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AN OVERVIEW OF CIVIL PROCEDURE IN ARGENTINA[1]

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ABSTRACT: The paper presents an overview of Federal Civil Procedure in Argentina, analyzing its historical and cultural influences as well as current trends. Firstly, it describes how the Spanish conquest influenced Argentine civil procedure and the main reforms that took place during 1968, 1981 and 2001. Then, it describes Argentine civil procedure main features, such as the "attenuated party-driven procedure", the "contradiction principle", and the "mixed written-oral system", among others. Particularly, it focuses on two procedural devices developed along the last twenty-five years: mandatory mediation before accessing to courts and class actions litigation. Finally, the report states that, despite Argentina´s reform efforts, the Federal Civil Procedure structure still works with an outdated model

1. O autor deste artigo foi convidado a escrever neste número da Revista e, por isso, seu texto não passou pelo processo de dupla avaliação cega.

based in a written scheme, with low levels of transparency and publicity, no close contact between parties and judges and lacks of new technologies, among other structural problems.

KEYWORDS: Civil procedure – Latin American civil procedure - Principles of civil procedure in Argentina - Civil procedure reforms in Argentina - Mediation in Argentina - Class actions in Argentina.

I. INTRODUCTION

The aim of this report is to present an overview of the main characteristics of Argentine civil procedure. To do that, I will briefly explain its roots, historical evolution and distinctive features, and then present some discussions about specific institutions that have recently marked relevant changes in this field of law: mandatory pre-judicial mediation and class actions.[2]

Considering that Argentina is a federal country where the Provinces have power to enact their own rules on civil procedure, as well as the rules on courts' system and organization, the focus of this report will be on the federal level. Nonetheless, most of the issues and discussions presented herein can be translated -with certain adaptations and precautions- to what happens in those local States.

II. ARGENTINE CIVIL PROCEDURE ROOTS. THE SPANISH HERITAGE AND THE STRONG INFLUENCE OF CIVIL LAW TRADITION

As Oteiza clearly explains, to find the roots of Argentine civil procedure we must look back to the 12th and 13th centuries. In that historical moment we can find "the ideas that still dominate civil procedure in Argentina and in most Latin American countries".[3] Particularly in our country, the canonical Roman law arrived from Spain. Its direct influence during the three centuries that followed the conquest of America, and indirect up to the present, is more than evident.[4]

2. This short paper reflects the conference delivered by the author at the "III Siberian Legal Forum", Tyumen University, November 2018. It works on materials already published by the author, mainly in Berizonce, Roberto O. & Verbic, Francisco, *Las reformas procesales en la República Argentina*, in Oteiza, Eduardo (Director) *Sendas de la reforma de la justicia en el siglo XXI*, 61-94 (ed. Marcial Pons, 2018) and Verbic, Francisco, *An overview of class actions in Argentina,* Global Class Actions Exchange, Stanford Law School, [http://globalclassactions.stanford.edu/].
3. Oteiza, Eduardo, *El fracaso de la oralidad en el proceso civil argentino*, in Carpi, Federico & Ortells, M. (Directors), *Oralidad y escritura en un proceso civil eficiente*, 413-439 (ed. Universidad de Valencia, 2009).
4. See generally Berizonce Roberto O. & Ferrand Frédérique, *Lois modèles et traditions nationales = Model laws and national traditions,* XIVeme Congres mondial de l'AIDP, Heidelberg 2011(ed. Bielefeld: Gieseking-Verlag, 2014).

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National authors and researchers agree on the fact that the incontrovertible source of our first comprehensive modern rules (both Act N° 50 of "Procedure before National Courts", passed in 1863, and its complementary "Code of Procedures", adopted in 1880), was the Spanish Law of Civil Procedure of 1855, which core, in turn, can be traced to the "Partidas" of Alfonso el Sabio (circa 1251).

After those first procedural legal bodies, the most relevant reform in this field came in 1968 during the military government of Juan Carlos Onganía. Then, almost exactly fifty years ago, the Act N° 17.454 approved the first "National Civil and Commercial Procedural Code" (NCCPC). It was a system eminently written and with plenty of incentives towards delegation, even though during the 60's there were intense debates all along the country about the need to give greater relevance to orality in civil procedure.

The NCCPC had its first relevant reform in 1981 through Act N° 22.434, and then another one -more specific- in 1995 through Act N° 24.573. The 1981 reform had two fundamental goals: (i) to empower the judge to delegate certain tasks to facilitate her immediate and effective participation in evidence hearings; and (ii) to expressly establish the nullity of the hearing where confession evidence is taken in case the judge was not present there. Oteiza points out that delegation was effectively implemented but not the sanction of nullity, even though judges continued -in their great majority- without personally managing that hearing. The 1995 reform, in turn, introduced a preliminary hearing and ratified the requirement of the Judge presence therein under pain of nullity (as Act. N° 22.434 has done before regarding the confession evidence hearing). Although the chosen path can be considered correct, once again its implementation failed.

It should be noted that all the trends and projects that were developed in this field of law in Argentina after the 1981 reform of the NCCPC had been strongly influenced by Italian professor Mauro Cappelletti. He visited the country at the beginning of that decade and provoked, as Berizonce always like to say, a "true revolution in the way of thinking and studying procedural law".

Another relevant influence in this path was the Model Code of Civil Procedure for Latin America, drafted by the Ibero-American Institute of Procedural Law and approved in Rio de Janeiro in 1988. This initiative was also shaped under the light of the fundamental principles advanced by Cappelletti: access to justice, strong judges with powers and duties on evidence and case management, immediacy, orality, legal aid for the poor, declaration of part (instead of confession), cross-examination and duty of collaboration.[5]

5. See generally 1 Morello, Augusto M. & Sosa, Gualberto L. & Berizonce Roberto O., *Códigos Procesales en lo Civil y Comercial de la Provincia de Buenos Aires y la Nación, Comentados y Anotados* (4th ed. Abeledo Perrot, 2016).

Among the subsequent reforms, the most relevant was that operated through Act 24.588 in 2001. Among other issues, arts. 34 and 36 of the NCCPC were modified to determine that different tasks that were previously recognized as "faculties" of the judge had to be considered as "duties". In addition, the reform maintained the preliminary hearing, but eliminated the sanction of nullity in the event of absence of the Judge. Another relevant (and regressive) modification was the elimination of summary proceedings, reshaping the structure of the NCCPC to allow only two alternatives: an ordinary procedure, with great place for debate and evidence, and a super summary procedure, only enabled for exceptional circumstances and with a limited margin for discussion and evidence.

Almost nothing changed with these reforms, showing clearly that it is not possible to modify deeply rooted cultural practices by simply modifying the text of the law.

III. SOME OF THE BASIC FEATURES THAT TYPIFY ARGENTINE CIVIL PROCEDURAL SYSTEM

In great measure because of its historical roots and evolution, as well as to the main doctrinal source of influence described above, Argentine civil procedure is characterized by some basic features that can easily be identified.[6] To facilitate the comparative analysis, I will not present them in detail but in a plain way.

(i) Attenuated party-driven procedure

Parties have the burden to stimulate the Judiciary through the proposal of the action, which must contain a precise definition of facts and claims, as well as a precise adducing of evidence regarding those facts.

On the other hand, the case management goes with the judge. This includes the duty to urge the procedure *ex officio*, notwithstanding the burden of the parties to do the same, as well as the recognition of powers of certain scope to complete or integrate the evidence provided by the parties.

(ii) Principle of contradiction

The right to have enough and reasonable opportunity to be heard and to contradict the opponent arguments and evidence (as well as the evidence produced ex officio by the judge) derives from conventional and constitutional clauses that consecrate the inviolability of due process of law in Argentina (art. 18 CN, arts. 8 and 25 of the American Convention on Human Rights).

(iii) Mixed written-oral system

The almost unaltered survival of the structural features of civil law tradition has been one of the main reasons that has prevented in Argentina the adoption of a predominantly oral system.

6. Berizonce, *supra*, at. 4.

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An old scriptwriting scheme structured in a frame of strict preclusive phases, with all the shortcomings that are consequence of the lack of immediacy, the practice of delegation, very little publicity, and its inevitable sequels in terms of delay, are trying to be replaced. But, as we all know, old habits die hard.

(iv) Publicity

Civil procedure is a way of public adjudication that deserves, in turn and because of that public profile, according measures of publicity. Despite of that, the features we have already presented in this report had make of publicity in this field an insufficient and very undeveloped phenomenon.

The legal provisions on the public nature of the ordinary hearings have no significance and had been systematically overwhelmed by the weight of tradition and bad practices. The exception to his state of things is the special regulation on public hearings implemented by the Argentine Supreme Court of Justice ("ASCJ") for cases of "institutional relevance" (Acordada N° 30/2007).

(v) Burden of proof

The general criterion for the burden of proof is entrusted it to the part that sustain certain facts have happened in the real world. Besides that, there is an increasing use of the doctrine of "dynamic burden of proof" as well as a recently new approach to the issue in terms of "principle of collaboration".

This last doctrine has been formally regulated in Act. 24.240, a specific statute for consumers protection. Furthermore, as we have already seen, the judge has a duty (since the 2001 reform) to order the production of evidence in case it is necessary to clarify the truth of the disputed facts (principle of primacy of reality).

(vi) Ordinary and extraordinary appeals system

The Spanish tradition left deep traces in the intricate ordinary appeal proceedings historically in force in Argentina.[7] The system operates in a framework of double instance. A double instance that is not a conventional nor a constitutional right (as it does in criminal procedures), unless it is effectively regulated for the specific issue in discussion.

The ordinary appeal subsumed the nullity appeal, so you can challenge both in *iudicando* and in *procedendo* mistakes from the first instance court. New evidence is allowed only exceptionally. Regarding its immediate effect over the judgment, as a rule the filing of the appeal suspends its execution until decided.

On the field of extraordinary appeals, Argentina has replicated the US federal system. We have a Supreme Court at the summit of the Judiciary almost identical (in

7. See generally Oteiza Eduardo, *Disfuncionalidad del modelo de proceso civil en América Latina*, (ed. University of Medellín, 2010).

theory, though not in practice) to the scheme created by the US Judiciary Act of 1787. Following this path, the extraordinary federal appeal before the ASCJ was established in 1863 and promptly adopted the "Marbury vs. Madison" doctrine with the aim of becoming the guardian of the Constitution and to ensure its supremacy through the ultimate stage for judicial review (without prejudice to the diffuse power of judicial review vested to all judges).

The Argentine system was also influenced by the US writ of certiorari. In 1990 a surgical reform incorporated art. 280 bis to the NCCPC, creating a quite peculiar "negative certiorari" that allows the ASCJ to discretionally reject any extraordinary appeal, just by citing art. 280 bis, on the basis of "lack of sufficient federal grievance or when the issues raised are irrelevant or".[8]

(vii) Procedure and new technologies

The degree of modernization of civil procedure of Argentina is far from acceptable at these times. We can access and check the electronic file online, but we couldn't abandon the paper file. Electronic notice has been implemented successfully, maybe the most relevant advance in this field. There is a lot to do in this field to catch up with jurisdictions like Brazil.

IV. MANDATORY MEDIATION BEFORE GOING TO THE COURT

Argentina was a pioneer and still is a regional reference when it comes to deal with regulation and implementation of a mandatory pre-judicial mediation stage in Latin-America.[9]

Act N° 24.573 (the same reform that introduced the preliminary hearing in the NCCPC), regulated a regime applicable to all civil and commercial procedures that were to be commenced in the national justice system. The enactment of this regime was not surprising since by then a pilot test had been carried out as part of the National Mediation Plan set forth in 1991.[10] Its development had a strong economic support of international cooperation funds, particularly the World Bank.

Fifteen years later the system was reformed by Act of Mediation and Conciliation N° 26.589. The new regulation ratified the mandatory character prior to the judicial case, expressly states the power of the judge to bring the parties together to try a self-resolving solution of the litigation (in the preliminary hearing regulated in art. 360 of the NCCPC), and the possibility of referring the parties to a mediation.

8. See generally Morello Augusto M, *Admisibilidad del recurso extraordinario (el certiorari según la jurisprudencia)*, (ed. Librería Editorial Platense S.R.L., 1997).
9. See generally Giannini, Leandro J., *La mediación en Argentina* (ed. Rubinzal Culzoni, 2015).
10. See generally Oteiza, Eduardo, *Punto de vista: MARC/ADR y diversidad de culturas: el ejemplo latinoamericano*, 8 Revista Iberoamericana de Derecho Procesal (2005).

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One last comment on this topic: the mandatory mediation regime was established in Argentina with the stated purpose of alleviating the workload of courts. So, instead of dealing with the serious problems of efficiency and effectiveness that our civil procedural system suffers, the legislator just sought to establish palliatives.

V. CLASS ACTIONS

As an unexpected result of the 1994 constitutional reform, collective standing to sue acquired constitutional status in Argentina. This happened due to the introduction of a new art. 43, which vested certain kind of NGOs, the ombudsman and the individual "affected", with the right to file representative lawsuits to protect groups of people.[11]

Since then, legislative developments in the fields of consumers and environmental protection have established some collective procedural rules regarding these matters. First through the Consumer Protection Act N° 24.240, specially as reformed in 2008 by Act N° 26.361, and then through the General Environmental Act N° 25.675, enacted in 2002.

But it was not until the leading case "Halabi" that class actions (specially class actions for damages) were fully recognized as a plausible means to litigate collective grievances. In that opinion, a tight 4-3 decision, the majority recognized the existence of constitutional "homogeneous individual rights" and held that in Argentina is "perfectly acceptable" to file lawsuits "with analogous characteristics and effects as US class actions" to vindicate them. Before "Halabi" the ASCJ has systematically dismissed cases where NGOs, individuals or the ombudsman were litigating collective cases involving patrimonial rights.

Four years and a half after "Halabi", the ASCJ delivered another relevant opinion in this field of law. That happened when deciding "PADEC v. Swiss Medical". The differences between the cases show the importance of this last opinion. First, this was a class action filed by an NGO seeking declaratory and economic relief for insurance consumers, while "Halabi" was filed by an individual "affected" and has only involved declaratory relief.

Even more important, the ASCJ opinion in "PADEC" applied the "Halabi" doctrine in full (including long quotations) and confirmed the fundamental features of what can be described as a hybrid model of class actions in Argentina: a system which merges a catalogue of collective substantive rights, taken from the Brazilian Code of Consumer Protection, with specific procedural rules and safeguards designed to protect due process rights of absent class members, taken from the class actions regulated in the US Federal Rule of Civil Procedure 23 (FRCP 23). These procedural safeguards include

11. See generally Verbic, Francisco, *Tutela colectiva de derechos en Argentina. Evolución histórica, legitimación activa, ámbito de aplicación y tres cuestiones prácticas fundamentales para su efectiva vigencia*, (special ed. Rubinzal Culzoni, 2012).

the essential basis of US class actions: adequacy of representation, notice and opt out rights.

Both in "Halabi" and "PADEC", as well as in several opinions delivered since then, the ASCJ has sustained that the admissibility of class actions to vindicate homogeneous individual rights demands the fulfillment of four requirements:

(i) A relevant number of individuals affected (like the impracticability of joinder prerequisite of FRCP 23(a)(1)).

(ii) A common origin of the injury, which was explained by the ASCJ as requiring the existence of a single or complex fact causing the grievances suffered by the class (similar to the commonality prerequisite of FRCP 23(a)(2)).

(iii) A pleading and a cause of action focused on the issues common to the class (somewhat like the typicality prerequisite of FRCP 23(a)(3)); and

(iv) Individual interests at stake should not be of such importance to justify individual lawsuits "so that access to justice could be compromised".

Along with those admissibility requirements, as we have mentioned, the ASCJ has established several procedural safeguards which she considered as "essential" to protect absentees' constitutional due process rights: the burden to provide a precise definition of the represented group, adequacy of representation (which must be "supervised" by the court), notice to absent members, class members' opt out and intervention rights, and publicity of proceedings in order to avoid parallel and overlapping litigation.

Finally, there are two administrative regulations from the ASCJ that must be particularly considered, because they translated the "Halabi" and "PADEC c. Swiss Medical" doctrine and standards into positive law:

(i) Acordada N° 32/2014, creating the Collective Proceedings Public Registry and establishing in its art. 3 a sort of "certification stage" that demands Federal Judges to deliver an opinion on admissibility requirements, notice and adequacy of representation before communicating to the Registry the existence of the case.

(ii) Acordada N° 12/2016, in effect since October 2016 and enacting a "Regulation of Collective Proceedings" which contains provisions on jurisdiction, appeals, case management powers of the judge, registration, lis pendens and pleading requirements, among others.

It is difficult to sustain the constitutionality of these last two regulations, because they plainly provide for procedural rules that, in Argentina, should only be enacted by Congress. However, it is hard to believe that the ASCJ would review its own administrative acts in such a way.

On top of that, it also should be mention that these regulations came to occupy a statutory empty space which poses huge problems of legal uncertainty, as well as

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severe difficulties of coordination between overlapping and parallel litigation (just to mention a couple of critical issues).

VI. CLOSING REMARKS

Closing this short report, we share Oteiza's opinion regarding the fact that "Argentina remains attached to a civil procedure characterized by lack of immediacy between the judge and the parties, delegation of functions, absence of concentration of its different phases, little publicity and predominance of writing as habitual practice for motions and other procedural issues. These characteristics influence its low level of efficiency, measured in terms of reasonable length, sustainable cost and ability to produce fair decisions".[12]

But winds of change are blowing. Nowadays, there is a special commission of the Executive Power discussing and working on a draft to enact a new NCCPC. The same happens with class actions and several other areas of civil procedure. It seems that we are going to have deep changes in our system quite soon.

12. See generally Oteiza, Eduardo, *¿Debemos reformar la justicia civil? Los procesos colectivos como una pieza clave de una reforma imprescindible*, in Salgado, José M. (Director), *Procesos Colectivos y Acciones de Clase*, (ed. Cathedra Jurídica, 2014).

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