

History and Projects

Remembering Carlos Fernández Sessarego

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*A teacher affects eternity;
he can never tell where
his influence stops.*

Henry Adams

The departure of a loved and admired being – my mentor was – is always a reason for a nostalgic look towards the past, reliving memories and trying to recover the moments of the shared existential journey. Thus, my memory went back to 1984, when the Civil Code, once defined by Francesco Busnelli as one of the pillars of Private Law in Latin America, was enacted – the Code of which, as Giovanna Visintini justly stated, Carlos Fernández Sessarego is the father.

Indeed, in 1965, when Fernández Sessarego was the Minister of Justice, the Commission in charge of the study and revision of the (then-governing) 1936 Peruvian Civil Code was created by Supreme Decree. The 1936 Code would give way, almost twenty years later, to the 1984 Peruvian Civil Code.

This Code strongly shows the influence of the Italian 1942 Codice Civile. The influence appears particularly strong in Book I, Rights of Persons (of which Fernández Sessarego was draftsman);¹ Book VII, Sources of Obligations (which includes the contractual regulation); and Book II, Juridical Acts.

Book II – deserving a separate mention within the national experience – was inspired by the Contracts Book of the Italian Civil Code, particularly in its treatment of the juridical categories of form, representation, interpretation, condition, term, simulation, invalidity (within which are counted the nullity and the annullability), error, malice and violence, among others.

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¹ Indeed, it is pointed out that ‘the 1984 codifier, by formulating the draft of the Rights of Persons Book, took more into account the Italian theory and – to a lesser extent – jurisprudence than the very 1942 Italian Civil Code, which across the years since its enactment has been subjected to lucid comments and abundant and well documented criticism. (C. Fernández Sessarego and C. Cárdenas Quirós, ‘Estudio preliminar comparativo de algunos aspectos del Código civil peruano de 1984 en relación con el Código civil italiano de 1942’ *El Código civil peruano y el Sistema jurídico latinoamericano* (Lima: Cultural Cuzco, 1986),107.

Therefore, the Italian Civil Code – as well as the legal theory and case law, which explain it and enrich it – happens to be a necessary reference for the interpretation of the national legislative models. However, in the 1980s, besides the translated works of Francesco Messineo, Domenico Barbero, and some others, there was not much written about contemporary Italian juridical experience.

Fernández Sessarego, in this context, built bridges: his neat and prolific production rendered an account of the most recent theoretical, legislative and jurisprudential tendencies of the Italian Private Law. *Additionally, he showcased the Peruvian Private Law and made it circulate in the international juridical panorama. This was, in my opinion, his greatest accomplishment.*

The diffusion of the emerging Italian juridical theory made by this distinguished jurist can be noted across his prolific work, materialized in the Peruvian Civil Code as well as in his juridical writings. Without aiming to be exhaustive, some of his major contributions concerned:

1. The recognition the unborn as a subject of law (Art 1 Civil Code):

‘(D)eserving consideration are, among many others, the lucid opinions of Bianca, Busnelli, Oppo, Biscontini, Traverso, and all the others who have contributed – to different extents – to shape a realist conception of the juridical quality of the unborn’.²

2. The regulation of the right to intimacy (Art 14 Civil Code): Thus,

‘the right to privacy of disclosure or reserve is widely treated by theory and has been subjected of a rich jurisprudence in Italy. It has, to a great extent, been an inspiration to the aforementioned norm. Many Italian authors work on the subject. It would suffice to remember Ravá, Ligi, Pugliese, De Cupis, Vassalli, Rodotà, Rescigno, Palladino, De Mattia, Galli and Franceschelli’.³

3. The normative treatment of legal persons, in which ‘is perceived, along with various tranches, the valuable intake of a particularly rich Italian legal theory’. Many authors have, somehow, contributed to sustaining diverse approaches reflected in the legislation concerning legal persons in the Peruvian Civil Code. It would suffice to quote Ascarelli, Catalano, D’Alessandro, Magni, De Giorgi, Frosini, Galgano, Giannini, Orestano, Rescigno, Scarpelli, Bianca, Zatti, among many others.⁴

4. In Latin America, Fernández Sessarego was a pioneer in spreading, in the early 1990s, the recognition and protection of the right to identity. He did valuable and interesting research on the legislative, theoretical and jurisprudential

² *ibid* 109.

³ *ibid* 112.

⁴ *ibid* 117.

underpinnings of the Italian juridical experience.⁵

5. The introduction of the concept of harm to the person (*'daño a la persona'*) in the Civil Code and the Latin-American juridical system. Fernandez Sessarego took inspiration from the writings of Paradiso, De Giorgi, Bonillini, Rotondi, De Cupis, Messineo, Rescigno, Busnelli and the Italian jurisprudential tendencies.⁶

One must note the philosophical vision Fernández Sessarego had on Law. It was materialized in his undergraduate thesis, *Sketch for an ontological determination of Law (Bosquejo para una determinación ontológica del derecho, 1950)*. Presented at the Law School of Universidad Nacional Mayor de San Marcos – the oldest in America –, he set there the foundations of specific tridimensionalism. In it,

‘the juridical science (...), or plainly Law, is constituted by the integration of three elements: norm-thinking, human conduct-object and value-purpose. Three elements that belong to the domain of Law, that demand each other mutually, and that, being linked, essentially constitute the juridical science’.⁷

In 1992, Fernández Sessarego was invited to the Convention promoted by the *Istituto di Diritto Privato della Facoltà di Giurisprudenza* of the University of Genova. It was named *'Il Diritto dei Nuovi Mondi'* and organized by Giovanna Visintini. He fascinated the audience when he exposed, in perfect Italian, *'Un nuovo modo di fare diritto'*. In this lecture, he developed his thinking, influenced by the existentialism and personalism currents and keeping present the co-existence of the human being.

Fernández Sessarego – like Carnelutti, for whom ‘the fact, which is the act, has to be observed, as far as it is possible, over reality’–,⁸ incarnated these concepts in juridical institutions such as the abuse of right, the tridimensional vision of the legal person, the harm to person, and – in particular – the harm to the life project, which

⁵ C. Fernández Sessarego, ‘El derecho a la identidad personal’ *Tendencias actuales y perspectivas del Derecho Privado y del Sistema Jurídico latinoamericano* (Lima: Cultural Cuzco, 1990), 55-102.

⁶ C. Fernández Sessarego, ‘El daño a la persona en el Código Civil de 1984’ *Libro Homenaje a José León Barandiarán* (Lima: Cultural Cuzco, 1985), 163-222.

⁷ C. Fernández Sessarego, *El Derecho como libertad. Preliminares para una filosofía del Derecho* (Lima: Librería Studium Ediciones, 1987), 68. The creators of specific tridimensionalism are Miguel Reale y Carlos Fernández Sessarego. Both of them, without knowing each other, developed this new conception of Law; agreeing on the inseparability of its elements but differing in some aspects. The works written on the subject are not few. David Sobrevilla y Domingo Garcia Belaunde follow suit in their book *El Derecho como libertad*, *ibid*, which is the edited version of a – currently unpublished – part of Carlos Fernandez Sessarego's thesis. In a similar fashion, Carlos Torres y Torres-Lara does a comparison in an article entitled *Un nuevo libro: El Derecho como libertad* (Lima: Dominical, 1988), 14.

⁸ F. Carnelutti, *Metodología del Derecho* (México D.F.: Unión Tipográfica Editorial Hispano-Americana, 1940), 55, translated by A. Ossorio.

‘is permanent and accompanies the subject until his death. It compromises his existential destiny and, therefore, constitutes a radical frustration of the human being’.⁹

Beginning one year from the enactment of the Peruvian Civil Code, Fernández Sessarego organized international congresses attended by personalities as Pietro Rescigno, Giovanna Visintini, Francesco Busnelli, Pietro Perlingieri, among others. Without aiming to be exhaustive, I recall the following events: ‘The Peruvian Civil Code and the Latin-American Juridical System’ (9-11 August 1985), ‘Current tendencies and perspectives of Latin-American Private Law and Juridical System’ (5-7 September 1988), and ‘The Spanish Civil Code and the Hispanic-Latin-American Codification’ (16-18 November 1989), in which Luis Díez-Picazo was present.

These meetings were wonderful opportunities for the Peruvian juridical community to be in touch ‘live’ and directly with the most important figures of Argentinean Civil Law, such as Guillermo Borda, Aída Kemelmajer de Carlucci, Luis Moisset de Espanés, Jorge Mosset Iturraspe, Santos Cifuentes, Atilio Anibal Alterini, and many others. The attendance to these events was massive and, when it was Fernández Sessarego’s time to talk, one confirmed he was an excellent speaker, with a great capacity to keep his audience captivated.

It must be kept in mind that in the Foundations of the 2012 draft of the Argentinean Civil and Commercial Code it was stated that ‘the Peruvian Civil Code, which has two texts, has been much quoted in Latin-American private law’.¹⁰ These are Arts 1984 (concerning moral harm) and 1985 (regarding the harm to the person). Even Art 1738 of the Argentinean 2014 Civil and Commercial Code expressly recognizes the ‘interference in the life project’ as a compensation criterion. This reveals that the influence of Fernández Sessarego’s thinking largely surpasses national borders.

The connection with Italy in Fernández Sessarego’s scientific journey culminates with his active support as a member of *The Italian Law Journal’s* Advisory Board. This Journal having as its objective promoting the transnational dialogue about the Italian juridical culture and experience.

Fernández Sessarego always encouraged his proteges to research, write and spread the results. When, in 1990, I had the boldness of publishing the first edition of my ‘Studies on the Rights of Persons’ (*Estudios de Derecho de las Personas*), I dared to ask him to write a prologue. He accepted without hesitating. I allow myself to quote some of his advice:

‘These young men begin a career, which I hope to be brilliant. That will

⁹ C. Fernández Sessarego, ‘Un nuovo modo di fare diritto’, in G. Visintini ed, *Il Diritto dei Nuovi Mondi*. Atti del Convegno promosso dell’Istituto di Diritto Privato della Facoltà di Giurisprudenza, Genova 5-7 novembre 1992 (Padova: CEDAM, 1994), 274.

¹⁰ *Anteproyecto del Código Civil y Comercial de la República Argentina, Fundamentos*, 232.

depend, to a great extent, on their silent persistence in the effort constant study supposes; in their spirit to renounce everything that disturbs their vocation, in their scientific humbleness. But, as well, on their recognition of the merits of others, on their solidarity with their vocation companions, on the honesty of their quotes, on not rushing too much in achieving easy and immediate successes, on not getting discouraged by the inevitable setbacks they will find along their way, and, overall, on their moral quality. They shall not forget that the best teaching is that of example’.

These words are more than valuable if we keep in mind that we face an ethical crisis not only in Peru but around the world, since corruption has also globalized.

I finish this very brief review with the words José León Barandiarán, Fernández Sessarego’s mentor, would use, reflecting the intellectual curiosity of his disciple.

‘What do we expect of Fernández Sessarego? We do not know. One moment he has an idea. Right then he comes up with another. He is eternally creating. He is a man of great abundance in interests and issues regarding juridical didactic. He is full of curiosity. What will we hear today about Fernández Sessarego? There is always a huge interest in hearing him because in his classes, whenever he speaks, on any occasion and circumstance, he shows enthusiasm. He gives a personal experience full of warmth, full of fervour, because he is a professor par antonomasia. A professor, I think Goethe said, is a man who knows to wake up curiosities; or, rather, who knows to wake up enthusiasms’.

One of the phrases I liked the most of Carlos Fernández Sessarego’s undergraduate thesis was the one regarding the essence of Law. In it, he referred to love and said we should ‘love men the way Christ did and love things the way Francis did’.

I think the essence of life is expressing love in all of its ways, without forgetting its most sublime sense: solidarity, which is shown through service vocation. A life dedicated to oneself is an egoist life; a life dedicated to others is a life that transcends. It is everyone’s chore to look for the just balance, certainly, departing from loving oneself – as Fromm said –, to be able to love others. I am convinced my mentor achieved this happy middle point.