

**SOME BRIEF THOUGHTS ON HECTOR  
MAIRAL'S ARTICLE, *ARE LEGAL FAMILIES  
DETERMINANT OF INVESTORS'  
PROTECTION FROM GOVERNMENT  
MISTREATMENT?***

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Jonathan M. Miller\*

It is an honor to be able to offer some brief comments on Professor Mairal's article and accompanying presentation at Southwestern Law School given Professor Mairal's legendary status in Argentina and in Administrative Law generally. Not only is Professor Mairal a Professor Emeritus from the Universidad de Buenos Aires where he previously held a chair in Administrative Law, but for many years he was a name partner at Argentina's largest law firm, Marval, O'Farrell & Mairal, where he is now emeritus, and headed one of the most important international legal practices in Latin America. Very few people can match his legal and practical understanding of the problem of government relations with investors.

Professor Mairal's article offers an important qualitative analysis behind data that seems to show that common law countries offer an advantage over countries indebted to French models and he concludes that much of the difference lies not in French practice, but in the failure of some developing countries grouped as following French models to offer the level of investor protections that France in fact offers.<sup>1</sup> He begins by taking note of a study by the World Bank in 2004 that compared investor rights in countries with common law origins with those of other legal families.<sup>2</sup> The study concluded that common law countries offer more favorable places for doing business and better protect investor rights than countries with French legal origins, with German and Scandinavian countries in between.<sup>3</sup> Then Professor Mairal develops his own study of the impact of French

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\* Professor of Law, Southwestern Law School.

<sup>1</sup> Héctor A. Mairal, *Are Legal Families Determinant of Investors' Protection from Government Mistreatment?*, 30 SW. J. INT'L L. 285, 286 (2024).

<sup>2</sup> *Id.* at 284-85.

<sup>3</sup> *Id.* at 285.

Administrative Law models on foreign investors. He notes that countries broadly identified as importers of French Administrative Law have faced many more arbitration claims for violation of bilateral investment treaties than common law countries. But he does not stop his analysis there, and does not conclude that French Administrative Law models are inferior to common law models for avoiding government vs. investor disputes.

Instead, Professor Mairal digs further to determine what lies behind the relative unattractiveness to investors of countries in the French legal family. He notes that a detailed analysis of French Administrative Law shows that France provides parties that contract with the State with very substantial protections and that France itself is a very good country for a foreigner to do business with.<sup>4</sup> Rather, it is the incomplete fashion with which many countries have adopted the French model that likely provokes government vs. investor disputes.<sup>5</sup> Professor Mairal illustrates his point by showing the differences in administrative law protections offered in Argentina compared with France. Rather than foreign investors having a problem with French law, it is the inclusion in the French legal family of Argentina and some similar Latin American countries that distort French law that explains the high number of government vs. investor arbitrations in the French legal family of countries.<sup>6</sup> The issue is not French Administrative Law, but adaptations of French models without central French protections for investors.

My comments will not question any aspect of Professor Mairal's excellent article, but will simply suggest that we also need to better understand a nonlegal dimension – the economic and social forces that stand in the way of legal change in Argentina. The problem that hobbles Argentina is not just a failure of law, but the capture of the State by groups that corrupt it for their ends and that successfully promote ideologies to support their economic position.

Professor Mairal has a peerless mastery of comparative administrative law; but Argentina's legal regime also requires an anthropological or sociological description. The sociological analysis is something that Professor Mairal sometimes hints at on other work, and I wish I could hear more about it. My sense is that while Professor Mairal offers a thorough analysis of relevant legal principles, the differences between Argentina and a country like France could also benefit from Marxist analysis of the nature of law and ideology.

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<sup>4</sup> *Id.* at 286.

<sup>5</sup> *Id.* at 287.

<sup>6</sup> *Id.* at 289.

When I refer to a Marxist analysis of the nature of law and ideology, I am not referring to anything particularly radical, but merely to the idea that Marx elaborates in *The German Ideology* that ideology, understood as ideas that serve as a tool for social domination, develops in response to the needs to those who exercise political, economic and social power, and that law is largely an implementation of the dominant ideology.<sup>7</sup> Of course both ideology and law are constantly contested, with competing political forces seeking recognition of their understanding of the world and social needs, and law tending to implement an ideological vision. But when looking at a society as troubled as Argentina's which nevertheless has a very sophisticated legal system, one needs to ask why the present malaise continues to exist. What is it about Argentina's dominant economic and social forces that has allowed persistence of a legal system that makes massive corruption almost inevitable.

In 2007, Professor Mairal published an extraordinarily insightful, short book, *Las Raíces Legales de la Corrupción* [The Legal Roots of Corruption], that describes the factors in Argentina's legal system that sustain public corruption.<sup>8</sup> He begins his book by noting that Argentina is routinely described by both Argentine intellectuals and Transparency International as among the most corrupt countries in the world.<sup>9</sup> He describes a country where government contracting lacks transparency, where the Executive enjoys excessive discretion because sometimes the law and regulations are so unclear that varying interpretations of questionable validity can survive, where public officials receive wide enforcement discretion, and where further discretion exists because of laws that are either impossible to comply with or are routinely subject to lax enforcement.<sup>10</sup> Excessive Executive discretion creates the opportunity for venality. And sometimes Executive discretion further increases due to the difficulty of obtaining judicial review and from judicial doctrines that offer extraordinary deference to the administrator.<sup>11</sup> Further, sometimes the temptation for corrupt enforcement increases due to the enormous gains to the violator from violation, and hence a willingness to pay a high bribe, or from extraordinarily high costs to the violator from enforcement.<sup>12</sup> Professor Mairal's book is filled with examples, just as his article's observations of Argentina's corruption of the

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<sup>7</sup> Karl Marx, *Critique of Modern German Philosophy According to its Representatives Feuerbah, B. Bauer and Stirner*, in KARL MARX & FREDERICH ENGELS, *THE GERMAN IDEOLOGY: INCLUDING THESES ON FEURBACK AND INTRODUCTION TO THE CRITIQUE OF POLITICAL ECONOMY* 27, 67 (Prometheus Books, 1998) (1932).

<sup>8</sup> See generally, HÉCTOR A. MAIRAL, *LAS RAÍCES LEGALES DE LA CORRUPCIÓN: O DE CÓMO EL DERECHO PÚBLICO FORMENTA LA CORRUPCIÓN EN LUGAR DE COMBATIRLA* (2007).

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *Id.* at 21-22.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 22.

French Administrative Law model are quite specific. But there is a missing element. Is there an ideology that produces the enormous administrative discretion, opaque government contracting and ineffectual judges? What prevents Argentine society from responding?

Argentine corruption kills people. When the brakes on a train failed because of inadequate maintenance by a government-subsidized train operator, fifty-one people were left dead.<sup>13</sup> When a warehouse was illegally allowed to operate despite repeatedly failing city safety requirements, ten emergency responders died in the resulting fire.<sup>14</sup> Yet as one of Argentina's top investigative journalists writes, the system of government "acts with only one objective: to accumulate power and guarantee impunity."<sup>15</sup> There have been at least a dozen cases of foreign companies that admitted to the U.S. Securities and Exchange Commission or the U.S. Department of Justice that they paid bribes in Argentina, and in only one of the cases, involving IBM, was there a legal action that produced a criminal conviction—and only a very limited one.<sup>16</sup> The system facilitates the enrichment of a corrupt political cast where operators from opposing political parties sometimes work together for mutual enrichment.<sup>17</sup>

Professor Mairal's book identifies some of the ideas that empower Argentina's morass. He observes an emphasis in Argentine society on the importance of friendship over neutral application of the law or adherence to legal rules.<sup>18</sup> He also notes frequent assumptions that economic interventionism works—that price controls, tariffs and special protections for industries or professions serve the public good when in practice they also create gains for unscrupulous individuals who seek to avoid application of the rules or obtain the ability to collect some unique benefit or rent.<sup>19</sup> And he notes the invocation of patriotism as a device to serve corruption since it deprives the public of rational discussion of problems.<sup>20</sup> But I would argue that the underlying ideas protecting the existing corrupt system have a further and rather depressing element. At heart is a sense of learned helplessness, a dominating idea that graft is simply how society works and that the best one can hope for is a political party that "robs but get things

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<sup>13</sup> FLORENCIA HALFON, ¿LA CORRUPCIÓN MATA? 95-100 (2019).

<sup>14</sup> *See id.* at 171, 181-198.

<sup>15</sup> HUGO ALCONADA MON, LA RAÍZ (DE TODOS LOS MALES) 16 (2018).

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *See id.* 32-35; *see also* JUAN CARLOS VEGA, LA CORRUPCIÓN COMO MODELO DE PODER 7 (2019) (describing a model of corrupt power involving political, economic and trade union elements).

<sup>18</sup> MAIRAL, LAS RAICES, *supra* note 8 at 16.

<sup>19</sup> *Id.* at 16-17.

<sup>20</sup> *Id.* at 17-18.

done” as opposed to those who rob but produce nothing.<sup>21</sup> Oddly, an ideology of helplessness is also an idea that serves as a source of power.

Obviously I cannot fault Professor Mairal for not coming up with a full map of the beneficiaries of corruption and the culture that perpetuates their power. But that map needs accurate development if new forces in Argentine society are ever to be mobilized in pursuit of their interest in clean government. Agustín Gordillo’s *Prologue* to Professor Mairal’s book notes that when the Argentine Senate voted to approve the Inter-American Convention Against Corruption, the draft of the stenographers’ notes indicated “risas en la sala” [laughter in the chamber].<sup>22</sup> That laughter represents an idea and power structure that have cursed Argentina for an extraordinarily long time.

Societies and their legal structures certainly evolve. In Argentina’s case, new social and economic forces dramatically realigned Argentina’s dominant ideologies at least twice in the last two centuries, once in the middle of the nineteenth century and again in the 1930’s and 1940’s. At the middle of the nineteenth century, the opportunity for trade with Europe led Argentina’s economic elites to adopt what became known as the Alberdian vision.<sup>23</sup> That ideology, which dominated Argentine thinking at least through the first World War, called for protection of investments, economic liberty and many individual rights, the encouragement of immigration, and unrestricted international trade—all of which were translated into law through Argentina’s Constitution of 1853/1860 and subsequent codification.<sup>24</sup> In the 1930’s and ‘40’s, once the Great Depression caused the world trading system to collapse, newly empowered nationalist and corporatist forces in Argentine society began to assert themselves, leading to Peronism.<sup>25</sup> In both cases, new economic conditions changed the interests and organization of important economic and social groups, changing relative political forces—and ushering in first ideological change and then legal change.

Unfortunately, looking at Argentina today, while the country has certainly changed since the 1940’s, a realignment of social and economic forces has not appeared that has significantly modified the powerful interests that work against transparency and economic opportunity. When the approval of a treaty against corruption produces laughter among the legislators approving it, the legal regime that Professor Mairal identifies is

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<sup>21</sup> ALCONADA MON, *supra* note 15 at 28.

<sup>22</sup> Agustín Gordillo, *Prologo*, in MAIRAL, LAS RAICES, *supra* note 8 at 11, 12.

<sup>23</sup> See Jonathan Miller, *Judicial Review and Constitutional stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT’L & COMP. L. REV. 77, 131-133 (1997).

<sup>24</sup> See *id.* at 133-142.

<sup>25</sup> See *id.* at 143-150.

not yet under threat. Exactly what will eventually produce new political forces remains to be seen.