

Codes and Constitution in Argentina: A Difficult Marriage

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Argentina's legal culture is a hybrid one. The national legal system was constructed after the independence revolution in the mid-19th Century under the influences of both the continental European legal system and the American Constitutional law model. The impact of the latter can be seen not only in the fact that the form of government and the bill of rights established in Argentina's Constitution were pretty much inspired in the American Constitution, but also because the judicial review system resembles the own established in the US particularly after *Marbury v. Madison* (except for the not minor detail that Argentina does not recognize the rule of precedents). It is not usual, and probably sort of unique, that a legal system so much immersed in the Civil Law Tradition combines with such constitutional law regime.

The civil law tradition has had a pervasive impact on the country's legal structures, shaping our codes, our judicial practice, our legal education system and method of teaching, our procedures for the selection of judges, our underestimation of the role of precedents, and our conception of what the law is and how justice is made. Probably because of these reasons there is a generalized impression in the legal community that Argentina belongs to the family of civil law countries, as opposite to those from the common law.

Almost at the same time the Civil Code was written – mid 19th Century –, the Constitution was signed by all states. Shortly after, the Supreme Court, in the *Sojo* case, extremely similar to *Marbury v. Madison*, decided that judges had the power to check on the constitutionality of laws when a case was brought before them. In addition to this, cases decided by the Supreme Court began to be published since the very first year of the establishment of the Highest Court of the land – what is a very unusual practice for a civil law country. Interesting enough, the

introduction to the first volume of these decisions is amazingly similar to the one that appeared in the first volume of the US Supreme Court's decisions, both justifying the enterprise in the need for citizens to know what the Constitution says according to what judges say its meaning is.

By then, Codes and Constitutions were supposed to live together, peacefully and harmoniously. This ideal was never achieved. Argentinean legal system and legal and political institutions became the battlefield in which both traditions silently fought – and still fight against each other today – for dominance. It is clear to me that the civil law tradition is winning this battle. This victory, that may not be forever but has been present for more than a Century, manifests itself in our formalist legal education, in the belief that judges decide cases according to the Codes with no interference of value judgments in the process of adjudication, in the very few cases in our legal history in which Codes provisions were found against the Constitution and invalidated, in the expectation that our Supreme Court Justices must be experts in different “areas” of law (that correspond with the different Codes) and not necessarily in Constitutional Law, in the little value we assign to precedents, and so on.

Argentina's constitutional democracy has not been able to establish and to settle a strong and durable constitutional tradition. This is probably related to the lawlessness culture that has dominated most of our history, the *anomy*, as Professor Carlos Nino calls it. The Constitution is most of the time regarded as the expression of good wishes, a set of principled aspirations, but not as the hard law that limits the power of the majority of the people expressed through the political branches of government. Our political system is, in some way, in fact, more “democratic” than “constitutional.” Our law students take one course on Constitutional Law in first year and there is hardly another mention or reference to the Constitution during their years in law school in no other course, particularly in those in which they are taught the Codes, as if the law is just what the Codes “evidently” say. The typical civil law professor does not seem to see the need for introducing constitutional questions in her courses, not to say cases in

which the tension between the code and the constitution arises. Something similar seems to happen to judges, with the exceptional case of the Supreme Court... most of the time.

Therefore, there is an important question to ask ourselves and that is whether we could find an explanation for our weak constitutional tradition in the relative defeat of the constitutional aspect of our legal system by the overwhelming cultural influence of the civil law tradition and its assumptions about what the law is, how it is conceived and constructed, how justice is made, and how dominant the political branches are or should be in the political system. If this is the case, I believe that we should explore ways by which the constitutional side of our legal system may be reinforced and strengthened. I do not think that the framework for this discussion should be one that tries to point out to the differences between the civil law tradition and the common law tradition, but one that addresses the tensions between the civil law tradition and (the American type of) constitutionalism, both at the roots of Argentina's legal system and legal culture.