A PANORAMA OF BRAZILIAN CIVIL LAW FROM ITS ORIGINS TO THE PRESENT

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I. THE ORIGINS OF BRAZILIAN CIVIL LAW

The roots of Brazilian civil law lie in ancient Portuguese civil law. Consequently, Brazilian civil law has been profoundly influenced by Roman law. Ironically, current Brazilian civil law is more closely tied to ancient Portuguese civil law than the civil law of Portugal itself.

Shortly after the proclamation of independence, Brazil passed a law providing that the *Ordenações Filipinas* (Philippine Compilation),[1] laws, regulations, charters, decrees and resolutions promulgated by the kings of Portugal up until April 25, 1821, should remain in force until a new code was adopted or until the Portuguese legislation was modified.[2] The rules of civil law then in force in Brazil were found principally in Book IV of the *Ordenações Filipinas*. These rules evolved over a long period that began with the Reconquest of the Iberian Peninsula from the Moors. At that time there were two principal sources of law: the Visigothic Code and customary law (*mos, consuetudo, forum*), which was made up principally of customs originating in popular Roman, Germanic, canonical and Moslem practices. Customary law was reduced to writing by municipal charters (*forais*), starting about the end of the 13th Century.

Of all the so-called "Barbarian Legislation," the Visigothic Code was [3] the most heavily influenced by Roman law. But the Roman influence was pre-Justinian, stemming from the post-classical period. In customary law, alongside canonical and Germanic elements, Roman elements stood out. These came from what is now called *vulgar* Roman law, the living law of the post-classical epoch. Because of the decadence of the legal culture, the divergence between the law on the books and that applied in practice became much clearer during this period. The prevalence of the law in practice was so great that it eventually brought about

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1 The *Ordenações Filipinas*, published in 1603, was the last of three major compilations of basic Portuguese legislation.

2 Law of Oct. 20, 1823.

3 The Visigothic Code is also called the *Lex Gothorum, Liber Judicialis* or *Forum Judicum*. The *Forum Judicum* was the designation used in the *Fuero Juzgo*, the translation ordered by Ferdinand III.

changes in the law on the books, a process that may be characterized as the reception of practice into official law.

In the 13th century, the phenomenon of the reception of Roman law, observed in many European countries also occurred in Portugal, albeit at different times. Interest in the study of Roman law had been revived in Italy by the Glossators. In Portugal, this reception of Roman law resulted from the return of Portuguese who had gone to study law in Italy. Its spread was principally due to the university founded in 1290, by Dom Diniz in Lisbon and later transferred to Coimbra.

Accompanying the resurgence of Roman law was a movement for renewal of canon law, by compiling new statutory collections, beginning with the Decretals of Gratian. In the 16th century, the *Corpus Juris Canonici*, a parallel to the *Corpus Juris Civilis*, brought canon law together in a single compilation. This canon law renewal, which began in the 12th century, was soon reflected in Portugal.

Reception of Roman law and the renewal of canon law did not prevent the use of diverse customary principles, such as those derived from Germanic custom. But Roman and Canon law benefitted the development of law-making powers of the Portuguese monarchs, because the strengthening of the king's authority was a logical consequence of principles derived from study of the *Corpus Juris Civilis*. Hence general laws were issued that would be incorporated into the *Ordenações Afonsinas* (Alphonsine Compilation) in the 15th century.

The drafting of the *Ordenações Afonsinas* was completed in 1446. The compilers utilized prior sources, such as the general laws, many of which had been brought together in two ancient collections: *O Livro das Leis e Posturas* (the Book of Laws and Precepts) and the *Ordenações de D. Duarte* (Compilation of Dom Duarte). They also used royal resolutions, concordats, and national or local customs. Borrowings from and references to Roman and canon law were common.

In the 16th century, the *Ordenações Afonsinas* were replaced by the *Ordenações Manuelinas* (Manueline Compilation), which reformed and updated the earlier compilation. Less than a century later, in 1603, the *Ordenações Filipinas* replaced the *Ordenações Manuelinas*, which had become out of date because of the subsequent enactment of a great many uncompiled laws. Even though drafted under Spanish rule, the *Ordenações Filipinas* retained distinctly Portuguese characteristics.

Romanization of Portuguese law owes much to those three *Ordenações*, due both to their substantive contents as well as to their extensive omissions, principally in the area of civil law. The bulk of the principles set out in the *Ordenações* were borrowed from or at least inspired by Roman law. Their lacunae, however, played no lesser role in the incorporation of Roman rules into Portuguese law because of the practice of using Roman law as secondary sources to fill in the gaps. The *Ordenações Afonsinas* provided that cases not controlled by laws of the Realm, by the rules of the Court, or by custom would be governed by imperial law (Roman law) or, in matters of sin, by the sacred canons (canon law). In the absence of Roman or canon law rules, the courts were to follow the glosses of Acursius; where these were insufficient, the opinions of Bartolus were to be followed, even if other learned commentators disagreed with his views. Two changes in this system

of secondary sources were introduced in the *Ordenações Manuelinas*: Roman law rules were to be followed only for the good reason upon which they were based, and the glosses of Acursius and opinions of Bartolus were not to be applied whenever they ran counter to the prevailing opinion of the learned commentators. The *Ordenações Filipinas* made no change in this system.

Roman law was widely used in Portugal until the second half of the 18th century, not only because it served to fill in the gaps of Portuguese law, but also because of the prestige it enjoyed as *ratio scripta*. It was frequently employed in contravention of express language of the *Ordenações*; hence, it was generally understood that the rules of Portuguese law contrary to Roman law should be strictly construed, whereas those in conformity with Roman law should be broadly construed.

Beginning in the second half of the 18th century, the Enlightenment challenged the excessive use of Roman law that had dominated Portuguese legal practice. The movement in favor of Portuguese law began with the Marquis of Pombal and became enshrined in the Law of August 18, 1769, known as the Law of Right Reason (*Lei da Boa Razão*).[4] In the more than 150 intervening years between the *Ordenações Filipinas* and the Law of Good Reason, the influence of Roman law was so great that in 1746, Luiz Antonio Verney, criticizing legal studies in Portugal during the first half of the 18th century, exclaimed:

> It is no doubt much to be admired that men leave the universities speaking much about the laws of Justinian, which apply only in the absence of municipal law, and yet know nothing of that law that is supposed to be the governing law.[5]

The Law of Right Reason changed the rules for use of secondary sources, exerting a decisive influence in the field of private law where the need for gapfilling was felt more intensely. The law forbade the use of learned texts or authors where specific precepts were to be found in the *Ordenações*, in uncodified laws, or Portuguese custom. Instead, it determined that Roman law should apply only when dictated by right reason (the *recta ratio* of natural law doctrine) found in texts that had not departed from it, and in the legal rules unanimously observed by civilized peoples and nations. In political, economic, commercial, and maritime matters, recourse was had to the laws of the modern Christian nations. The new Statutes of the University of Coimbra complemented the Law of Right Reason. The statutes not only made radical reforms in legal education, but also furnished practical criteria by which to gauge the level of conformity of Roman law with right reason. This was the logic accepted by the most illustrious representatives of *usus modernus pandectarum*, an innovation that brought about profound changes in Portuguese private law via interpretation or through new laws.[6] Legislative

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[4] The *Ordenações Manuelinas* and the *Ordenações Filipinas* contained a restriction upon using Roman law as a secondary source: Roman law rules were to be applied only for the "right reason" upon which they were based. Both *Ordenações*, however, failed to define this expression.

[5] 4 L. Verney, *Verdadeiro Método de Estudar* 195, Livraria Sá da Costa, Lisbon (1952).

[6] For example, natural law theorists rejected the Roman rule memo *pro parte testatus pro parte intestatus decedere potest*. This rule had been regarded as implicitly contained in Portuguese law because the

reforms, also inspired by natural law ideas, revoked Roman law principles traditional to Portuguese law. This is evident in numerous laws governing inheritance drafted by Pombal during the mid-18th Century. The concept of intestate succession was exalted as compatible with human reason, and legislation established several drastic restrictions upon testamentary succession. The Roman law principle that the heir had to take physical possession of the decedent's property was supplanted and replaced by the Germanic principle of seisin, where possession of inherited property was automatically transferred to heirs.

This movement became more intransigent with the implantation of liberalism in Portugal during the first quarter of the 19th Century. Several factors contributed to this intransigence: the diffusion of liberal ideas, the exaltation of individualism, and the adoption in the most recent codifications of legal precepts inspired by this new legal order. By 1820, the tendency, already observed by Manuel de Almeida Souza,[7] to abandon Roman law doctrines as secondary sources by authors of the *usus modernus pandectarum* intensified. Increasingly jurists invoked principles extracted from the modern European codifications, which often diverged from those Roman law doctrines. At this moment, however, Brazil proclaimed its independence and disassociated itself from Portugal.

II. FROM INDEPENDENCE TO THE CIVIL CODE

Because Brazil adopted only Portuguese legislation enacted on or before April 25, 1821,[8] the liberal reforms introduced in Portugal in the early 1820s were not applied in Brazil. These reforms were influenced mainly by the new precepts in foreign legislation that diverged from the Roman law tradition of Portuguese law. The intensity of the influence of ideas born during the French Revolution was considerably greater in Portugal, which was geographically much closer to France than Brazil. Moreover, Brazil was absorbed in its own serious problems of consolidating its independence.

Brazil's first Constitution provided that: "A Civil Code and a Penal Code, founded on the solid bases of justice and equity, shall be drafted as soon as possible."[9] This mandate was partially accomplished in 1830 with enactment of a Penal Code of the Brazilian Empire. Yet nearly a century elapsed before the Civil Code was finally enacted, despite the picturesque wording of the Constitution calling for both codes to be drafted as soon as possible. Much of the explanation for this long delay lies in the legislative activities of Teixeira de Freitas, one of Brazil's greatest jurists.

Ordenações specifically permitted the contrary only as a privilege to soldiers. These theorists contended that the principle was not accepted by Portuguese law because it was not expressly referred to in the *Ordenações*.

7 This author cited in his works Frederick's Prussian Code of 1749, the Napoleonic Code, and the Civil Code of Sardinia.

8 Law of Oct. 20, 1823.

9 Imperial Const. of 1824, art. 179 (XVIII).

The first step towards preparing the Civil Code was taken on February 15, 1855, when Teixeira de Freitas was contracted to prepare a Consolidation of Civil Laws as a preliminary text.[10]

Teixeira de Freitas finished the Consolidation of Civil Laws[11] in three years. The Consolidation brought order to the chaotic civil law principles of the *Ordenações Filipinas* and the uncompiled laws, finally making it possible to know what rules were in force in Brazil. The highpoint of the Consolidation was its two hundred-page Introduction, which differentiated the practical from the scientific part. In the practical part, the very nature of his opus — the consolidation of all civil law rules in force and their reduction as much as possible into concise precepts — which demanded erudition, patience, and accuracy, left little opportunity for creativity. Teixeira de Freitas' remarkable creativity appeared in the theoretical part in the demarcation of the limits on civil legislation and its system of exposition. He unequivocally revealed his creative spirit in the systematic approach he adopted in the Consolidation. After an exhaustive critique of the system utilized in the Roman Institutes — persons, things, and actions — and the modern systems, from Leibniz to the German Romanists represented by Mackeldey, Teixeira de Freitas explained his own approach in these terms:

> As fundamental ideas that we have developed, the Consolidation of Civil Laws presents in its first division two great categories that form its Special Part. A General Part, which includes Introductory observations, precedes the Special Part.
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> The General Part treats in two Titles "Persons" and "Things", which are the constituent elements in all juristic relationships and therefore in all such relationships within the scope of Civil Law.
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> Two books make up the Special Part, in correlation with the fundamental division of the two categories. The First Book deals with "personal rights," while the Second Book treats "rights *in rem*".[12]

This was the first time in our civil legislation that the German Pandectists' format had been adopted. This format was divided into a general part that grouped all elements constituting subjective rights, and into a special part that grouped the rules referring to subjective rights in specific cases. Nevertheless, both subdivisions departed from the Germanic orientation: the general part was concerned only with persons and things. He excluded juristic facts due to his belief that only lawful voluntary facts — juristic acts — had to be regulated. For this reason "factual matters cease to be general, and belong almost entirely to the special subjects of

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10 In 1851, Eusébio de Queiroz, then Minister of Justice, had suggested that Correa Telles' Portuguese Digest should be adopted as the Civil Code; however, after its rejection by the Institute of the Brazilian Bar Association, the idea was aborted.

11 *Consolidação das Leis Civis*, Typographia Universal de Laemmert, Rio de Janeiro (1st ed. 1857). In 1897, the Consolidation was translated and summarized into French by Raul de la Grasserie, *Code Civil du Venezuela. Lois Civiles du Brésil*, V. Giard & E. Briere, Paris (1897).

12 *Id.*, at 99-100.

contracts and wills."[13] Many rights "have nothing to do with juristic acts, whereas without persons and things, or at least persons, there are no rights at all."[14] The special part limited itself to distinguishing between personal and *in rem* rights, a division deemed fundamental in regard to subjective rights, for Freitas considered that the division adopted by Mackeldey — law of things, law of obligations, family law, law of successions, and creditors' rights — was excessive. In order to fit all rights under one of these two categories, *in rem* rights were defined as "all absolute rights immediately concerning things, either in complex units, creating rights of title or property; or in elementary units spread over two or more agents." Personal rights were defined as "those rights that affect one or more individually obligated persons, and only through those persons do they concern things."[15] Therefore, personal rights were subdivided into personal rights in domestic relations (including marriage, paternal authority, kinship, tutelage, and guardianship) and personal rights in civil relations (including causes for their creation — contracts and torts — and causes for their extinction). *In rem* rights included ownership, easements, inheritance, mortgage and adverse possession (*usucapio*). Freitas recognized, however, that this division of subject matter could be improved in a completely new codification in which he was free to "choose the subjects freely."[16] He observed that inheritance contained elements common to two kinds of subjective rights and should be included in both. The same was true of creditors' rights and adverse possession, which created the need for a third book in the special part, containing the subjects common to the areas of *in rem* and personal rights. This book would contain three titles: the first dealing with inheritance, the second dealing with creditors' rights, and the third dealing with adverse possession and statute of limitation.

Our legal system's preservation of the ancient Portuguese legal traditions drawn mainly from Roman sources owes much to Freitas' Consolidation of Civil Laws. The Consolidation was a formidable obstacle to use of foreign elements to fill gaps that were often non-existent, thus avoiding the introduction of principles alien to our judicial development. On the other hand, in his Rough Draft (*Esboço*) of the Civil Code, Teixeira de Freitas found a convenient place to demonstrate his creative spirit.

A Decree of December 22, 1858, authorized the Minister and Secretary of Justice to commission a jurist of his choice to prepare a Draft Civil Code of the Brazilian Empire. He chose Teixeira de Freitas, who agreed, in a formal contract signed with the government, to deliver the Rough Draft by December 31, 1861, a deadline later extended to June 30, 1864. Freitas understood that he was to prepare a Rough Draft before undertaking the definitive version of the Draft Code. After he had completed 4,908 articles of the Rough Draft, Freitas became convinced of the

[13] *Id.*, at 107.

[14] *Id.*, at 107- 108.

[15] *Id.*, at 100-101.

[16] *Id.*, at 102.

pressing need for unification of private law by combining the rules of civil law and commercial law. He proposed to the then Minister of Justice, Martim Francisco Ribeiro de Andrade, that the plan be modified so that instead of preparing one civil code, he would prepare two codes: a General Code (dealing with legal cause, persons, property, juristic facts, and juristic effects) and a Civil Code (covering civil effects, personal rights and *in rem* rights). In an official letter to the Minister of Justice, dated September 20, 1867 — slightly more than twenty-one years before the Cesare Vivante's famous inaugural class in Bologna on the unification of private law, Teixeira de Freitas wrote:

> The Government expects a Draft Civil Code with the system of this Rough Draft, a system set out in my contract of January 10, 1859. There is no possibility of my adhering to that system, for I am convinced that the project should be carried out in a different way. The Government wants a Draft Civil Code to govern with the help and compliment of the Commercial Code. It intends to retain the existing Commercial Code in a revised form. Today, my ideas have changed, and I reject unequivocally this calamitous duplication of the Civil Laws. I do not perceive any of the laws of this class that would require a Commercial Code.[17]

This was the first time that anyone had attacked the civil law/ commercial law dichotomy openly and directly, rather than criticizing it vaguely, as had been previously done by Montanelli[18] and Pisanelli[19] in Italy, and by Pimenta Bueno[20] in Brazil. Freitas also argued for the unification of private law, which he proposed to do in his draft code, because he was convinced that there was no substantial difference justifying separate codifications. Although the Justice Division of the Council of State issued a favorable opinion, Freitas' proposal was rejected by the Imperial Government. In 1872, after he officially refused to finish his Rough Draft, Freitas' contract with the Government was rescinded. But his ideas had been launched and would spread in the future.

The system adopted by Freitas' Rough Draft is different from the one he used in the Consolidation of Civil Laws. In the general part, he added to "persons" and "things" a third category called "facts."[21]

[17] Cited in 1 Ferreira Coelho, *Código Civil dos Estados Unidos do Brasil* 267 (Formação do Direito Escrito), no. 613, Officinas Gráphicas do "Jornal do Brasil", Rio de Janeiro (1920). Teixeira de Freitas' letter continued:

> There is no model for this arbitrary separation of Laws called the Commercial Law or Commercial Code. All acts of juridical life, with the exception of charitable ones, can be commercial or non-commercial, that is, they can be done as much for financial gain as for satisfaction of some other interest. ... Legislative inertia, however, contrary to the progressive development of juridical relations, slowly formed a large number of uses, customs and doctrines that first became laws of exception, and then became Codes, with their own courts with restricted and limited jurisdiction. This is the history of Commercial Law! Thus has legal teaching been falsified, and its spirit confounded by the frivolous anatomy of acts to extract from their very entrails the delicate criterion. *Id.*, at 269.

[18] *Introduzione Filosofica allo Studio del Diritto Commercialle Positivo*, cap.13 e 14. — 1847.

[19] 1 *Commentario del Codice di Procedura Civile* 23, parte I, Della Competenza, no. 12.

[20] *Direito Público Brasileiro e Análise da Constituição do Império* 11, Rio de Janeiro new ed. (1958)

[21] His justification for this addition was:

In the special part, besides adding a third book (whose contents he never wrote) concerning provisions common to *in rem* and personal rights (inheritance, creditors' rights adverse possession and statute of limitation), he changed the section of the book dealing with personal rights. He began with "general personal rights" (where he placed generic provisions on obligations); continued with "personal rights in domestic relations" (where he dealt with family law); and finished with "personal rights in civil relations" (where he regulated the causes of obligations). In the book on *in rem* rights, he first dealt with "general *in rem* rights," followed by "*in rem* rights over one's own property" (individual and joint ownership), and lastly "*in rem* rights over others' property (emphyteusis, usufruct, use, habitation and easements). Prior to the general part, he placed a preliminary chapter on "place" and "time" in which he regulated the limits of geographical application of the Civil Code. Thereafter, emphasizing that limitations of periods would be dealt with in a special provisional statute, he set out rules for the counting of time periods.

Not only in systematization did Teixeira de Freitas depart from the then-known codes, especially from the highly influential French Civil Code. He also departed from existing codes on fundamental points dealing with the regulation of various legal institutions. Freitas' innovative spirit stands out particularly in the general part of his Rough Draft. In distinguishing between *de jure* and *de facto* capacity, he made an important point that only recently has become generally accepted. He noted that *de jure* capacity does not translate into the ability to acquire rights, but rather to the degree of one's ability to do so, because "no one is without *de jure* capacity, no matter how great the number of Code prohibitions."[22] Freitas' observation has been used by modern civil law scholars to distinguish between juristic personality and legal capacity. The former is an absolute concept — either it exists, or it does not. The latter is a relative concept; since it exists as matter of degree, it measures juristic personality. Freitas divided persons into those of visible existence (human beings) and those of ideal existence, which he also called "legal entities." The former can acquire all civil

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This Third Section which concerns "facts", one of the elements of rights covered by the Civil Code, was not in my original plan, as can be seen in the *Consolidation of Civil Laws, Introd.*, pages 106, 107, and 108. There I stated " Some authors add this third element under the title of facts, juridical facts, juridical acts, which they also deal with in the general part of the field of Civil Law. We do not agree with this method."
Today, however, I am convinced that without this method it will be impossible to expound correctly the synthesis of the relationships of Private Law and to avoid the serious flaws that afflict all the Codes, with the exception of the Prussian. These Codes have legislated about matters of general applicability and almost all of the subjects of the Civil Code, the Commercial Code, and the Code of Civil Procedure, as if these were applicable exclusively to contracts and wills. Under this system, the drafters complicate the precise understanding of Private Law, treating separately effects that have the same cause and allowing many cases to avoid being governed by the Codes' guiding principles. (*Código Civil — Esboço*, note to art. 431, Ministério da Justiça e Negócios Interiores, Rio de Janeiro, 1952).

[22] *Id.*, at 24, note to art. 21, when Freitas states:
Degree of ability. I do not say ability, because there is no person without legal capacity, no matter how numerous are the Code's prohibitions. Legal capacity is always relative with respect to every person, since all persons are legally capable of what the Code does not prohibit to them, and at the same time are legally incapable as to what is prohibited to them.

rights, regardless of whether they are Brazilian citizens or their political capacity. They are deemed to exist from the moment of conception, differing from the Roman texts that regarded a foetus as non-human.[23] Absence was governed by the general part rather than lumped together with family law. His treatment of simultaneous death departed from prior law, which had followed the *Corpus Juris Civilis* and the French Civil Code. Freitas took the position that "when it is impossible to know who died first, it should be presumed that all perished at the same time, so that the transmission of rights between them cannot be alleged."[24]

The Rough Draft represents the first time a codification undertook to cover all aspects of legal entities.[25] Freitas' treatment of the law of things was also path breaking. After emphasizing in Article 317 that "all material objects capable of valuation are things," he restricted his Code's concern to corporeal things.[26] Article 90 of the German Civil Code (BGB) would follow this orientation years later in determining: "Things, in the legal sense, are only corporeal objects."[27] He also diverged from Roman Law by excluding *res communes omnium hominum* from the category of things, on the theory that "common and inexhaustible material objects are not elements of law."[28]

The field of juristic facts as sources of subjective rights, a particularly difficult terrain, contains seminal views worthy of mention. Freitas focused on the distinction (alluded to but not considered in depth by Savigny) among juridical acts, based upon the way in which volition operated. If intended directly to create or extinguish a juristic relationship, they were "declarations of will or juristic transactions;" if done with some other immediate objective, with juristic effects occupying a secondary level of intent or not being desired at all, then they were "juristic acts that are not legal transactions," a category unnamed by Savigny but adopted by Freitas' Rough Draft. He emphasized in Article 435 that "voluntary facts are either lawful or unlawful acts" and that "lawful acts are voluntary actions not prohibited by law, that can result in some acquisition, modification, or

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[23] Instead, Freitas opted for the solution given by the Prussian Code: "Unborn children, from the moment of their conception, possess the rights common to human beings." *Id.* at 135, note to art. 221. Incidentally, this was also the position of the *Ordenações Filipinas*. In contradistinction to the Napoleonic Code, birth required only life outside the uterus, with no concept of viability, as was the case under the Prussian Code.

[24] *Id.*, at 146, art. 243.

[25] Freitas noted:
I submit this 3rd Title on "persons of ideal existence" with certain misgivings, not because there is the least shadow of doubt in my mind, but because of the appearance of novelty (which is in fact only superficial) in presenting a synthesis never before attempted, but without which it is impossible to comprehend the theory of persons, and all the beauty and majesty of the Civil Law. This is the first bold attempt to join into a whole, and what is more, place in a Code, what is most metaphysical in all jurisprudence". *Id.*, at 158, note to art. 272.

[26] Article 319 of the Rough Draft provided: "Although capable of valuation, immaterial objects are also not deemed to be things in the sense of this Code."

[27] *Sachen in Sinne des Gesetzes sind nur Körperliche Gegenstände.*

[28] 1 *Código Civil — Esboço*, p. 193, note to art. 318.

extinction of rights." In Article 436 he referred to lawful acts that do not have as their immediate goal the acquisition, modification or extinction of rights, but will only produce those effects in cases expressly provided for by law. In Article 437 he defined legal transactions that he called juristic acts: "When lawful acts have as their immediate goal some acquisition, modification or extinction of rights, they shall be called juristic acts."

In two respects Freitas went beyond Savingy. First, when referring to juristic acts that were not legal transactions, Savingy included both lawful and unlawful acts. Second, while Savigny only made the distinction, Freitas clearly emphasized that the effects of these lawful acts would only be those prescribed by law. His position was accepted by the most modern doctrine in the early 20th century, with Manigk, who based the distinction between "legal transactions" and "sharing of volition" upon the difference between *ex voluntate* and *ex lege* effects.

Freitas' foresight in including Article 436 in his Rough Draft merits high praise. Only in 1967 did the new Portuguese Civil Code come to deal with these acts; however, it did so only to declare that the rules governing legal transactions are applicable to such acts, insofar as justified by analogous situations. Within the shifting sands of the concept of the legal transaction, Freitas did not overlook what modern doctrine would call "transactional behavior," defined by Lorenzo Campagna as legal transactions in which "volition is not declared, but is only expressed through conduct."[29] Freitas' Article 446 had already anticipated this concept in providing that external acts manifesting volition may consist in "the performance of some material fact, either consummated or incipient," and not merely in the positive or tacit expression of volition. As to contracts, where Article 438 refers to examples of *inter vivos* juristic acts, Freitas warned that he was not adopting the extremely broad conceptualization given to them by Savigny, but rather the restricted one of binding contracts.[30] In the special part of the Rough Draft, annotations appear frequently in Section I (general personal rights) of Book II (personal rights that regulate the general part of obligations. Review of these notes reveals, however, that alongside those in which Freitas criticizes Roman law and the legislation and legal doctrine of his day, countless times he either limits himself to citing Roman texts without giving their sources, or cites them accompanied by complementary observations. It is not difficult, however, to locate the Roman sources whose texts Freitas transcribed without explanation to support articles included in the Rough Draft. He took them, almost in their totality, from citations made by Maynz and Molitor.[31] The greater part of the guidelines he accepted were Roman. Not infrequently he criticized the solutions adopted by the French Civil Code and took a contrary position. When he diverged from Roman law, he gave reasons for his departure.

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[29] I *"Negozi di Attuazione" e la Manifestazione deli'Intento Negoziale* 1, Dott. A. Giuffrè-Editore, Milan (1958).

[30] *Código Civil — Esboço* 236, note to art. 438.

[31] See J.C. Moreira Alves, "A Formação Romanística de Teixeira de Freitas e seu espírito inovador", in *Augusto Teixeira de Freitas e il Diritto Latinoamericano* 34, note 51, Cedam, Padova (Sandro Schipani ed. 1988).

Section II (Personal rights in domestic relations) of that same Book II covers pre-nuptial agreements, which were also permitted under prior law.[32] It governed weddings performed by the Catholic Church, as well as mixed marriages, whether or not authorized by the Church.[33] The marital property system was universal community property, which came from Portuguese law. It then regulated separate property and dower. His treatment of divorce came from canon law rather than from Roman law, permitting only legal separation of persons and property but not dissolution of the matrimonial bond.[34] He did, however, permit dissolution of marriages performed without authorization of the Catholic Church if the non-Christian or non-Catholic spouse later converted and then wished to marry another person within the Church.[35] The Roman prohibition of *turbatio sanguinis* was followed in the extended form of the post-classical period; the minimum waiting period before a second marriage, irrespective of the cause of the dissolution of the first, was set at ten months.[36] Children whose domicile of origin was Brazil could only be legitimated by a subsequent marriage.[37] Recognition of paternity of children born out of wedlock, incest, or sacrilege was prohibited.[38] As in prior law, adoption was permitted. Finally, tutelage and guardianship were amply covered.[39]

The third and last section of the Second Book (Personal Rights in Civil Relations) covered precepts governing obligations arising from contracts, lawful non-contractual acts, involuntary acts, facts that are not acts, and unlawful acts. The organization of the subject matter of this part of the Rough Draft merits special mention, particularly in connection with the rules relating to contracts generally and those referring to obligations derived from non-contractual acts or facts. The ordering of all these obligations, principally those stemming from contracts, is largely inspired by Roman law. Nevertheless, Freitas often departed from this Roman inspiration in order to maintain principles from Luso-Brazilian tradition. This occurred, for example, in mandate (agency), which necessarily implies contractual representation, as can be seen from Article 2853: "A mandate exists as a contract (Art. 1830) when one of the parties has bound himself to represent the other in one or more acts of civil life."

The last book that Freitas completed of his Rough Draft dealt with *in rem* rights, where he generally followed the directives of Roman law. His system was the *numerus clausus* — Article 3703. He distinguished *in rem* rights over one's

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[32] *Código Civil-Esboço*, arts. 1237 to 1253.

[33] *Id.*, at arts. 1254 to 1298.

[34] *Id.*, at art. 1379.

[35] *Id.*, at art. 1420, no. 2.

[36] *Id.*, at art. 1379.

[37] *Id.*, at art. 1554.

[38] *Id.*, at art. 1601.

[39] *Id.*, at arts. 1634 to 1829.

own property (individual and joint ownership) from *in rem* rights over others' property (emphyteusis, usufruct, use, habitation, easements). In Article 3707, he separated "true" *in rem* rights (which exist whenever the one exercising them has the right to do so in all respects, or when they have been legitimized through the running of the statute of limitations) from "putative" *in rem* rights (which exist whenever the person exercising them is presumed to have the right to do so, either by exercising or possessing them under good title, or merely by exercising or possessing them).

Freitas' treatment of possession displayed the influence of Savigny and the Prussian Code; indeed, several of his articles simply reproduced paragraphs of that Code. At times his nomenclature was analogous, but the meaning differed, such as occurred with "bare holding", "perfected possession," and "unperfected possession."[40] Like the Prussian Code, the regulation of holding and possession was extremely detailed in the Rough Draft. The acquisition of *in rem* rights preserved the Roman distinction between title and the method of its acquisition. Personal property (movables) is acquired by physical transmission, whereas real property (immovables) is acquired by transcription in a Conservative Registry, an innovation worthy of note.[41] He distinguished perfected title (perpetual *in rem* rights of one person over his own property, real or personal, with all rights over its substance and use) from unperfected title (the conditional or fiduciary right of a person over property as to which only a right of use has been transferred.)[42] The last institution dealt with in the published part of the Rough Draft was the easement to draw water.

Even though it never became the Brazilian Civil Code and was never finished, the Rough Draft greatly influenced Latin American civil law, especially the Argentine Civil Code. According to the Argentine writer, Enrique Martinez Paz:

> The exact proportion of the articles contributed by the Rough Draft to our Code was revealed by Dr. Lisandro Segovia, following lengthy and intelligent investigation. Considering the three thousand and some articles that make up the first three books of the Argentine Code, the only ones over which Freitas could have had any influence, one finds that one-third thereof, something more than one thousand articles, were copied almost literally.[43]

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[40] Bare holding, as defined in the Rough Draft, included not only the instances of holding contained in the Prussian Code, but also some instances treated therein as imperfect possession (*unvollständiger Besitz*). The distinction between "perfected" and "unperfected" possession set out in the Rough Draft is largely founded upon the concepts of "perfected" and "unperfected" title adopted by Freitas, which do not follow *vollständiger und unvollständiger Besitz*, for "unperfected" possession also included instances of the exercise of real rights over another's property that were "exercisable" through possession.

[41] *Id.*, at art. 3809.

[42] *Id.*, at arts. 4072 and 4300. *He also permitted usufructs of fungibles and of credits. Id.*, at arts. 4652 — 4662.

[43] *Freitas y su Influencia sobre el Código Civil Argentino* 54-55 (Univ. of Córdoba 1927).

The admiration that Velez Sarsfield, author of the Argentine Civil Code, had for Freitas's Rough Draft is revealed in his reply to Alberdi's criticisms of the Argentine Civil Code:

> Dr. Alberdi found it sufficient to cite me examples from the French Code, which he erroneously believes followed the method of the Institutes, and is mistaken as to the preference that I showed for Freitas over Tronchet, Portalis and Maleville. Dr. Alberdi confesses he has no knowledge of the legislative work of Mr. Freitas and appears convinced that nothing better could possibly exist than the jurisconsults who drafted the French Code and who are today so roundly criticized by the jurisconsults from the same country. He may forgive me for stating that, after serious study of the work of Mr. Freitas, I consider that the only one whose work can be compared to his is Savigny.[44]

In 1872, the year that the contract between Teixeira de Freitas and the Imperial Government was rescinded, two significant events occurred concerning efforts to draft a Brazilian Civil Code. The first event was preparation of a Draft Brazilian Civil Code prepared by Viscount Seabra, author of the Draft that became the Portuguese Civil Code in 1867. This Draft, which contained only 392 articles, appears to have remained unfinished. It contained a Preliminary Title on civil law, its object and nature, and a single book (on civil capacity and its exercise) of the First Part. Although seen in manuscript form in the Office of the Ministry of Justice by Clóvis Bevilaqua,[45] drafter of the Civil Code that was ultimately adopted by Brazil, Seabra's draft remained unpublished until 1951, when the University of Lisbon Law Review published it as an unknown work of historical interest.[46]

The second event was the signing of a contract for the preparation of a new Draft Civil Code between the Imperial Government and Senator Nabuco de Araújo. Nabuco's untimely death in 1878 prevented him from ever completing his draft. He left behind 118 articles from the Preliminary Title (containing provisions about publication, effect and application of Laws of the Brazilian Empire) and 182 articles from the General Part (which included only Title I, On Persons, of Book I On the Elements of Law). These were published posthumously in 1882.[47]

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[44] *Id.*, at 56.

[45] *Código Civil dos Estados Unidos do Brasil Comentado* 19, Livraria Francisco Alves, Rio de Janeiro (9th ed. 1951).

[46] 8 *Revista da Faculdade de Direito de Lisboa* 305-325 (1951); vol. 9, pp. 289-311; vol. 10, pp. 455-504. The following explanation accompanied the publication:

> The LISBON LAW SCHOOL REVIEW jubilantly announces the reproduction in its pages of part of the draft of the Brazilian Civil Code authored by Viscount Seabra, which it believes has never been published and whose manuscript was kindly made available, together with the right to publish, by its present owner, the Honorable Dr. Augusto Raul de Seabra, Judge in Ultramar and a descendant of the illustrious author of the draft.

[47] *Projeto do Código Civil Brasileiro do Dr. Joaquim Felício dos Santos Precedido dos Atos Oficiais Relativos ao Assunto e Seguido de um Aditamento Contendo os Apontamentos do Código Civil Organizados pelo Conselheiro José Thomaz Nabuco de Araújo*, Tipografia Nacional, Rio de Janeiro (1882). The biography written by his son, Joaquim Nabuco, *Um Estadista do Império*, Editora Nova Aguilar: Rio (1975), reveals that his father left many volumes of notes relating to the studies carried out

The last draft Civil Code prepared during the Empire was by Felício dos Santos, an attorney who offered his *Apontamentos para o Projeto de Código Civil* (Annotations for a Draft Brazilian Civil Code) to the Government in March 1881. A committee that included five of the outstanding authorities on civil law of the time was appointed to review his proposal.[48] The Committee decided that although a work of outstanding calibre, the *Apontamentos* needed substantial changes in order to become a draft that could be properly reviewed. The Government determined that the same Committee, to which Felício dos Santos was then appointed, should become a standing committee to organize the Draft Civil Code. Because of the voluntary resignation of some of its members, the studies were never completed. Between 1884 and 1887, Felício dos Santos published five volumes of commentary on the 2,692 articles then drafted. Antonio Coelho Rodrigues, who studied the Draft at great length, criticized it broadly because of its plan, its execution, and its form.[49] The plan was inspired by the Portuguese civilist Coelho da Rocha. It contained a preliminary title (on publication, effects and application of laws in general); a general part (composed of 3 books covering, respectively, persons, things, and juristic acts in general); and a special part (also with 3 books covering persons, things and particular juristic acts).

In 1889, the same year in which the Republic was later proclaimed, Candido de Oliveira, who was Justice minister in the cabinet of the Viscount of Ouro Preto, created a committee to prepare a new draft civil code. It met eight times, under the chairmanship of Emperor Pedro II himself, but was dissolved upon the inauguration of a new political system.[50]

In 1890, shortly after the proclamation of the Republic, Campos Salles, Minister of Justice during the transitional government, contracted Antonio Coelho Rodrigues to prepare of a Draft Civil Code. Written almost exclusively in Switzerland and strongly inspired by the Civil Code of Zurich, Coelho Rodrigues's Draft was finished in 1893.[51] The Government appointed a committee of three

for the Draft, but that they were almost unintelligible to third persons wishing to decipher his thoughts. The transcription of these notes, however, shows he was familiar with existing Codes, such as the Chilean, Portuguese, Austrian, and that of Louisiana. He referred to texts from Freitas' Rough Draft, and he reviewed the doctrine written by Marcadé, Aubry et Rau, Laurent, Zachariae, Caen, and Coelho da Rocha. He twice referred to Savigny in this small sample of his notes, and he cited the *Cours d'Institutes et d'Histoire du Droit Romain* by the Belgian P. Namur.

[48] These five jurists were Lafayette Rodrigues Pereira, Antonio Joaquim Ribas, Antonio Ferreira Viana, Francisco Justino Gonçalves de Andrade, and Antonio Coelho Rodrigues.

[49] *Projeto do Código Civil Precedido da História Documentada do Mesmo e dos Anteriores* 227, Tipografia do Jornal do Brasil, Rio de Janeiro (1897).

[50] Afonso Pena, Olegário Herculano de Aquino e Castro, Sylva Costa and Coelho Rodrigues, *inter alia*, were members. The proceedings of these meetings are found in the pamphlet "Projeto do Código Civil Brasileiro em 1889" (published in Polto) (1906), and in 68 *Revista do Instituto Histórico e Geográfico Brasileiro*, part I, pp. 7 to 48.

[51] This is the plan of the Draft: a General Part (divided into 3 books: the first on persons, the second on property and the third on legal effects and transactions), and a Special Part (composed of 4 books: the first on obligations; the second on possession, ownership and other *in rem* rights; the third on family law; and the fourth on succession). The following synopsis of the personality of Coelho Rodrigues, done

jurists to review it, who issued an opinion urging rejection of the Draft. Pontes de Miranda has pointed out that Clóvis Bevilaqua borrowed several provisions from Coelho Rodrigues' Draft for use in the Draft that became our Civil Code. Many of Bevilaqua's innovations resulted from the progressive spirit of Coelho Rodrigues, notwithstanding his deeply ingrained Roman law training.

In 1899, Clóvis Bevilaqua was selected by Epitácio Pessoa, then Minister of Justice, to prepare a Draft Civil Code, using previous drafts as much as possible. Bevilaqua set to work in April and finished by October of the same year. As had become the tradition, the Government named a committee composed of five eminent jurists to review the Draft.[52] Even before the Committee began its meetings, Carlos Augusto de Carvalho, as a contribution to the study of the Draft by Clóvis Bevilaqua, published a consolidation of the civil laws in force in Brazil in which systematically compiled the civil statutes in force in the country.[53]

After two revisions (with Clóvis Bevilaqua participating in the second) by the committee, the Draft was submitted in November 1900 to the Federal Congress. After much debate, it was finally approved on December 26, 1915, and enacted into law on January 1, 1916. On January 1, 1917, some 95 years after the 1822 Constitution called for enactment of a civil code, the Brazilian Civil Code finally went into effect.

III. THE CIVIL CODE

In the preface he wrote in 1928 for the French translation of the Brazilian Civil Code, Clóvis Bevilaqua revealed the sources of his codification:

> The Brazilian Civil Code strove to merge into a harmonious synthesis the diverse legal traditions that contributed to its creation. Foremost was the national tradition, based on Roman and Portuguese law, but always oriented towards an ideal of justice and freedom, and concerned with responding to

years later by Clóvis Bevilaqua, flows accurately from the content of his Draft: "The image of Coelho Rodrigues appears as a strong intellect, well bolstered with solid studies, in which a rebellious spirit is oddly associated with an attachment to traditions, and progressive outbreaks to fetters of prejudice." *História da Faculdade de Direito do Recife* 339-340 (2d ed.)

[52] The committee was made up of Olegário Herculano de Aquino e Castro, Anfilóphio Botelho Freire de Carvalho, Joaquim da Costa Barradas, Francisco de Paula Lacerda de Almeida, and João Evangelista Sayão Bulhões de Carvalho. Rui Barbosa referred to this Committee, in an opinion that he began to write in 1905 in the Senate but never finished, in the following way:

> The Revising Committee, however, contained the dean of our magistrates, presiding Justice of the Federal Supreme Court, one of the grand old men of our courts; Councillor Barradas, experienced in public administration under the former regime and now one of the chief judges of the Union; Anfilóphio Botelho, another long-standing and eminent member of that great republican tribunal contributing to the panel, a professional steeped in legal learning and having an exceptionally austere conscience; Drs. Lacerda de Almeida and Bulhões de Carvalho, in short, two preeminent figures in Brazilian civil law, consummate practitioners noted for their measured opinions. "Código Civil, Parecer Jurídico," 32 *Obras Completas de Rui Barbosa*, TOME III 303 (1905), Ministério da Educação e Cultura, Rio de Janeiro (1968).

[53] *Direito Civil Brasileiro Recompilado em Nova Consolidação das Leis Civis* (Aug. 1899).

the needs of modern civilization. Next came the influence of the French Civil Code and French doctrine, which has always enjoyed great prestige among South American jurists. Then came the influence of the Codes of Portugal, Spain, Italy, Argentina, and the Canton of Zurich. Finally, came that of the most modern legislation, the German Civil Code and the Swiss Code.

The Brazilian Civil Code, inspired by foreign law as studied in statutes and commentaries, reflects faithfully the image of the time when it was published; it fixes a moment in the world's legal evolution. Nonetheless, it retains its original appearance, both in regard to its technical and its social aspects.[54]

The end result of these influences is explained by the education and training of the jurists who contributed to the crafting of the Brazilian Civil Code and by the circumstances under which it was drafted.

A. THE PROFOUND ROMAN LAW INFLUENCE

Clóvis Bevilaqua belonged to the cultural movement that became known as the Recife School, orchestrated by Tobias Barreto, who was characterized by his Germanic tendencies. Even before drafting the proposed Civil Code in 1899, Bevilaqua's work demonstrated solid familiarity with the German legal literature, including the Pandectists. From the Roman law tradition, he frequently cited Mackeldey, Ihering, Savigny, Bonfante, Van Wetter, Cuq, Maynz, Leist, Padeletti, and Cogliolo. Clóvis' Germanic and Roman leanings, with the latter predominating, were evident in his Draft Civil Code.

The members of the Governmental Committee that revised his Draft were solidly grounded in the Roman law tradition, particularly Bulhões de Carvalho and Lacerda de Almeida. The latter was also a well-known connoisseur of Germanic legal writing. During the Congressional debates on Bevilaqua's Draft, the facility with which Coelho Rodrigues invoked Roman texts on diverse questions of civil law was impressive. The preparation received in Roman law by Clóvis Bevilaqua, Amaro Calvalcanti, and Andrade Figueira was also noteworthy. Figueira stood out as the defender of traditional principles in our civil law, at times preventing adoption of modern precepts that should have been adopted.

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[54] *Code Civil des États-Unis du Brésil* 48-49, Traduit et Annoté par P. Goulé, C. Daguin et G. D'Ardenne de Tizac, No. XXIX, Imprimerie Nationale, Paris (1928). Bevilaqua also stated:

> Technically, it was the creation of distinguished Brazilian lawyers themselves, starting with Teixeira de Freitas and all those who, with him or thereafter, collaborated by their efforts in preparing the Code, all of whom were formed by and in the Brazilian culture and endeavoring their efforts to satisfy the specific needs of the society in which they lived, through the means that this society offered them. Socially, the Civil Code is the exact and characteristic expression of present-day Brazilian society. Without doubt, the principles upon which it is based are the ethical-juridical conquests of civilization as a whole: the sense of equality, which places all individual members of a social group at the same level, regardless of their origin or wealth; protection and consolidation of the family; emancipation of women, priestesses of the hearth; legal equality of the sexes, etc. But, in consummating these principles, the Code did not proceed through juxtaposition, but incorporated them into the body of society and adapted them to the peculiarities of the Brazilian society in accordance with its historical background.

Brazilian legal tradition was fundamentally grounded in Roman, canon, and Portuguese law, especially Roman law. In 1903, in his Comparative Law Course, Candido de Oliveira observed that "The foundation of our legislation is essentially Roman law."[55] It is not surprising, therefore, that Pontes de Miranda, one of Brazil's most prominent treatise writers, produced the following inventory of the sources of the Brazilian Civil Code:

> Of the approximately 1,929 sources of the Civil Code, 479 were taken from prior law, 272 from prevailing doctrine prior to the Civil Code, and 189 from the Rough Draft by Teixeira de Freitas. This means that the Rough Draft was the principal source of all that was changed. The Codes that quantitatively contributed the most articles were the French Code Civil with 172 (although not as much for intrinsic quality as for the modern expression it had given to Roman rules), followed by the Portuguese Code with 83, the Italian with 72, the German Drafts with 66, the *Privatrechtliches Gesetzbuch für den Kanton Zurich* with 67, the Spanish with 32, the Swiss Law of 1881 with 31, the Argentine Civil Code with 17, Roman law directly with 19, the BGB of Austria with 7, the Chilean Civil Code with 7, the Mexican Code with 4, the Uruguayan Code with 2, the Peruvian Code with 2, *et al.* The German sources were the most important, and at times the other Codes were mere vehicles for the German and Austrian influence. Of the 1,178 innovations in prior law, foreign law codes were responsible for less than half, for more than 670 came from Brazilian sources. The Rough Draft of Teixeira de Freitas accounted for 189, the Draft by Felício dos Santos 49, Coelho Rodrigues 154, Clóvis Bevilaqua 135 (revised down to 78) the Chamber of Deputies 40, the Federal Senate 26, and others 1 or 2.[56]

In determining that there were only 19 direct contributions from Roman law,[57] Pontes de Miranda obviously never meant to reduce the influence of Roman law on our civil codification to such a limited number, which would fly on the teeth of all available evidence. Rather he sought to characterize the circumstances by which Roman law usually worked its way through the prevailing doctrine in Brazil or in Codes or Drafts strongly impregnated with Roman law principles. There is, therefore, no contradiction between the assertion of Pontes de Miranda and that of Abelardo Lobo, who wrote: "[I]f we review each of the 1,807 articles of our Civil Code, we can verify that more than *four fifths*, that is, 1,445 articles, are

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[55] *Curso de Legislação Comparada — Parte Geral: As Fontes* 140, Jacinto Ribeiro dos Santos, Rio de Janeiro (1903). Candido de Oliveira also noted:

> Today one can still say with certainty that virtually no institution of our private law has escaped Roman influence. If Ordinance Book III, Title 64 ordered the application of Imperial Laws in cases not provided for, this rule did not imply the repudiation of Justinian's Corpus Juris when domestic law was complete. Even without a lacuna in the text to make Roman law supplementary law, knowledge of its principles would be the best guide for the study of Brazilian law." *Id.*

[56] *Fontes e Evolução do Direito Civil Brasileiro* 119-120, no. 50, Pimenta de Mello & C., Rio de Janeiro (1928).

[57] Pontes de Miranda refers to articles 43(III), 49, 50, 55, 57 and 291 of the Brazilian Civil Code. *Id.*

products of Roman culture ...."[58] Nor is there any contradiction between Pontes de Miranda's position and that of Gaetano Sciascia, who stated:

> It is well-known that the Brazilian Civil Code assumed and developed in its general lines the work of the Pandectists of the 19th century. Corresponding Roman texts can be found for almost every article of the Brazilian Code, showing the relative factual categories in their living reality and in the infinite variety of human occurrences. ... [J]ust as the Portuguese language is surely the closest to the original [Latin], Brazilian civil law seems to us closer to Roman law than Italian civil law.[59]

B. THE STRUCTURAL INFLUENCE OF GERMAN LAW

The Brazilian Civil Code was strongly influenced by the systematic organization of the German Civil Code (BGB). This approach already appeared in the work of the Committee created in 1889 to draft a new Civil Code and in the Draft by Coelho Rodrigues. This Germanic influence has been noted by German scholars like Hans Carl Nipperdey, who accurately stated:

> The most independent of the Latin-American codifications is the Brazilian Civil Code of 1/1/1916. It consists of 1807 articles, around half of which are derived from European codes, principally the French and the Portuguese, with 62 from the German Civil Code. The other half is based upon ideas of Brazilian jurists and draws together customary law. The ordering of the subject matter is closely related to that of the German Civil Code, although its articulation in the general and special parts is different.[60]

In certain significant ways, however, the Brazilian Civil Code diverges from the German system. The Brazilian Code is preceded by an Introduction whose numbering differs from the main body of the Code and contains provisions on legal norms in general and their application in time and space. Regulation of absence and general provisions on contract are transposed from the general part to the special. The order of the special part differs from that of the BGB, which deals first with obligations, then things, domestic relations and succession. Instead, the Brazilian Code deals first with domestic relations, then things, obligations and succession. In his *Nas Observações para esclarecimento do Código Civil* (Observations Clarifying the Brazilian Civil Code), which serves as the legislative

[58] 1 *Curso de Direito Romano* 51, Rio de Janeiro (1931). In the Introduction that he wrote for the German translation of the Brazilian Civil Code edited by Heinsheimer, also published in 1928, Pontes de Miranda reproduces the same statistics on the sources of the Brazilian Code, with an amendment worthy of note: when he refers to the contribution of the *Code Napoleon*, he retains the observation that it derived more from its modern expression of Roman rules, but he adds immediately thereafter (which he did not do in *Fontes e Evolução do Direito Brasileiro Civil*) that 19 precepts came to us directly from Roman law. *Die Zivilgesetze der Gegenwart*, Band III, Brasilien Codigo Civil, p. XL, J. Bensheimer, Mannheim, Berlin, Leipzig (1928).

[59] *Direito Romano e Direito Civil Brasileiro* 205, Saraiva S/A, São Paulo (1947).

[60] In the re-editions done by him of the notable *Allgemeiner Teil des bürgerlichen Rechts* in the *Lehrbuch des bürgerlichen Rechts* by Enneccerus, Kipp and Wolff, Erster Band, Erster Halband, § 29, x, p. 113, J. C. B. Mohr (Paul Siebeck) Tubinger (1952).

history for his Draft, Clóvis Bevilaqua justified changing the order of the special part, placing domestic relations law foremost, by arguing:

> b) Having adopted the classifying criterion of decreasing generality, after the general part, in which principles applicable to all the moments, situations and forms of private law are included in an abstract fashion, should then come the legal institutions of family law, which are integral parts of the foundations of all civil society. As Menger says, they interest the natural base of society and are therefore of greater generality than the legal institutions of property;
>
> c) If man considered socially is superior to man as an individual; if altruistic interests prevail over egotistical ones; if, as Savigny recognized, property is an extension of the power of the individual, an attribute of his personality; then, for the sake of sociology and logic, it is proper to accord precedence to institutions of the family, which is the circle of social organization, over economic institutions, which are the means to ensure the conservation and development of social life.[61]

The Introduction to the Brazilian Civil Code, which went into force together with the Code on January 1, 1917, consists of 21 articles. The 1,807 articles of the Code cover the following subjects:

GENERAL PART:

Book I — Persons
Book II — Property
Book III — Juristic Facts

SPECIAL PART:

Book I — Family Law
Book II — Property Law
Book III — Law of Obligations
Book IV — The Law of Succession

The Brazilian Civil Code merits high praise for technique. Manuel Paulo Merêa, the great historian of Portuguese law, analyzed the Code's technical merits in these terms:

> There should be no equivocation in praising its technical part, which avoids the two great submerged reefs of the law-giver: the danger of doctrinal exaggeration in scholastic definitions and divisions and nebulous abstractions, and the danger of exaggerated regulation of details by a casuistic exposition of subjects, which is a hindrance to the judge's task of interpretation. The Brazilian Civil Code seems to us to be clear, serious, practical, popular, and comparable in this respect to the Swiss Civil Code, whose technique has been so warmly praised.[62]

[61] In 1 *Projeto do Código Civil Brasileiro — Trabalhos da Comissão Especial da Câmara dos Deputados* 15, Imprensa Nacional (1902).

[62] *Código Civil Brasileiro* 15, Livraria Clássica Editora, Lisboa (1917).

C. THE CONTENTS OF THE CIVIL CODE

Book I (Persons) of the General Part deals with individuals and legal entities. Article 3 provides that "the law shall not distinguish between Brazilians and foreigners as to the acquisition and enjoyment of civil rights." An individual's civil personality begins when he or she is born alive, although Article 4 also safeguards the rights of the unborn child. Those persons deemed relatively incapacitated *de facto* include persons between the ages of 16 and 21, married women so long as the conjugal society exists, spendthrifts, and forest dwellers.[63] Pursuant to Article 9, minority terminates upon attaining age 21. For simultaneous death, Article 11 adopts the solution of the rebuttable presumption (*juris tantum*) that both died at the same time. Article 13 distinguishes between domestic and foreign legal entities of public law. Article 15 provides that legal entities of public law are "civilly liable for acts of their representatives who, while acting in such capacity, cause damage to third parties, acting contrary to law or in breach of a duty prescribed by law, with the public legal entity retaining the right to sue its agents who caused the harm." Private law legal entities, such as civil companies and associations, are governed by Articles 20-23, and foundations by Articles 24 to 30. An individual's civil domicile is as much where he intends to reside permanently as the center of his habitual occupation.[64] An individual may have more than one domicile. If a person has no habitual residence, or he spends his life travelling, without a central place of business, he is deemed domiciled in the place he can be found.[65]

Book II (Property) of the General Part traces the rules for the different classes of property.[66] This Book also regulates family property, which corresponds to the homestead. It contains a provision protecting creditors, thus deflecting the criticism commonly directed at this concept.[67]

Book III (Juristic Facts) of the General Part is basically concerned with juristic acts, a generic expression in the technique of the Civil Code that today one prefers to call legal transactions. A "juristic act" is defined according to its subjective conception, a dominant idea in that period. Error or ignorance, fraud (*dolus*), coercion, simulation, and fraud against creditors are treated as defective juristic acts. Conditions, terms, modes, or burdens are regulated as "modalities of juristic acts." The invalidity of juristic acts is regulated in two forms: nullity and annulability. This Book also contains precepts governing absolutely unlawful acts (those violating *erga omnes* rights) and on the period of limitation of actions

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[63] Brazilian Civil Code, art. 6. Forest dwellers, which refers to Indians living in their native state, are subject to tutelage enacted in special laws and regulations. The tutelage ceases as a function of their adaptation to civilization.

[64] *Id.*, arts. 31 and 32.

[65] *Id.*, art. 33.

[66] These include personalty and realty, fungible, consumable, divisible, singular (simple and several), collective (*universitates facti* and *universitates iuris*), principal and accessory, public and private, and property not in commerce. *Id.*, arts. 43- 69.

[67] *Id.*, arts. 70 to 73.

(without distinguishing it, however, from lapse of rights, which was later done by the doctrine.)[68]

Book I of the Special Part of the Code is devoted to family law and is divided into six Titles. Title 1 deals with marriage (preliminary formalities, impediments and their opposition, celebration of marriage, proof of marriage, void and voidable marriages, and penal provisions).[69] The Civil Code recognizes only civil marriage. The impediments to marriage listed therein are classified as absolute or relative and penalties, depending upon whether they were grounds for, respectively, nullity, annulability, or the imposition of sanctions (established in the penal provisions of this Title) when disregarded. The legal effects of marriage are dealt with in Title II — Articles 229 to 255 — which provides for the irrevocability of the marital property regime, reciprocal duties, and the rights and duties of each spouse. The husband is deemed to be the head of the conjugal society, but he cannot, regardless of the marital property regime, make certain dispositions (*e.g.* transfer, mortgage, or encumber real estate) without the wife's approval or a court order. More restrictions, however, are imposed upon the wife's freedom of action without her husband's approval, including holding gainful employment, but these can be overridden, in some cases, by a court order.

Title III contains rules on marital property relations between spouses.[70] Four typical regimes are set out: universal community property (the standard legal regime), partial community property, separate property and dowry. Title IV concerns the dissolution of the conjugal society and the protection of children.[71] The Civil Code permitted no absolute divorce, authorizing only a legal separation (judicial or amicable), which did not dissolve the matrimonial bond or permit remarriage of either party. Parentage is covered by Articles 330 to 405 of Title V, which regulates legitimacy, legitimation, recognition of illegitimate children, adoption, parental authority, and support obligations. Finally, the concepts of tutelage, guardianship and absence are regulated in Title VI, articles 406 to 484.

Book II of the Special Part concerns the law of things. It is divided into three titles: possession (Title I, arts. 485 to 523), ownership (arts. 524 to 673) and rights *in rem* over others' property (arts. 674 to 862). Possession is characterized as the full or partial *de facto* exercise of some of the powers inherent in ownership. It is organized horizontally into possession of things and possession of rights, and vertically into direct and indirect possession. A holder maintains possession in the name and under the orders or instructions of someone to whom he is in a dependent relationship. *In rem* rights are listed exhaustively in a *numerus clausus* and are divided into two large groups: (1) ownership, which deals with real and personal property and condominiums, as well as literary, scientific and artistic property; and (2) *in rem* rights over the property of others, which are: emphyteusis, easements, usufruct, use, habitation, profits-à-prendre, pledge, antichresis, and mortgage.

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[68] *Id.*, arts. 171 to 179.

[69] *Id.*, arts. 180 to 228.

[70] *Id.*, arts. 256-314.

[71] *Id.*, arts. 315 to 329.

The law of obligations is governed by Book III of the Special Part, which is divided into nine titles: (1) Forms of Obligations (Arts. 863 to 927), (2) Effects of Obligations (Arts. 928 to 1064), (3) Assignments of Credits (Arts. 1065 to 1078), (4) Contracts (Arts. 1079 to 1121), (5) Various Types of Contracts (Arts. 1122 to 1504), (6) Unilateral Promissory Obligations (Arts. 1505 to 1517), (7) Obligations from Unlawful Acts (Arts. 1518 to 1532), (8) Satisfaction of Obligations (Arts. 1533 to 1553), and (9) Arrangements with Creditors (Arts. 1554 to 1571). Notably absent from this Book is assignment of debts. Typical contractual forms regulated herein are: puchase and sale, exchange, donation, leases (of things, services and construction), loans (of fungibles and non-fungibles), bailments (voluntary and necessary), mandate, publishing, dramatic production, partnership, rural sharecropping (agricultural and livestock), annuities, insurance, and guaranty. Unilateral promissory obligations arise from bearer instruments and promises of rewards.

Finally, Book IV of the Special Part deals with succession. It is divided into four titles: Succession in General (arts. 1572 to 1602), Intestate Succession (arts. 1603 to 1625), Testamentary Succession (arts. 1626 to 1769), and Inventory and Distribution (arts. 1770 to 1805). It accepts the institution of *seisin* by declaring that, "upon succession, title and possession of the estate are transferred immediately to the legitimate heirs and legatees."[72] Intestate succession adheres to the following order: descendants, ascendants, surviving spouse, collateral heirs up to the sixth degree,[73] and escheat to the States, Federal District, or Federal Government depending upon the residence of the decedent. There are three normal forms of wills: public, sealed, and private, and codicils are permitted. The seaman's and serviceman's wills are treated specially.

IV. AMENDMENTS AND INNOVATIONS BY SUBSEQUENT LEGISLATION

Soon after the Civil Code came into force on January 1, 1917, it became apparent that several of its provisions were incorrectly published, or contained formal defects that made its interpretation difficult. In an effort to cure these defects, a law was enacted that amended 192 articles of the Civil Code.[74] Most of these amendments were changes in form rather than substance. Since then, much more substantial changes have been made to Brazilian civil law. The principal modifications are noted in this section.

One of the principal legislative changes was the imposition of a series of limitations on freedom of contract. In contrast to the Civil Code, which set no limit upon the interest rates that could be stipulated in contracts, a 1933 decree

[72] *Id.*, art. 1572.

[73] This has been changed to the fourth degree by Decree-Law 9.461 of July 15, 1946.

[74] Law No. 3.725 of January 15, 1919.

prohibited the charging interest greater than twice the legal interest rate (6% per annum) and declared usurious contracts null and void.[75]

The Civil Code permitted payment to be stipulated in particular types of money as well as in foreign currency. Subsequent legislation has prohibited such stipulations, except for international contracts.[76]

Substantial limitations on both commercial and residential leases were imposed by subsequent rent control statutes, reflecting conflicting societal interests. Legislation dating back to 1934 still substantially restricts freedom of contract with respect to renewing commercial and industrial leases.[77] In the decade of the 1930s, the imbalance in supply and demand for rental housing, and the corresponding increase in rents, brought temporary rent control legislation.[78] Since 1942, residential rent control has become a permanent fixture in Brazilian law.[79] A number of modifications to the Civil Code resulted from the need for more modern techniques of financing commercial transactions. Despite long use in practice, conditional sales agreements with retention of title were only recognized by Brazilian legislation in 1938.[80]

Laws subsequent to the Civil Code updated its rules on the rural land pledges and created other types of security interests, without loss of possession, such as security interests in industrial machinery.[81]

The concept of the transfer in trust as a guarantee (*alienação fiduciária em garantia*) was created by the Brazilian legal system to satisfy the desire for new

[75] Decree No. 22.626 of April 7, 1933. Subsequently, Law No. 1521 of December 16, 1951, made usury a crime against the economic public interest. Art. 4 § 3 of this law provides that "any stipulation of usurious interest or profit rates shall be void, and the judge should either adjust them to the legal rate, or if they have already been paid, order the restitution of the excess amount paid, with legal interest thereon as from the date of improper payment."

[76] Decree 23.501 of Nov. 27, 1933, replaced by Decree-Law 857 of Sept. 11, 1969, which now govems the area.

[77] Decree No. 24.150 of Apr. 20, 1934, as amended by Law No. 6.014 of Dec. 27, 1973.

[78] Law No. 4.403 of Dec.22, 1928.

[79] The series of rent control laws began with Decree-Law 4.598, Aug. 20, 1942. Among those that followed, Law 1.300 of Dec. 22, 1950 and Law 4.864 of Nov. 29, 1965 — stand out. The latter excluded non-residential leases from the rent control law, placed them under either the Civil Code or Decree 24.150, depending upon its purpose. Presently, Law 6.649 of May 16, 1979, as amended by Law 6698 of Oct.15, 1979, regulates the lease of urban buildings, except for leases for commercial or industrial purposes, which continue to be governed by Decree 24.150 (unless a suit to renew such a lease is not filed), and except for urban buildings owned by the Federal government.

[80] Decree-Law No. 869 of Nov. 18, 1938. It is now substantially governed by Articles 1070 and 1071 of the Civil Procedure Code (Law No. 5.869 of Jan. 11, 1973).

[81] Decree-Law No. 1.271 of May 16, 1939, permitted creation of a security interest in industrial machinery and equipment. Decree-Law No. 1.697 of Oct. 23, 1939, extended the industrial security interest to hog-raising products, and Decree-Law No. 3.168 of Apr. 2, 1941, permitted the pledge of salt and things designed for its production.

types of *in rem* security interests, which would protect creditors' rights more effectively than those in existence.[82] This bilateral legal transaction is analogous to those creating *in rem* security interests. The *in rem* guarantee (title held in trust), whose creation the transfer seeks (a contract for rights *in rem*) does not arise from the mere signing of the contract, but rather from registration with the Registry of Deeds and Documents. This fiduciary quality, which is the *in rem* guarantee, is a limited form of property whose restrictions, including rescindibility, are imposed by law so as to take into account the scope of the guarantee.

Two important developments in real property law were designed to give greater protection to the rights of prospective buyers. In 1937, legislation governing land divided into lots declared that annotation in the Registry of an agreement of sale "grants the prospective purchaser an *in rem* right against third parties to prevent a subsequent alienation or encumbrance, and shall be done by showing the agreement of sale so that the registry official can note the book, page and date of registration."[83] In 1949, this right was extended to purchasers of land that had not been subdivided into lots.[84] A similar *in rem* right was granted to the assignees of agreements of sale of unsubdivided land in 1964.[85]

"Horizontal" condominium rights for one-level land were unknown to the Civil Code. Condominium rights in buildings and real estate subdivisions are now an important part of modern real estate transactions and are governed by special legislation dating back to 1928.[86]

More modern legislation has supplanted or supplemented the Civil Code in a number of other areas. For example, the ordering of publishing and dramatic presentation contracts contained in the Civil Code (arts. 1346 to 1362) was revoked in 1973 by a new Copyright Law.[87] The limitation of a drug addict's capacity, both relative and full, which are deemed equivalent to relative and absolute *de facto* incapacity — is not governed by the Civil Code, but rather by a statute enacted in

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[82] Introduced by Art. 66 of Law 4.728 of Jy. 14, 1965 (the Capital Markets Law). It is presently controlled by Decree-Law 911 of Oct. 1, 1969. *See* Romney, "The Brazilian Alienação Fiduciária em Garantia and the American Trust Receipt: A Comparison," 1 *Arizona Journal of Int'l & Comp. L.* 157 (1982).

[83] Decree-Law 58 of Dec. 10, 1937, art. 5.

[84] Law No. 469 of Mar. 11, 1949. Article 1 of this law provides:
A contract that contains no clause permitting repentance, for the promise of the purchase and sale of land not subdivided into lots and whose price has been paid upon contracting or must be paid in one or more installments over some period of time, grants to the promising parties an *in rem* right, opposable to third parties, as well as the right to compel the transfer of title.

[85] Law No. 4.380 of Aug. 21, 1964, art. 69 provides:
The contract of a promise to assign rights relating to land not divided into lots, where the assignee may not repent and is placed in possession, once inscribed in the general land register, grants the promisor/assignee an *in rem* right opposable to third parties and also grants the right to compel the execution of the definitive deed of assignment; in such case the terms of Art. 16 of D-L 58 and Art. 396 of the CPC shall be applied where appropriate.

[86] Decree No. 5.481 Je. 25, 1928, as amended by Decree-Law No. 4.591 of Dec. 16, 1964.

[87] Law No. 5.988 of Dec. 14, 1973.

1938.[88] The removal and transplant of tissues, organs and parts of cadavers for therapeutic and scientific purposes is governed by legislation enacted in 1968.[89]

The area of the Civil Code that has undergone the greatest changes, however, is family law. Several provisions in this part of the Code were changed significantly, primarily to improve the legal status of married women and illegitimate children. Law No. 3.200 of April 19, 1941, which provided for the organization and protection of the family, permitted the marriage of third degree relatives, so long as a medical examination showed no health reasons to the couple or their offspring that should not prevent the wedding. This same law also regulated the civil law effects of religious marriage[90] and further complemented the Civil Code provisions on family property. Subsequently, Law No. 883 of October 21, 1949, provided for recognition of illegitimate children by permitting either spouse, after dissolution of the conjugal society, to recognize a child born out of wedlock, and by permitting a child to sue for a declaration of paternity. Law No. 3.133 of May 8, 1957, made several changes in the articles of the Civil Code dealing with adoption. In addition, Law No. 4.655 of June 2, 1965, implanted in Brazil legitimation by adoption, following the French and Uruguayan models. The Code of Minor Children[91] permits minors to be placed in surrogate homes, which can be done through simple adoption (governed by the Civil Code) or by full adoption (which corresponds to legitimization by adoption).

This Code of Minors was abrogated by Law 8.069 of July 13, 1990, which provides about the statute of the child and the adolescent in accordance with the 1988 Constitution. This law brought about substancial changes aiming at their assistance and protection. On adoption the new law introduced a special systemby which the adopted child gets the same status, rights and obligations as children in general, including inheritance rights, severing all ties with his parents and family, excepting matrimonial impediments. The inheritance rigths between adoptive parents and the adopted child extend reciprocally to the descendents of the child and the ancestors, descendents and collaterals of the adoptive parents in accordance with the rules on the line of succession. This law also provides on the adoption of Brazilian children by aliens.

Profound changes in the legal status of married women began in 1962 with the so-called Married Women's Statute,[92] which ended the wife's partial incapacity by giving her the right to collaborate with the husband in managing the conjugal society. It improved her position in relation to rights and duties, as well as to paternal authority. It granted the surviving spouse a usufruct in the deceased spouse's property during widowhood if the marriage was not under a total community property regime; for marriages under total community property law, it

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[88] Decree-Law No. 891 of Nov. 25, 1938.

[89] Law No. 5.479 of Aug. 10, 1968.

[90] This part was revoked by Law No. 1.110 of May 23, 1950.

[91] Law No. 6.697 of Oct. 1, 1979.

[92] Law No. 4.121 of August 27, 1962.

granted an *in rem* right to live in the family residence, so long as this was the only realty of such nature in the estate. Law No. 6515 of December 26, 1977, which provided for rules for marital separation and divorce, also made important amendments for the protection of children, the use of the married name, and support payments in cases of separation or divorce.

Finally, in view of the prevailing opinion that even programmatic constitutional rules have the effect of revoking incompatible prior legislation, promulgation of the present Federal Constitution on October 5, 1988, has made appreciable changes — whose exact limits have not yet been thoroughly explored by either the case law or the doctrine — in the field of family law. Thus, for purposes of government protection, the Constitution has recognized a stable union between a man and a woman as a family unit, and a law is to be enacted to facilitate its conversion into formal marriage.[93] The Constitution provides that rights and duties of the conjugal society are to be exercised equally by men and women.[94] Divorce has been made easier by a constitutional provision stating: "Civil marriage may be dissolved by divorce, after judicial separation for more than one year in cases expressed in law, or after proven *de facto* separation for more than two years."[95] The Constitution provides that "Adoption shall be assisted by the Government, in the form of the law, which shall establish the cases and conditions under which foreigners may adopt."[96] The Constitution declares that all children shall be treated equally, be they born in or out of wedlock or adopted, granting all children "the same rights and qualifications, prohibiting any discrimination with respect to filiation."[97] The Constitution finally ended the controversy over the recoverability of moral damages in our legal system, assuring such compensation as an individual constitutional right.[98] It created qualified rights to acquire urban and rural homesteads by adverse possession.[99] Finally, Article 49 of the Transitional Provisions permits the legal extinction of emphyteusis in urban land, fixing principles for the redemption of the leasehold through acquisition of direct title.

V. EFFORTS TO REFORM THE CIVIL CODE

From 1916 to the present, three attempts were made to reform the Brazilian Civil Code, and a fourth is currently under way. Only the first, which took place in the 1930s, did not confront the issue of unification of private law. Even though the

[93] Const. of 1988, art. 226 § 3.

[94] *Id.*, art. 226 § 5.

[95] *Id.*, art. 226 § 6.

[96] *Id.*, art. 227 § 5.

[97] *Id.*, at. 227 § 6.

[98] *Id.*, art. 5(V) and (X).

[99] *Id.*, arts. 183 and 191.

objective of the Government at that time was the drafting of a new Civil Code, the studies were limited to suggestions for modification of the existing Code. Later, one of the jurists nominated to draft this new code, Eduardo Espíndola, emphatically took the position that revision of the existing Code was preferable to replacing it, because it would then be possible, "leaving in force a body of law that does honor to Brazilian legal culture, (1) to integrate into the Code subsequent legislation that has added, modified, and revoked it; (2) to eliminate from the text of the Code certain contradictions and defects, stemming from the dubious wording of certain articles, whose elegant form betray their real meaning; and (3) to change the substance of certain institutions that no longer reflect the present needs of society."[100]

In 1940, the Federal Government gave a commission composed of Orozimbo Nonato, Philadelpho Azevedo and Hahnemann Guimarães the task of revising the Civil Code, charging them:

> To take account of changes brought about by subsequent laws, to follow modern legal trends, to mitigate the excesses of individualism incompatible with the present legal system, and to reduce the dualism in principles applicable to civil and commercial transactions in order to unify the precepts that should govern all private legal relations.[101]

In view of this charge, the Commission felt that the most urgent need was to work on the law of obligations. This comes through clearly in their explanation presented on January 24, 1941, to the then Minister of Justice, Francisco Campos:

> The unification of general principles on obligations, and the disciplining of types of contracts have the advantages of resolving the problem of the reform of mercantile law, which will thus be reduced to a compact nucleus of precepts regulating the professional activities of merchants; matters relating to companies and to transportation should be the subject of separate codifications.[102]

The Code of Obligations that the Commission started to draft, would have accomplished the partial unification of Brazilian private law.[103] Even though this effort was not finished, it revived and intensified debate on the convenience of the unification of private law.

In 1961, a Commission on Legislative Studies was created within the Ministry of Justice to direct and coordinate the work of reforming the Brazilian codes.[104] The then Minister of Justice, who had direct responsibility for supervising

[100] 2 Eduardo Espindola & Eduardo Espindola Filho, *Tratado de Direito Civil Brasileiro* 554, Livraria Editora Freitas Bastos, Rio de Janeiro (1939).

[101] *Anteprojeto de Código das Obrigações* (Parte Geral) 5, Imprensa Nacional, Rio de Janeiro (1941).

[102] *Id.*, at 6.

[103] The first draft for the general part was published by the Government Printing Office. Part of the specific section was subsequently published in the law review *O Direito*.

[104] Decree 51.005 of July 25, 1961.

and coordinating these projects, contracted several jurists for the preparation of discussion drafts for integral reform of codification. A directive was issued to unify the field of private law by drafting a Civil Code and an Obligations Code along the lines utilized in Switzerland. The task of preparing the discussion draft of the Obligations Code was given to three jurists: Caio Mário da Silva Pereira, Sylvio Marcondes, and Teófilo de Azeredo Santos. Prof. Orlando Gomes was charged with preparing a discussion draft of the Civil Code.

After the first three drafts of the Obligations Code were submitted and examined by a revising committee, they were converted into a Draft Obligations Code. The Draft Code was divided into three parts: Part One (obligations and their sources), prepared by Caio Mário da Silva Pereira; Part Two (negotiable instruments), prepared by Teófilo de Azeredo Santos; and Part Three (businessmen and companies), prepared by Sylvio Marcondes. The discussion draft of the Civil Code was revised by a Committee composed of Orlando Gomes (its author), Minister Orozimbo Nonato, and Professor Caio Mário da Silva Pereira. In the Statement of Reasons for the *Anteprojeto de Reforma do Código Civil* (Discussion Draft for the Reformation of the Civil Code), published in 1963, Orlando Gomes, clarified the purpose of this reform:

> Drafted with the intent to modernize civil legislation systematically, the Discussion Draft coordinates and consolidates changes made to the Code by scattered laws. It innovates in countless areas. Without this innovative purpose, no reform of the Civil Code would be justified. ... Innovation, however, does not mean slavish love of novelty, but rather taking full advantage of the experience of other peoples and of our own experience as condensed by case law and the doctrine.[105]

This explains why the authors made most use of the contributions made by the Civil Codes of Switzerland, Italy, Greece, Mexico, and Peru, as well as the discussion draft for reform of the French Civil Code.

Putting aside the changes that laws subsequent to the Civil Code had already incorporated into our legal system (such as, for example, legitimation of children by adoption), the principal innovations that the Discussion Draft of the Civil Code sought to introduce into our law were the following:

A — SUBJECT MATTER ORGANIZATION

1. The book on obligations was removed from the Civil Code because of the proposed Code of Obligations (similar to Switzerland and Poland) in which civil and commercial law are partially unified.

2. Unlike the Civil Code, the Discussion Draft had no General Part. Instead the subjects treated in the General Part were distributed in various books. Legal transactions were placed in the first part of the Draft Code of Obligations.

[105] *Memória Justificativa do Anteprojeto de Reforma de Código Civil* 19, Departamento de Imprensa Nacional (1963).

B — LEGAL INSTITUTIONS

(a) *Persons*

1. The age of majority was changed to 18. Absolute incapacity ended at age 14, and voluntary emancipation became possible at age 16. The act of emancipation could be cancelled by a court whenever the emancipated minor showed an inability to manage his property.

2. The rights of personality were regulated.

3. The concepts of domicile and residence were modified.

4. Three years after a decision declaring a person presumed dead became final and non-appeable, the spouse could remarry. If the presumedly dead spouse later reappeared, the second marriage would be deemed void, but would produce the effects of a putative marriage.

(b) *Family Law*

1. The minimum age required for a person to marry was set at 16 for males and 14 for females.

2. Some of the impediments to marriage contained in the Civil Code were eliminated.

3. Matrimonial capacity was distinguished from matrimonial impediments.

4. The concept of essential error as to the person of a spouse as a ground for the annulment of a marriage was changed.

5. If the marital property regime was completely separate, the need for one spouse to authorize the other to transfer or encumber real property interests or bring suit thereon, was eliminated.

6. The position of spouses became one of complete equality in their relations with each other and their children.

7. The regime of separate property, except for property acquired during marriage, became the normal legal regime for marital property.

8. Dowry and the partial community property regime set out in the Civil Code were abolished.

9. During marriage, the spouses could amend their marital property regime.

10. Regardless of the date of conception, a child born during a marriage was legitimate.

(c) *The Law of Things*

1. The social function of the law of property was accentuated. Article 375 provided that "Property cannot be used except in accordance with its social and economic purposes," while Article 377 stated that "Especially when exercized in the form of a firm, property must conform to the demands of the common good and is subject to legal provisions that limit its content, impose obligations, and repress abuses."

2. Passage of power and gas lines over land belonging to others was regulated.

3. The concepts of use, habitation and antichresis were abolished, and rules were adopted to encourage elimination of emphyteusis.

(d) *Succession*

1. Only collateral descendants through the third degree of sanguinity could inherit.

2. The surviving spouse became a necessary heir, having the right, as a forced heir, in the absence of a will, to one-half the estate of a deceased spouse who had no descendants or ascendants, and to one-fourth thereof if the competing heirs were children or ascendants of the decedent spouse, so long as the marriage was not under the regime of total community property.

3. Forced heirship did not imply a clause of inalienability of the inheritance.

4. The companion of a single, legally separated, or widowed man was granted inheritance rights to his estate.

5. Fideicomissary substitution was restricted to benefit only descendants of the testator unborn at the time of death.

Once again, however, the attempt to reform the Civil Code was not successfully concluded. The countless criticisms made throughout the country against certain innovations in the Draft Civil Code, especially in the area of family law, caused the Federal Government, which had forwarded the Drafts that of the Civil Code and the Obligations Code to Congress on October 12, 1965, to reverse its position and to withdraw both the Drafts for further scrutiny.

In May 1969, an order of then Minister of Justice, Luiz Antonio da Gama e Silva, formed a Commission of law professors, chaired by Professor Miguel Reale, to prepare a new Discussion Draft for a Civil Code. The members of the Committee and their areas of responsibility were José Carlos Moreira Alves (General Part), Clovis Couto e Silva (Family Law), Agostinho de Arruda Alvim (Obligations), Ebert Vianna Chamoun (Things), Torquato Castro (Succession), and Sylvio Marcondes (Companies).

This Commission had a different task from that given to its predecessor. The reform proposed by the Government in 1961 envisioned total reformulation of private law by drafting two Codes that would encompass both civil and commercial law. In 1969, the new Committee was to prepare a discussion draft that would preserve all of the existing Civil Code that remained compatible with the evolution of in Brazilian society, changing only that part which was out of step with this evolution or the advances in legal science. In one aspect, however, the orientation remained unchanged. The new Civil Code should carry out the unification of private law. To do this, the ministerial order entrusted Professor Sylvio Marcondes with responsibility for drafting the part concerned with company law.

In 1971, the Committee submitted its discussion draft to the then Minister of Justice, Alfredo Buzaid. In this discussion draft, the Civil Code continued to be divided into two large parts: the general part, consisting of three books (Persons, Things, and Juristic Facts), and the special part, consisting of five books (Obligations, Business Activity, Property, Family, and Succession). The unification of private law was accomplished by the integration into the Civil Code of the book

"Business Activity," which covered businessmen, business associations (divided into legal entities and non-legal entities), and a final chapter on complementary areas (the commercial registry, commercial names, pre-requisites and record-keeping for businessmen and companies). On the other hand, the general principles for credit instruments and contracts heretofore governed by commercial laws were included in the book covering Obligations. Subjects such as bankruptcy and credit instruments calling for payment in kind were omitted from the Code to be covered by future complementary legislation.

This discussion draft was published in 1972, in the Federal Official Gazette (*Diário Oficial*), as well as in a separate volume, for the purpose of receiving criticisms and suggestions. In March 1973, the Committee submitted a reworded text, with modifications resulting from its own efforts and from the suggestions and criticism it had received. This revised version was also published in 1973 as a separate volume and in the Federal Official Gazette in 1974. In view of suggestions from the Committee members themselves and from critical contributions sent to them, additional revisions were made. Finally, in January 1975, the Committee submitted its Draft Civil Code to the Ministry of Justice. That same year, the Administration submitted this Draft to the Federal Congress for enactment into law.

The accompanying legislative history (Explanation of Motives) highlighted the principal innovations in the Draft. Among these, the following merit special mention:

A. THE GENERAL PART

1. The rights of personality were safeguarded in a multiplicity of ways, from the protection afforded name and reputation up through the right to dispose of one's own body for scientific or altruistic purposes.

2. Legal entities were treated differently. A clear distinction was made between not for profit entities, such as associations and foundations, and entities with business purposes, such as partnerships and business companies.

3. The rules governing associations in general were modified. Special provisions were inserted on the reasons for and methods of exclusion of members and restraints upon the improper use of legal entities.

4. The rules governing legal transactions were updated, with more precise definitions of their creation, defects and invalidity. Mistakes arising from the failure of the existing Civil Code to distinguish clearly between validity and efficacy were avoided.

5. The doctrine of *lesão enorme*,[106] which had been originally rejected by Clovis Bevilaqua in drafting the Civil Code, was accepted in certain circumstances.

6. The chapter containing general principles on voluntary and involuntary representation was placed in the General Part.

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[106] *Lesão enorme (laesio enormis)* is a civil law doctrine permitting rescission or modification of certain types of contracts for gross price inadequacy. The doctrine has come into Brazilian law through subsequent legislation.

7. The distinction between time-barred rights that are lost automatically (*decadencia*) and those limitation periods that are not automatic (*prescrição*) was regulated separately.

B. THE SPECIAL PART

(a) *Obligations Law*

1. The treatment of nonperformance of obligations was reconciled with those articles of the Draft creating new ethical and social directives for civil liability.

2. The courts were given flexibility over penalties resulting from breach of contracts.

3. Contracts of adhesion were regulated, and various problems in construction contracts were resolved.

3. Insurance contracts received new treatment.

4. The Draft improved rules for the incorporation of condominium rights for buildings (called *incorporação edilícia*).

5. Banking contracts were regulated.

6. General rules for credit instruments were set out.

7. Recoverable damages were extended to include moral damages.

8. Contracts for sale with retention of title (presently governed by the Civil Procedure Code) and contracts with persons to be designated were regulated.

9. Revaluation of monetary amounts was permitted for debts of value,[107] but monetary correction clauses were prohibited in all other cases, except for clauses stipulating progressive increases in contracts to be performed in successive stages.

10. The judge was permitted to reduce damages, based upon equitable considerations, "where damages were disproportionately high in relation to the degree of fault."

11. The chapter referring to the termination of contracts included rules permitting termination for excessive hardship.

(b) *The Book on Business Activity*

1. The traditional forms of companies were revised to improve their technical structure.

2. The principles governing all forms of company activity were determined, complementing the rules for associations set in the General Part.

3. A simple partnership was instituted, and detailed treatment was given to the limited liability company.

4. Rules characteristic of corporations and cooperatives were set in general terms.

[107] A debt of value is sometimes called an adaptable debt, is an obligation that requires the obligor to pay an economic value rather than a pecuniary sum child support and alimony are classic examples.

5. The thorny problem of affiliated companies was regulated.

6. Rules governing the process of incorporation, corporate reoganization, merger, and corporate dissolution were updated.

7. The distinguishing features of an "establishment" through which a company does business were defined.

(c) *Property*

1. Surface rights and the rights of the persons signing agreements to purchase real property were included in the restricted list of rights *in rem*.

2. Property rights were to be exercised in conformity with their economic and social purposes, preserving, as provided in specific legislation, flora, fauna, natural beauty, and ecological balance, and avoiding air and water pollution.

3. An owner suing to recover his land could be deprived of title, upon payment of just compensation, if the land contained a large area that had been occupied, uninterruptedly and in good faith, by a significant number of persons, who had built or performed services deemed by the judge to be of important social and economic interest.

4. The periods for adverse possession were reduced.

5. Fiduciary property rights were regulated.

6. The rules governing antichresis and mortgage were brought up to date.

7. Emphyteusis was no longer permitted for privately owned land.

(d) *Family Law*

1. The distinction between personal and patrimonial family rights was adopted.

2. The power of the husband was reduced, with essential questions to be jointly decided. The wife's cooperation was made always necessary in the management of the conjugal society. Where there were differences, the husband's decision should prevail, but the wife could appeal to the court, so long as the matter was not exclusively of the husband's interest (personalissima).

3. The conjugal domicile was to be decided by both spouses, and the exercise of paternal power belongs as well to the wife as to the husband.

4. New rules were provided for the invalidity of a marriage.

5. The wife could recover the use of her maiden name if she were the prevailing party in an action for a legal separation.

6. Adoption received new rules, and full adoption was distinguished from restricted adoption.

7. Partial community property became the normal legal regime for marital property.

8. Dowry was no longer permitted as the normal property rule.

9. A new form of marital property, the final sharing of acquired property, was created.

10. The rules governing family property were restructured to enable them to perform effectively the social function for which they were designed.

11. The institutions of tutelage and custody were modified.

12. The property relations for concubines were to be governed by a specific law.

(e) *On Succession*

1. The modifications in family law brought about changes in inheritance law, such as, for example, deeming the surviving spouse to be a necessary heir, given the alteration in the marital property regime.

2. Legitimate children were given greater protection and were entitled to two-thirds of the estate destined for the heirs.

3. The inheritance rights of adopted children depended on whether they had been fully or partially adopted.

4. The formalities of a will were simplified, without loss of certainty and safety.

5. A sealed will could be made by another person, at the request of the testator.

6. Two corroborating witnesses were made sufficient to prove a private will.

7. The rules governing *fideicommissus* were revised, permitting its conversion into a usufruct.

8. New treatment was given to the escheat of forfeitable inheritances, as well as to the rule of forfeiture.

This Draft was considered by the Chamber of Deputies from 1975 to 1984, when it was approved with several changes, which were accepted by the Reporter of the Special Committee. Although most of the proposed changes were rejected, they resulted in 1063 amendments, analyzed by the reporters of the separate sections.[108] In family law, these changes took into account Law No. 6.515 of 1977, which created rules for divorce and modified various provisions of the Civil Code, in light of Constitutional Amendment No. 9 of June 28, 1977, which permitted abolute divorce. The Bill approved by the House is still pending before the Senate.

In late August 1989, Sen. Nelson Carneiro published an opinion as a member of the Committee which was examining the Bill emanating from the House — on the changes introduced by the Full House on the family law Book. In the introduction to this opinion the author warns that it was concluded in June 1987, so that one must re-examine positions set forth at that time in light of the innovations introduced by the 1988 Constitution.

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[108] A Special Committee of the Chamber of Deputies heard testimony from the Committee that had prepared the Draft submited to Congress by the Executive.