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## Argentina - On Codes, Marriage, and Access to Justice: Recent Developments in the Law of Argentina

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# ON CODES, MARRIAGE, AND ACCESS TO JUSTICE: RECENT DEVELOPMENTS IN THE LAW OF ARGENTINA

Julieta Marotta\* & Agustín Parise†

I. Introduction .....	237
II. Civil Law Codification: Seeking a Generation Shift .....	239
A. First Generation Civil Code .....	241
B. Towards a Second Generation Civil Code .....	243
III. Same-sex Marriage: An <i>Avant-garde</i> Pillar for Family Law	250
IV. Improving Access to Justice for All .....	258
A. Law 25871 on Migration Rights .....	259
B. Law 26485 on Violence against Women .....	262
C. Procedures on Family Matters in the 2012 Code Project .....	265
V. Concluding Remarks.....	268

## I. INTRODUCTION

The Republic of Argentina is considered to be a member of the Romano-Germanic family,<sup>1</sup> a tradition it inherited from the

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Spanish colonial period. Private law in Argentina, as in other civil law jurisdictions of the Americas, experienced significant developments in recent decades, when, for example, efforts were undertaken to leave behind patriarchal standards and to give equal standing to all members of society.<sup>2</sup> Those developments, however, did take place within a broader context, and were therefore also experienced in public law.

Three developments are of paramount importance and must be included in this report. The first development deals with ongoing efforts towards the adoption of a second generation civil code in Argentina. Those recent efforts reflect that the Argentine legal community is still seeking for a text that would better serve current needs. This report will focus on the reception of the doctrine of abuse of rights within the different revision and re-codification projects of the civil code, illustrating, by means of that example, the shift from a liberal conception towards a social conception of rights. The second development deals with a fundamental pillar of family law: marriage. The report will address the adoption of legislation recognizing same-sex marriages in Argentina, which took place in 2010, and placed Argentina as a regional forerunner in that respect. The report will show how Argentina shifted from religious to civil marriage, and recently welcomed same-sex marriages. The third development deals with the right to access to justice and its interplay with vulnerable groups. The report will focus on two groups (i.e., women victims of violence and immigrants) and reflect how recent regulations aimed at those groups incorporated international law principles and stressed the importance of access to justice as a means to exercise all other

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1. The terms Civil Law, Romano-Germanic, and Continental European can be used indistinctly in this report to refer to the prevailing system of private law that applies in Argentina.

2. See the references to the patriarchal elements in Haiti, El Salvador, and Honduras in Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1157-1159 (2009).

rights. Furthermore, it will address the reception of access to justice within the ongoing efforts towards the adoption of a second generation civil code. These three developments will show readers that the law of Argentina is far from being dormant or static.

## II. CIVIL LAW CODIFICATION: SEEKING A GENERATION SHIFT

Civil law jurisdictions in the Americas are divided between those having first generation civil codes and those having second generation civil codes.<sup>3</sup> The current scenario enables the grouping of jurisdictions into clusters, though not all jurisdictions are clear-cut examples of a particular generation.<sup>4</sup>

A group of jurisdictions resists the adoption of second generation codes.<sup>5</sup> This resistance, as is the case in Argentina, may be motivated because of veneration of the existing first generation codes, which were *avant-garde* at the time of enactment.<sup>6</sup> The resistance of members of this group may be also motivated due to a lack of consensus on what steps should be followed at the time of alteration or because of a limitation in the allocation of the required resources.<sup>7</sup> Jurisdictions that still preserve their first generation codes were able to update the texts through revision and de-codification, however. Several decades ago, some of those jurisdictions began to feel a need to adopt second generation codes.

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3. This paragraph and the two that follow borrow part of their exposition, sometimes drawing *verbatim*, from the previously mentioned work of Moréteau & Parise and from Agustín Parise, *Civil Law Codification in Latin America: Understanding First and Second Generation Codes*, in TRADITION, CODIFICATION AND UNIFICATION 183-193 (M. Milo et al. eds. 2014).

4. The U.S. state of Louisiana provides an example of one of the latter jurisdictions. Some may claim that Louisiana adopted a second generation civil code, which resulted from the ongoing revision of the first generation civil code; while others may claim that the ongoing re-codification process has not yet reached a second generation status. See Moréteau & Parise, *supra* note 2, at 1112-1120.

5. Argentina, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Haiti, and Uruguay.

6. *E.g.*, Civil Code of Argentina and Civil Code of Chile.

7. *E.g.*, Ecuador and Dominican Republic.

Even if their codes may be far from experiencing a generation shift, they are currently undergoing a thorough revision or entering into a de-codification process, especially, as already mentioned, with regards to family law and the prevailing patriarchal systems. The civil code of Argentina belongs to this first group, because it still does not surrender to replace its current code by one of second generation.

Another group of jurisdictions welcomed second generation codes.<sup>8</sup> The texts of first generation codes, however, had been previously updated through partial revisions and de-codification, and ultimately led to the adoption of texts with second generation status. Many of these new texts incorporated social aspects of law,<sup>9</sup> and their sources were more eclectic. The typifying characteristic of these codes is that they were able to incorporate local elements that distinguished them from codes of other jurisdictions, while also distinguishing them from the texts of their previous generation codes. Second generation codes found a more mature society and were able to highlight their own identity.

Argentina still applies its first generation code, which has been subject to revision and de-codification. That first generation civil code, which dates from 1871 and was drafted by Dalmacio Vélez Sarsfield (hereinafter, Vélez), may be subject to veneration, having been *avant-garde* at the time of enactment, and is still generating resistance to replacement.<sup>10</sup> However, Argentina undertook several attempts to adopt a second generation civil code, which can be traced back to the first decades of the twentieth century and are still ongoing. Argentina indeed offers a fertile ground for revision

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8. Bolivia, Costa Rica, Cuba, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Québec, and Venezuela.

9. *E.g.*, Civil Code of Mexico, 1932.

10. For more information on generations of civil codes, *see generally* Parise, *supra* note 3.

efforts,<sup>11</sup> and holds a unique record of aborted re-codification attempts.<sup>12</sup>

#### A. First Generation Civil Code

The first attempts towards civil law codification<sup>13</sup> in Argentina were undertaken in 1852.<sup>14</sup> At that time, the head of the executive power delivered a decree ordering the appointment of drafters that would work on the civil, commercial, criminal, and procedural codes.<sup>15</sup> That effort did not advance, however.<sup>16</sup> One year later, the Argentine Constitution further stated that the national legislative branch should deliver civil, commercial, criminal, and mineral codes.<sup>17</sup>

The completion of a civil code was delayed until the following decade. In 1864, Vélez was appointed to draft a project,<sup>18</sup> and his resulting work was approved without parliamentary debate<sup>19</sup> by the National Congress on September 25, 1869, taking effect as the *Código Civil de la República Argentina* (hereinafter, Argentine Code) on January 1, 1871.<sup>20</sup> The Argentine Code had 4051 articles and was divided into two preliminary titles and four books: Book I

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11. Agustín Parise, *Jimena Andino Dorato, Jean-Frédéric Ménard et Lionel Smith (dir), Le droit civil et ses codes: parcours à travers les Amériques*, 4:2012 REVUE INTERNATIONALE DE DROIT COMPARÉ 1027, 1028 (2012).

12. Moréteau & Parise, *supra* note 2, at 1146.

13. Previous efforts were undertaken in the area of commercial law in 1824, with the drafting of a project of a Commercial Code. See VÍCTOR TAU ANZOÁTEGUI, *LA CODIFICACIÓN EN LA ARGENTINA (1810-1870): MENTALIDAD SOCIAL E IDEAS JURÍDICAS* 125 (1977).

14. ABELARDO LEVAGGI, 2 *MANUAL DE HISTORIA DEL DERECHO ARGENTINO* 265 (1987).

15. *Id.*

16. *Id.*

17. See the text of the Constitution of 1853 at *Constitución de la Confederación Argentina*, in *ANALES DE LEGISLACIÓN ARGENTINA: COMPLEMENTO AÑOS 1852-1880* 9-33 (1954). See, TAU ANZOÁTEGUI, *supra* note 13, at 319.

18. LEVAGGI, *supra* note 14, at 266.

19. *Id.* at 269. See also the complete study by JORGE CABRAL TEXO, *HISTORIA DEL CÓDIGO CIVIL ARGENTINO* 156-178 (1920).

20. Law 340, Sept. 29, [I] A.D.L.A. 496-905. See Moréteau & Parise, *supra* note 2, at 1143-1145; and LEVAGGI, *supra* note 14, at 266.

of persons (*de las personas*), Book II of personal rights in civil relations (*de los derechos personales en las relaciones civiles*), Book III of real rights (*de los derechos reales*), and Book IV of real and personal rights-dispositions in common (*de los derechos reales y personales - disposiciones communes*). The Argentine Code overruled all related prior laws that had developed during the Spanish colonial period and the early independent period (e.g., *Indiano* and *Patrio* laws).<sup>21</sup> As other nineteenth-century codes, the Argentine Code did not welcome explicitly the doctrine of abuse of rights.

Vélez had an eclectic approach to law,<sup>22</sup> and therefore identified materials from many sources. He worked with legislative acts, drafts of codes, codes, and doctrine that served him as guides.<sup>23</sup> Similar to other drafters, he used the ideas and codes that existed at the time.<sup>24</sup> He was especially interested—as were, for example, Andrés Bello in Chile and Louis Moreau-Lislet in Louisiana—in the jurists and works that theorized on modern law while building from Roman law principles.<sup>25</sup> Finally, Vélez added to those materials the identification of local customs.<sup>26</sup> It can be claimed that the resulting text of the Argentine Code was tinted with an individualistic and liberal conception, as most nineteenth-century civil codes that found a precedent in the *Code Napoléon*.

The Argentine Code was never replaced, though its text was subject to many alterations that were introduced mainly through

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21. Law 340, *supra* note 20, at 496-905.

22. ALEJANDRO GUZMÁN BRITO, LA CODIFICACIÓN CIVIL EN IBEROAMÉRICA: SIGLOS XIX Y XX 453 (2000).

23. Agustín Parise, *Legal Transplants and Codification: Exploring the North American Sources of the Civil Code of Argentina (1871)*, 1.2 ISAIDAT LAW REVIEW 1, 7 (2010). See also Raymundo Salvat, *El Código Civil Argentino (Estudio General): Historia, Plan o Método y Fuentes*, VII REVISTA ARGENTINA DE CIENCIAS POLÍTICAS 420, 436 (1913).

24. ABELARDO LEVAGGI, DALMACIO VÉLEZ SANSFIELD, JURISCONSULTO 180 (2005).

25. *Id.*

26. RAYMUNDO SALVAT, I TRATADO DE DERECHO CIVIL ARGENTINO 132 (1950).

revisions.<sup>27</sup> For example, *secular laws* were enacted in the 1880s in Argentina. Accordingly, a law on civil marriage was adopted in 1888,<sup>28</sup> together with laws on civil registry that were adopted in 1884 and 1898.<sup>29</sup> The first decades of the new century also brought new legislation that affected the civil code. For example, the national congress adopted a law on agricultural leases in 1921<sup>30</sup> and a law on the rights of women in 1926.<sup>31</sup> Most partial reforms, however, dealt with specific areas of the civil code<sup>32</sup> and lacked a comprehensive approach.

### *B. Towards a Second Generation Civil Code*

Several major revision and re-codification efforts were undertaken in Argentina starting at the turn of the twentieth century. Three of those efforts were undertaken in 1936, 1954, and 1968, and they paved the way for the formal reception of the doctrine of abuse of rights. Those efforts assisted in leaving behind the liberal conception that had characterized the first generation code.

At the break of the twentieth century scholarly writings indicated a need to harmonize the civil code with the new context.<sup>33</sup> Accordingly, a first re-codification effort was started in 1926 with the appointment of a codifying commission.<sup>34</sup> The latter

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27. JORGE JOAQUÍN LLAMBÍAS, 1 TRATADO DE DERECHO CIVIL PARTE GENERAL 199-203 (6th ed. 1975).

28. For more information on the 1888 law, *see infra* note 90 and accompanying text. ABEL CHÁNETON, 2 HISTORIA DE VÉLEZ SÁRSFIELD 335 (1937).

29. *Id.* at 336.

30. *Id.* at 335.

31. *Id.* at 336.

32. LEVAGGI, *supra* note 14, at 271.

33. *See generally* Agustín Parise, *La comisión de reformas al Código Civil (1926). Aproximación histórico-jurídica a su proyección*, IUS HISTORIA, Sept. 2006, <http://www.ijeditores.com.ar/articulos.php?idarticulo=62005&print=2>.

34. Through the ten years of existence, the commission was composed by Juan A. Bibiloni, César de Tezanos Pinto, Mariano de Vedia y Mitre, José A. Gervasoni, Héctor Lafaille, Enrique Martínez Paz, Julián V. Pera, Juan Carlos Rébora, Roberto Repetto, Rodolfo Rivarola, Raymundo M. Salvat, and Gastón Federico Tobal. *See* ENRIQUE R. AFTALIÓN & FERNANDO GARCÍA OLANO,



delegated to one of its members—Juan A. Bibiloni—the drafting of a pre-project<sup>35</sup> that did not welcome the doctrine of abuse of rights. The pre-project was revised by the commission, and Héctor Lafaille and Gastón Tobal undertook the final drafting of a project<sup>36</sup> that was completed in 1936, was notably brief, and was ultimately never adopted by the legislature.<sup>37</sup> Lafaille indicated that the commission had preferred to work with, amongst others, the Brazilian, Spanish, and Swiss civil codes, and had not excluded from their work the Chilean code and the *Code Napoléon*.<sup>38</sup> The project welcomed the doctrine of abuse of rights, differently from its predecessor. The concrete applications of the doctrine were increased within the code, and the limitations for its application were removed.<sup>39</sup>

In the 1950s, scholars claimed that there was a need to change civil code provisions to make them reflect current standards.<sup>40</sup> Within that scenario, a second re-codification effort was undertaken in 1950 by the Civil Law Institute of the Ministry of Justice, under the leadership of Jorge Joaquín Llambías.<sup>41</sup> The

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INTRODUCCIÓN AL DERECHO 454 (1939); and Juan Carlos Rébora, *Nota e informe presentados por el profesor Dr. Juan Carlos RÉBORA al Honorable Consejo Académico de la Facultad de Ciencias Jurídicas y Sociales de la Universidad de La Plata, con motivo de su actuación dentro de la Comisión de Reformas del Código Civil*, 5 LA LEY 66, 69 (1937).

35. AFTALIÓN & GARCÍA OLANO, *supra* note 34, at 454. *See generally* JUAN ANTONIO BIBILONI, 1-7 ANTEPROYECTO DE REFORMAS AL CÓDIGO CIVIL ARGENTINO (1929).

36. *See* GUILLERMO A. BORDA, 1 TRATADO DE DERECHO CIVIL PARTE GENERAL 148 (9th ed. 1987); and Moréteau & Parise, *supra* note 2, at 1145.

37. PROYECTO DE CÓDIGO CIVIL ARGENTINO 523-537 (1938). *See also* AFTALIÓN & GARCÍA OLANO, *supra* note 34, at 454; and LEVAGGI, *supra* note 14, at 272.

38. Parise, *supra* note 33.

39. Héctor Lafaille, *Hacia el nuevo Código Civil*, 58 JURISPRUDENCIA ARGENTINA 21, 26 (1937).

40. Susana T. Ramella, *Propiedad en función social en la constitución de 1949. Una “mentalidad” del Antiguo Régimen representada en el constitucionalismo social de la época*, 35 REVISTA DE HISTORIA DEL DERECHO 297, 308 (2007).

41. ANTEPROYECTO DE CÓDIGO CIVIL DE 1954 PARA LA REPÚBLICA ARGENTINA 7 (1968); and LEVAGGI, *supra* note 14, at 272.

work resulted in a pre-project that welcomed the developments of the national jurisprudence, and was inspired by the codes of Italy, Peru, Switzerland, and Venezuela.<sup>42</sup> The pre-project was also brief, and was completed in 1954, though never adopted by the legislature.<sup>43</sup> The work included an article that expressly welcomed the doctrine of abuse of rights. That article, numbered 235, read in part that “the law does not tolerate the abuse of rights” and that “the exercise of a right will be deemed abusive when it contradicts the requirements of good faith or the ends towards its recognition.”<sup>44</sup> The note to that article indicated a thorough review of foreign scholarly writings and legislation, and a survey of Argentine precedents.<sup>45</sup> The proposals of the pre-project paved the way for the formal reception of the doctrine in the subsequent revision effort.<sup>46</sup>

A third major revision effort was completed in 1968. That effort, however, did not aim to achieve re-codification, and was limited to achieve revision of 204 articles.<sup>47</sup> The new texts were adopted by Law 17711 of 1968,<sup>48</sup> and drafted by José F. Bidau, Abel M. Fleitas, and Roberto Martínez Ruiz, with the decisive participation of Guillermo A. Borda.<sup>49</sup> Their revision work introduced principles of social solidarity in a code that had been

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42. LEVAGGI, *supra* note 14, at 272; and Moréteau & Parise, *supra* note 2, at 1145.

43. LEVAGGI, *supra* note 14, at 272.

44. Luis Moisset de Espanés, *Introducción al abuso del derecho*, 89 ACTUALIDAD JURÍDICA 47 (2001), also available at [http://www.acaderc.org.ar/doctrina/articulos/introduccion-al-abuso-del-derecho/at\\_download/file](http://www.acaderc.org.ar/doctrina/articulos/introduccion-al-abuso-del-derecho/at_download/file), at 18.

45. *Id.*

46. *Id.* at 19.

47. BORDA, *supra* note 36, at 143; Guillermo Antonio Borda, *La Reforma de 1968 al Código Civil Argentino* in 2 EL CÓDIGO CIVIL DEL SIGLO XXI (PERÚ Y ARGENTINA) 1445 (Muñiz Ziches *et al.* Coord., 2000). See also LUIS M. VALIENTE NOAILLES, COMENTARIOS A LAS REFORMAS AL CÓDIGO CIVIL 7-9 (1968); and GUILLERMO A. BORDA, LA REFORMA DE 1968 AL CÓDIGO CIVIL (1971).

48. See the text of Law 17711, available at <http://www.infojus.gob.ar/documentDisplay.jsp?guid=123456789-0abc-defg-g31-11000scanyel&title=reformas-al-codigo-civil->.

49. LEVAGGI, *supra* note 14, at 271.

known as individualistic.<sup>50</sup> The 1968 revision introduced the doctrine of abuse of rights, mainly in article 1071,<sup>51</sup> which in its previous wording had defended that the exercise of one's rights could not turn any act illegal.<sup>52</sup> The new text, in radically different lines, rephrased the original wording and added a second paragraph indicating that: "the law does not protect the abusive exercise of rights. It will be deemed abusive the exercise that contradicts the aims that the law had when recognizing them or the exercise that exceeds the limits imposed by good faith, morals, and good customs."<sup>53</sup>

More recent major revision and re-codification efforts were undertaken since the 1980s in Argentina. Projects of new codes were completed in 1987, 1992, 1993, and 1998, though never took force of law.<sup>54</sup> The most recent re-codification attempt<sup>55</sup> was presented before the executive power on February 24, 2012,<sup>56</sup> and is currently subject to debate before the National Congress. Parts of the proposed text encountered opposition from different groups and members of society,<sup>57</sup> and have also motivated the

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50. *Id.*; and Moréteau & Parise, *supra* note 2, at 1145.

51. MANUEL I. ADROGUÉ, *EL DERECHO DE PROPIEDAD EN LA ACTUALIDAD. INTRODUCCIÓN A SUS NUEVAS EXPRESIONES* 119 (1991).

52. Law 340, *supra* note 20, at 614-615.

53. See the current text of the civil code, available at [http://www.infojus.gob.ar/legislacion/ley-nacional-340-codigo\\_civil.htm](http://www.infojus.gob.ar/legislacion/ley-nacional-340-codigo_civil.htm).

54. Graciela Medina, *Argentina on the Eve of a New Civil and Commercial Code* in *THE SCOPE AND STRUCTURE OF CIVIL CODES* 43, 58 (Julio César Rivera ed. 2013). About some of those drafts, see Fernando J. López de Zavalía, *Reflexiones sobre el actual Proyecto de unificación civil y comercial*, in *ESTUDIOS SOBRE EL PROYECTO DE CÓDIGO UNIFICADO DE 1998* 25-70 (Roberto H. Brebbia dir. 2001); Julio César Rivera, *El Proyecto de Código Civil para la República Argentina*, 35 *REV. JURÍDICA U. INTER. P.R.* 381 (2001); and *Proyecto de Código Civil de la República Argentina* in *VII ANTECEDENTES PARLAMENTARIOS* 149-546 (2d ed. 2000).

55. All relevant information regarding the ongoing re-codification effort is available at <http://www.nuevocodigocivil.com>.

56. Modificaciones del poder ejecutivo nacional al anteproyecto de reforma del código civil elaborado por la comisión de reformas decreto 191/2011, available at <http://www.nuevocodigocivil.com/pdf/Fundamentos-de-los-cambios-introducidos-por-el-PEN.pdf> at 1.

57. See, e.g., *Debate por la reforma del Código Civil*, *LA NACIÓN*, March 7, 2012 at 15; and *CONFERENCIA EPISCOPAL ARGENTINA, REFLEXIONES Y APORTES SOBRE ALGUNOS TEMAS VINCULADOS A LA REFORMA DEL CÓDIGO CIVIL* (2012).

development of copious literature commenting on its virtues and weaknesses.<sup>58</sup> The codifying commission was led by Elena Highton de Nolasco and Aída Kemelmajer de Carlucci, under the presidency of Ricardo Lorenzetti.<sup>59</sup> That re-codification effort

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58. The most comprehensive study on the 2012 code project is COMENTARIOS AL PROYECTO DE CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN 2012 (Julio César Rivera dir., 2012).

The authors of this report have identified, since 2012, no less than 200 scholarly articles published in Argentine law journals that address the 2012 code project. The main legal databases are those of the journals *La Ley*, *El Derecho*, *Jurisprudencia Argentina*, and *Eldial*. The following selection of articles, not mentioned in other parts of this report, address some of the main reforms in the code project: Liliana Abreut de Begher, *La propiedad comunitaria indígena. Comentario del Anteproyecto de Código*, LA LEY 06.07.2012; Atilio Aníbal Alterini, *Soluciones del Proyecto de Código en materia de responsabilidad civil*, LA LEY 07.30.2012; Juan Manuel Aparicio, *Contratos en general. Observaciones al Proyecto de Código*, LA LEY 12.05.2012; Carlos Arianna, *Notas al Proyecto de Código Unificado en materia de recompensas*, LA LEY 09.14.2012; Agustín Bender, *Validez probatoria del correo electrónico en la jurisprudencia y en el Proyecto de Código Civil y Comercial de la Nación*, ELDIAL 04.10.2013; Alberto Biglieri, *Tensión entre la Reforma del Código y la ley de responsabilidad del Estado proyectada*, LA LEY 05.09.2014; Alberto J. Bueres, *La responsabilidad por daños en el Proyecto de Código*, LA LEY 02.18.2013; Manuel Gonzalo Burgueño Ibaguren, *La cuantificación del daño moral en el Proyecto de Código Civil y Comercial de la Nación del año 2012*, ELDIAL 12.18.2013; Bernardo P. Carlino, *Libros de Comercio y Proyecto de Código*, LA LEY 07.11.2013; Juan Carlos Cassagne, *Responsabilidad del Estado y de los funcionarios y empleados públicos en el Código Civil y Comercial proyectado*, LA LEY 10.01.2012; María Victoria Famá, *Desplazamiento filial en el Proyecto de Código*, LA LEY 02.26.2013; Sara L. Feldstein de Cárdenas & Luciane Klein Vieira, *El Proyecto de Código Civil y Comercial de la Nación Argentina y la protección del consumidor transfronterizo*, ELDIAL 03.28.2014; María G. Iglesias, *Capacidad jurídica: restricciones a la capacidad en el Anteproyecto de Código Civil. Entre la incapacidad y los apoyos*, JURISPRUDENCIA ARGENTINA 06.20.2012; Marcelo J. López Mesa, *La gestión de negocios ajenos, en el marco del Proyecto de Reforma al Código Civil*, ELDIAL 08.10.2012; Rafael M. Manóvil, *Las sociedades de la sección IV del Proyecto de Código*, LA LEY 10.24.2012; Osvaldo J. Marzorati, *Contrato de distribución en el Proyecto de Código*, LA LEY 03.25.2014; Jorge O. Perrino, *Maternidad subrogada*, JURISPRUDENCIA ARGENTINA 04.11.2012; Ramón D. Pizarro, *La mora del deudor en el Proyecto de Código*, LA LEY 09.03.2012; Julio César Rivera, *El arbitraje en el Proyecto de Código sancionado por el Senado. Prejuicios y errores*, LA LEY 12.17.2013; Agustín Sojo, *Efectos de la pretendida regulación de las uniones convivenciales*, ELDIAL 07.10.2012; Rubén S. Stiglitz, *La teoría del contrato en el Proyecto de Código Civil y Comercial de la Nación*, LA LEY 06.13.2012; and Daniel R. Vítolo, *Los contratos asociativos en el proyecto de Código Civil y Comercial de la Nación*, EL DERECHO 08.08.2012.

59. See the text of Decree 191/2011, available at <http://www.infojus.gob.ar/documentDisplay.jsp?guid=123456789-0abc-191-0000-1102soterced>.

unified the civil and commercial codes into a single body. The resulting code project<sup>60</sup> had 2671 articles and was divided into a preliminary title and six books: Book I of the general part (*parte general*), Book II of family relations (*relaciones de familia*), Book III of personal rights (*derechos personales*), Book IV of real rights (*derechos reales*), Book V of *mortis causa* transmission of rights (*transmisión de derechos por causa de muerte*), and Book VI of dispositions in common for real and personal rights (*disposiciones comunes a los derechos personales y reales*).<sup>61</sup> Each book was divided into titles and chapters, and when necessary, into sections and paragraphs. The new project placed the doctrine of abuse of rights in a paramount position within the preliminary title of the code, continuing with the path taken since 1936 towards the adoption of a less individualistic conception of rights. That doctrine clearly outgrew all different parts of the code and it now applies to all private law.<sup>62</sup> The to-be article 10 reproduced without major alterations the two paragraphs of current article 1071, and added a third paragraph stating that the judge must order the necessary measures to prevent the effects of an abusive use of rights, and if necessary, procure the retrocession to the previous status, determining a compensation.<sup>63</sup>

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60. The resulting text was referred to as pre-project by the codifying commission in its *exposé des motifs*, though in the front page of the proposed code it reads project. Earlier versions of the proposed code indeed referred to it as pre-project.

61. See the complete text of the project, available at <http://www.nuevocodigocivil.com/pdf/Texto-del-Proyecto-de-Codigo-Civil-y-Comercial-de-la-Nacion.pdf> [hereinafter *Texto del Proyecto*].

62. Ricardo L. Lorenzetti, *Aspectos valorativos y principios preliminares del Anteproyecto de Código Civil y Comercial de la Nación*, LA LEY 04.23.2012.

63. *Texto del Proyecto*, *supra* note 61, at 3-4. See also Graciela Medina, *La contractualisation de la famille / Contractualisation of family law* in INFORMES DE LA ASOCIACIÓN ARGENTINA DE DERECHO COMPARADO AL XIX CONGRESO DE LA ACADEMIA INTERNACIONAL DE DERECHO COMPARADO 385, 394 (2014).

The 2012 code project suggested numerous alterations to the existing law. According to Lorenzetti,<sup>64</sup> the codifying commission respected the Roman, Spanish, and French traditions that had an impact on Argentine legal history, yet they also aimed to provide a text immersed in a Latin American cultural identity.<sup>65</sup> The codifying commission also benefited from analyzing all previous major revision and re-codification efforts that had taken place in Argentina.<sup>66</sup> Alterations were proposed for almost all areas of private law (e.g., property law, commercial law), yet it is relevant to highlight the following: (i) incorporation of a title dealing with private international law,<sup>67</sup> in similar lines with modern codes, such as the one of Louisiana, that added a fourth book on that subject;<sup>68</sup> (ii) incorporation of protection of inalienable personal rights (*derechos personalísimos*), which had already found their way into Argentine domestic legislation by means of the adoption of international conventions, and which were yet not expressly addressed in the Argentine Code;<sup>69</sup> (iii) incorporation of prenuptial agreements, which are currently not included in the Argentine Code;<sup>70</sup> (iv) incorporation of several changes when facing divorce, i.a., the elimination of the impossibility to file for divorce within

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64. See the complete text of the *exposé des motifs* of the 2012 code project, available at <http://www.nuevocodigocivil.com/pdf/Fundamentos-del-Proyecto.pdf> [hereinafter *Fundamentos del Proyecto*].

65. *Id.* at 4.

66. *Id.* at 6.

67. Book IV, Title IV, arts. 2594-2671 (Texto del Proyecto, *supra* note 61, at 572-592). On this topic, see Cristina Britos, *Principios del Derecho Internacional Privado en el Proyecto de Código*, LA LEY 02.13.2014.

68. See, e.g., Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original*, 83 TUL. L. REV. 1041 (2009).

69. Inalienable personal rights are addressed, *i.a.*, in arts. 17, 55, 59, 646, paragraph c, and 1738 of the project. See also Fabio Fidel Cantafio, *La salud y los derechos personalísimos en el Proyecto de Código*, LA LEY 11.16.2012.

70. See Book II, Title II, Section 1, arts. 446-450 and art. 2625 (Texto del Proyecto, *supra* note 61, at 112-113 and 579). On this topic, see Ana Ortelli, *Las convenciones matrimoniales y los convenios reguladores de crisis matrimoniales en el proyecto de Código Civil y Comercial de la Nación*, ELDIAL 07.11.2012.

the first three years from the celebration of the marriage;<sup>71</sup> and (v) incorporation of provisions on assisted reproductive technologies within the civil code.<sup>72</sup>

It seems clear that Argentine jurists and society at large sense a need to reach a generation shift. The first generation civil code needs a refurbishment that may no longer be achieved by means of revision or de-codification, while the fate of the Argentine Code is now in the hands of the legislature.<sup>73</sup>

### III. SAME-SEX MARRIAGE: AN AVANT-GARDE PILLAR FOR FAMILY LAW

Argentina experienced in 2010 a very significant change in the area of family law, more precisely in the dispositions dealing with marriage. Law 26618<sup>74</sup> of that year welcomed same-sex marriage, being the second civil law jurisdiction from the Americas—after

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71. See Book II, Title I, Chapter 8, Section 2, arts. 436-438 (Texto del Proyecto, *supra* note 61, at 109). See also Fundamentos del Proyecto, *supra* note 64, at 64; Eduardo A. Sambrizzi, *El divorcio en el anteproyecto de reforma al Código Civil*, ELDIAL 04.12.2012; Lidia B. Hernández et al, *Matrimonio y divorcio en el Anteproyecto de Código Civil y Comercial*, LA LEY 05.30.2012; and Luis María López del Carril, *El divorcio en el Proyecto de Código*, LA LEY 09.12.2012.

72. The provisions are spread throughout the draft (*i.a.*, arts. 19, 529, and 2631), though the general rules dealing with that type of filiation are included in Book II, Title V, Chapter 2, arts. 560-564 (Texto del Proyecto, *supra* note 61, at 138-140). See Aída Kemelmajer de Carlucci et al, *El embrión no implantado. Proyecto de Código unificado. Coincidencia de la solución con la de los países de tradición común*, LA LEY 07.10.2012; Aída Kemelmajer de Carlucci et al, *El embrión no implantado. El Proyecto de Código y su total consonancia con la CIDH*, LA LEY 12.28.2012; Fernando López de Zavalía, *Técnicas de reproducción humana asistida y el Proyecto de Código*, LA LEY 08.23.2012; and Úrsula C. Basset, *Incidencia en el derecho de familia del proyecto de Código con media sanción*, LA LEY 12.16.2013.

73. At the time this Report was submitted for publication (August 12, 2014) the National Congress had not taken yet a decision on the fate of the 2012 code project. See also Julio César Rivera, *The effects of financial crises on the binding force of contracts: renegotiation, rescission or revision* in INFORMES DE LA ASOCIACIÓN ARGENTINA DE DERECHO COMPARADO AL XIX CONGRESO DE LA ACADEMIA INTERNACIONAL DE DERECHO COMPARADO 285, 295 (2014).

74. See the text of Law 26618, available at <http://www.infojus.gob.ar/legislacion/ley-nacional-26618-matrimonio-entre-personas-mismo.htm?5#>.

Québec—to do so.<sup>75</sup> Those changes are part of a more comprehensive shift, which also provides for recognition of gender identity, as established in Law 26743<sup>76</sup> of 2012.<sup>77</sup> Accordingly, gender identity might differ from that assigned at the time of birth and should reflect the internal and individual experience of each person.<sup>78</sup> The principle of equality was also welcomed by the democratic conception of family as assured by the constitutional reform of 1994, granting constitutional standing to a series of international Human Rights conventions.<sup>79</sup>

The Argentine Code, as other nineteenth-century civil codes, did not welcome same-sex marriage, and followed a model of the patriarchal family.<sup>80</sup> In addition, its text, as adopted in 1871, did not follow the *Code Napoléon* conception of marriage as a mere civil contract.<sup>81</sup> Vélez's code ratified authority to Canon law, and regulated marriage amongst Catholics,<sup>82</sup> and also regulated marriage with<sup>83</sup> and without<sup>84</sup> authorization of the Catholic Church. There were no specific provisions for marriages amongst non-believers, yet it was interpreted that the code dispositions on

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75. A decision of the Court of Appeals of Québec, in the case *Ligue catholique pour les droits de l'homme c. Hendricks*, resulted in the legalization of same-sex marriages in Québec. See <http://citoyens.soquij.qc.ca/php/decision.php?ID=78C475AD045B50A084375C394E0B74DB&page=1>; and Donald G. Casswell, *Same-Sex Marriage: Equality for Lesbian and Gay People*, 62 *ADVOCATE VANCOUVER* 709, 716 (2004).

76. See the text of Law 26743, available at [http://www.infojus.gob.ar/legislacion/ley-nacional-26743-ley\\_identidad\\_genero.htm?7](http://www.infojus.gob.ar/legislacion/ley-nacional-26743-ley_identidad_genero.htm?7). An implementation decree for Law 26743 was also adopted. See Decree 1007/2012, available at <http://www.infojus.gob.ar/documentDisplay.jsp?guid=123456789-0abc-700-1000-2102soterced>.

77. Article 1 of the new law established that every person has the right to recognition of its gender identity, to freely develop according to that gender identity and to be treated according to his gender identity. *Id.*

78. *Id.* at art. 2.

79. Graciela Medina, *Matrimonio y disolución* in *COMENTARIOS AL PROYECTO DE CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN 2012* 259, 261 (Julio César Rivera dir., 2012).

80. Medina, *supra* note 63, at 390.

81. LEVAGGI, *supra* note 14, at 131.

82. Arts. 167-179 (Law 340, *supra* note 20, at 524-525).

83. Arts. 180-182 (Law 340, *supra* note 20, at 525-526).

84. Art. 183 (Law 340, *supra* note 20, at 526).



public instruments in general applied.<sup>85</sup> Article 167 of the code provided the basic tenets by indicating that marriage amongst Catholics should be celebrated according to the canons and solemnities of the Catholic Church.<sup>86</sup> Vélez had indicated in his note to that article that:

Catholics, such as the people of Argentina,<sup>87</sup> could not celebrate civil marriage. For them it would be a perpetual concubinage, condemned by their religion and by the customs of the country. A law authorizing such marriages, according to the current state of our society, would disavow the mission of the laws to sustain and increase the power of customs and not to enervate and corrupt them. Such a law would encourage Catholics to ignore the precepts of their religion, with no favorable results for people and families.<sup>88</sup>

The 1871 text also referred explicitly to husband and wife throughout its articles, not taking a neutral stand by means of the generic term *spouse*.<sup>89</sup>

Argentine society experienced several changes towards the end of the nineteenth century.<sup>90</sup> For example, the 1895 Argentine census indicated that the country had 4.1 million inhabitants,<sup>91</sup> of

85. LEVAGGI, *supra* note 14, at 132.

86. Law 340, *supra* note 20, at 524.

87. The 1895 Argentine census indicated that in that country “991 out of 1000 are Catholics, seven are Protestant, and two are Israelites.” SEGUNDO CENSO DE LA REPÚBLICA ARGENTINA. MAYO 10 DE 1895. TOMO II POBLACIÓN CXXII (1898) [hereinafter SEGUNDO CENSO].

88. The text of the note, in its relevant part, read in Spanish:

Las personas católicas, como las de los pueblos de la República Argentina, no podrían contraer el matrimonio civil. Para ellas sería un perpetuo concubinato, condenado por su religión y por las costumbres del país. La ley que autorizara tales matrimonios, en el estado actual de nuestra sociedad, desconocería la misión de las leyes que es sostener y acrecentar el poder de las costumbres y no enervarlas y corromperlas. Sería incitar a las personas católicas a desconocer los preceptos de su religión, sin resultado favorable a los pueblos y a las familias.

Law 340, *supra* note 20, at 524. See also LEVAGGI, *supra* note 14, at 131.

89. See, e.g., arts. 185-193 (Law 340, *supra* note 20, at 526).

90. For a comprehensive view on Argentina during the turn of the century and until the 1930s, see THE CAMBRIDGE HISTORY OF LATIN AMERICA VOLUME V C. 1870 TO 1930 327-452 (Leslie Bethell ed. 1998).

91. SEGUNDO CENSO, *supra* note 87, at cxlix.

which 24.5% were foreigners,<sup>92</sup> mainly migrants from Europe.<sup>93</sup> The period 1901-1910, alone, resulted in the arrival of 1.1 million permanent immigrants.<sup>94</sup> No other civil law jurisdiction of the Americas received more immigrants than Argentina.<sup>95</sup> In addition, early industrialization resulted in new interaction amongst actors, many of them being immigrant workers.<sup>96</sup> That new interaction lacked economic and normative frameworks, and eventually triggered social unrest and strikes.<sup>97</sup> Agnostic ideas had also developed at that time in Argentina, and there were controversies between Catholics and Liberals, triggered by several governmental measures against the former.<sup>98</sup> Within that context, the already mentioned *secular laws* were enacted in the 1880s in Argentina. Accordingly, civil marriage was introduced by means of Law 2393, which took effect on November 11, 1888.<sup>99</sup> Since then, only civil marriage was recognized by the state.<sup>100</sup> Furthermore, the new law stated that ministers of the Church would be prosecuted if they celebrated religious marriages without a copy of the civil

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92. *Id.* at cliii.

93. Ernesto Cerro, *La migración en la República Argentina y especialmente en Tucumán entre 1869 y 1914* in LA INMIGRACIÓN EN LA ARGENTINA 81, 81-82 (Universidad Nacional de Tucumán 1979).

94. 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).

95. DONALD S. CASTRO, THE DEVELOPMENT AND POLITICS OF ARGENTINE IMMIGRATION POLICY 1852-1914: TO GOVERN IS TO POPULATE 4 (1991). See also the relevant statistics in *id.* at 267.

On the current immigration policies of Argentina, see 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 225-283 (2014).

96. 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, 140 (Rubén Giustiniani ed. 2004). 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).

97. Pérez Vichich, *supra* note 96, at 140.

98. LEVAGGI, *supra* note 14, at 134.

99. *Id.* at 136.

100. *Id.*

marriage act being produced before them.<sup>101</sup> The law on civil marriage did not welcome unions of same-sex spouses.

The current century saw the emergence of legislation that aimed to grant similar rights to different- and same-sex couples. The path towards same-sex marriage was paved by at least two precedents from as early as 2003, when the city of Buenos Aires<sup>102</sup> and the province of Río Negro<sup>103</sup> introduced the possibility of registering civil unions amongst same-sex couples.<sup>104</sup> A fundamental change, that was *avant-garde* for the entire region, took place in 2010 with the enactment of Law 26618 on Same-sex Marriage. It took effect on July 22, 2010, and incorporated changes to the civil code; to two special laws (i.e., Law 18248 and Law 26413); and to the entire Argentine legal framework dealing with the requirements, rights, duties, and effects of marriage.

Law 26618 implemented a first set of changes that were introduced exclusively to the civil code. The texts of thirty-four articles from the Argentine Code were replaced by new wordings, which aimed to guarantee full recognition to same-sex marriages.<sup>105</sup> A first example is found in article 172, being the leading article for the chapter dealing with marital consent. It added a second paragraph that clearly eliminated any distinction by stating that “marriage will have the same requirements and effects, not depending on whether the spouses are of the same or different

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101. *Id.*

102. The changes were implemented by means of Law 1004. See the complete text of the law available at [http://www.buenosaires.gob.ar/areas/educacion/recursos/ed\\_sexual/pdf/ley1004.pdf](http://www.buenosaires.gob.ar/areas/educacion/recursos/ed_sexual/pdf/ley1004.pdf).

103. The changes were implemented by means of Law 3736. See the complete text of the law by searching “Ley 3736” in the search engine available at <http://www.legisrn.gov.ar/LEGISCON/conleystanwp.php>.

104. Gerard-René de Groot, *Private International Law Aspects Relating to Homosexual Couples* in GENERAL REPORTS OF THE XVIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 325, 332 (Katharina Boele-Woelki & Sjeff van Erp eds. 2007).

105. The text of the following civil code articles was replaced: 172; 188; 206; 212; 220, par. 1; 264, par. 1; 264 ter; 272; 287; 291; 294; 296; 307; 324; 326; 332; 354; 355; 356; 360; 476; 478; 1217, par. 1; 1275, par. 2; 1299; 1300; 1301; 1315; 1358; 1807; 2560; 3292; 3969; and 3970.

sex.”<sup>106</sup> Another example of change is found in new article 206, which indicated that, regardless the age of the child, in same-sex marriages, the judge considers the best interest of the child at the time of granting custody to one of the parents.<sup>107</sup> In similar lines, article 307 indicated that parental rights (*patria potestad*) may be lost by parents, regardless of their sex, when the security, physical or psychic health, or morality of the child is jeopardized due to bad behavior, pernicious examples, or delinquent misconduct.<sup>108</sup> The changes in the law, therefore, also contemplated the other members of the family, not focusing exclusively on the spouses.

The new law implemented a second group of changes that were introduced in two national laws that regulate fundamental aspects of personality: name and legal capacity of persons. First, the new law implemented a change in the wording of five articles of Law 18248<sup>109</sup> on Names, aiming to eliminate any distinctions between the effects of different- and same-sex marriages.<sup>110</sup> Second, a modification was implemented to article 36, paragraph C of Law 26413<sup>111</sup> on the Registry of Civil Status and Capacity of Persons. That article deals with the registration of birth, and according to the new text, the registration of birth for children born from same-sex spouses requires the name and surname of the mother and its spouse.<sup>112</sup>

Article 42 of Law 26618 implemented a final and overreaching provision that affected the entire domestic legal framework. That article stated in its first paragraph that every reference to marriage

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106. The article read in Spanish: “*El matrimonio tendrá los mismos requisitos y efectos, con independencia de que los contrayentes sean del mismo o de diferente sexo.*” Law 26618, *supra* note 74.

107. *Id.*

108. *Id.*

109. See the text of Law 18248, available at <http://www.infojus.gob.ar/documentDisplay.jsp?guid=123456789-0abc-defg-g02-01000scanyel>.

110. Law 26618 replaced arts. 4, 8-10, and 12 of Law 18248. Law 26618, *supra* note 74.

111. See the text of Law 26413, available at <http://www.infojus.gob.ar/documentDisplay.jsp?guid=123456789-0abc-defg-g65-45000scanyel>.

112. *Id.* at art. 36, par. C.

within the internal legal framework should be understood as being applicable both to different- and same-sex spouses.<sup>113</sup> The second paragraph extended that understanding to all family members. It therefore stated that family members from different- and same-sex marriages have identical rights and obligations.<sup>114</sup> Finally, the third paragraph of that article stated that no disposition of the Argentine legal framework should be interpreted or applied in a way that limits, restricts, excludes, or eliminates the enjoyment of the same rights and obligations for different- and same-sex marriages.<sup>115</sup> Regardless of this overreaching statement, an imminent re-drafting of many other dispositions of the domestic legal framework would be well received.

Same-sex marriage was also welcomed in the 2012 code project. Lorenzetti had indicated at the time of presenting the 2012 code project that the work had aimed to elaborate a code for a multicultural society, and that in the area of family law important decisions had been made to attend some social conducts that could no longer be ignored.<sup>116</sup> He also defended that taking those decisions did not imply that certain conducts were encouraged or subject to value judgment, because taking those decisions had aimed to regulate options for life in a pluralistic society.<sup>117</sup> It has been claimed, however, that the proposed changes in family law implicitly canceled the role of Argentine legal tradition as a source for that area of law, because of the radical changes proposed, which would result in the need to “discard entire libraries.”<sup>118</sup> A number of proposed articles refer to same-sex marriage and couples. For example, article 402, being fundamental for the interpretation and application of provisions, reproduced almost

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113. Law 26618, *supra* note 74.

114. *Id.*

115. *Id.*

116. Presentación del Proyecto, available at <http://www.nuevo.codigocivil.com/pdf/Presentacion-de-Dr-Ricardo-Lorenzetti.pdf> at 5.

117. *Id.*

118. Úrsula C. Basset, *El matrimonio en el Proyecto de Código*, LA LEY 09.05.2012.

*verbatim* the third paragraph of article 42 of Law 26618.<sup>119</sup> That wording could serve to solve any unattended conflicts between the scope of rights and duties of different- and same-sex spouses. The location of the article within the 2012 code project was also relevant, because it was placed as the second and final article in Book II, Title I, Chapter 1 dealing with the general principles of freedom and equality. The project also dealt with the effects of same-sex marriage in article 69, paragraph C, regulating the instances when surnames can be changed, again a fundamental aspect of personality.<sup>120</sup> Another reference was found in article 509, which highlighted that the provisions on cohabitation unions (*uniones convivenciales*) applied equally to different- and same-sex couples.<sup>121</sup> Finally, the 2012 text eliminated all references to husband and wife throughout its articles.

Marriage in Argentina has changed drastically in a 140 year period. Those changes (i.e., from religious to civil, and welcoming same-sex marriage) provide an example of how partial revisions and de-codification may pave the way for a shift in generation status. In Argentina, the first generation code status is preserved, even when fundamental changes took place in the area of family law. One wonders how many of these fundamental changes can occur until the generation shift eventually takes place.

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119. The article read in Spanish:

*Interpretación y aplicación de las normas. Ninguna norma puede ser interpretada ni aplicada en el sentido de limitar, restringir, excluir o suprimir la igualdad de derechos y obligaciones de los integrantes del matrimonio, y los efectos que éste produce, sea constituido por dos personas de distinto o igual sexo.*

Texto del Proyecto, *supra* note 61, at 97.

120. Art. 69, par. C (Texto del Proyecto, *supra* note 61, at 19).

121. Art. 509 (*id.* at 128).

## IV. IMPROVING ACCESS TO JUSTICE FOR ALL

Access to justice is the vehicle whereby other rights are conveyed.<sup>122</sup> Recent legislation and the 2012 code project have addressed that fundamental right by including provisions towards assuring access to justice for all. Special attention was given to those groups more vulnerable to achieve access to their rights. The inclusion of special provisions to assure that right for vulnerable groups reinforced the idea that individual freedoms are seen, in recent legal developments, as social commitments and not as self-responsibility.

Argentina aims to achieve a judicial value of “equality” that materializes in values of non-discrimination and equal opportunities.<sup>123</sup> Access to justice is considered in a broad sense, thus allowing justice to be granted by different mechanisms, not limited to the traditional access to courts: “it means access to a solution to a conflict, and not access to trial.”<sup>124</sup> Innovations in mechanisms of access to justice were welcomed in the creation of institutions and enactment of laws that tended to eliminate common obstacles to reach the law and available mechanisms to make use of the law and of the judicial system.

Changes in private law were accompanied by changes in public law in Argentina. These changes shaped a new context on access to justice where that right was largely extended by means of the previously mentioned Human Rights conventions that gained constitutional supremacy in 1994. Argentina hence reinforced the right to a fair trial as a necessary step to obtaining an effective and

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122. See, e.g., the interview of Santiago Otamendi, available at <http://www.fiscalias.gob.ar/informacion/canal-de-videos>.

123. Ricardo Lorenzetti, *Acceso a la Justicia de los Sectores Vulnerables* in DEFENSA PUBLICA: GARANTIA DE ACCESO A LA JUSTICIA 61, 62 (2008); and MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975). For a reflection on the introduction of these principles in the law, see Eduardo José Cárdenas, *La familia en el Proyecto de Código Civil*, LA LEY 08.15.2012.

124. Lorenzetti, *supra* note 123, at 70.

enforceable remedy.<sup>125</sup> International conventions also extended the responsibility of the state to make access to justice achievable.<sup>126</sup>

Equal opportunity to access to justice for all members of society was recently addressed in Argentina. The regulations took a holistic approach on the issue, considering the particularities of different groups. Accordingly, laws were tailor-made for these groups, as illustrated by Law 25871 of 2003,<sup>127</sup> addressing the right of immigrants; and by Law 26485 of 2009,<sup>128</sup> addressing the right of women to live free of violence. In addition, access to justice was addressed in the provisions on procedures regarding family matters within the 2012 code project.

#### *A. Law 25871 on Migration Rights*

Argentina is a country with a strong tradition of welcoming immigrants.<sup>129</sup> Law 25871 of 2003 provided the main legal framework for immigration<sup>130</sup> and aimed to harmonize the internal normative framework with the international conventions

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125. See the text of article 18 of the Constitution of 1994, available at [http://pdba.georgetown.edu/Constitutions/Argentina/argen94\\_e.html](http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html); and the text of article 8 of the American Convention on Human Rights, available at [http://www.hrcr.org/docs/American\\_Convention/oashr.html](http://www.hrcr.org/docs/American_Convention/oashr.html).

126. See, e.g., the reception in arts. 8, 10 and 22 of the Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr>; and in arts. 2(3) and 14(1) of the International Covenant on Civil and Political Rights, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

127. See the text of Law 25871, available at <http://www.infojus.gov.ar/documentDisplay.jsp?guid=123456789-0abc-defg-g94-84000scanyel>. An implementation decree for Law 25871 was also adopted. See Decree 616/2010, available at [http://www.infojus.gov.ar/legislacion/decreto-nacional-616-2010-decreto\\_reglamentario\\_ley\\_25871.htm?4](http://www.infojus.gov.ar/legislacion/decreto-nacional-616-2010-decreto_reglamentario_ley_25871.htm?4).

128. See the text of Law 26485, available at <http://www.infojus.gov.ar/documentDisplay.jsp?guid=123456789-0abc-defg-g31-55000scanyel>. An implementation decree for Law 26485 was also adopted. See Decree 1011/2010, available at <http://www.infojus.gov.ar/documentDisplay.jsp?guid=123456789-0abc-110-1000-0102soterced>.

129. See, e.g., Parise *supra* note 95.

130. See, generally, Law 25871, *supra* note 127; 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).



subscribed to by the country.<sup>131</sup> Some scholars considered that Law 25871 went further in the recognition of international rights to immigrants and hence defended that the right to migrate in Argentina should be regarded as a human right.<sup>132</sup>

Law 25871, a prime example of a tailor-made law, also accorded the right of immigrants to access to justice. Immigrants and their families now enjoy the right to be informed of their obligations and rights, together with the right to be informed of the requirements needed to be admitted, to stay, and to leave Argentina.<sup>133</sup>

The new law also considered access to justice in a broad sense, not limiting it to access to courts. Legal aid offices were incorporated as important intermediary institutions to assure immigrants exercise their right to access to justice. They must provide aid free of charge and, when possible, in a language the immigrant understands. Language interpreters should be appointed to assist non-Spanish speaking immigrants that face administrative or judicial proceedings.<sup>134</sup> There are several offices that render legal aid in Argentina, and they cannot deny legal aid, even when immigrants have an irregular status.<sup>135</sup> For example, the University of Buenos Aires (UBA), CELS, and *Comisión de Apoyo a Refugiados y Migrantes* (CAREF) sponsor, since 2002, a legal

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131. Alejandro O. Tazza, *Ley 25.871. Extranjeros. Política migratoria*, 2004-E ANALES DE LEGISLACIÓN ARGENTINA (2004).

132. Hines, *supra* note 130, at 509. Several works have compared the innovative approach of this new legislation to that existing in other countries, such as the U.S. (*see, e.g.*, 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 (2009)).

133. Law 25871, *supra* note 127, at art. 9; and Decree 616/2010, *supra* note 127, at art. 9 (provides implementation requirements).

134. Law 25871, *supra* note 127, at art. 86; and Decree 616/2010, *supra* note 127, at art. 86 (provides implementation requirements). *See also* Saideh Saleh Ebrahimi, *El derecho constitucional a ser oído y la asistencia lingüística a los extranjeros*, LA LEY SUPLEMENTO ACTUALIDAD 05.24.2011.

135. Decree 616/2010, *supra* note 127, at art. 56 (provides implementation requirements). *See also* Ebrahimi, *supra* note 127.

clinic for the protection of rights of immigrants and refugees.<sup>136</sup> Similar legal clinics were established in other universities across Argentina.<sup>137</sup> Legal aid was also encouraged by Decree 836 of 2004, which advocated for the creation of an office to assist and inform immigrants within the scope of the National Migration Office.<sup>138</sup>

In 2007, the public sector opened offices to aid immigrants and refugees, facilitating access to justice to those groups.<sup>139</sup> Those efforts were also addressed by the creation of public offices, commissions, and institutes. For example, the National Institute against Discrimination, Xenophobia, and Racism (INADI)<sup>140</sup> also offers protection to immigrants, having already been created in the late 1990s. Other efforts were implemented in 2008, when a Commission of Migrants was created within the scope of the National Public Defenders' Office.<sup>141</sup>

Argentina is a pioneer in granting a human right status to migration.<sup>142</sup> Many changes took place in the Argentine legislation on immigration, and the last decades proved to be fruitful in the adoption of tailor-made changes for immigrants. However, a gap between the law and the existing reality for immigrants in

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136. FIDH & CELS, ARGENTINA: AVANCES Y ASIGNATURAS PENDIENTES EN LA CONSOLIDACIÓN DE UNA POLÍTICA MIGRATORIA BASADA EN LOS DERECHOS HUMANOS 34-35 (No. 559e, Feb. 2011). This is a very complete work by *Federación Internacional de Derechos Humanos* (FIDH) and *Centro de Estudios Legales y Sociales* (CELS).

137. *Id.* at 35.

138. See the text of Decree 836/2004, available at <http://www.infojus.gov.ar/legislacion/decreto-nacional-836-2004-declaracion-emergencia-administrativa-en.htm?28>.

139. FIDH & CELS, *supra* note 136, at 35.

140. For more information on the National Institute against Discrimination, Xenophobia, and Racism, see <http://inadi.gob.ar/promocion-y-desarrollo/publicaciones/documentos-tematicos/migrantes/>.

141. For more information on the Commission of Migrants see <http://defenpo3.mpd.gov.ar/defenpo3/def3/direcciones/comisiones/migrante.htm>. See generally Ivanna Opacak & Matías Eidem, "Ningún ser humano es ilegal" *Un paso adelante respecto de la cuestión migratoria*, ELDIAL 08.16.2011.

142. 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, *supra* note 130, at 472.

Argentina is perceived.<sup>143</sup> It is now the time to implement specific public policies that will assist in bridging the gap, e.g., human resources will be needed to continue with the implementation (and improvement) of services for access to justice.<sup>144</sup> The immigration scheme in Argentina should certainly accompany the most vulnerable groups, defending the already two-hundred-year-old fundamental notion that in Argentina the constitutional rights are applicable to *all men* [and women] *of the world who wish to dwell on Argentine soil*.<sup>145</sup>

#### *B. Law 26485 on Violence against Women*

Eradication of violence against women requires that access to justice is granted in an effective and suitable way according to the specificities of each group.<sup>146</sup> Argentina experienced an early start in that respect by dealing with access to justice in situations of family violence. Law 24417 of 1994<sup>147</sup> was the first federal and comprehensive regulation against family violence. This law defined domestic violence as that which occurred within family members without differentiating genders. The law established the procedural baseline and judicial competency.<sup>148</sup> Article 1 stated that judges with competency to hear family matters could receive petitions, written or oral, related to family violence.

Law 26485 of 2009 reassured and extended the previous statements towards access to justice. The new law included a

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143. Enrique Oteiza, *Hacia una nueva Política Migratoria Argentina: Inmigración. Integración y derechos humanos* in MIGRACIÓN: UN DERECHO HUMANO 87, 105 (Rubén Giustiniani ed. 2004).

144. Gabriel B. Chausovsky, *Apuntes jurídicos sobre la nueva Ley de Migraciones* in MIGRACIÓN: UN DERECHO HUMANO 159, 171 (Rubén Giustiniani ed. 2004); and FIDH & CELS, *supra* note 136, at 23.

145. Preamble of the Constitution of 1994, available at [http://pdba.georgetown.edu/Constitutions/Argentina/argen94\\_e.html](http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html).

146. GENERAL SECRETARIAT ORGANIZATION OF AMERICAN STATES, ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS 122 (2007).

147. See the text of Law 24417, available at <http://www.infojus.gob.ar/documentDisplay.jsp?guid=123456789-0abc-defg-g37-93000scanyel>.

148. *Id.* at art. 1.

gender perspective to violence at large, and violence within the family. It extended the points of access to submit a claim and allowed all judges, even those without competency, to hear domestic violence cases, to receive the petition, and to grant preventive measures (e.g., restraining orders).<sup>149</sup>

Human Rights conventions played a key role when addressing access to justice to vulnerable groups. Two international documents were especially relevant for Argentina when implementing public policies to eradicate violence against women: the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>150</sup> and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).<sup>151</sup> These international documents specifically addressed the role of the state in procuring accurate mechanisms for victims to benefit from a judicial system that deals with the specificities of their problems.<sup>152</sup>

Law 26485 found inspiration in CEDAW and the Convention of Belém do Pará. This was the first tailor-made law adopted in Argentina at a federal level to prevent, punish, and eradicate violence specifically against women. The law stated the importance to promote and assure access to justice to those women who suffer from violence.<sup>153</sup> Access to justice was understood in a broad sense, not limited to access to courts.<sup>154</sup> The laws called for the implementation of public policies by the three branches, at federal and provincial level, to assure a free, expeditious, transparent, and efficient process to access to justice.<sup>155</sup>

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149. Law 26485, *supra* note 128, at art. 22.

150. See the text of the Convention on the Elimination of all Forms of Discrimination against Women (hereinafter, CEDAW), available at <http://www.un.org/womenwatch/daw/cedaw/>.

151. See the text of the Convention of Belém do Pará, available at <http://www.oas.org/juridico/english/treaties/a-61.html>.

152. *Id.* at arts. 7(d) and 8(d); and CEDAW, *supra* note 150, at arts. 13 and 25.

153. Law 26485, *supra* note 128, at art. 2(f).

154. *Id.* at art. 11(5.1.a).

155. *Id.* at arts. 7(c) and 20.

Furthermore, it promoted the creation of services to provide free, specialized, and holistic assistance.<sup>156</sup> The executive branch called for the cooperation, through the celebration of agreements, amongst sectors from different jurisdictions, including the Attorney General Office, bar associations, law faculties, and other governmental and non-governmental institutions.<sup>157</sup> Law 26485 incorporated procedural aspects under Title III, to set a baseline for the federal and provincial regulations of minimal rights and guarantees in the judicial and administrative procedures.<sup>158</sup>

The new law instructed the Ministry of Justice to implement measures to facilitate access to justice to women, and to create and improve information centers and programs providing legal assistance and representation.<sup>159</sup> Women can submit a complaint (civil or criminal) without legal representation and before any tribunal.<sup>160</sup> However, legal representation is an important element for the right to access to justice and to achieve a judicial remedy.<sup>161</sup> Furthermore, the law stated that access to justice for victims should be free regardless of their economic situation.<sup>162</sup> This inclusion was in line with the particularities of the problem because many times, even when victims have economic resources, they may not have free disposition.

Access to justice for women victims of violence improved significantly during the last decade in Argentina, by the creation of

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156. *Id.* at arts. 9(d) and 16(a).

157. Decree 1011/2010, *supra* note 128, at art. 16(a).

158. Law 26485, *supra* note 128, at arts. 16-40.

159. *Id.* at art. 11(5.a).

160. *Id.* at art. 21.

161. *See, e.g.*, Advisory Opinion, Oc-11/90, *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(A) And 46(2)(B) American Convention On Human Rights)* 08.10.1990, available at <http://www.corteidh.or.cr/index.php/en/advisory-opinions>; and Federico Andreu-Guzmán & Christian Courtis, *Comentarios sobre las 100 Reglas de Brasilia sobre Acceso a la Justicia de las Personas en Condición de Vulnerabilidad* in DEFENSA PÚBLICA: GARANTÍA DE ACCESO A LA JUSTICIA 51, 54 (2008).

162. Law 26485, *supra* note 128, at art. 3(i).

public funded institutions, such as legal aid offices.<sup>163</sup> For example, in the city of Buenos Aires, women victims of violence can now claim their rights at the Domestic Violence Office,<sup>164</sup> the Attorney General Office,<sup>165</sup> the Access to Justice Office,<sup>166</sup> police stations,<sup>167</sup> and courts.<sup>168</sup> The creation of these offices, together with the recent developments in the law, offered victims new options to claim for rights, beyond the traditional forums (i.a., family courts). The implementation of the new institutional structure resulted in an increase of submission of complaints, though the overall impact is yet to be assessed.<sup>169</sup>

### *C. Procedures on Family Matters in the 2012 Code Project*

The 2012 code project included the principle of equality by recognizing human diversity.<sup>170</sup> Equality and diversity had been previously welcomed in multiple legislations. For example, at the international level, it was welcomed by the *American Convention on Human Rights*;<sup>171</sup> and at the domestic level, article 19 of the

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163. For a study on how legal aid offices can improve accessibility to rights, see UN Secretary-General, *Legal Empowerment of the Poor and Eradication of Poverty*, Report A/64/133, 07.13.2009.

164. For a description on the operation of the office, see <http://www.csjn.gov.ar/ovd/>.

165. For a description on the operation of the office, see <http://www.fiscalias.gob.ar/>.

166. For a description on the operation of the office, see <http://www.jus.gob.ar/accesoalajusticia/caj/centros.aspx>.

167. Law 26485, *supra* note 128, at art. 36.

168. *Id.* at art. 22.

169. For a perception on the number of cases filed, see the statistics collected by the Domestic Violence Office and the Attorney General Office, available at [http://www.csjn.gov.ar/docus/documentos/cons\\_temaovd.jsp?temaID=K186](http://www.csjn.gov.ar/docus/documentos/cons_temaovd.jsp?temaID=K186); and <http://www.fiscalias.gob.ar/al-habitante/acerca-de-mpf/ofavyt-oficina-de-asistencia-a-la-victima-y-testigo>.

170. For an understanding on the reception of the concept of equity in the 2012 code project, see *Fundamentos del Proyecto*, *supra* note 64, at 4; and Lorenzetti, *supra* note 62.

171. See the text of the American Convention on Human Rights, available at <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. For a note on the constitutional aspects introduced in the 2012 code project, see Marcela I Basterra, *Aspectos constitucionales del Proyecto de Código*, LA LEY 12.14.2012; and Alberto M. García Lema, *Interpretación de la Constitución reformada y el Proyecto de Código*, LA LEY 06.02.2014. On the

Argentine Code addressed one of its dismemberments: the principle of privacy.<sup>172</sup>

Principles and rights can only be achieved by suitable processes.<sup>173</sup> The 2012 code project therefore incorporated Title VIII on the general principles for family procedures, which includes articles 705-710. These general principles established the standards for the procedures on family matters. The articles were inspired by the Brasilia Regulations Regarding Access to Justice for Vulnerable People.<sup>174</sup> Article 706, being the main provision for that section, read that:

The process in family matters should respect the principles of effective judicial protection, immediacy, good faith and procedural fairness, officiousness, oral proceeding, and limited access [only for parties] to the 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 specialized and obtain multidisciplinary support....<sup>175</sup>

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constitutionalization of the civil code, see Andrés Gil Domínguez, *Estado constitucional de derecho y proyecto de Código Civil y Comercial*, LA LEY 08.07.2012.

172. The text of the article 19, in its relevant part, reads in Spanish: “*La renuncia general de las leyes no produce efecto alguno; pero podrán renunciarse los derechos conferidos por ellas, con tal que sólo miren al interés individual y que no esté prohibida su renuncia.*” Article 19, Argentine Code, available at <http://www.infojus.gob.ar/legislacion/ley-nacional-340-codigo-civil.htm>.

173. 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 dir., 2012).

174. *Id.* at 441. See also *Fundamentos del Proyecto*, *supra* note 64, at 97-98. See the text of the Brasilia Regulations Regarding Access to Justice for Vulnerable People, available at <http://www.osce.org/odihr/68082?download=true>.

175. The text of the article, in its relevant part, read in Spanish:

El proceso en materia de familia debe respetar los principios de tutela judicial efectiva, intermediación, buena fe y lealtad procesal, officiosidad, oralidad y acceso limitado al expediente.

Las normas que rigen el procedimiento deben ser aplicadas de modo de facilitar el acceso a la justicia, especialmente tratándose de personas vulnerables, y la resolución pacífica de los conflictos.

The inclusion of Title VIII enabled the 2012 code project to recognize the particularities of family procedures, and the need to regulate resulting specificities.<sup>176</sup> Furthermore, it served as another example of the interplay between private and public law,<sup>177</sup> including vulnerable groups in the text of the seminal private law regulation. Lastly, it shifted the view on conflicts amongst people, placing in a paramount position the characteristics of those facing conflicts.<sup>178</sup> The latter is considered a requirement to assure access to justice for all.

A change in paradigm on accessibility to rights is perceived in the private law of Argentina, and the 2012 code project is no exception. The project changed the traditional paradigm where the subject of private rights is “the person,” to a paradigm that addresses that person in an egalitarian way, without discriminations based on gender, religion, place of birth, or wealth.<sup>179</sup> The proposed text made specific references to different groups of society, amongst others, women, children, persons with disabilities, consumers, and original communities, turning them all into specific recipients of rights.<sup>180</sup> Within family law, the project went even further, with the inclusion of procedural standards, showing a specific interest towards access to justice and dispute resolution for family members.<sup>181</sup>

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Los jueces ante los cuales tramitan estas causas deben ser especializados y contar con apoyo multidisciplinario....

Texto del Proyecto, *supra* note 61, at 174.

176. Medina, *supra* note 173, at 440-449; Angelina Ferreyra de De la Rúa, *El procedimiento de familia en el Proyecto*, LA LEY 06.21.2012; and Gabriel González Da Silva, *Inconstitucionalidad de las disposiciones procesales contenidas en el Proyecto de Código*, LA LEY 05.16.2013.

177. Fundamentos del Proyecto, *supra* note 64, at 4.

178. *Id.* at 4-6.

179. *Id.* at 5.

180. *Id.*

181. The 2012 code project did not provide a conceptualization of what “family procedures” encompass. For a note on this point, *see* Medina, *supra* note 173, at 440-449.



## V. CONCLUDING REMARKS

Argentine law cannot be considered dormant or static. The report addressed three main developments that took place in the law of Argentina. The first development dealt with the ongoing efforts towards the adoption of a second generation civil code, with special focus on the resulting 2012 code project that aimed to unify the civil and commercial law provisions into a single-fabric text. The second development dealt with the adoption of same-sex marriages in Argentina, which took place in 2010, and placed that jurisdiction as a regional forerunner. The third and final development dealt with the right to access to justice, with a special focus on two vulnerable groups (i.e., women victims of violence and immigrants) and on the reception of that right in the 2012 code project. All developments addressed in this report share common links, being part of a broader policy that aims to give equal standing to all members of Argentine society.

The report helped illustrate that in Argentina, as in other jurisdictions, the division of law into private and public tends to fade. The different areas of law now form part of a broader context that benefits from the interaction of provisions emanated from different areas. That broader context can be sensed, for example, by the constitutionalization of private law as experienced in the inclusion of general principles (i.a., equality) within the new regulations of the 2012 code project. In addition, tailor-made laws also merged private and public law components that provided an integral approach to the daily challenges of society members. Argentina is pursuing a generation shift in code status, building from previous revision and de-decodification experiences. That shift will ultimately also reflect that private and public law are no longer watertight compartments.

*POST SCRIPTUM*

On October 1, 2014, the Argentine Congress adopted Law 26994, which approved the text of the 2012 code project.<sup>182</sup> The Argentine President, Cristina Fernández de Kirchner, promulgated the above-mentioned law on October 7 of that same year. According to article 7 of the law, the new code will take effect on January 1, 2016.

J.M. and A.P.

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182. See the text of Law 26994, available at <http://www.infojus.gob.ar/26994-nacional-codigo-civil-comercial-nacin-lns0005965-2014-10-01/123456789-0abc-defg-g56-95000scanyel>.