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## Essay: The Revised Brazilian Civil Code

André Antunes Soares de Camargo<sup>1</sup>

### I. Introduction

Brazilians – both lawyers and laypersons – as well as foreign investors interested in Brazil have reason both to celebrate and to worry. After twenty-six years of congressional discussion, a central piece of Brazilian legislation was enacted on January 10, 2002. Effective January 11, 2003, the Revised Brazilian Civil Code<sup>2</sup> (“RBCC”) not only creates entirely new civil, commercial, and family rules, but also legalizes many practices in Brazilian society and codifies some important decisions of higher courts. Given the new Code’s importance, the purpose of this article is not only to provide the reader with a brief discussion of this new Code, but also to make some comments on its main virtues and weaknesses.

Part II contains an overview of the Brazilian legal system, explaining the hierarchy of rules under the Brazilian Federal Constitution. Part III provides a summary of the Civil Code’s history. Finally, Part IV examines the RBCC itself: its importance, scope, structure, and the main changes, virtues, omissions, and criticisms thus far.

### II. The Brazilian Legal Structure and the Civil Code

According to the famous jurist Hans Kelsen, “the ground for the validity of a rule can only be the validity of another rule.”<sup>3</sup> Kelsen was describing the civilian legal system, a complex normative system in which rules are structured in pyramid form. The highest source of authority is normally the Constitution, followed by the other laws, rules, and regulations, either at the federal, state, or municipal levels. It is a hierarchical organization, which is one of the guarantees that helps the whole system to work harmoniously. Brazil is not an exception to this model.<sup>4</sup>

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<sup>2</sup> CÓDIGO CIVIL (C. Civ) (Br.), 2002.

<sup>3</sup> HANS KELSEN, *TEORIA PURA DO DIREITO* 2 (João Baptista Machado trans., Armênio Amado ed., Coimbra, 1962).

<sup>4</sup> *E.g.*, CONSTITUIÇÃO FEDERAL [hereinafter “C.F.”] [Constitution] art. 1 (1988).

Promulgated on October 5, 1988 and composed by two hundred and fifty-one articles, the Federal Constitution heads the Brazilian legal system.<sup>5</sup> Besides other important rules, it contains the list of the main principles, the fundamental rights,<sup>6</sup> and the rules that create the structure of the Brazilian state.<sup>7</sup> Brazil is a Federative Republic formed by the inseparable association of states, cities, and the Federal District.<sup>8</sup> Each of these members has autonomy, with boundaries that are defined in the Federal Constitution.<sup>9</sup> They have their own properties, obligations, and sovereignty to enact their own rules on certain matters, provided that they do not conflict with the constitution.<sup>10</sup> Brazil is an unusual type of federation. Unlike the United States, the Brazilian states have very limited legislative autonomy. Federal law is the sole means by which many bodies of law – including commercial, criminal, election, and labor law – can constitutionally exist.<sup>11</sup>

Such is also the case of the Brazilian civil law.<sup>12</sup> In other words, Brazil has just one Civil Code for the whole country, a structure that involves both advantages and disadvantages. On one hand, a federal civil code simplifies the study and understanding of its rules. A lawyer from the State of São Paulo and another from the State of Amazonas need only to use one statute in their work. On the other hand, a federal civil code in a continentally sized country like Brazil<sup>13</sup> can be unfairly applied given the totally different cultures and traditions spread throughout the country.

The Brazilian Civil Code can be considered the second most important piece of legislation in Brazil, after the Constitution. It regulates many aspects of life in Brazil, including contracts and property. Accordingly, a full revision of the Code brings about significant changes in many aspects of Brazilian law.

### III. A Brief History of the Brazilian Civil Code

Divided into two parts (one general and one subject-matter specific), the Brazilian Civil Code was enacted on January 1, 1916 and became effective exactly one year later. The first part deals with general

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<sup>5</sup> *See id.*, art. 18.

<sup>6</sup> *Id.*, arts. 1-17.

<sup>7</sup> *Id.*, arts. 18-43.

<sup>8</sup> *Id.*, art. 1.

<sup>9</sup> *Id.*, art. 18.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, art. 22, §1.

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

<sup>13</sup> Brazil encompasses more than eight million square kilometers.

rules applicable to the second part. The second part is divided into four different books: family law, property, obligations (contracts), and succession (wills). This statute was commonly known as a legislative masterpiece of its time, since it symbolized what represented the most modern legal theories developed in the beginning of the twentieth century.<sup>14</sup> However, by the end of the twentieth century, the 1916 code had two major defects: first, the code reflected the interests of a small conservative bourgeoisie culture that no longer existed, and second, the code's language was very archaic, even for jurists.<sup>15</sup>

In 1969 the Brazilian Congress, together with some of the most respected Brazilian lawyers, decided to conduct a full review of this important statute. A first draft of the revisions was made and sent to the Brazilian House of Representatives, where several adaptations took place.<sup>16</sup> But a problem developed when the revised draft code went to the Senate in 1977. The revision of the Brazilian Civil Code became a never-ending discussion. As of 2000, the project had not been approved, nor sent to the President, and nobody knew when or if the Revised Brazilian Civil Code would come into force.<sup>17</sup>

However, while the Revised Civil Code was under congressional discussion, the Brazilian courts practically adapted and updated the old-fashioned civil rules on their own accord. Although judicial decisions are not binding under the Brazilian legal system, the higher courts invariably maintained a certain understanding about some issues. However, the *de facto* judicial revisions to the 1916 Code complicated certain issues because the sources of informal authority proliferated without a proper formal change in the law.

Finally (or suddenly), the Revised Brazilian Civil Code was enacted on January 10, 2002 after almost three decades of discussions in Congress. While the new Code came as a relief to some, the new Code also tremendously altered the areas of law it regulates, yielding some improvements and some problems.

#### **IV. The Revised Brazilian Civil Code**

As mentioned before, the Civil Code is the second most important piece of legislation in the Brazilian legal system. It is the main

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<sup>14</sup> See, e.g., SÍLVIO RODRIGUES, DIREITO CIVIL VOL. I, at 12 (30<sup>th</sup> ed. 2000).

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

<sup>16</sup> The draft of the Revised Civil Code was first written by law professors José Carlos Moreira Alves and Agostinho de Arruda Alvim, among others, with the supervision of Miguel Reale, one of Brazil's most important jurists.

<sup>17</sup> Rodrigues, *supra* note 14, at 15.

statute that regulates the private situations in the country, containing both general and specific rules for family law, property, contracts, and wills. The RBCC has two thousand and forty-six articles, which makes it the longest code in force in Brazil.

Similar to the 1916 Brazilian Civil Code, the RBCC is divided into general and specific subject-matter parts. The principles in the general section apply to the subject-matter specific rules, which regulate the same areas of law as the 1916 code (contracts, property, family law, and wills), with the addition of commercial law.<sup>18</sup> The last part of the RBCC is reserved for the dispositions that help the transition from the former to the new Civil Code.

The RBCC contains several changes to the existing civil law. First, with respect to the equal rights of men and women, the new Code expands to women marriage and guardianship rights that were limited to men only.<sup>19</sup> Second, civil minority now ends at the age of eighteen, rather than twenty-one.<sup>20</sup> Third, if a long-term contract turns out to be too economically excessive for performance, a competent judge may declare the contract void.<sup>21</sup> Fourth, the time required to take title to unoccupied lands decreased from twenty-five to fifteen or to ten years, depending on the case.<sup>22</sup> Fifth, problematic co-owners may be subject to penalties or even compelled to leave their real property.<sup>23</sup> Sixth, the rights of personality, including the right to life, has become a distinct body of rights, reinforcing an existing constitutional principle, these rights may not be transferred or waived.<sup>24</sup> And seventh, to extend the application of the piercing the corporate veil, judges are now authorized to disregard the corporate entity if there is an abuse of the corporate legal existence when assets are intermingled or any wrongdoing occurs in the conduction of the business.<sup>25</sup>

The RBCC has several virtues. It was written with more clarity. Aiming at providing an easier read, the legislators decided to give another expression to many rules that already existed, adapting the

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<sup>18</sup> The Second Book of the RBCC regulates all forms of business associations, and Title VIII of Book I contains several rules concerning titles of credit.

<sup>19</sup> Many rules, such as C. CIV. art. 1 (Br.) aim at regulating C.F. art. 5, §1 (1988).

<sup>20</sup> C. CIV. art. 5 (Br.).

<sup>21</sup> *Id.*, art. 478.

<sup>22</sup> *Id.*, art. 1238.

<sup>23</sup> *Id.*, art. 1337.

<sup>24</sup> *Id.*, art. 11.

<sup>25</sup> *Id.*, art. 50.

language to the current legal Portuguese.<sup>26</sup> It has a better organic structure than the 1916 Civil Code. A good example is the lining-up of the different subjects it contains with the law school curricula, therefore facilitating easier study by students and practitioners. And perhaps most significantly, the new code codifies majority decisions from higher courts,<sup>27</sup> which also makes the study and application of certain issues easier. Also, the new code harmonizes the 1916 Civil Code, the 1988 Federal Constitution, and newer legislation like the 1990 Consumer's Protection Code and the 1990 Child and Teenager Statute,<sup>28</sup> minimizing conflicts between those bodies of law.

Although the RBCC rules have the above-mentioned virtues, Brazilian legislators have missed the opportunity to include several other important revisions. Technological advances that are influencing the commercial, biological, and medical fields have not been addressed. There are no rules for the new fields of electronic commerce and genetic engineering. Another omission concerns recently accepted realities such as the civil responsibility in family relationships and concubinage between persons of same gender. These lapses will not only frustrate judges and lawyers who will have to face difficult problems without any rules at their disposal, but also will allow lawyers and judges to insert their own ideas where the democratically elected legislators should control.

Brazilian legislators granted a one-year term before the RBCC becomes effective.<sup>29</sup> The so-called "vacatio legis" is necessary for the whole society to get used to a new statute and it is also an opportunity for the legal experts to present their critiques, studies, comments, and suggestions for improvements to this piece of legislation. Special attention was given to the RBCC, since its rules practically affect all Brazilians and foreign investors interested in Brazil.

## V. Conclusion

"With its two thousand and forty-six articles, . . . [i]t is certain that some aspects [of the new Code] will have to be improved or adapted," stated the Brazilian President when he signed the RBCC on January 10, 2002. According to Miguel Reale, the ninety-one-year-old

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<sup>26</sup> *E.g., id.*, art. 22.

<sup>27</sup> *E.g., id.*, art. 1642.

<sup>28</sup> *See, e.g.*, C.F. art. 229 (1988), C. Civ art. 1634 (Br.), and Lei No. 8069, §22, de 13 de julho de 1990, Lex de 3 trimester de 1990, addressing parental obligations to raise minor children.

<sup>29</sup> C. Civ. art. 2044 (Br.).

jurist in charge of the commission that drafted the RBCC, “the fortuitous lapses and the omissions are secondary and are easy to fix.”<sup>30</sup> The importance of this new statute is huge. Only time and the skill of commentators will tell whether Mr. Reale was right.

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<sup>30</sup> Leila Suwan, *Novo Código Civil é Sancionado Após 26 anos*, FOLHA DE SÃO PAULO, January 11, 2002, at C5.