. 24 of the American Declaration of the Rights and Duties of Man and art. 7th, inc. c), of Law No. 19,549, which finds its direct correlation in the right to obtain a true, complete, exact and timely response from the Administration.

Since there is a reciprocal relationship between these two rights, the Administration is placed at the head of the duty to always respond to claims, petitions, complaints, etc., that are made by an individual. This duty is circumscribed to the obligation to issue an express statement on the matter submitted to the Administration, not being understood that there is a generic duty of the State to grant the claims or requests that are formulated.

The *"amparo por mora"* has its constitutional basis on the right of citizens to petition the authorities (with the corresponding right to

obtain a response to their petition), and the purpose of this judicial process is limited to obtaining by a court of law a decision that forces the Administration to issue a pronouncement on the presentation that was made.

This obligation to respond does not mean that the Administration must make a pronouncement in one sense or another, but rather that the duty to always pronounce itself when the citizens made any presentation. This obligation, as has been held by Chamber IV of the CNCAF in the cases "Meza, Oscar R.", of 09/24/92, "Criscuolo, María del C", of 03/21/06, and "Bordigoni, Adriana I. ", dated 06/29/10, is determined by the duty to comply with a positive behavior from which an express pronouncement emanates within the time limits set by the court, and the content cannot in any way be determined by the courts, as well as the judge's decision may not be construed as a recognition of a right other than the right to obtain an express decision.

The peculiarity that the final resolution presents in this type of process is that there are only three possible solutions that the magistrate can arrive at: admit the claim, reject the claim or, declare the process abstract.

Only when the report outlined in art. 28 or, when the term to produce it has expired, the court will have the necessary elements to verify the existence or non-existence of the alleged delay.

Regarding the determination of the existence or non-existence of the delay, it should be noted that article 28 only contemplates the assumption of objective delay, which occurs due to the simple expiration of the legal deadlines the Administration has to issue the pronouncement or, well, by the passage of an unreasonable period without having issued the opinion or resolution of the procedure or merits that have been required.

The existence of procedural circumstances, assumptions of fact, negligence or fraud in the actions of administrative employees, or other circumstances that may prevent the Administration from complying promptly with the duty to respond that it is responsible for, are related to what should be understood as a subjective default, a legal circumstance not contemplated, and, therefore, unfeasible to justify the delay.

On the other hand, it should be noted that, when evaluating the existence or non-existence of the default, the magistrate must take into account the date of receipt of the administrative file by the organism

that must issue the opinion or resolution.

The court at the time of issuing the final judgment can resolve the issue by disposing of the prompt dispatch order, rejecting the claim, or declaring the matter abstract. In the first of the assumptions, the content of the judgment, when the claim is accepted, condemns the Administration to fulfill an obligation to do something (i.e. the fulfillment of an order of prompt dispatch), within the term that according to the nature and complexity of the matter the judge determines. In this sense, it cannot be ignored that when determining the period in which the Administration must comply with the prompt dispatch order, the special circumstances of the required pronouncement must be taken into account, since it cannot be validly required that the Administration avoids legal stages and, consequently, issue an illegitimate pronouncement.

About the second of the assumptions, the judge may dismiss the petition based on: a) the legal deadlines have not expired; b) the decision required of the Administration had been issued before the start of the process; c) the petitioner is not a party to an administrative file; or, d) there is no duty of the Administration to issue it.

Finally, it should be pointed out that the decisions in this kind of process must comply with the existing situation at the time of issuing the final decision. Thus, the Administration may issue the required pronouncement after the start of the process, but before the issuance of the final resolution, a circumstance takes place that determines that the matter submitted to the court becomes abstract, since it is not appropriate to provide an order regarding a pronouncement already issued.

10. Silence in Private Law.

In this chapter, I will refer to silence in the field of Civil and Commercial law, making a short exposition of what is stated in the Civil and Commercial Code.

The Civil and Commercial Code establishes in article 263 that “the silence opposed to acts or an interrogation is not considered as a manifestation of will in accordance with the act or interrogation, except in cases in which there is an obligation to do so that comes from the law, an agreement, the general uses and practices, or a relationship between the current silence and previous statements”, referring to the abstention from speaking, whether orally or in writing, as to the non-adoption of

any means of symbolic representation (unequivocal signs).

The Civil and Commercial Code replace the Civil Code, and came into force in 2015. If we compare the wording of article 919 of the Civil Code, according to which the silence opposed to acts was not considered as a manifestation of will, unless there is an obligation imposed by law, family relations, or because of a relationship between the current silence and the preceding statements, we can analyze that it is not very far from the current wording of the current Code. In any case, it is important to note that the duty to issue in family relations has been eliminated, the uses and practices were incorporated, and the statement is preserved when there is a relationship between silence and the preceding statements.

Silence is not considered a manifestation in any situation, except for exceptions that will be constituted as a declaration of will.

Regarding *"the law and the will of the parties"*, it is the case in which a particular law attributes to silence the value of consideration, or when by an agreement of the parties it is stipulated that in case of silence of one of them it will be given a specific meaning.

A second exception according to the article under study is the general "uses and practices", which are a formal source of law linked to the random, uniform, continuous and lasting succession, even if not general, of circumstantial procedures not inspired by an alleged value binding.

In both exceptions mentioned, silence is constituted as a "declaration", unlike the third exception, which is considered a "manifestation".

The third and last exception occurs in the "relationship between the current silence and the preceding statements", when the omission, together with the circumstances that surround it, allows establishing with certainty, based on experience criteria and real empirical rules of connection, which has a certain significance.

III. Conclusion.

In Argentine administrative law, the essential purpose of administrative silence is that when the administered makes a requirement that necessarily requires an express response from the Administration, and it is not issued, the administered can consider the request denied and also has the judicial instance enabled to safeguard its rights.

It is a presumption that can only be invoked by administered, as an alternative that allows access to the review of the petition by courts.

As a general rule, administrative silence has a negative meaning. In special circumstances, once the period established for the Administrations pronouncement has elapsed, it is possible to consider that the request has been favorably received.

The Crisis of Liberal Democracy, Diagnostics and Therapies

Report on the Republic of Argentina to the XXI International Congress of the International Academy of Comparative Law

RODRÍGUEZ GALÁN, Alejandra[1]

Preliminary remarks

The purpose of this paper is to explore and examine the crisis of liberal democracy, with especial focus on Argentina, within the main scope of the democratic system at large.

The concept of system is significant because it provides an efficient analytical tool. If the system is conceived as an "organized totality", the dialectical interaction between the whole and the parts finds a clear and precise definition in the theory of complex systems[2]; category that can be reassigned to analyze political systems.[3] From this perspective, political regimes are categories that acquire actual meaning within a systemic model.[4]

The philosophical bases are in the underpinning of any social system and provide a guide to interpretate certain paths. Thus, it is not a coincidence that at similar moments in the history of a civilization, common political concerns arise in different nations. [5]

1 Professor of Constitutional Law. Universidad de Buenos Aires (UBA). Universidad Católica Argentina (UCA). Master in Political Science (CUNNY, US). General Secretary of the Argentine Association of Comparative Law. Member of the Argentine Association of Constitutional Law. Former General Counselor at the Argentine Supreme Court. Adviser at the National Convention for the reform of the National Constitution.

2 García Rolando, "*Sistemas complejos, concepto, método y fundamentación epistemológica de la investigación interdisciplinaria*." Gedisa, España, 2006, pág. 127 y ss.

3 Díaz, Rodolfo Alejandro, "*Prosperidad o ilusión" las reformas de los 90 en Argentina.*" Ed. Ábaco, 2002. Maurice Godelier, he defines the system as a set of elements linked together by a certain "combination rule". The main feature of a system is determined not by the elements that constitute it but by the combination' rule. pág. 250.

4 The reference to David Easton is a must!

5 Rodríguez Galán Alejandra. "El Método en el Derecho Comparado", en *Estudios de Derecho Comparado.* Asociación Argentina de Derecho Comparado. EUDEBA,

Spaniard scholar Daniel Innerarity argues about the complex features of democracy:

"The main threat to democracy is not violence, corruption or inefficiency, but simplicity."

"The ideas of legitimacy, sovereignty, representation or authority responded to such simplicity, where there was no room for interdependence, the unbearable acceleration that characterizes our current democracies."

"*…the main consequence of this renunciation of complexity is the establishment of a great break, an unsustainable division of labor between the principle of reality and the normative plane, between technocracy and populism (…) technocratic reasons and populist reasons, which oppose effectiveness and democracy, is the great bankruptcy that characterizes our democratic societies and today configures the principal range of political antagonism."*

"A complex democracy is one capable of balancing all its dimensions."[6]

At this point we can agree upon diverse phenomenon challenge liberal democracies, and therefore a simplistic approach will provide us neither therapy, no solutions.

II. When addressing the issue of the current crisis of democracy, some caveats immediately arise. From ancient Greece to our times, has democracy been the main and historic form of government in the world? The Western world as we know it today in its democratic dimension, when did it emerge? Can we argue that representative democracy constitutes the most generalized form of government in this 21st century?[7]

II.1. Representative democracy continues to be the most suitable form of government to deliver the public goods that *We the People* demand from authorities. Thus, is democracy considered a universal value?

We must also inquire what is the true definition of democracy nowa-

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Buenos Aires, 2016, p. 161/179.

6 Innenarity Daniel, *Una teoría de la democracia compleja. Gobernar en el siglo XXI"*. Galaxia Gutenberg. Third edition, Barcelona. Spain, 2019, p.11 and 18.

7 Grayling A.C. *Democracy and its crisis.* One world Publications. London, 2018.

days.[8] Does democracy emerge as a societal movement from the bottom up or, perhaps, it can be said that it is imposed from the top down. Is the regime change valid and effective? Are we heading towards another year of *democratic recession*[9]?

Furthermore, is there a prerequisite for democracy to be successful? Is *civic culture* -traced back to Alexis de Tocqueville´s Democracy in America-[10] the underpinning which explained that democracy works due to the eagerness of the Americans to take part in their government? How relevant are Montesquieu´ *moeurs* nowadays? As he rightly stated*, moeurs always make better citizens than laws.*[11]

Are democracy's building blocks -rule of law, human rights protection, free press, free elections, alternance, respect of minorities, civil society, fighting corruption…- being eroded? If so, why? Is the erosion of the center, and the rise of extremism, with the consequent effect of polarization, another significant reason for the crisis?

Lately**,** new global issues are emerging and its specificities call for a particular treatment that has a direct impact in public policies and governance, such as energy, environment, health, pandemic, digital information and communications, among others. In addition, we have to consider the impact of Artificial Intelligence upon representative democracy: the way public authorities are constituted (on elections), the way citizens are involved in the decision-making process (on citizen participation) and on the way public authority is exercised (i.e., on governance). Are we heading towards new forms of participation?[12]

These are all very pertinent questions that constitute the background for treating the subject from an Argentine perspective. Although I will not be able to deal in depth with all the above-mentioned topics, at least

8 Birch H. *The concept and theories of Modern Democracy.* Routledge. New York, 1993.

9 Diamond, Larry. "Facing Up the Democratic Recession". Journal of Democracy, volume 26, number 1, 2015.

10 The classic equation formulated by Alexis de Tocqueville: "liberty and equality" in *Democracy in America* and *The old Regime and the revolution,* has derived into the dichotomy: "freedom-authority".

11 Charles Louis de Secondat, Barón de Montesquieu. *El Espíritu de las Leyes*, Editorial Losada, Buenos Aires, 1967.

12 Bartlett Jamie. *The People vs. Tech. How internet is killing democracy*. Ebury Digital, 2018.

I will try to explore some outlines. I will adopt a systemic approach in order to draw an itinerary, a "dialogue" through the Argentine political system.[13]

II. 2. As 2022 has begun, we must reflect on the state of democracy in the region, Latin America. One way to approach the issue is by learning what people think about the political system in their countries. The Barometer of the Americas (Latin American Public Opinion Project - Lapop) is a public opinion poll that is carried out every two years throughout the region. This project, founded at the University of Pittsburgh and now based at Vanderbilt University, has conducted 350,000 interviews in 34 countries between 2004 and 2021.

Ariel Armony[14] highlights certain points that seem especially relevant in order to understand what people want for their countries. Although the results vary considerably across the region, it is possible to identify certain common trends. His impression is that people know very well what they want for their countries, but they don't know where to find the right model.

i) The survey indicates that satisfaction with democracy remains low, but remains stable. Support for democracy as a system of government increased slightly in 2021, but remains far from the values of almost two decades ago.

ii) Latin American citizens prefer presidents who rule firmly, even if this conflicts with democratic norms. Support by strong executives - for example, presidents who choose to govern without the legislature or who try to control the judiciary - has doubled in the last decade.

iii) People want a voice in politics, especially as it affects their daily lives. Direct democracy as a means of participation is attractive to many.

iv) The majority of those surveyed views electoral democracy with mistrust. They think that corruption is rampant in politics and that the rich have the power to rig elections.

These results define a simple but eloquent equation. People continue

13 Habermas Jürgen. *Legitimation crisis*, in Juan V. Sola, *Derecho Constitucional*. Ed. Lexis Nexis, Buenos Aires, 2006, p. 24 y ss. See also. Raymond Aron, in *Ensayo sobre las libertades*. Alianza Ed., Madrid, 1974, p. 152 y ss.

14 Vice dean of Global Affairs of the University of Pittsburgh.

to prefer democracy as a system of government, but they are dissatisfied because it does not generate the expected results. When it comes to political future, Latin Americans are willing to support a more direct democracy and tolerate the concentration of power in the Executive in favor of a political order that distributes better benefits to all its citizens. Indeed, in recent years, we have witnessed reforms of many Constitutions in the region, that sought concentration of power in the Executive. Also, the public wants to be heard. People are increasingly disappointing with elections and politicians.[15]

Argentina far from been absent of these tendencies is challenged by them. Lately two facts generated some concern. First the high percentage of people who did not turn out to vote at the mid-term congressional election, last November: 30%; which is 10 % more than the average percentage figure. Secondly, at local level, the Legislature of the Province of Buenos Aires passed a law consecrating the possibility of indefinite re-election of the mayors, violating the key principle of alternance in the most sensitive territory: the city.

II. 3. According to the Index "Freedom in the World 2021" by Freedom House, *in 2020, the number of free countries in the world reached its lowest level since the beginning of a 15-year period of global democratic decline, while the number of not free countries reached its highest level: e*ighty-two (82) are *free,* fifty-nine (59) are *partly free* and fifty-four (54) *not free*.

Despite Argentina is correctly characterized in the Freedom House report in the *free* category, it is still a country with an unresolved internal stress: the tension between its liberal oriented Constitution – whose original spirit and words, dating from 1853, are inspired by the ideas of the French Enlightenment and the US Federal Constitution– and the sociology of *caudillismo*. A phenomenon that has roots in Argentina´ colonial Spanish tradition, as well as in the *inertia* of the independence process, more influenced by the *sword* than by the *pen.*

Section 1 of the Argentine Constitution defines the system of government in terms of *representative, republican and federal*, and it is precisely the second one that must be monitored. That is why it is not by chance that the republican principle is prioritized over the democratic one. And yet, the principle of division of power is often challenged by

15 Ariel C. Armony, "Present and future of Latin-Americans democracies". The Nation, January 3rd, 2022.

the democratic principle related to political representation.

Republicanism, in terms of division of powers, checks and balances are central elements in the stabilization of the system of government. Republicanism is also an antidote to *caudillismo* -strong man- in order to overcome the thesis that personal loyalties to a leader are characteristically stronger than institutional loyalties. Thus, the republican principles emerge with the intention of allocating the power in different branches of government, the ideal of limited government in order to promote federalism and avoid personalisms.

However, Argentina´s democratic history has not been that lineal.[16]

III. The Argentine Political System

Today the Argentine Republic is a stable democracy, organized upon a strong Presidential system. The stabilizing and rationalizing effects of the Constitution organize community life, and seek to respond to social demands while the republican principle prevent excesses of power.

The Federal Constitution was enacted in 1853, and our Founding Fathers drafted it essentially along lines of the 1787 U.S. Constitution, responding to the Argentine traditions providing for a strict separation of powers among the three branches of government. As part of the system of division of powers, judicial independence is an essential feature.[17]

III. 1. According to the rapport from the Congress of Public Law at UBA, held in Buenos Aires in 2012,[18] Argentine democracy had a peculiar historical evolution that, although it has shown stages of denial

16 Rodríguez Galán, Alejandra, *The Failure of Party Competition and the Crisis of Democratic Institutions in Argentina, Political Parties, 1912-1930.* Thesis MA, Political Science. City University of New York (CUNY). Nueva York, EE.UU., 1990.

17 The Executive power vested in a President that is elected directly by the people by a system of majority run-off election with a threshold of absolute majority. Once elected, the president lasts four years in office and could be reelected for one period. The Legislative power is vested in a Congress, based on a bicameral structure: the Senate that holds the representation of the provinces, and the Lower House, represents the people and keep legislative initiative in its hands, except in federal issues. The Judiciary is vested in a Supreme Court and inferior courts of justice. Justices are nominee by the President with consent of the Senate, but requiring publicity of the hearings. Federal judges could be removed by impeachment.

18 Viale Paula Andrea. Congress of Public Law. "Democracy and rights. What is populism in Argentina today?" UBA. Law School. Buenos Aires, May, 2012.

of popular aspirations, has never questioned it as a national substance. In spite of the above mentioned "authoritarian tendencies", José Luis Romero wrote: *"Democracy constitutes our authentic and enduring political tradition, we have no other."* [19]

It is important to visualize Argentine history reflecting on the socio-political and economic trends, in a long-term time table. However, can we agree with Romero that the Argentine soul has been permeated with democracy from independence? Has democracy been the Nation's organizational substrate, beyond dialogue or tension with other political principles (liberalism, federalism)? Ultimately, what kind of the democracy was born in the early nineteenth century and how did it evolve?

i) Liberal democracy: a contradictory product.

As we know, modern democracy arises and develops within a complex dialogue with liberalism, and the Argentine case does not exceed this characterization. Liberal democracy is a difficult marriage of liberalism and democracy, a weld of two different principles (freedom and equality) in a political order. When observing liberal democracy as a combination of equality and freedom, it should be noted that was of Alexis de Tocqueville' s original idea.[20] These two principles are different in nature and not always clearly amalgamated. According to Giovanni Sartori, are not reducible to each other. In this regard, Carl Schmitt stated: *"It is necessary to separate both, democracy and liberalism, in order to understand the heterogeneous construction that constitutes modern democracy"* (Schmitt, 1926: 12).[21]

ii) What is the properly democratic aspect of modern democracy?

Basically equality. Homogeneity is a feature of democratic equality. Again, Carl Schmitt with a very provocative thought argued that"...*it must be added that a democracy, since an equality always corresponds to an inequality, can exclude a part of the population dominated by the State without ceasing to be a democracy."* (Schmitt, 1926: 13).

When it comes to the intrinsic homogeneity of democracy, the ques-

19 Romero, José Luis. *"*The drama of Argentine democracy*", 1945*, published in the journal of the University of Colombia, No. 5.

20 Alexis de Tocqueville, opus cit.

21 Rodríguez Galán, Alejandra. "The Concept of Politics on Carl Schmitt and its relation to violence*."* Association for the study of Law, Culture, and the Humanities. Nineteenth Annual Conference. University of Connecticut Law School. Hartford, Ct. April 1-2, 2016.

tion of popular access to the government appears. Sartori clarified that: *"it can be said that liberalism is, above all, the technique of limits to the power of the State, while democracy is the entry of popular power into the State"* (Sartori, 1997: 207). If democracy presupposes certain homogeneity; for others it is defined better in terms of popular participation in the decision-making process.

iii) What would be the strictly liberal component of modern democracy?

In this sense, and not coincidentally, Sartori expresses that: *"it can be affirmed that liberalism is simply the theory and practice of the defense through the constitutional State of individual political freedom."* (Sartori, 1988: 463). As for him, liberal logic tends to make individuals differentiate, while democratic logic tends to expect the natural difference between men to equalize at one point. According to Schmitt, "*the right to vote universal and equal is only the reasonable consequence of equality within a circle of equals"* (Schmitt, 1923: 14). At this point, Sartori and Schmitt take different paths. The Italian hold explicitly that modern democracy assumes liberalism, that modern democracy without liberalism is born dead. For the German, that democratic homogeneity is the substance of modern democracy, where liberal "respect" derives from it. For Sartori, the equality behind individual differentiation is not substantial, while for Schmitt it is.[22]

iv) Solving this counterpoint means define what democracy is.

Question that many have asked, but that we do not intend to answer here. The history of modern democracies is a history of how political regimes have changed and posed on one of these principles. Liberal democracy is, as Sartori states, a two-headed skein that holds up well until one of the two ends of the thread is pulled, exposing those two substrates we are talking about. More democracy does not mean less liberalism. At various historical-political moments in a country, democracy means homogeneity, and therefore non-liberalism. The Argentine case, perhaps as much as the Brazilian one, throughout the 20th century, shows the slow and winding path of instability of a democracy with little liberal flavor, crossed by diverse political traditions and attacked by the dictatorial intervention of the armed forces that became a central actor in national politics.

v) Has the marriage of liberal democracy been achieved in Argentina?

22 Viale, opus. cit.

As it was stated, my country was organized as a Republic, which was not specifically democratic but rather liberal. Electoral mechanisms for individual participation were considered but clearly restricted in nature, and a principle of territorial organization of power was established, which for this argument is central: Federalism. It is not easy to see democracy (in modern terms) welded to the national political soul, but a content of something that could be called "conservative liberalism". [23]

In the Argentine case, the liberal Constitution gave existence to a State that, in turn, gave life to the Nation. And in this process, federalism has a significant place. It is "the federal" formula that allows Alberdi to promote the organization of the country around a constitution that intent to reconcile two principles that had divided the country after the May Revolution (1810). Two principles, unity and diversity, presents in the federal agreements. Federalism, in Alberdi's vision implies a "compromise." A commitment as a guarantee that the "actors of diversity" would not jeopardize the process of building the national state.[24]

The conservative regime installed in 1880 opened the door to a wider electoral participation. In 1912, the Sáenz Peña Law was enacted which, by consecrating compulsory, secret and universal suffrage, gave path to the necessary opening of the political system and allowed the Radical party to win the presidential election in 1916, thus consolidating a new scheme of political power. Argentine democracy began to take shape.[25]

Argentina adopted the universal male suffrage in the elections of 1916, and expanded it to female suffrage in 1951. Likewise, in the 105 years since universal male suffrage was adopted, Argentina had six military coups (1930, 1943, 1955, 1962, 1966 and 1976).

Between 1853 and 1930, the system was implemented successfully surpassing all obstacles, but starting with the 1930 *coup d' Ètat,* the incursion of the Armed Forces into politics and the successive de facto governments, followed by the closure of Congress constitutes a turning point in order to centralize power on the Executive, *extramuros* of the Constitution.[26]

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23 Viale, opus.cit.

24 Rodríguez Galán, Alejandra. Ponencia en Foro Global Digital Descentralización: Retos de la democracia del futuro: "Federalismo y Descentralización. El sistema federal argentino: avances y retrocesos." 2007.

25 Rodríguez Galán, "The failure…" opus cit, 1990.

26 Rodríguez Galán, Alejandra "Reflexiones en torno al sistema presidencialista

It should be noted that since democracy was recovered in 1983, Argentina has had a sequence of democratic governments, sometimes in alternation, without any complaint or questioning of fraud. With the return of the country to the rule of law in 1983, political forces began to building consensus for the reform of the National Constitution, in 1994, that generated important changes based on three fundamental pillars: expanding political and social participation and making institutions more effective and achieve better control over governmental acts. Perhaps its performance has not been very satisfactory in these aspects, but it proved to be successful by expanding human rights protection. The 1994 amendments to the Constitution introduced a set of very progressive contents regarding religious freedom, broadest protection to ethnical, gender and vulnerable groups of society.[27] [28] Plus, section 75, 22, recognizes constitutional status to Human Rights Conventions enhancing the "catalogue" of rights protected under our Constitution. [29]

III. 2. In a sustainable democracy, judges acquire a fundamental role.

The notion of *reinforcement in representation* emphasis that courts should ensure majority governance while protecting minority rights. The judicial process many times allows to correct issues unresolved by legislation, in order to protect "*discrete and insular minorities"*, because in many cases these minorities do not have preferential access to the political process. [30]

A Judicial Power consistent with the principles of the Constitution,

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argentino, a 20 años de la reforma constitucional de 1994". ED. El Derecho,19 de noviembre de 2014.

27 I was legal adviser to the National Convention to the Reform of the Constitution, in that capacity, I *participated in the works and debates of the Convention in 1994.*

28 The impact of the 1994 constitutional reform on the recognition of indigenous rights was vast and profound. Section 75, 17.

29 In this path, Argentina became the first country in Latin America to recognize the right to same-sex marriage at the national level, on July 2010. See Article 2 of Law 26,618 on Civil Marriage (2010), known as the Equal Marriage Law.

30 ELY, J.H. *Democracy and Distrust*. Harvard. 1980. Carolene Products -note N ° 4, Chief Justice Stone' opinion. Although Bruce Akerman' critic that footnote 4 can lead to a hasty generalization, it should be noted that this footnote was written in 1938. Currently, we have instruments such as the positive actions and "collectives" for asserting their rights. But Akerman's comment does not invalidate this notion, as it had the merit of shedding light on these minorities and by "judicial supervision" improving their situation.

is capable of telling the people what are the great rules of our social contract. The judicial review originates in the democratic concept of a limited government. When there is a judicial decision that annuls a law of Congress, the limitation does not come from the will of the judges but from the need to comply with the Constitution. [31]

The Judiciary embodies the idea of impartiality, which implies objectivity to "command" political powers, by imposing limits and exercising the sufficient control. In Argentina, experience shows how in recent years, the decisions of the Supreme Court of Justice of the Nation have promoted the inclusion of certain issues on the legislative agenda or, in other cases, they have pointed the constitutional path to Congress on delicate issues.[32]

"*The reality is that today democracy is intensive, that intermittent democracy no longer exists, citizens react, debate and discuss in the face of each decision, and they do so in the absence of other channels, in the Judiciary. That is why we must have the necessary prudence not to interfere or substitute governance, on the one hand, because the judges do not govern, but on the other, knowing how to find the right measure of the limits of the abuses of all kinds of power and protect our citizens. citizens." [33]*

III. 3. The Argentine political regime.

In this century, the Argentine political and territorial articulation was given by a singular populism, committed to a nationalizing project. It is logical to think that the democratic period opened a new space for the affirmation of territorial political identities. That eventually has happened when one of the latest versions of Peronism ("*Kirchnerismo")*[34] came into power in 2003, and it is also logical to ask what happens to that tendency once the traditional articulating matrix is decomposing... In the last analysis, populism becomes basically inefficient in terms of achievements. In this sense, it is possible to observe political parties and representatives are more willing to satisfy the interests of their communities and less committed to a general long-term project.

What then is the "model" nowadays? Federalization in terms of

31 Sola Juan Vicente, *Tratado de Derecho Constitucional*. La Ley. Buenos Aires, 2009.

32 Rodríguez Galán, Alejandra. "La función de los jueces", en la Reforma al Poder Judicial. Revista de Derecho Público. Rubinzal y Culzoni, 2021. p. 251.

33 Judge Ricardo Lorenzetti, in Rodríguez Galán, Ibid, 2022.

34 After President Nestor Kirchner.

broadening the horizon of collaboration between different sectors and greater political centralization that tends, in turn, to collapse.[35] Is it possible that the centralizing tendency collapses along with the populist one and the consolidation of a "liberal" democracy finally arises? The actual political process is contradictory, combining old dialogues between political traditions with new actors and new political objectives. In other words, the national political matrix tends to fragment and open doors to a reconfiguration of spaces and political struggles that deserve more time and dedication to research and reflection, to define what populism[36] is today in Argentina; question that is only suggest here.

The current political party system is made up of two large coalitions, one around the Kichnerist edge of Peronism and the other one, the center-right and the Radical party. Far from both, emerge the libertarians. Dalla Via clarifies: *"It is not that the large parties have ceased to exist but there are other characteristics in the political game that are especially evident from the crisis of 2001-2002.*[37] Tendencies, in this way, are not verified within the structure of the same national party, as happened with the charismatic leaderships, but rather they occur in a game or balance of powers between different sectors.

IV. Final words

According to Adam Przeworski, the best diagnosis of the current situation in many democracies is one of *intense partisanship with weak parties*, thus strengthening the thesis of the crisis of representative democracy.[38]

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35 Rapport. Congress of Public Law. UBA, 2012.

36 For many political scientists and philosophers, populism is generally a political pathology that strikes ignorant masses victims of demagogues. But when it comes to actually defining populism, they never quite find a comprehensive concept. Ernesto Laclau, in *On Populist Reason*, published in 2005, shares the common challenge of rethinking and explain populism from a different view.
Rosanvallon, Pierre *Le siècle du Populism. Histoire, théorie, critique.* Éditions du Seuil, 2020.

37 Dalla Vía, Alberto Ricardo. "La territorialización de la política." Academia Nacional de Ciencias Morales y Políticas, 2007.

38 Przeworski, Adam. *Crisis of Democracy*. Cambridge University Press. 2019.

Today´s democratic ecosystem is permeated by an increasing political polarization, declining trust both between fellow citizens and between them and government institutions, systematic attacks on the press and independent media, the decline of political parties as legitimate vehicles to aggregate interests, and an increasing frustration that democratic governments are not satisfying people's basic needs and aspirations.[39] This trend is also fed back by the wide use and impact of digital communication technologies, that exacerbates and intensifies polarization.

Looking into the future, can we be optimistic about the future of a vibrant democracy? Yes, insofar as we recover the lost value: *trust and resilience.* For doing so, we must make democracies more resistant and better equipped to manage uncertainty [40] -the *pandemics* of the future- as much as to deliver basic and necessary public goods to it main constituency: We the People.

Thus, we must act twofold. In the short term, strengthen the *deliverance* dimension of democracy: the capacity of its institution to act effectively, avoiding thus the contest between democracies and authoritarian systems. In the long term, adapt the social contract: distribution of burdens between social groups and a new relationship between states, We the people and markets.

39 Azzar, Julia. "Weak Parties with strong partisanship are a bad combination". November 3rd, 2016.

40 Lagorio, Ricardo E., "Hacia un escenario de concordia y multilateralismo". Diario La Nación, 29 de abril de 2021.