

THE CIVIL CODE OF THE REPUBLIC OF ARGENTINA:
ITS PAST, ITS PRESENT, AND ITS FUTURE

BY

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It is a great pleasure for me to be among you.
Thankfully, this was possible owing to the invitation the authorities of the Xiamen University granted me in order to lecture some issues of the Argentine Civil Code: about its past, its present, and its future.

I come from a young Country in South America. And we really hope we get to know the Chinese millenarian civilization.

May I give you respectful regards of the Dean of the School of Law of Buenos Aires University, together with its student's warmest regards.

The purpose of this lecture is to give information about the Argentine Civil Code.

Moreover, we expect this lecture could bring advantage all along the civil codification process in China.

I.- ABOUT THE PAST

My Country, the Argentine Republic, was governed by the Spanish Kingdom since the discovery of America in the fifteenth century until 1810.

Spain civilized and Spain provided education.

In Spain, at the beginning of the fifteenth century, a question arose whether Native American had soul or not.

This issue which, nowadays, makes somebody smile; nonetheless, it had important consequences in South America.

In fact, as Native Americans had soul, they could get religious education by priests, who also provided education related to the use of language and science.

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As aborigines had soul, Spanish people mixed their race with them; conversely, Anglo-Saxon colonization did not do so.

Spanish people also provided to all South America with the civil law in force at that time in Spain. The said civil law was Roman law, which was handed down in several legal documents.

Specially, *Las Siete Partidas* or the seven books of law passed by King Alfonso X.

However, Spanish Acts were not entered into force the like they were in Spain. Indeed, they underwent adaptation in order to go into effect in South America. Hence, the applicable law was the seven books of law passed by King Alfonso X and the Digest of "Leyes de Indias"

It was not until 1776 that Spain decided to create the Viceroyalty of Rio de la Plata (River of Silver) so as to improve its administration.

The said Viceroyalty administered the Argentine territory as well as the Uruguayan, Paraguayan and Bolivian ones.

Thirty four years afterwards, Argentina gained independence from Spain; however, it continued to apply the Spanish civil law.

II.- ABOUT THE PRESENT

It is well known that before its independence, Argentina was not one of the most relevant territories of Spain.

Argentina, the name given to this territory, is an adjective which means "Silver" – the precious metal-. Besides, the name "Rio de la Plata" (River of Silver), together with Argentina came to be just mere wishes instead of reality. Never was Silver found there.

The Pampas were a green sea where many efforts wrecked. For such reasons, neither the first university nor the first civil code in South America was Argentine.

However, the Argentine Civil Code enacted in 1869 –which author was Velez Sarfield, acquired a standing reputation in America and the rest of the world. This led the Argentine civil law and its doctrine could be highly considered.

Even though, the Argentine Civil Code was enacted before the discovery of electric power during this period of one hundred and thirty two years, the Civil Code has been updated on studies undertaken by professors and writers of treatises of civil law.

The whole Argentine Civil Code is in a straight line of the Roman Law. Moreover, the contributions made by Spanish and French laws are in some way Roman Law.

On many occasions, the Civil Code was intended to be amended. There came to be in 1926 the Draft of Juan Bibiloni; three other Drafts in 1936, 1954, 1987; two Drafts in 1993; and the last Draft in 1998.

In the latter one I took part as the Secretary of the Commission responsible for drawing it up.

The Argentine Civil Code is old-fashioned; however it was not born old. Conversely, it was a modern code at the time of its creation.

For instance, the system of reaching an agreement between two parties which are absent from each other; the introduction of International Private law; the scheme laid out for the marital properties and the systematisation of the personal right to withhold property law.

During these one hundred and thirty two years, the Argentine civil law had influence upon the Uruguayan civil law. As a matter of fact, the author of the Uruguayan civil code was an Argentine lawyer, Tristan Narvaja. Moreover, the Republic of Paraguay decided to apply the Argentine Civil Code until 1986.

In addition to this, the Argentine Civil Code was, to a certain extent, the foundation of much legislation as shown recently by Professor Alterini².

I am referring to the Panamanian Civil Code in 1916, the Philippines's Civil Code in 1950, the Japanese Civil Code in 1898, the Nicaragua's Civil Code in 1904; and likewise, the Spanish Civil Code, which took as a basis several sections from the Argentine Civil Code.

Lately it has been the contribution of Professor Saúl Litvinoff to the making up of the Civil Code of Louisiana as well as my own contribution to the Draft Civil Code of Puerto Rico.

At this stage of the lecture, I must highlight the greatest honour granted by Professor Xu Guodong when he made use of some sections of the Argentine Civil Code and the Argentine Draft Civil Code of 1998 in order to draw up the Draft Civil Code of China.

Now, in Argentina, the studies of Law last five years. And in order to get into the School of Law, there is one more year at the very beginning of the study courses. The Law Program of Study bases its syllabus on five courses of civil law: General Part, Obligations, Contracts, Real Property Law and Family together with Succession Law.

² ALTERINI, Jorge "The influence of the Argentine Civil Code in other codification processes" , in "The codification process: its foundation and prospective". Buenos Aires. Ed. El Derecho. 2004 p. 183

III.- ABOUT THE FUTURE

The aforementioned Argentine Draft of 1998 is still under the Congress analysis.

Whether it is passed to be an Act, this masterpiece points out several tendencies I will explain following.

1).- CONTINUATION OF CODIFICATION PROCESS.

Codification process is strengthening. Nowadays, it is dying out the process of not codification during de twentieth century. Today, decodification is turning into recodification.

For instance, it is being studied Amendments to the Civil Code of Peru, Puerto Rico, Quebec, Bolivia, Costa Rica and Argentina.

Additionally, there are new Civil Codes, or at least those Codes in force have been amended.

To mention some, there are in Moldova in 1964; in Somalia in 1973; in Bolivia and Argelia in 1975; the former Democratic Republic of Germany in 1976; Hungry in 1978; Venezuela in 1982; Peru in 1984; Cuba and Paraguay in 1987; in Québec and Holland in 1991; in Byelorussia, Kazakhstan and Mongolia in 1994; Vietnam in 1995, Russia Federation in 1996, Georgia and Kyrgyzstan in 1997; Armenia in 1998; Tajikistan in 1999, as well as in Azerbaijan, Turkmenistan and Uzbekistan. Brazil also had its new Civil Code in 2003.

Hence, the Codification system is a process which will last for a long time in civil law.

Among several countries, the civil law consolidation always starts within the field of contracts.

2).- LEGISLATIVE DRAFTING

Firstly, I should draw attention to the magnitude of the use of clear rules of legislative drafting.

Probably, the first rule is the uniformity of the language and ways of writings, as a means to obtain understandable norms.

The clarity is the elegance of the law

In my opinion, the second rule is to create general set of laws in order not to give into temptation and try to rule every circumstance, which, in fact, it is not possible to do at all.

The third rule is that alongside the whole drafting work a clear structure without exemption could be followed.

3).- INCLUSION OF A GENERAL PART

There is a tendency towards the existence of a general part in Civil Codes. In fact, the Civil Code of Japan (1896), Germany (1900), Brazil (1916), the Soviet ones (from 1924), the Holland's civil code (amended in 1970) and the Civil Code of Cuba (1988).

The Civil Code in force in Argentina does not have a general part; however, it was included in all the Drafts –seeing that that General Part is being taught since 1910³.

In South America, the Civil Code of Brazil of 2003 and both Drafts of Puerto Rico and Argentina of 1998 have just introduced a general part.

Moreover, there are small general parts within the regulation of Contracts and Property Law in the Argentina Draft of 1998 and the Brazilian Civil Code in force since 2003.

4).- INCLUSION OF ANY RIGHTS

Any Rights are introduced through Constitutional Law in Civil Codes as a way of acknowledge of said Rights.

I am referring to those rights that normally are ruled in constitutional texts, Such as the right to honour, the right to life, the right to security, the right to physical integrity, the right to health, the right over one's own body, one's own image or one's own voice.

The Draft Civil Code of Bolivia, Peru, Puerto Rico and the last Argentine draft regulate these rights.

5).- UNIFICATION IN THE FIELD OF CIVIL AND COMMERCIAL OBLIGATIONS.

In several international conferences, it has been fostered the unification of civil and commercial obligations.

This unification exists in the Civil Code of Switzerland of 1912, the French and Italian draft civil Code, the civil code of Tunes of 1906, the Morocco's civil code of 1912, the Turkish Civil Code of 1926, the Lebanon's Civil Code of 1934, the Civil Code of Poland of 1934, the Civil Code of Madagascar, Senegal. And said

³ LLAMBÍAS. Jorge Joaquín. Treaty of Civil Law. General Part. Buenos Aires. Ed. Perrot. 1978- T-I. p. N°304 p. 234.

unification is partially ruled in the civil code of Italy, former Soviet Union, Peru, Paraguay, Cuba, Holland, Mongolia, Vietnam, the Russian Federation, Taiwan, Thailand, Québec, the General Principles of Civil law in China Republic of 1987, and the Argentine drafts of 1987, 1993, and 1998⁴.

Moreover, the Peruvian draft also unifies the rules governing both civil and commercial obligation.

The new Brazilian Civil Code of 2003 derogated, in part, the Commercial Code, which had a major backwards. For instance, section 273 regulated the issue of slaves.

6).- UNIFICATION IN THE FIELD OF CONTRACTUAL AND NON CONTRACTUAL LIABILITY.

The last four Argentine Draft Civil Codes unify both contractual and non contractual liability systems. There is also a strong tendency among the Peruvian doctrine.

Specially, the European Economic Community has passed the Directive 374/85/EEC by which both contractual and non contractual systems concerning liability for defective products are unified. This led to amend the laws of Great Britain, Greece, Italy, Luxemburg, Denmark, Portugal, Germany, Holland, Belgium, Ireland, Spain, Austria, Finland, Sweden and France⁵.

Something similar may happen in the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1994).

7).- LIMITATION ON AMOUNT OF COMPENSATION CONCERNING CIVIL LIABILITY

There is another tendency regarding the limitation on amount owed as compensation concerning civil liability.

In this respect, it is possible to get a quick collection of compensation and that parties may reach an agreement on an insurance contract .

Nowadays, rated compensation is a common rule on air and maritime transportation. Within the Mercosur, it has also been applied rated compensation in transport since 1994.

⁴ See the Note written by Atilio A. Alterini to the Congress about the Draft Civil Code of 1998 to the Republic of Argentina, 18th of december of 1998.

⁵ LÓPEZ CABANA, Roberto. "The unification of contractual and non contractual civil liability", in ALTERINI, PICASSO, WAJNTRAUB. Modern Private Law Institutions. Ed. Abeledo Perrot. Bs. As. 2001 p. 215 y ss.

This issue is also fostered in the Vienna Convention on Civil Liability for Nuclear Damage (1963).

8).- CHANGES OF MATRIMONIAL REGIME

In addition, it can be seen a tendency towards initial options growing on the matrimonial regime. An as a consequence, there is a possibility to change said regime once the marriage is celebrated.

Argentine Draft Civil Code of 1998 and 1993, the new Brazilian code and the Peruvian Draft Civil Code grant permission to change the matrimonial regime during the marriage.

This subject matter was in force in Spain since 1978.

On several decisions, the Supreme Court of Puerto Rico has taken this position regarding the question of making matrimonial regime changes during the marriage. So, I would guess it to be an alternative when that part of the Draft would be drawn up.

IV.- CHINA Y ARGENTINA. CHINA AND ARGENTINA

These were only a few issues from many others -at least, as many issues as a Civil Code has. And those issues not being considered would really deserve to be taken into consideration.

However, my own language limitations do not allow me to do so.

I wish both Universities reach an agreement by which Chinese and Argentine Professors and Students interchange their knowledge.

In my opinion, Professor Xu Guodong has the merit of having been the first one to know the Argentina civil law. To him I am thankful. If it were not for his gentle contribution, I would not have been among you.

Everything is going to be performed. The future is ours.

The World is looking at China with respect and admiration; and Argentina as well.
