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Public and Private Intermingled: Changes in the Family and Property Laws of Argentina

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**PUBLIC AND PRIVATE INTERMINGLED:
CHANGES IN THE FAMILY AND PROPERTY LAWS
OF ARGENTINA**

Julieta Marotta* & Agustín Parise†

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I. INTRODUCTION

The traditional division of law into private and public has faded away in many jurisdictions across the globe, already for several decades. The Republic of Argentina is no exception to that phenomenon, since private and public law cannot be considered watertight

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Research for this report was undertaken at the law library of Universidad de Buenos Aires. 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. All websites were last visited on Dec. 20, 2020.

compartments. This report addresses the interplay of private and public law in that South American country. It focusses on developments that deal with the adoption of a national civil and commercial code (*Código Civil y Comercial de la Nación*, ACCC) on August 1, 2015,¹ while elaborating on two pillars of private law that serve as examples of the referred interplay, namely the law of family and the law of property. As this report aims to demonstrate, these developments are interconnected and reflect paradigmatic shifts in the understanding of the law by scholars, courts, and society at large.

The current context welcomes a frequent interplay of private and public law in Argentina. Constitutional law in this South American country includes the Argentine Constitution and a selection of human rights treaties.² The Argentine Constitution contains the value premises under which Argentine society is formed. Human rights treaties, incorporated in the Argentine Constitution in 1994,³

1. See Law 26994, available at <https://perma.cc/Z26Y-TWHE>.

On the path towards the adoption of the new Argentine text, see 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); and Agustín Parise, *The Argentine Civil and Commercial Code (2015): Igniting a Third Generation of Codes for Latin America*, 3 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 639 (2017).

2. This paragraph borrows part of its exposition, sometimes drawing verbatim, from 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 (Boekenplan Maastricht 2017).

3. See National Constitution of the Republic of Argentina, available at <https://perma.cc/DVK7-UENZ> [hereinafter Const. Nacional]; the English translation of art. 75(22) reads as follows:

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

recognize and extend rights to the people.⁴ They also increase the international responsibility of the State to, on the one hand, implement policies to ensure the recognition of fundamental rights and proper prevention on latent social problems; and, on the other hand, to examine, adjudicate, and compensate for the violation of rights.⁵ Indeed, policy decisions at an international and constitutional level may color the subsequent legal provisions that have to comply with this legal threshold.⁶

II. BLURRING DIVIDE

The interplay of private and public law is sensed in many aspects of the Argentine legal framework.⁷ A recent example is present in the ACCC, and 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

Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not 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.

4. The Argentine Constitution incorporates human rights treaties ranking at the same level than the Constitution itself. In addition, it establishes the procedure for further approval of international treaties. Human rights treaties that do not rank at the constitutional level are anyway above federal law. See MARÍA ANGÉLICA GELLI, *CONSTITUCIÓN DE LA NACIÓN ARGENTINA: COMENTADA Y CONCORDADA* 591-597 (2d ed., La Ley 2004).

5. GENERAL SECRETARIAT ORGANIZATION OF AMERICAN STATES, ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS § 15, 33 (2007). See also *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights 1988; and art. 7, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, available at <https://perma.cc/5BVJ-L5G6>.

6. MICHAEL J. HILL, *THE PUBLIC POLICY PROCESS* 160 (6th ed., Routledge 2013).

7. This section borrows part of its exposition, sometimes drawing verbatim, from Parise, *supra* note 1.

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.⁸ Resilience is a characteristic of codification: codes are indeed able to adapt to different societal needs at different times and places.⁹ 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 des motifs* to a number of tenets that are present in the new text.¹⁰ 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.¹¹ The ACCC offers a community between private law and public law, especially with the Argentine Constitution.¹² For example, as this report aims to demonstrate, the new code offers articulation between public and private law in the areas of family and property. Further, 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.¹³ This community of systems has long been sought for by a number of Argentine

8. See Marotta & Parise, *supra* note 1, at 239-250.

9. 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).

10. See the complete text of the *exposé des motifs* in *Fundamentos del Anteproyecto de Código Civil y Comercial de la Nación*, especially at 4-6, available at <https://perma.cc/2TG8-TK7W> [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).

11. 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).

12. *Fundamentos del Anteproyecto*, *supra* note 10, at 4. See Rivera, *supra* note 11, at 8; and Miriam Smayevsky & Marcela A. Penna, *Los derechos reales en el siglo XXI*, *LA LEY* 1, 4 (April 10, 2015).

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

scholars.¹⁴ The *exposé des motifs* states along those lines that “it may be affirmed that a reconstruction of the coherence of the human rights system with private law exists.”¹⁵ A number of provisions of the ACCC, therefore, find grounding in the Argentine Constitution and in supranational law.¹⁶ 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.”¹⁷ 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 that is coherent with the entire system.”¹⁸ The constitutionalization of private law and the incorporation of international treaties into the Argentine Constitution had had an impact in domestic law,¹⁹ and the ACCC aims to make that scenario explicit in its provisions. The Argentine Constitution is now at the center of the system, and—as mentioned before—a selection of treaties have become part of the internal system.²⁰ The ACCC aims to adapt the civil and commercial law to the Argentine Constitution and to supranational human rights.²¹ Thus, the new text places all human beings at the center, 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.²²

14. Fundamentos del Anteproyecto, *supra* note 10, at 4.

15. *Id.* See Rivera, *supra* note 11, at 8.

16. Rivera, *supra* note 11, at 21.

17. Law 26994, art. 1.

18. *Id.* at art. 2. See Héctor P. Recalde et al., *Precisiones sobre el Código Civil y Comercial y el Derecho Laboral*, LA LEY 1, 1 (Nov. 10, 2014).

19. Elena I. Highton, *Los jóvenes o adolescentes en el Código Civil y Comercial*, LA LEY 1, 1 (Apr. 13, 2015).

20. *Id.*

21. 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 (June 17, 2015).

22. Oscar E. Garay, *Protección de la persona y temas de la salud en el Código Civil y Comercial*, LA LEY 1, 1 (Nov. 17, 2014).

Three more tenets may be grouped together and derive from the constitutionalization of private law. One tenet refers to a code of equality. Again, the central place in codification is now occupied by the human being who must be treated equally.²³ Equality does not distinguish according to sex, religion, place of origin, or wealth:²⁴ it has a universal dimension in the ACCC.²⁵ 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.²⁶ 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.²⁷ Individual rights and rights with a collective impact are both explicitly mentioned in the ACCC.²⁸ The spread of a variety of dangers and their diffuse or collective character justifies the inclusion of rights with a collective impact.²⁹

Another tenet focusses on pillars of private law that intermingle with public law. That tenet relates to a code with a new paradigm of family law and of property law.³⁰ On the one hand, in the law of family, it is possible to sense that family relations experienced the

23. *Id.*

24. *Id.*

25. *Id.* at 9.

26. It should be noted, however, that some scholars claim that this tenet is not fully present when dealing with the rights of Native Americans. 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).

27. See arts. 41, 43, Const. Nacional.

28. Law 26994, art. 14. See Lidia M. R. Garrido Cordobera, *Derechos individuales y de incidencia colectiva en el Código Civil y Comercial*, LA LEY 1, 6 (Feb. 10, 2015).

29. Garrido Cordobera, *supra* note 28, at 6.

30. Fundamentos del Anteproyecto, *supra* note 10, at 5.

constitutionalization of private law.³¹ Family relations preserve in Argentina their importance as a social institution and strengthen the principle of equality and non-discrimination recognized at a constitutional and international level.³² On the other hand, in the law of property, the Argentine Civil Code of 1871 had followed the *Code Napoléon* conception, and welcomed the liberal paradigm of property.³³ As other nineteenth-century texts, the Argentine code had embraced the liberal ideal of an absolute, unique, and perpetual real right of ownership.³⁴ A broader scope was proposed in the 2015 text for this pillar of private law, aiming to a reconciliation with constitutional law and human rights.³⁵ It is possible to note that in Argentina the ACCC welcomes both the unification of civil and commercial laws and the interplay of constitutional principles and their operationalization through private law.³⁶

III. FAMILY LAW

The ACCC is tightly related to the Argentine Constitution, where civil law becomes a reflection of a number of constitutional principles.³⁷ This relation between a private law code and the constitution was pointed early in the nineteenth century, as expressed by the ideas of Juan Bautista Alberdi; yet, the relationship lost

31. Carla Modi, *El derecho real de habitación del cónyuge/conviviente supérstite*, ED-DCCLXXVII-929 1, 1-2 (June 10, 2019).

32. 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).

33. Abelardo Levaggi, *El proceso de transformación del régimen de la propiedad según la codificación iberoamericana del siglo XIX*, in V Actas do XII Congresso Internacional de AHILA 413, 417 (Eugénio dos Santos ed. 2001).

34. *Id.* at 416-419; MANUEL I. ADROGUÉ, *EL DERECHO DE PROPIEDAD EN LA ACTUALIDAD: INTRODUCCIÓN A SUS NUEVAS EXPRESIONES* 36 (Abeledo-Perrot 1991).

35. 1 CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN COMENTADO 26-27 (Julio César Rivera & Graciela Medina eds., La Ley 2014) [hereinafter, RIVERA & MEDINA, 1 CÓDIGO CIVIL Y COMERCIAL COMENTADO].

36. *Id.*

37. Fundamentos del Anteproyecto, *supra* note 10, at 59; and RIVERA & MEDINA, 1 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 35, at 26-27.

strength during the twentieth century.³⁸ Jurists of the current century revived the relationship, focusing on the interaction between constitutional principles and the ACCC. They acknowledge that the constitution provides the main principles under which a nation is built and look at codes as tools to materialize such principles.³⁹

In family relations the division between private and public law becomes blurry. After all, families play a fundamental role as a social institution; and 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.⁴⁰ The Codifying Commission indeed gave preeminence to a code with express principles that represent a multicultural society;⁴¹ and, as indicated in the *exposé des motifs*, the ACCC represents a “democratization of the family,”⁴² recognizing the different types of families that individuals may form.⁴³ Family relations in the ACCC are hence defined by the current culture of the Argentine society and not by a natural principle.⁴⁴

38. RIVERA & MEDINA, 1 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 35, at 26-27.

39. *Id.*

40. 2 CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN COMENTADO 567-571 (Ricardo Luis Lorenzetti ed. 2015) [hereinafter, LORENZETTI, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO].

41. See Parise, *supra* note 1, at 654-655; referring to Ricardo L. Lorenzetti, *Proyecto de Código Civil y Comercial de la Nación* 5 (2011), available at <https://perma.cc/4VSB-34SD>; and Aída Kemelmajer de Carlucci, *Las nuevas realidades familiares en el Código Civil y Comercial argentino de 2014*, LA LEY 1, 2 (Oct. 8, 2014).

42. Fundamentos del Anteproyecto, *supra* note 10, at 60.

43. 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 (Nov. 17, 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 Ursula C. Basset, *El abuso en las relaciones de familia*, ED-DCCLXIII-778 1 (Mar. 3, 2019).

44. Kemelmajer de Carlucci, *supra* note 41, at 1.

This current approach also affected the understanding of damages within family relations, see Ursula C. Basset, *Admisibilidad de los daños en las relaciones de familia: De la inmunidad a la postfamilia*, ED-DCCLXXVII-479 1 (June 1, 2018).

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.⁴⁵ The latter article considers family as an institution independent from the formal act of marriage.⁴⁶ 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.⁴⁷ 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.

A. Public Law Principles in Family Relations

The ACCC deals with family relations in Book II. That book incorporates fundamental principles such as freedom, equality, and non-discrimination that are relevant to family relations and that can be traced to public law. These fundamental principles can be found, for example, in the Argentine Constitution. There, article 19 points

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 (Aug. 15, 2012).

45. See art.14 *bis*, Const. Nacional: it reads in its relevant part, in an English translation:

The State shall grant the benefits of social security, which shall be of an integral nature and may not be waived. In particular, the laws shall establish: compulsory social insurance, which shall be in charge of national or provincial entities with financial and economic autonomy, administered by the interested parties with State participation, with no overlapping of contributions; adjustable retirements and pensions; **full family protection**; protection of homestead; family allowances and access to a worthy housing (emphasis added).

46. GELLI, *supra* note 4, at 129; and Fundamentos del Anteproyecto, *supra* note 10, at 59-60.

47. Kemelmajer de Carlucci, *supra* note 41, at 2; and Silvana Ballarin, *Las relaciones de familia: ¿árbol o rizoma?*, 96 DERECHO DE FAMILIA: REVISTA INTERDISCIPLINARIA DE DOCTRINA Y JURISPRUDENCIA 3 (2020).

to freedom and equality,⁴⁸ while article 75(22) welcomes different international instruments that encapsulate those principles.⁴⁹ Examples are found in the incorporation of the American Convention on Human Rights of 1969⁵⁰ and in the Convention on the Elimination of All Forms of Discrimination against Women of 1979.⁵¹ At an internal level, Law 26618 of 2010⁵² also serves as a precedent for the ACCC, since it deals with same-sex marriage and the fundamental principles that surround that paradigmatic change in family law.⁵³ The fundamental principles are used as a guideline to understand the spirit of the ACCC, and may assist judges at the time of rendering justice.⁵⁴ Further, they create an international responsibility for signatory countries, since, for example, the Inter-American Court of

48. Art. 19, Const. Nacional reads in an English translation:

The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.

49. See *supra* note 3, and accompanying text.

50. Art. 1(1), American Convention on Human Rights reads in its relevant part:

The States Parties to this Convention undertake to respect the rights and freedoms . . . and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

American Convention on Human Rights “Pact of San Jose, Costa Rica,” available at <https://perma.cc/5XWH-EUS4>.

51. Art. 16, Convention on the Elimination of All Forms of Discrimination against Women reads in its relevant part: “1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. . . .”, available at <https://perma.cc/6KZE-M5Z5>.

52. LORENZETTI, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 40, at 567-571; and 2 CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN COMENTADO 1-3 (Marisa Herrera et al. eds. 2015) [hereinafter, HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO].

53. For a description of how same-sex marriage was incorporated in the ACCC, see Marotta & Parise, *supra* note 1, at 250-257. For a reflection on the developments of how same-sex marriage was incorporated in Argentine legislation, see Ursula C. Basseta, *How the Battle to Redefine Marriage affected Family Law in Argentina*, 27 *BYU J. PUB. L.* 529 (2013).

54. LORENZETTI, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 40, at 568.

Human Rights could hold Argentina accountable for a violation of the principle of equality.⁵⁵

The incorporation of fundamental principles is in line with the constitutionalization of private law. On the one hand, the principles of freedom and equality in family relations are present in article 401 of the ACCC. This article reads in an English translation:

This code does not recognize agreements of future marriage. There shall be no action to demand performance of a promise of marriage or to claim for damages caused by the end of the relationship, without prejudice to the application of the rules of enrichment without cause, or the restitution of donations, if applicable.⁵⁶

This article of the ACCC, accordingly, reinforces the prevalence of the constitutional principles of freedom by the time of the consummation of marriage. It further ensures that that freedom cannot be conditioned by prior agreements.⁵⁷ On the other hand, the principles of non-discrimination and equality are confirmed in article 402 of the ACCC. That article prescribes that:

No rule can be interpreted or applied in the sense of limiting, restricting, excluding, or suppressing the equal rights and obligations of the parties to a marriage; and the effects the marriage produces, be it between two people of the same or different sex.⁵⁸

55. *Id.* at 567-571, and its reference to the cases *Atala Rifo v. Chile* and *Fornerón v. Argentina*.

56. Law 26994, art. 401 (emphasis added).

57. LORENZETTI, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 40, at 565.

Scholars in Argentina, however, indicate that this article is detrimental for the constitutional “no-damage” value premises as recognized in art. 19 of the Argentine Constitution, since it does not allow parties to claim for the compensation of damages. 2 CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN COMENTADO 4-5 (Julio César Rivera & Graciela Medina eds. 2014) [hereinafter, RIVERA & MEDINA, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO].

58. Law 26994, art. 402 (emphasis added).

This article, accordingly, states that no provision of the ACCC may limit the equality of the rights and obligations of the couple.⁵⁹

The principle of non-discrimination, as addressed in the Convention on the Elimination of All Forms of Discrimination against Women, is embedded in the text of articles 401 and 402 of the ACCC.⁶⁰ All the above mentioned principles serve as examples of the limitations in the intervention of the State to decide on the private sphere, as long as society is not negatively affected.⁶¹ Ultimately, the ACCC follows an approach to the fundamental principles that derives from public (national and international) law and private law.

A final note relates to the law of procedure as to family matters, since the ACCC includes—along similar lines than the Argentine Civil Code of 1871, yet in a more significant number—provisions that deal with that part of the law.⁶² As expected, substantive reforms in private law necessarily had an impact on procedure.⁶³ For example, the new text states the standards it protects, subscribing to what Ricardo Lorenzetti refers to as the incorporation of a “constitutional procedural law of the family” (*derecho procesal constitucional de la familia*).⁶⁴ The ACCC emphasizes access to justice and dispute resolution for conflicts among family members.⁶⁵ The new

59. LORENZETTI, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 40, at 567-571; and RIVERA & MEDINA, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 57, at 5-6.

60. HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 1-5.

61. Fundamentos del Anteproyecto, *supra* note 10, at 60; and GELLI, *supra* note 4, at 183-185.

62. Juan José Guardiola, *Necesaria revisión de las normas procesales en cuestiones de relaciones de poder y prescripción adquisitiva*, JURISPRUDENCIA ARGENTINA 1 (Sept. 30, 2020).

63. *Id.*

64. Fundamentos del Anteproyecto, *supra* note 10, at 97. Constitutional procedural law refers to the procedures that aim to secure the enforcement of constitutional principles, *see* Jorge Horacio Gentile, *Derecho Procesal Constitucional y control de constitucionalidad*, 2 REVISTA DE LA FACULTAD DE DERECHO 111, 116-117 (2011).

65. Graciela Medina, *El proceso de familia*, in COMENTARIOS AL PROYECTO DE CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN 2012 437, 440-449 (Julio César Rivera ed. 2012).

text therefore addresses procedure within family law aiming at protecting constitutional standards of those involved in family conflicts.⁶⁶ The procedure provides further guidance to family judges to perform their duties and reinforces and ensures the possibility of parties to exercise their family rights.⁶⁷

B. Access to Justice in Family Relations

The term “rights” in Spanish (i.e., *derechos*) derives from the Latin *directus*, which also means “straight.”⁶⁸ Legal scholars have associated “rights” with the image of a “straight” path that connects a problem with a solution.⁶⁹ The positivistic understanding of the function of rights is far from expressing what actually happens, though it serves as a reminder that rights are meant to serve as a tool to simplify access to a remedy (access to justice). This goal is shared by private and public law, though with a different focus: access to remedies for private parties, and access to remedies for the public good. The adoption of article 706 of the ACCC serves as a prime example of how private and public law interact in Argentina.⁷⁰

Access to justice—even beyond Argentina—is currently understood in a holistic and inclusive way.⁷¹ The term considers the drafting and the administration of the law important, together with the welcoming of other disciplines beyond the law to achieve conflict

66. The ACCC does not define what a “family procedure” is, *see id.* For a general analysis of the law of procedure as to family law, *see* Angelina Ferreyra de De la Rúa, *El procedimiento de familia en el Proyecto*, LA LEY 1, 1-9 (June 21, 2012).

67. HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 559.

68. MAROTTA, *supra* note 2, at 376; and EDUARDO ÁNGEL RUSSO, TEORÍA GENERAL DEL DERECHO 18 (Abeledo-Perrot 2003).

69. *Id.*

70. Argentina aims to achieve a judicial value of “equality” that materializes in values of non-discrimination and equal opportunities. The concept of access to justice, as included in the ACCC, incorporates these values, *see* Marotta & Parise, *supra* note 1, at 258-267. *See generally* Mario Masciotra, *Principios generales en los procesos de familia*, ED-CMXXXIV-181 (Nov. 17, 2020).

71. Roderick A. Macdonald, *Access to Civil Justice*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 492, 507-508 (Peter Cane & Herbert M. Kritzer eds., Oxford U. Press 2010).

resolution. A clear expansion of the term “access to justice” is observed and boundaries are broadened in view of protecting the ultimate goal of access to justice: conflict resolution and societal order. The incorporation of human rights treaties in Argentina plays a significant role in broadening the right to access to justice and in addressing equality by introducing principles considering particularities of individuals and especially of vulnerable groups.

The concept of access to justice recognizes the value of law, courts, and judges when searching for conflict resolution and societal order. It further gives value to international law and constitutional principles, to multidisciplinary assistance, and to the active participation of all parties involved. This understanding preserves a legal-empowerment approach to access to justice that positions the capabilities of individuals at the center, recognizing their capacities to exercise themselves. Hence, private rights apply to individuals in an egalitarian way, without distinctions based on constructed identities, such as gender, religion, place of birth, or wealth.⁷²

Article 706 of the ACCC places access to justice as a central goal of the law of procedure as to family matters, directly referring to access to justice for vulnerable groups.⁷³ That article, being the main provision for that part of the ACCC, states in its relevant part that:

Proceedings in family matters should observe the principles of effective judicial protection, procedural immediacy, good faith and procedural fairness, intervention by the judge at his/her own initiative when required, oral proceeding, and limited access [only for parties] to the case file.

The rules governing the procedure must be applied to facilitate access to justice, especially for vulnerable people, and to achieve peaceful resolution of conflicts.

Judges before whom these cases must be filed should be

72. Fundamentos del Anteproyecto, *supra* note 10, at 5.

73. Medina, *supra* note 65, at 440-449; and Masciotra, *supra* note 70, at 2. See also Marotta & Parise, *supra* note 1, at 266-267.

specialized and have multidisciplinary support. . . .⁷⁴

There is merit in undertaking a more detailed analysis of that seminal provision.⁷⁵ Article 706 incorporates the underlying constitutional and international principles of equality and due process. That incorporation is primarily evident in the adoption of references to “effective judicial protection” and “procedural immediacy.” First, the reference to “effective judicial protection,” which is about the right of a person to be heard by a judge that is independent, impartial, and appointed by law before the act for which he/she is to be tried.⁷⁶ This is in line with article 18 of the Argentine Constitution⁷⁷ and with articles 8 and 10 of the Universal Declaration of Human Rights of 1948.⁷⁸ Further, the reference to “effective judicial protection” represents the contents of articles 8 and 25 of the American Convention on Human Rights,⁷⁹ since the latter articles address the

74. Law 26994, art. 706. Compare this translation with the one provided in Marotta & Parise, *supra* note 1, at 266-267. The authors are indebted to Mariano Vitetta for his suggestions, helping improve in this report the quality of the English translation of article 706.

75. *See, e.g.*, the brief reference in Belluscio, *supra* note 10, at 693.

76. Ferreyra de De la Rúa, *supra* note 66, at 2. For a general note about “effective judicial protection,” *see* Medina, *supra* note 65, at 441-442.

77. Art. 18, Const. Nacional reads in its relevant part, in an English translation:

No inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he is tried. Nobody may be compelled to testify against himself, nor be arrested except by virtue of a written warrant issued by a competent authority. The defense by trial of persons and rights may not be violated. . . .

78. Art. 8, Universal Declaration of Human Rights *available at* <https://perma.cc/7JGJ-T7DG>: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Art. 10 of this same instrument reads in its relevant part: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations. . . .”

See also Ferreyra de De la Rúa, *supra* note 66, at 2; RIVERA & MEDINA, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 57, at 633; and Masciotra, *supra* note 70, at 2-3.

79. Art. 8, American Convention on Human Rights reads in its relevant part: “1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law. . . .” Art. 25 of this same instrument reads in its relevant part:

role of judges to ensure a fair trial and the right to judicial protection.⁸⁰ Here, once more, the presence of public law is noticed.

The reference to “procedural immediacy” in article 706 is also important. It can be deemed essential in family proceedings due to the characteristics of the conflicts in which a delayed involvement of judges could be detrimental for the possibility to solve conflicts (or avoid their escalation).⁸¹ “Procedural immediacy” can be found in a number of international instruments. For example, it is present in article 8 of the American Convention on Human Rights,⁸² in article 9 of the Convention on the Rights of the Child of 1989,⁸³ and in articles 1, 3, and 13 of the Convention on the Rights of Persons with Disabilities of 2007.⁸⁴

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention. . . .

2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.

80. Ferreyra de De la Rúa, *supra* note 66, at 3; and HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 559-560.

81. Medina, *supra* note 65, at 442-443; and Masciotra, *supra* note 70, at 3-4.

82. See *supra* note 77, and accompanying text.

83. Art. 9, Convention on the Rights of the Child, available at <https://perma.cc/94WM-98D3>, reads in its relevant part:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. . . .

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

84. Art. 1, Convention on the Rights of Persons with Disabilities, available at <https://perma.cc/UW7V-RTXW>, reads in its relevant part: “The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. . . .” Art. 3 of this same instrument reads in its relevant part:

The principles of the present Convention shall be:

1. Respect for inherent dignity, individual autonomy . . . , and independence of persons;
2. Non-discrimination;
3. Full and effective participation and inclusion in society;

Article 706 also makes reference to the intervention of the judge at his/her own motion, which is further addressed in article 709.⁸⁵ This incorporation provides family judges with the procedural capacity to move the case forward when the parties fail to do so. Family judges are called on by the ACCC to take an active role in the proceeding.⁸⁶ Hence, family judges are viewed as fundamental social actors in the conflict who are given the possibility to participate in the proceeding in view of protecting the public interest.⁸⁷ After all, the State must be involved in safeguarding the family as a social institution since it encompasses one of its main interests.⁸⁸ Article 706(b) further refers to the need of family judges to be specialized in that area of the law and to have multidisciplinary support.⁸⁹ The inclusion of public law elements within the ACCC requires family

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4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
 5. Equality of opportunity;
 6. Accessibility. . . .

Further, art. 13 of this same convention reads in its relevant part: “1. States Parties shall ensure effective access to justice for persons with disabilities. . . .” *See also* HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 560-561.

85. *See* Law 26994, art. 709.

86. Masciotra, *supra* note 70, at 5-7; and Marianela Calabrese Gilardo, *Procesos de familia: principios probatorios en el Código Civil y Comercial*, REVISTA CÓDIGO CIVIL Y COMERCIAL 23, 23-24 (Apr. 12, 2019).

87. HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 559; and RIVERA & MEDINA, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 57, at 636.

88. HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 559; and RIVERA & MEDINA, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 57, at 636-639.

89. Ferreyra de De la Rúa, *supra* note 66, at 2; Medina, *supra* note 65, at 446-447.

On the importance of multidisciplinary assistance to family judges, particularly in cases dealing with family violence, *see* María C. Castillo & Miguel Carol Lugones, *Violencia familiar y la interdisciplina. El abuso sexual intrafamiliar*, 87 DERECHO DE FAMILIA: REVISTA INTERDISCIPLINARIA DE DOCTRINA Y JURISPRUDENCIA 309 (2018).

On how the ACCC highlighted the importance of an interdisciplinary approach to family matters, *see* Nora Lloveras, *El Código Civil y Comercial de la Nación y la interdisciplina*, 87 DERECHO DE FAMILIA: REVISTA INTERDISCIPLINARIA DE DOCTRINA Y JURISPRUDENCIA 1 (2018).

judges to be knowledgeable beyond private law, being aware of the different interpretations by national and international courts.⁹⁰

Article 706(a) addresses vulnerable groups, aiming to reduce social inequalities and enhance social cohesion.⁹¹ Scholars have pointed that the Brasilia Regulations Regarding Access to Justice for Vulnerable People of 2008⁹² were the inspiration for that reference to vulnerable groups within the ACCC. They consider that that international instrument is to be used when aiming to understand the extension of the definition and classification of those groups.⁹³ In addition, that instrument has been referred to extensively by family law regulations in Argentina.⁹⁴

Book II on family relations of the ACCC makes evident the interplay of public and private law. It incorporates principles from constitutional, international, and procedural law. Likewise, Book II offers articulation between a public law system that defends freedom, equality, and non-discrimination, and a private law system of family relations that offers adequate protection to the individuals that are part of a family. Constitutional, international, and procedural principles are operationalized in that book of the Argentine new code, influencing the expertise that is needed from the family judges and the international responsibility undertaken by the State in protecting those principles.

IV. PROPERTY LAW

The law of property in the ACCC offers positive innovations when compared with the text of the Argentine Civil Code of 1871. The new text adapts the law to social realities that had demanded

90. HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 563; and RIVERA & MEDINA, 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 57, at 640.

91. Masciotra, *supra* note 70, at 2.

92. Brasilia Regulations Regarding Access to Justice for Vulnerable People, available at <https://perma.cc/6XAH-XNPC>.

93. HERRERA ET AL., 2 CÓDIGO CIVIL Y COMERCIAL COMENTADO, *supra* note 52, at 561-563.

94. *Id.*

change for a number of decades, incorporating jurisprudential and doctrinal developments.⁹⁵ The individualistic paradigm was left behind, being now more in accordance with the tenets of the Argentine Constitution and special legislation.⁹⁶ It is therefore possible to sense a blurring divide between private and public law. For example, as indicated in the *exposé des motifs*, various non-pecuniary things have emerged since the nineteenth century (e.g., genetics) which require legislative attention.⁹⁷ Furthermore, the communitarian rights of Native Americans are to be acknowledged, especially in Latin America, where many of those rights were more fully recognized only with the constitutional reforms of the final part of the twentieth century.⁹⁸ Environmental hazards also trigger the constitutionalization of private law, since they affect property that is considered collective by the Argentine Constitution and by special legislation, hence not deemed restricted to the private domain.⁹⁹

The ACCC introduces fundamental aspects of property in its Preliminary Title, offering a framework that applies throughout the text. Property in the new text was expanded to include the environment and the human body.¹⁰⁰ The nineteenth century text—in line with other contemporary codes—had neglected these elements of property law. According to the new text, persons can hold individual rights on property that is part of their patrimony. Material property is referred to as a thing and the same rules apply to energy and natural forces that can be subject to the service of humankind. Parts of the human body have no commercial value and can be disposed of freely if having an affective, therapeutic, scientific, humanitarian, or

95. Eduardo Molina Quiroga, *Principales reformas en materia de derechos reales en el Código Civil y Comercial de la Nación*, LA LEY SUPLEMENTO ESPECIAL NUEVO CÓDIGO CIVIL Y COMERCIAL 2014 165, [19] (Nov. 17, 2014).

96. María Elena Martínez Espeche, *Bienes de dominio público y privado del Estado en el nuevo Código Civil y Comercial de la Nación*, ELDIAL DC1F75 4 (Feb. 2, 2016).

97. Fundamentos del Anteproyecto, *supra* note 10, at 5.

98. *Id.*

99. *Id.*

100. Molina Quiroga, *supra* note 95, at [2-4].

social purpose. Finally, Native Americans have the right to possess and own the lands their community traditionally held and others that may enable human flourishing, according to the Argentine Constitution.¹⁰¹

Concepts that are needed to fully understand the extent of property law in Argentina are presented in Book I of the ACCC, dealing with the general part. Fundamental dichotomies are therefore addressed at turns in that book. For example, property can be movable or immovable, divisible or not subject to fragmentation, principal or accessory, consumable or nonconsumable, and fungible or nonfungible.¹⁰² It can be noted that the ACCC suppresses the category of the so-called “movables or immovables due to their representative nature.”¹⁰³

Relationships with property are addressed in that same book of the ACCC. First, with relation to people. Here, property can fall within the public domain (e.g., rivers in their natural beds, streets, parks, archaeological sites), can belong to the State (e.g., gold mines, non-navigable lakes), or can be privately owned. Second, with relation to rights with a collective impact.¹⁰⁴ Elements of an ecological function of property can be identified in that second relationship in Argentina. Rights with a collective impact secure the enjoyment of individual rights; hence, it is worth positioning the former over the latter.¹⁰⁵

Society at large plays a role in securing the sustainability of the environment.¹⁰⁶ Owners of property, however, must play a specific

101. Law 26994, arts. 15-18.

102. *Id.* at arts. 225-232.

103. Molina Quiroga, *supra* note 95, at [2-4].

104. Law 26994, arts. 235-241. *See also* José María Mariucci & Natalia Mariel Peluso, *El dominio público en el nuevo Código Civil y Comercial de la Nación: Su vinculación con los derechos de incidencia colectiva*, LA LEY SUPLEMENTO ADMINISTRATIVO 3 (Sept. 2015).

105. Mariucci & Peluso, *supra* note 104, at 3.

106. This paragraph and the one that follows borrow parts of their exposition, sometimes drawing verbatim, from Agustín Parise, *Preliminary Reflections on Paradigms, Ownership, and Ecology*, in *SUSTAINABILITY AND PRIVATE LAW* 17, 17-18 (Bram Akkermans & Gijs van Dijck eds., Eleven Intl. Publ'g 2020).

role. Sustainability does not fall within the exclusive competence of public law. For example, in Europe, the Constitution of Slovenia of 1991 welcomes the regulation of restrictions to the right of ownership to ensure the economic, social, and ecological function of property.¹⁰⁷ In the Americas, the Constitution of Colombia states also since 1991 that property is limited by an ecological function;¹⁰⁸ while a Brazilian high court understood in 2012 that there are ecological concerns that prevent owners from destroying natural resources that benefit society.¹⁰⁹ Similar situations may be faced with hydraulic fracturing in South Africa, with gas drilling in the Netherlands, with mining in China, or with surface mining in the USA.

The ecological function of property refers to ownership as fulfilling an ecological function, with a duty to secure sustainability.¹¹⁰ Limitations to ownership have proliferated since the final decades of the twentieth century because of environmental controls from the State.¹¹¹ It has been correctly stated, already in 2002 by Myrl L. Duncan, that “land ownership disconnected from community is a logical impossibility.”¹¹² Awareness of the role of humans as creatures in an environment enables reconciliation between ownership

107. The text refers to an environmental function, it should be noted. See art. 67 of the Constitution of the Republic of Slovenia, in English, available at <https://perma.cc/SM37-N4E2>. See also Suzana Kraljić & Vesna Rijavec, *Slovenia*, in 7 INTERNATIONAL ENCYCLOPEDIA LAWS: FAMILY AND SUCCESSION LAW § 498 (Wolters Kluwer 2014).

108. See art. 58, Constitution of the Republic of Colombia, in English, available at <https://perma.cc/99N8-8EWD>. See also Helena Alviar Garcia, *Looking beyond the Constitution: The Social and Ecological Function of Property*, in COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 153, 158 (Rosalind Dixon & Tom Ginsburg eds., Elgar 2017).

109. Nicholas S. Bryner, *Public Interests and Private Land: The Ecological Function of Property in Brazil*, 34 VA. ENVTL. L.J. 122 (2016) [hereinafter, Bryner, *Public Interests and Private Land*].

On the Brazilian court, see Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)*, 29 PACE ENVTL. L. REV. 470 (2012).

110. See, e.g., Bryner, *Public Interests and Private Land*, supra note 109.

111. Terry W. Frazier, *Protecting Ecological Integrity within the Balancing Function of Property Law*, 28 ENVTL. L. 53 (1998).

112. Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-based Resource In Memoriam: Professor Curtis J. Berger*, 32 ENVTL. L. 773 (2002).

and ecology.¹¹³ A main challenge of sustainability relates to reaching a development that is grounded in ecology, social equality, cultural diversity, and democratic participation.¹¹⁴

The ACCC refers that the exercise of individual rights must be compatible with rights that have a collective impact, hence not affect the sustainability or operation of, amongst others, ecosystems of flora, fauna, biodiversity, and water. The new text includes limitations to individual rights over things in order to protect sustainability.¹¹⁵ The understanding of property is broader, hence not only focusing on patrimonial aspects, and open to enjoyment of other members of society.¹¹⁶ It should be noted that the collective value of property had been addressed by the Argentine Supreme Court already in 2006, in the *Mendoza* case,¹¹⁷ in which environmental law was determined to rank at the constitutional level.

A. Power Relationships

The ACCC refers to power relationships rather than real or possessory relationships. The use of the term “power relationships”—not free of criticism¹¹⁸—may be deemed novel, more precise, and

113. Frazier, *supra* note 111, at 103.

114. Mariano H. Novelli, *Bases jurídicas de la educación para el desarrollo sostenible en el Mercosur*, 6 ACADEMIA 183, 187 (2008).

115. Law 26994, arts. 14, 240. *See also* Aníbal J. Falbo & José Alberto Esain, *El Código Civil y Comercial y el ambiente*, REVISTA CÓDIGO CIVIL Y COMERCIAL 19 (Aug. 17, 2015); and Carlos A. Rodríguez, *Derecho ambiental y Código Civil y Comercial*, LA LEY ACTUALIDAD 1 (June 2, 2015).

116. María Elena Martínez Espeche, *Análisis del Libro Primero, Parte General, Título III del nuevo Código Civil y Comercial: Bienes*, ELDIAL DC1F74 1-5 (Mar. 1, 2016).

117. *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros*, Fallos 329:2316 (2006).

118. *See, e.g.*, Jorge Horacio Alterini, *Primeras consideraciones sobre los Derechos reales en el Proyecto de Código*, LA LEY ACADEMIA NACIONAL DE DERECHO 1, [6-8] (Sept. 4, 2012); and Jorge Horacio Alterini et al., *Una nueva visión de las relaciones reales (mal llamadas “relaciones de poder”)*, LA LEY 1 (Dec. 11, 2017).

not limited to possession. Further, it may help avoid confusions in the comparative-law narrative.¹¹⁹

Possession and detention are the power relationships a subject may have with a thing, under the ACCC. In addition, those who use the thing due to a relationship of dependence, service, hospitality, or hosting are deemed servers of the possession. This additional distinction refers to a lack of autonomy and aims to enable the extrajudicial defense of possession, enabling that those who have the thing are able to protect themselves from the attacks that imply violence on the person.¹²⁰

Possession occurs when a person exercises a factual power¹²¹ over a thing, acting as the holder of the right, regardless of being indeed the holder. The drafters of the ACCC, similarly to the drafter of the 1871 text, enrolled in the ideas of Friedrich K. von Savigny, according to whom possession requires both *corpus* and *animus*.¹²² Detention occurs when a person exercises a factual power over a thing, acting as a representative of the possessor. Hence, only *corpus* is present in this second power relationship.¹²³

Possession is presumed when factual power exists, while power relationships are presumed to be legitimate and to start on the date of the title, within its limitations. A rebuttable presumption points to the start of possession on the date indicated in the just title (*justo*

119. Liliana Abreut de Begher, *Impacto de la reforma sobre los derechos reales en el nuevo Código Civil y Comercial*, JURISPRUDENCIA ARGENTINA 1, [6-9] (Dec. 10, 2014).

120. Law 26994, art. 1911. See Leandro S. Picado & Fabián M. Loiza, *La posesión y la tenencia en el Anteproyecto de Código Civil y Comercial*, JURISPRUDENCIA ARGENTINA 1, [1] (Oct. 17, 2012).

121. On the factual power, see generally Domingo C. Cura Grassi, *Naturaleza de la posesión en el Código Civil y Comercial*, ED-DCCLXXVI-80 1 (June 22, 2016).

122. See generally FRIEDRICH KARL VON SAVIGNY, *DAS RECHT DES BESITZES: EINE CIVILISTISCHE ABHANDLUNG* (1803).

See arts. 2351, 2352, 1871 Argentine Civil Code and accompanying notes. See also Sebastián E. Sabene, *Las relaciones de poder y una perspectiva constitucional de la acción de desalojo por intrusión*, JURISPRUDENCIA ARGENTINA 1, [1-2] (Feb. 2, 2018).

123. Law 26994, arts. 1909-1910. See Picado & Loiza, *supra* note 120, at [3].

título) or on the date of recordation, if constitutive in nature. Possession and detention rest on the thing determined, and may be exercised by one or multiple persons on the entirety or part of the thing. Subjects of power relationships act in good faith when facing an excusable and essential error that persuades them on their legitimacy. Good faith is—as a general rule—a rebuttable presumption, and it is determined at the time the power relationship starts and remains unaltered until a new acquisition occurs. Bad-faith possession is illegitimate if: (i) dealing with movables, when acquired by theft, embezzlement, or breach of trust; and (ii) dealing with immovables, when acquired by force, breach of trust, or in a surreptitious manner. It should be noted that heirs continue the possession of the deceased.¹²⁴

There are further elements that characterize power relationships. For example, these relationships are affected by a rebuttable presumption of legitimacy, and must be acquired voluntarily by a capable person (except for minors, who must be ten years of age) or by means of contact with or custody of the thing. Power relationships—as a general rule—require tradition; hence, the delivery of the thing from one subject to another who is willing to receive the thing. Further, tradition of movables also includes transfer of, amongst others, knowledge according to the standard practices when there is no opposition. Things should be free from other power relationships that might demand exclusion and should be free from opposition. Power relationships are preserved until they are extinguished and there is a presumption on their continuity through time. Finally, power relationships are extinguished when the power over the thing is lost (e.g., when the person abandons the thing expressly and voluntarily).¹²⁵

Multiple effects can emerge from power relationships. For example, subjects involved in power relationships must return the

124. Law 26994, arts. 1901, 1903, 1908-1921.

125. *Id.* at arts.1922-1931.

things to those who have the right to claim them back. Further, good-faith possessors keep the fruits received and the natural fruits that were accrued yet not received. Bad-faith possessors must return the fruits received and those that due to their fault were not received. All possessors must return the products that were obtained from the thing. Another effect is triggered by improvements. Accordingly, no subjects can claim compensation for improvements of mere maintenance or luxurious in nature. Conversely, they are entitled to claim any improvements that were necessary unless if resulting from their bad faith and fault.¹²⁶

Each power relationship triggers specific effects, likewise. On the one hand, possession triggers specific effects. For example, possessors must pay any taxes and burdens on the thing, and perform the obligation of enclosing, unless provided differently by law. On the other hand, detention triggers specific effects. For example, those exerting detention must preserve the thing, yet they can recover the costs from the possessor.¹²⁷

B. Innovation in Real Rights

Real rights extend through Book IV of the ACCC. A methodological innovation in the ACCC was the inclusion of a general part in the opening of that book, hence addressing principles that are common to all real rights (e.g., acquisition, transfer, and extinction).¹²⁸ Accordingly, the new text first addresses the general theory of these rights, offering a difference when looking at the 1871 text, being now in line with other modern codes, and avoiding some unnecessary repetitions.¹²⁹ Book IV then deals with the general theory of possession and detention, addressing the acquisition, exercise, conservation, and extinction, followed by their effects. Further, that

126. *Id.* at arts. 1932-1938.

127. *Id.* at arts. 1939-1940.

128. *Id.* at arts. 1882-1907. See Lily R. Flah & Rosana I. Aguilar, *La hipoteca en el Proyecto de Código*, LA LEY 1 (Aug. 2, 2013).

129. Smayevsky & Penna, *supra* note 12, at 1.

book of the ACCC deals with all real rights individually;¹³⁰ and finally, it addresses possessory actions. Book IV follows, in general, the proposals included in the 1998 draft of a civil and commercial code for Argentina, yet it typifies a number of real rights that had not been included in that earlier work.¹³¹

It is worth noting that the *exposé des motifs* of the ACCC refers to a real right for Native American communitarian property.¹³² 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, because starting in 1994 the rights of Native Americans are recognized in the Argentine Constitution.¹³³ Native American lands are addressed in Argentina in Law 23302 of 1985,¹³⁴ it should be noted. That law deals with Native American policy and must be studied in conjunction with Law 24071 of 1992¹³⁵ that incorporates into the Argentine framework the Indigenous and Tribal Peoples Convention of 1989 of the International Labour Organization.¹³⁶ It is worth

130. See also Abreut de Begher, *supra* note 119, at [1].

131. *Id.*

132. The definition was included in art. 2028 of the draft by the Codifying Commission. Liliana Abreut de Begher, *La propiedad comunitaria indígena. Comentario del Anteproyecto de Código*, LA LEY 1 (June 7, 2012).

133. Art. 75(17), Const. Nacional. See Liliana Abreut de Begher, *El derecho real de propiedad comunitaria indígena*, LA LEY 1 (Oct. 11, 2013). See also Abreut de Begher, *supra* note 119, at [1]; Irene Pujol de Zizzias, *La propiedad indígena en el Proyecto de reforma del Código Civil y Comercial*, JURISPRUDENCIA ARGENTINA 1 (Nov. 11, 2012); and 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*, JURISPRUDENCIA ARGENTINA 1, [3-5] (July 30, 2014).

134. See Law 23302, available at <https://perma.cc/R74M-X4LX>. See generally 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).

135. See Law 24071, available at <https://perma.cc/QU4SNZN5>.

136. 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] (July 31, 2013).

noting that those efforts took place within a broader regional context, since several national constitutions had started around that time to deal with Native American property relations.¹³⁷ In addition, the Inter-American Commission on Human Rights alerted that when Native American property was not recognized the cultural and spiritual development of the groups was affected.¹³⁸ In a similar vein, the Inter-American Court of Human Rights ruled that the protection of property as regulated in the American Convention on Human Rights included the rights of Native American groups within the framework of communitarian property.¹³⁹

Real rights are defined in a neoclassical¹⁴⁰ manner in Book IV of the ACCC.¹⁴¹ The 1871 text had not offered a definition of these rights, it should be noted. Real rights are the juridical powers—of a legal nature—that are enforced directly over the objects, in an autonomous manner and granting to the holders, amongst others, the right to follow and the right of preference. The reference to power alerts of the real rather than personal nature of these rights. Further, the *ius persecuendi* and the *ius preferendi* are granted to holders of real rights.¹⁴² The object of these rights is enforced over the totality or a material part of the thing, for its entirety or for an undivided part. The object can likewise consist of a good specifically referred to by law. Real rights are created and regulated only according to

137. Corna & Fossaceca, *supra* note 134.

138. Pujol de Zizzias, *supra* note 133, at 11.

139. *Id.* See also 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); and Salgado, *supra* note 133, at [1].

140. Picado & Loiza, *supra* note 120, at [2].

141. See generally Domingo C. Cura Grassi, *Definición y caracteres de los derechos reales en el Código Civil y Comercial*, ED-DCCLXXVI-328 1 (Oct. 26, 2016).

142. Law 26994, art. 1886. See also Abreut de Begher, *supra* note 119, at [2].

law, and the provisions on real rights are substantially of public order.¹⁴³ Argentina subscribes to the *numerus clausus* principle,¹⁴⁴ and judges cannot constitute or impose the constitution of a real right, except when provided by law.¹⁴⁵

Book IV of the ACCC indeed preserves the *numerus clausus* principle. The 2015 text welcomes new real rights to the Argentine codified system: horizontal ownership (*propiedad horizontal*),¹⁴⁶ immovable groups *per se* (*conjuntos inmobiliarios*),¹⁴⁷ timesharing,¹⁴⁸ and private cemeteries.¹⁴⁹ These real rights were added to those that already existed in the civil code before the adoption of the ACCC: ownership,¹⁵⁰ co-ownership,¹⁵¹ superficies,¹⁵² usufruct,¹⁵³ use,¹⁵⁴ habitation,¹⁵⁵ servitude,¹⁵⁶ hypothec,¹⁵⁷ antichresis,¹⁵⁸ and pledge.¹⁵⁹ The enactment of the ACCC ended the debate that considered usufruct, use, and habitation personal servitudes, for every time the ACCC clearly considers the three to be autonomous real rights.¹⁶⁰

The ACCC incorporates a number of provisions that had originally been placed outside of codes because of de-codification, and

143. Abreut de Begher, *supra* note 119, at [1]. See generally Nelson G. A. Cossari & Leandro R. N. Cossari, *Orden público en los derechos reales*, LA LEY I (Nov. 13, 2015).

144. Law 26994, arts. 1882-1184, 1887.

145. *Id.* at art. 1896.

146. Law 26994, arts. 2037-2072.

147. *Id.* at arts. 2073-2086.

148. *Id.* at arts. 2087-2102.

149. *Id.* at arts. 2103-2113.

150. *Id.* at arts. 1941-1982.

151. *Id.* at arts. 1983-2036.

152. *Id.* at arts. 2114-2128.

153. *Id.* at arts. 2129-2153.

154. *Id.* at arts. 2154-2157.

155. *Id.* at arts. 2158-2161.

156. *Id.* at arts. 2162-2183.

157. *Id.* at arts. 2205-2211.

158. *Id.* at arts. 2212-2218. On the current use of this real right in Argentina, see Domingo C. Cura Grassi, *El renacer de la anticresis como derecho real de garantía a partir del Código Civil y Comercial*, ED-DCCLXXVII-40 I (Dec. 11, 2017).

159. Law 26994, arts. 2219-2237.

160. Claudio M. Kiper, *El Proyecto de Código y el derecho real de usufructo*, LA LEY I, [1] (Apr. 16, 2013).

that had eventually gained a place within the civil code. For example, the ACCC, as opposed to the original text of 1871, includes the real right of superficies. This incorporation reflects the need to use the land in a beneficial way, avoiding vacant plots. This adoption could be perceived as a limitation to the holders of rights, in benefit of others, hence showing the percolation of public law.¹⁶¹ Doctrinal efforts had welcomed this right already for a number of decades in Argentina, and this right was included in all revision efforts since 1987.¹⁶² The normative reception would, however, take place by means of Law 25509 of 2001¹⁶³ dealing with superficies of forested areas, now abrogated by the ACCC.¹⁶⁴

The ACCC—as already mentioned—welcomes new real rights. Horizontal ownership moved from Law 13512 of 1948¹⁶⁵ into the ACCC, showing that the de-codification experience of that right extended for six decades. It should be noted that this right was not present in the 1871 code, having been expressly forbidden by the codifier.¹⁶⁶ This right, however, had gained the status of a real right almost undisputedly by its reception in doctrinal writings and jurisprudence, after the enactment of the previously mentioned special legislation.¹⁶⁷ There was a need to update the legislation that had existed almost without alterations for more than half a century, and

161. Domingo C. Cura Grassi, *Reflexiones acerca del nuevo derecho real de superficie forestal*, 2003-A LA LEY 1268, [2] (2003).

162. Alterini, *supra* note 118, at [3-4].

163. See Law 25509, available at <https://perma.cc/SS5X-CZDA>. Superficies was also affected by Law 25080 of 1999, available at <https://perma.cc/N62H-J89Z>.

164. Marina Mariani de Vidal & Adriana N. Abella, *Derecho real de superficie en el Código Civil y Comercial*, LA LEY 1, [1-3] (Feb. 23, 2016).

165. See Law 13512, available at <https://perma.cc/FH2W-FTHE>. See generally Juan A. Costantino, *La propiedad horizontal en el Proyecto de Código*, LA LEY 1 (Jan. 7, 2013).

166. See art. 2617, 1871 Argentine Civil Code. See also Lilian N. Gurfinkel de Wendy, *La propiedad horizontal en el Código Civil y Comercial de la Nación*, JURISPRUDENCIA ARGENTINA 1 (Oct. 29, 2014).

167. Jorge C. Resqui Pizarro, *Aproximaciones al nuevo Código Civil y Comercial en lo referido a la propiedad horizontal*, ELDIAL DC1E06 1, [1] (Dec. 3, 2014).

the ACCC encapsulates the existing provisions, while also including copious doctrinal writings and jurisprudential decisions.¹⁶⁸

Other new real rights are included in a specific title associated with new forms of property. These forms were a consequence of internal migration in Argentina and challenged the traditional ways to relate to property.¹⁶⁹ The three new real rights are of special interest when attending the blurring line of private and public law; and are referred to in the ACCC in an overarching (and ambiguous) manner as “immovable groups.”¹⁷⁰ The three rights—it is worth repeating—are immovable groups *per se*, timesharing, and private cemeteries.

Immovable groups *per se* refers to gated communities, industrial zones, and any other urban development projects regardless of their designated use for permanent or temporary residence or for commercial exploitation.¹⁷¹ The already mentioned Law 13512 had started to bridge the legislative gap, helping to regulate these groups, and there was a need for specific regulation.¹⁷² Limitations to ownership and an ecological function of property can be identified when attending the powers and obligations of owners in immovable groups *per se*.¹⁷³ Rights, accordingly, may be enjoyed within limitations that should aim to protect ecological, architectural, and landscape values. Further, the horizontal ownership regulations of the

168. *Id.* at [23]; and Abreut de Begher, *supra* note 119, at [10]. For a comparison of the provisions of Law 13512 and the relevant provisions of the ACCC, see generally Juan Carlos Hariri, *Comparación entre la ley 13.512 y el nuevo Código Civil y Comercial*, 267 EL DERECHO 674 (2016).

169. Miryam A. Farina, *Las urbanizaciones privadas en el Proyecto de Reforma del Código Civil y Comercial*, JURISPRUDENCIA ARGENTINA 1 (Sept. 1, 2013).

170. María Florencia Franchini, *Los derechos reales de garantía en el ámbito de conjuntos inmobiliarios, tiempo compartido y cementerios privados*, REVISTA CÓDIGO CIVIL Y COMERCIAL 58, [4] (July 6, 2016).

171. Law 26994, arts. 2073-2077.

172. Lilian N. Gurfinkel de Wendy, *Barrios cerrados y ejecución de expensas en el nuevo Código Civil y Comercial de la Nación*, JURISPRUDENCIA ARGENTINA 1, [2] (Nov. 11, 2015).

173. See *supra* note 105, and accompanying text.

group should attend aspects that would be beneficial for the urbanistic community.¹⁷⁴ Likewise, servitudes and other real rights may be established if allowing for a better enjoyment of the facilities and spaces in common.¹⁷⁵ Finally, transfer of units can be limited yet not completely forbidden and sanctions can be imposed on those who violate the horizontal ownership regulations.¹⁷⁶

Timesharing gained momentum in Argentina in the 1980s. It currently finds a place in the ACCC, having had its first regulation in Law 26356 of 2008.¹⁷⁷ Doctrinal debate accompanied that emergence, exploring whether it should be considered an autonomous real right.¹⁷⁸ Under the ACCC, this real right exists when one or more movable or immovable goods are subject to periodic or turns use for, amongst others, dwelling, commerce, tourism, and industry, and to offer the functions that are compatible with its purpose.¹⁷⁹ Actors have different duties in timesharing;¹⁸⁰ and they are involved in a consumer relationship to be regulated by the specific provisions of the ACCC and special legislation, needing to comply likewise with national, provincial, and municipal regulations.¹⁸¹ This aspect points to the constitutionalization of private law, since

174. Law 26994, arts. 2078-2080.

175. *Id.* at art. 2084.

176. *Id.* at arts. 2085-2086.

177. See Law 26356, available at <https://perma.cc/74WT7BGN>. It should be noted that the special law deals with the regulation of timesharing for tourism purposes. Therefore, only some chapters of that law have been affected by the ACCC.

178. See Molina Quiroga, *supra* note 95, at [12]; Marina Mariani de Vidal & Adriana N. Abella, *Tiempo compartido en el Código Civil y Comercial. Más dudas que certezas*, REVISTA CÓDIGO CIVIL Y COMERCIAL 12 (July 6, 2016); and María Isabel Di Filippo, *Tiempo compartido. Derechos de propiedad involucrados (Primer ensayo acerca de su encuadre en el derecho positivo argentino)*, 1985-D LA LEY 1048 (1985).

179. Law 26994, arts. 2087-2089. See the comprehensive study by Ricardo J. Saucedo, *El régimen jurídico del tiempo compartido en el Código Civil y en el nuevo Código Civil y Comercial de la Nación*, JURISPRUDENCIA ARGENTINA 1 (Dec. 24, 2014).

180. Law 26994, arts. 2094-2099.

181. *Id.* at arts. 2100-2102.

the general interest, also in the sphere of public law, is attended in the new text.¹⁸²

Private cemeteries are regulated as a real right in the ACCC. Cemeteries originally were annexed to the Church and then to the administration of the State, mainly by regulations of administrative law. More recently, private cemeteries started to develop, offering an alternative to the public grounds.¹⁸³ This real right encompasses the immovables of private ownership that are connected to the burial of human remains. The municipality must approve the operation of these cemeteries and that approval will prevent the use of the property for other purposes.¹⁸⁴

Innovation in real rights points to a blurring divide between private and public law in Argentina, safeguarding, amongst others, the right to freedom and non-discrimination of people and highlighting the role of property for all members of society. The ACCC welcomes changes that had found a place within the legal framework by means of de-codification and that responded to the needs of the current Argentine society.

V. CONCLUDING REMARKS

Argentina adopted a much-awaited civil and commercial code in 2015. A study of that new text assisted in visualizing the interaction of private and public law, showing that it is not adequate to speak of public and private law as watertight compartments: they intermingle. The results of the interaction between public and private in Argentina should be of benefit for members of society, when a plethora of rights can be protected and exercised.

This report first introduced the ACCC. It therefore pointed to the tenets that the members of the Codifying Commission extracted

182. See Juan Carlos Pratesi, *Conjuntos Inmobiliarios, tiempo compartido y cementerios privados en el Código Civil y Comercial de la Nación 2014*, ELDIAL DC1E21 1, [6] (Mar. 18, 2015). See also the early work by Alfredo Botassi, *Cementerios públicos y privados*, 1981-C LA LEY 1056, [4-5] (1981).

183. Molina Quiroga, *supra* note 95, at [10-12].

184. Law 26994, arts. 2103-2104.

from the new text, welcoming the constitutionalization of private law. The report then looked at family law, more precisely at family relations. There readers were directed to the presence of public law principles within that area of private law, while they were also introduced to the framework that the new text offers in its effort to secure access to justice for all. After all, families play a fundamental role as a social institution within a code that is aimed at a multicultural society. Finally, the report focused on property law, which is unquestionably one of the pillars of private law. There, attention was devoted to the power relationships that emerge when persons interact with things. In that section the report also alerted about the innovative approach that the Argentine codifiers took in the area of real rights.

The interconnection between public and private law can assist in achieving societal goals. Intermingling can be deemed positive in Argentina, since it is now evident that overarching principles and values that were traditionally considered as belonging to public law have been introduced into the main body of private law. The contents of the new text calls for a renewed approach by courts, practitioners, and member of society at large. Actors in Argentina will have to look at this seminal text of private law also through the prism of public law.