

THE PRESENT ARGENTINE ECONOMIC LAW

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I.	INTRODUCTION	919
II.	ECONOMIC LEGISLATION AT A FIRST THEORETICAL GLANCE.....	920
A.	<i>An Outline of the Issue</i>	920
B.	<i>Definition and Contents of Economic Law</i>	923
C.	<i>Basic Characteristics of an Economy</i>	923
D.	<i>Contents of Economic Law</i>	924
III.	ECONOMIC LAW IN ARGENTINA'S REALITY.....	926
A.	<i>Laws of the Reformation of the State and Economic Emergency</i>	927
B.	<i>Discrete-Laws of Deregulation and Anti- Monopoly for the Economy (228/91 & 2488/91)</i>	928
C.	<i>Law 23.928 of Convertibility of the Austral</i>	928
D.	<i>Banking and Financing Reform Law 24.144</i>	929
E.	<i>Organic Charter of the Central Bank of the Republic of Argentina</i>	930
F.	<i>Law for Financial Enterprises</i>	930
G.	<i>Penal Exchange Law</i>	931
IV.	CONCLUSION	931

I. INTRODUCTION

International Economic Law can be analyzed on three different levels:¹

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1. See generally J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 7-8; STEPHEN ZAMORA & RONALD A. BRAND, *BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW* ix (CCH Int'l, Chicago 1990).

The level of private transactions among private juridical persons, the level of national governmental regulations and its international effect and finally, the level of the inter-governmental international regulations.

Of the aforementioned three levels, we have chosen the second for the purpose of commenting on the development of the economic law in Argentina, and its autonomy or dependency of other branches of legislation, as well as its contents and scope. In the first section and second parts of the paper, we will make a synthesis of the great importance that this branch of law has had and still has, in our country through the so called reformation of the State. The paper will conclude with a short comment on the new law for financial institutions.

II. ECONOMIC LEGISLATION AT A FIRST THEORETICAL GLANCE

A. *An Outline of the Issue*

The extent gradually reached by the substantive commercial law, its socioeconomic repercussions, and the growing power of certain business enterprises, as well as the necessary influence which the State exerts on economic activities, has led many experts to believe that commercial law has fulfilled its historical duty and must now give place to a new branch such as *economic law*. The question can be posed as to whether economic law is actually a new science, or are we simply faced with yet another facet of commercial law or mercantile law, as interpreted by different nations?

This concept would be flawed from its inception since its application would be too vast due to the amount of juridical regulations of an economic nature that would encompass the present so-called fields of commercial, tax, labor, and civil laws.

In accordance with the idea of understanding economic law as a kind of macro-legislation, and comprehending all juridical relations of an economic nature, we find, Ferraz Augusto, among others, expresses the idea that: economic law is the instrument for realization of social justice and national expansion, in accordance with principals set up constitutionally.² In keeping with this theory of the Brazilian writer, included in the field of this law would be the control of environmental pollution caused by industrial activities (which would properly fall within the power of administrative policy) as well as the legal regulations on archaeological and prehistoric landmarks.

2. See generally ANA M. FERRAZ AUGUSTO, SISTEMATIZAÇÃO PARA CONSOLIDAÇÃO DAS LEIS BRASILEIRAS DE DIREITO ECONÓMICO 410-411.

On the other hand, economic law has been discussed not as a group of regulations of juridical content, but as a juridical idea that is basically political, which subordinates the institutions to the economic organization imposed by the government. Those who support this idea maintain that: economic law is not a branch of legislation with a special agenda, object and duties, but a transformation of the principles which inspire all patrimonial laws driven by a movement, that, in the face of the ideology of the last century, superimposes that which is collective to that which is individual and, that which is public, to that which is private.³

Other authors believe that economic law is a specific branch and not an extensive interpretation of several juridical regulations with economic contents, but at the same time restrict their opinion with the pretension of limiting it to its own laws in an economy guided, or at least organized, by the state.⁴

Thus, within those quoted, the most distinguished theorist, Hedemann, perceives economic law as an autonomous discipline of law, and above all as the basis for an economy which is planned, ordered, and headed by the state in a linked economy.⁵

In another line of opinion, economic law should be at present the correct name for commercial law; but even with this frame of thought, there are those that propose making another addendum: *private* economic law, with which they are implicitly asserting the existence of a *public* economic law.

We widely disagree with all of the above stated theories, since to economic law can be attributed its own contents and objectives, which would make it a specific branch and not limited to those countries with a planned or directed economy.

Our opinion is based on the historical origins of economic law. Following the excellent work of Satanowsky,⁶ we observe that the forerunners of economic laws as the legislation of an organized economy, were the Germans, Heymann and Lehmann. It originated as positive legislation as a war law during the hostilities of 1914 and 1918, and later became a peace law favored by some countries with certain political

3. See generally Jesús Rubio, *Sobre el concepto de derecho económico*, REVISTA DEL DERECHO MERCANTIL 353.

4. See generally VON GIERKE, DERECHO COMMERCIAL Y DEL LA NAVEGACIÓN 13, citing JUAN M. FARINA, EN CONTRATOS COMERCIALES MODERNOS 34 (1993); HEDEMANN, DEUTSCHES WIRTSCHAFTSRECHT (1939); GUÁSTAVO RADBRUCH, INTRODUCCIÓN A LA CIENCIA DEL DERECHO 109.

5. See generally HEDEMANN, in SATANOWSKY, TRATAO DE DERECHO COMERCIAL 171 (1989).

6. HEDEMANN, *supra* note 5, at 170, citing FARINA, *supra* note 4, at 35.

tendencies as a movement for the organization of the economy, in the interest of the community and for the modification of the whole mercantile institution concentrated therein.

This doctrine of economic law, or, better said, its systematization is due to Hedemann, who between the years of 1922 and 1930 conceived it as a new spirit in the juridical system; as a simple style, a special vibration, an accent of feature fundamental to an era; characterized and described by economic dominion in the same manner as natural law characterizes the juridical postulates of the eighteenth century.

In his last theory, post 1930, Hedemann maintains that the state governs the economy; that economic law is a completely new juridical subject in which the elements, both public and private, interact closely.

Based on the aforementioned, it may be said that without setting aside a strong current of opinion which perhaps opened roads on the subject, and which considered economic law as belonging to economy managed or at best planned, encompassing both modification of the intervention of the American government in the New Deal's policy and the militarization of the German economy under the heading of the great chiefs of industry during the Nazi regime.⁷ It is also convenient to speak of economic law in countries under a liberal economy, but even these countries have regulations for the purpose of fitting within a framework the activities of private parties and the state, since there does not exist a country that in some manner or another does not regulate its economic life. Even the lack of mandatory rules constitutes a manner of manifestation of the law, since the lack of such regulations indicate all that is tolerated, contrary to that which appear as mandatory or forbidden by the legislation in other countries. Thus, we would be subject to an expression of the universal principal of legality, which in our case is established by Article 19 of the National Constitution.

When laws of a country are silent regarding the sale of technologies or regulating the investment of foreign capital, this means that in that country these acts can be carried out freely and at the same time the interested parties are subject to the changes in the market and to said country's appropriate regulations regarding their rights and obligations.

It has therefore been suggested that the approach to be given to the subject of economic law should be different and independent since it is not the study of a science or art, but rather the methodical analysis of the juridical regulations that endeavor to channel the phenomenon of a country's economy.

7. See generally Farjat, *Las Enseñanzas de medio siglo*, in CUADRA, ESTUDIOS DE DERECHO ECONÓMICO 21.

As expressed by Farjat: in these circumstances, the jurists have a responsibility.⁸ When addressing the obstacles and problems of economic laws, it is necessary to consider the real part, which corresponds to economic law, and that which corresponds to ideologies and social forces; thereby, dividing the portion that corresponds to the law and the jurists.⁹

B. Definition and Contents of Economic Law

Having confined the field within which the economic law has been placed, we must then express an idea of our knowledge in the subject matter, for which we follow Farina's idea, who maintains that economic law: is the set of regulations that rule the organization of the economy of public powers and regulates the economic activities of private persons versus the state as a political power in accordance with ideology adopted in respect thereto.¹⁰ De Souza states that: it is the set of regulations of economic contents which by the principal of economics insures the defense and harmony of the individuals and collective interests defined by the ideology adopted by the juridical order and which regulates the activities of the respective subjects for the application of the economic policy adopted for the realization of such ideology.¹¹

Economic law is therefore linked to the ideology adopted by the state on matters of economic policies. For this purpose there are, at least theoretically, two basic sets of economic laws: the economic laws of the countries with capitalistic market economy and the socialist market economy. Michael E. Porter, professor at Harvard School of Business believes that it would behoove the jurists to make distinctions between liberal economies on absolute terms, neoliberalism, and planned economies.¹²

C. Basic Characteristics of an Economy

1) A large number of authors classify economic law as a combination of public and private law. The majority of authors tend to place economic law within the realm of public law, since it really refers to the relationship that exists between the state and its citizens and its effect on the economy of the country.

8. *Id.* at 37.

9. *Id.*

10. *Id.*

11. See generally De Souza, *Primeiras linhas de direito econômico*, WASH. POST, at 1.

12. Michael E. Porter, *La ventaja competitiva de las naciones*, in MARIANO GRONDONO, *EL POSTLIBERALISMO* 150 (1992).

2) The great flexibility of this body of law is due to a large degree to the result of changes in government policies, thus making the job of juridical analysis a very delicate one.

3) The flexible features of economic law within an economy are evidenced by the law's acclamation to the changing conditions of the system within which it evolves.

4) The important distinctions between regulations of different countries hinge upon the nature and stage of development of their respective economic systems.

5) The economy's regulations produced by the changes in criteria adopted by the establishment on policies to be adopted on economic matters.

6) Autonomy, even if we agree with De Souza,¹³ in that it is always delicate to speak of autonomy in regards to a branch of law, since law is presented as a whole body, rather than a collection of separate parts.

D. Contents of Economic Law

A short analysis of economic law in countries where the economy of the market place is predominantly private business, specifically Argentina, the economic policy is expressed in the following manner:

1) Industrial Promotion: The tendency for industrial promotion becomes evident in the developing countries, i.e. Latin American countries, where the policy that attempts to promote the establishment and growth of the industrial concerns is applied by means of granting direct incentives (tax reductions or exemptions, credit subsidies, etc.). It should be noted that the systems of industrial promotion implemented during the last decade in Argentina, specifically in the regions of San Luis, San Juan, and La Rioja, reveal an ever-increasing preoccupation for the selective granting of incentives.

2) Financial Policy: It is presumed that all credit and financial activity is a public service, which the state grants directly or delegates upon individuals such as banks, consumer credit associations and financial associations. If we add the fact that Argentina has retained the power to issue currency and all of the so-called activities of the depository bank, the logical conclusion is that all of these activities are, therefore, a public service. In other words, a service that should be provided, but that the state may also delegate to individuals in attempts to promote efficiency.¹⁴

13. De Souza, *supra* note 11, at 19.

14. CARLOS G. VILLEGAS, RÉGIMEN LEGAL DE BANCOS 12 (1989).

3) **Insurance Activity:** Insurance activity can be regulated according to the following criteria: 1) complete freedom; 2) monopoly by the state; 3) private enterprise subject to state regulations and inspections; 4) or joint efforts between public and private entities. In Argentina, the system of complete freedom existed until 1938. Since 1938, with the adoption of the National Superintendence of Insurance, the system of private insurance subject to state regulation and inspection was concurrently established with insurance activities handled by the government. This system was established by statute 20.091 of 1973 with amendments 23.488 (1986) and 23.962 (1991).¹⁵

4) **Investment of foreign capital:** Liberal regulations framed the policies on foreign investments and fulfilled a large part of the objectives of encouraging the establishment of such investments in developing countries. The participation of foreign investors in national industries grew rapidly until 1960 when participation reached its maximum proportions in the more dynamic industrial sectors.

Economic law that was made applicable to foreign investments was not neutral with respect to the aforementioned policies. At the beginning, there were conflicts of authority, lack of control and organization, and no set working criteria. But as time went on, rules and regulations worked themselves out and stabilized in matters concerning exchange of national currency, credits, taxes, and price control.

5) **Transfer of technology:** The legislation shall always attempt to route contracts transferring technology while maintaining national interests as a priority.

6) **Control of economic power:** Starting with financial reforms initiated in Latin America at the end of the 1980's, there appears to be a rapid growth of financial groups which adhere to the universal system of banking, or multi-banking. Although not necessarily with services under the same roof, banks are authorized to make investments in stocks; broker mutual funds; operate leasing businesses; manage credit card and financing consultant firms. It thus becomes necessary for economic law to take action through several statutory amendments. Countries that have made such statutory amendments are Argentina, in the 1977 Reform Act; Chile, in 1986; Mexico, in 1990; Peru, in 1993; El

15. JORGE OSVALDO ZUNINO, RÉGIMEN DE SEGUROS LEY 17.418 COMENTADA Y CONCORDADA (1994).

Salvador, as of May, 1991; and reform also occurred in Brazil and Venezuela in 1993, respectively.¹⁶

7) Stock Company formation: The methods by which companies can be formed may vary depending on the type of company (its nature and purpose) and the system that is used. There are essentially two types of systems. The first type is called the liberal system, which merely requires that the company adheres to the rules regulated by the Commercial Code and makes virtually no distinctions between the types of corporations formed. The other type, that which is used in our country, pursuant to statute 19.550, is the regulative or normative system.¹⁷

In summary, economic law, and its application in accordance with the aforementioned, can be classified pursuant to the Argentinean model, into the following groups:

- 1) economic growth;
- 2) industrial promotion and development;
- 3) the promotion of imports;
- 4) regulation of exportations;
- 5) regulation of private business performing public functions;
- 6) regulation of anti-trust;
- 7) promote free market competition; and
- 8) regulate and control economic power.¹⁸

III. ECONOMIC LAW IN ARGENTINA'S REALITY

At the beginning of the 1990's, Argentina attempted to renew the relationship between its citizens and the State. The renewed attempt occurred through two reformations, that of the State, and that of the Constitution.

The reformations were due to the State's failed attempt at total control. The neoliberal advance towards integration of countries has forced the State to assume a new posture and hence, a new role in government.

In accordance with this, economic law is made up of juridical regulations (laws, decrees, and resolutions) by virtue of which the State, through its corresponding bodies, establishes mandatory regulations, which are to be followed by businesses (private, public, or a combination of

16. Hernán G. Sommerville Senn, *Competitividad de la Banca Latinoamericana frente a la Globalización, disertación pronunciada con ocasión de las 6tas, JORNADAS BANCARIAS DE LA REPÚBLICA ARGENTINA* (July 1995).

17. CARLOS G. VILLEGAS, *DERECHO DE LAS SOCIEDADES COMERCIALES* 30-31 (1985).

18. FARINA, *supra* note 4, at 47.

both). The usefulness of this law in our country during this period of renewal thus becomes clear.

The great process of reform can be divided into two large phases: first, the approval of a powerful body of laws which include the Law of Reform of the State (23.696); the Law of Economic Emergency (23.697); decrees and laws of deregulation and economic demonopolization (2284-91) (2488-91); and the Law of Convertibility of the Austral (23-928); and second, more importantly the reformation of the Argentinean Constitution passed on August 22, 1994,¹⁹ as a result of the Law of Declaration of the Need for a Reform of the National Constitution,²⁰ which originated in the Pacto de los Olivios, between the leaders of the two major political parties of the country.²¹

We will only study the first phase of this reformation process, without ignoring the important influence that economic law had on the reformation of our Magna Carta, especially Articles 75, 18, 19 and 124, where mention is made of the new regime adopted for the purpose of economic integration with other countries.²²

A. Laws of the Reformation of the State and Economic Emergency²³

The process of reformation of the State that was started in our country by the passing of the aforementioned statute (23.696 or A Ley Dromi)²⁴ resulted in the State reviewing its functions in relation to the satisfaction of public interests. Thus, the rendering of public services was entrusted, by means of concessions or licenses, to public parties. The Provinces also followed this tendency.

The transfer of economic activities to the private sector were kept within constitutional limits, and reserved to the State the direct responsibility matters of public functions which are unable to be delegated, and indirect responsibility in matters of transferred public services.

19. B.O. 23/08/94; second publication ordered by Law 24.430, anc. Dec. 15, 1994, prom. Jan. 3, 1995; B.O., (Oct. 1, 1995).

20. ARG. CONST. Sanc. Y.

21. Unión Cívica Radical (U.C.R.) y Partido Justicialista, also known as *Peronismo*, in honor of its founder, Juan d. Perón (P.J.).

22. EDUARDO MENEM Y ROBERT DROMI, *LA CONSTITUCION REFORMADA COMENTADA INTERPRETADA Y CONCORDADA* 92 (1994).

23. ROBERTO DROMI, *DERECHO ADMINISTRATIVO* (4ed., Ediciones Ciudad Argentina 1995).

24. In honor of Dr. Roberto Dromi, the famous Argentine public administrator who idealized almost all of the basic laws of this legal revolution.

The law at issue declared the financial economic situation of the national public administration, both centralized and decentralized, to be in a state of emergency. That declaration included other organizations in which the State, or any of its bodies, held total or majority control in capital investment or corporate decisions.

B. Discrete-Laws of Deregulation and Anti-Monopoly for the Economy (228/91 & 2488/91)

The Law of Reformation of the State includes in its two amendments the list of enterprises and the course of action to be followed in all cases since the possibilities offered do not end with privatization itself. The following list of tools in order to carry out the reform is only suggestive in that they may be utilized individually or in any combination. They are: privatization, concession, licenses and permits, municipalization, provincialization, and programs of shared ownership. The Law of Economic Emergency Statute 23.697 also accompanied the legal security of the whole process. This set in action the power of the emergency police of the State; suspended for a fixed time all subsidies and allowances; regulations of industrial promotion; regulation of mining promotion and the regulation of national purchases.²⁵

C. Law 23.928 of Convertibility of the Austral²⁶

This statute is an important part of economic law. Statute 23.928, effective April 1, 1991, sets out the conversion formula of our currency to the United States dollar, establishing a fixed rate of one peso per one dollar where previously the exchange of currency required 10,000 Austral per one dollar United States. The law of convertibility is inspired on the healthy economical political principal that, as stated by Kleidermacher,²⁷ expenses should not exceed income. For this, the State must obtain the legitimate funds required for its functions by way of tax collection, privatization, sales of dispensable and unattached assets, loans, and placement of bonds or valuables in general, and negotiations of loans. But expenditures that exceed the amount of available resources can not be covered by false currency not backed by the corresponding exchange that would maintain the parity or fixed rate established. As of the effective

25. Law of Economic Emergency Statute § 23.697, arts. I, II, III, & IV.

26. Sanc. y prom. 27/III/1991; B.O., 28 III/1991. Enforcement commenced on (Jan. 4, 1991).

27. See generally Arnold Kleidermacher, *Fiscalía De Regreso a la Conversión y el Nominalismo*, 16 DERECHO ECONÓMICO 343.

date of this law, no currency can be made if there are insufficient reserves available within the budget of the incumbent officials. One of the more important aspects of the law is the prohibition of adjustments due to inflation, as set out in Article VII of Statute 23.928 as follows: The debtor of a certain sum of Austral complies with his obligation on the date of maturity the nominal amount expressed. In no case would monetary actualization be permitted, indexing of prices, variation of costs or revaluation of obligations, whatever their origins, whether there is default on the part of the debtor or not prior to April 1, 1991 when the convertibility of the Austral becomes effective.

All legal provisions and regulations are hereby revoked and contractual and conventional provisions contrary to the above are not applicable.

Lastly, it should be noted that the effective date of April 1, 1991 for conversion of the system is obligatory for all, without exception, and applies to all contracts retroactively.

Up to this moment, and thanks to superhuman efforts on the part of the Argentinean people accompanied by the iron hand of the Ministry of Economics, the plan is going forth having already achieved the desired stability.

D. Banking and Financing Reform Law 24.144²⁸

Since the restoration of democracy in 1983, there was a general desire for the reformation of the legislation on banking activities implemented in the country in 1977 by means of reform to the Organic Charter of the Central Bank of the Republic of Argentina, and Statute 21.526 on financial enterprises (amended and completed by Statute 25.501 of 1979, 22.267 of 1980, and 22.529 of 1982).

In 1990 the Executive placed before Congress the official project for the new Organic Charter of the Central Bank. Before the end of the 1992 term, the National Parliament passed Statute 23.144,²⁹ which establishes important reform to three juridical regulations of great importance; A) Organic Charter of the Central Bank; B) Law of Financial Enterprises; and C) Penal Tributary Law.

This law introduces important reforms to the legal regulation of nation banking and financial activity, which should be analyzed from the juridical viewpoint, but also, as is the case with all legal regulations on

28. CARLOS GILBERTO VILLEGAS, *LA REFORMA BANCARIA Y FINANCIERA* (1993).

29. B.O., 22/X/1992.

economic and financial matters, the affect that such reforms can cause in the national economy.

E. Organic Charter of the Central Bank of the Republic of Argentina

The most important reforms of the Organic Charter are as follows:

- a) Establishment of the autonomy of the Central Bank of the Republic of Argentina, which will no longer subject it to the nation's Ministry of Economics.
- b) Establishment of the primary and basic function of the Central Bank of the Republic of Argentina, which is the preservation of the value of the currency.
- c) The creation of a Superintendence of Financial and Exchange Enterprises placed under a superintendent and a vice-superintendent who will be in charge of supervising financial and exchange activities. These positions will be held by directors of the Central Bank of the Republic of Argentina recommended by the President of the Central Bank and appointed by the President of the Republic.
- d) Discounts and advances granted to entities by reason of temporary lack of solvency, will only be for thirty successive days, and will not exceed, in total, the net value of the entity. Advances will be granted against the guarantee of public titles or other goods and valuable, with security collateral, or by special or general encumbrances of certain assets. Funds loaned to entities will under no circumstance lack collateral guarantees, nor will unsecured loans be granted by way of overdrafts in checking account.
- e) The Central Bank of the Republic of Argentina can require that the entities make available certain portions of their deposits, in national or foreign currency, for the purpose of regulating the general liquidity and the best functioning of the financial market.

F. Law for Financial Enterprises

- a) All matters relating to bank confidentiality are modified, limiting same to liability operations made by the entities (deposits and other obligations). In this manner the obligation of secrecy does not apply to investment of funds (loans and credits in general) and services (collections and payments in general, handling of business operations, powers, etc.).
- b) All codes relative to sanctions and resources which add new elements for consideration to by the Central Bank before applying sanctions are modified.

- c) The system of liquidation and bankruptcy of enterprises is modified. The liquidation will always be juridical and will be handled by an officer (liquidator) appointed by the corresponding judge.
- d) The system of guaranteed deposits, provided by the previous law, is repealed.
- e) The Central Bank is empowered to establish the terms and conditions under which financial entities can use systems of reproduction such as photographs, microfilms, and any other electronic reproduction of documents which are kept in light of their legal value. For the purpose of best evidence, copies may be authenticated provided officials who are responsible for their custody certify them.
- f) All checks must show the codified taxable identification number (CUIT). In cases where the identification number is omitted the number of the document identifying the holder of a checking account in accordance with the provisions of the Central Bank must be shown.

G. Penal Exchange Law

The Penal Exchange Law 19.359 is also modified in taking away from the Central Bank the powers for applying penalties. In all cases, the Central Bank of the Republic of Argentina will only draw up the indictment and the case will go to a court of first impression for Economic Penalties in the Federal Capital or to a federal judge at the corresponding province.

Finally, the following are additional modifications to this law: The repeal of Statute 21.572 creating the Account for Monetary Regulation and the repeal of decree 4611/58 ratified by law 14.467 of Fiscalization of the Exchange System of the Central Bank.

IV. CONCLUSION

Through this writing, we have attempted to give an overview of the state in which economic law presently exists in Argentina and to express to what point it has been lived and experienced by the inhabitants of our country through the radical reforms introduced by our government.

It is self-evident by the birth of this new branch of law that economy and law do not advance in separate lanes, that they are not like water and oil. Both are social sciences capable of coexisting but that as social sciences it must be taken into account that their laboratory is society itself and not just a piece of paper which may be erased or crossed off during a cabinet meeting. We therefore recommend that the individual, the person, not be considered just another factor when an account does not

balance, but that they be considered an integral part of that to which we all aspire, the common good.