INTRODUCTION TO BRAZILIAN LAW

EDITED BY

FABIANO DEFFENTI

&

WELBER BARRAL

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To Juliana, my wife, love, life companion.

Welber Barral

To my wife, Cass, for the selfless assistance and endless support, for which I will be forever thankful.

Fabiano Deffenti

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List of Abbreviations

ADC	Declaratory Action of Constitutionality (*Ação Direta de Constitucionalidade*)
ADI	Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade*)
ADI-O	Direct Action of Unconstitutionality by Omission (*Ação Direta de Inconstitucionalidade por Omissão*)
ADPF	Claim of Non-compliance with a Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental*)
BDR's	Brazilian Depositary Receipts
BM&F	Mercantile and Futures Exchange (*Bolsa de Mercadorias e Futuros*)
BOVESPA	São Paulo Stock Exchange (*Bolsa de Valores de São Paulo*)
CDC	Consumer Defence Code
CLT	Consolidated Labour Laws (*Consolidação das Leis do Trabalho*)
COFINS	Contribution for Social Security Financing (*Contribuição para o Financiamento da Seguridade Social*)
CPC	Code of Civil procedure (*Código de Processo Civil*)
CPI	Congressional Investigating Committee (*Comissão Parlamentar de Inquérito*)
CSLL	Social Contribution over Net Profits (*Contribuição Social sobre o Lucro Líquido*)
CTPS	Employee's Work and Social Security Card (*Carteira de Trabalho e Previdência Social*)
CTN	Brazilian Tax Code (*Código Tributário Nacional*)
CUT	Workers' Central Union (*Central Única de Trabalhadores*)
FGTS	Unemployment Guarantee Fund (*Fundo de Garantia do Tempo de Serviço*)

ICC	International Chamber of Commerce
ICMS	State Tax on the Sale of Goods and Services (*Imposto sobre a Circulação de Mercadorias e Serviços*)
ILO	International Labour Organization
IOF	Tax on Financial Operations (*Imposto sobre Operações Financeiras*)
IPI	Excise Tax over Industralised Products (*Imposto sobre Produtos Industrializados*)
IPTU	Tax over Buildings and Land (*Imposto Predial e Territorial Urbano*)
IRPJ	Company Income Tax (*Imposto de Renda de Pessoas Jurídicas*)
ISS	Municipal Services Tax (*Imposto sobre Serviços*)
ITBI	Intervivos Real EState Transfer Tax (*Imposto de Transferência de Bens Intervivos*)
ITR	Rural Land Tax (*Imposto Territorial Rural*)
IVA	Value-Added Tax
PIS	Social Integration Program (*Programa de Integração Social*)
PND	National Privatisation Program (*Plano Nacional de Desestatização)*
SESC	Social Service for Commerce
SESI	Social Service Industry
STF	Federal Supreme Court (*Supremo Tribunal Federal)*
STJ	Superior Court of Justice (*Superior Tribunal de Justiça*)
SUS	Integrated System of Health (*Sistema Único de Saúde*)
TEC	Common External Tariff (*Tarifa Externa Comum*)

Preface

Brazil has recently become a major destination for foreign investors. However, when trying to become acquainted with Brazil's legal system foreigners are often perplexed with its complexity and idiosyncrasies.

Perhaps surprisingly, there has been little written about Brazilian law in the English language, with no recent work having ever been compiled to provide the reader with an overview of the main areas of Brazilian law. This book aims to close this gap.

Part of this complexity comes from the fact that Brazilian law draws from a number of sources. While the Portuguese and Roman law tradition is still strongly felt, over the centuries – and, especially, in the last few decades – Brazilian law has borrowed from the German, Italian, Spanish and American rules in a variety of legal fields, yet without a complete legal transplant from any foreign jurisdiction. This is largely due to a sophisticated legal elite, which has assisted courts and legislators in the adaptation of foreign rules to Brazil's realities.

In the late twentieth century, Brazilian law saw major improvements, after the coming into force of the Federal Constitution of 1988. Criticised by many as cumbersome and overly analytical in many parts, no one doubts that it has provided major improvements, especially in relation to individual protections and human rights. The legacy of the military dictatorship has all but vanished from the legal rules although in practice the protection of human rights has some way to go.

Administrative Law also saw a number of positive changes. The passing of the Procurement Law in 1993, the privatisation process, together with the various statutes creating regulatory agencies, and the Fiscal Responsibility Law in 2000, all of which brought about a more solid institutional structure for both local and foreign investors and business people. The Fiscal Responsibility Law, especially, is considered the key piece of legislation that has enabled Brazil to keep up with its international financial obligations and part of the reason for Brazil's recent economic success.

In 2002, the new Brazilian Civil Code was enacted, replacing the 1916 version. The Civil Code Bill sat idly for twenty-seven years in the Congress, until it passed without much scrutiny from Congress. Albeit already an old Code when it was passed, a number of provisions were modernised – especially in the fields of Property Law and Family Law. On the other hand, in a step which is criticised by many, the new Code gave greater State influence over contractual relationships with the introduction of the 'social function of contracts' principle. Courts have used this principle to change contractual terms, severely eroding the almost unanimously accepted *pacta sunt servanda* rule.

In the dispute resolution arena, the last ten years have seen a number of changes to the Code of Civil Procedure aimed to speed up the notoriously slow Brazilian courts. The passing of the Arbitration Law in 1996, essentially implementing the UNCITRAL model with minor modifications, did not immediately have a major impact on Brazilian litigation. This was largely a consequence of the uncertainty relating to whether the Arbitration Law would be considered constitutional. Once the doubts over the validity of the Arbitration Law were put to rest by the Supreme Court's decision in *Appeal 5,206-Spain (MBV v. Resil)*, Brazil has seen a spike in the number of disputes resolved by arbitration. Large investors probably have been the greatest beneficiaries of this, embracing the new law to the extent that Brazil is now one of the key markets for arbitration bodies such as the ICC.

Advances have also been seen in the insolvency field, with the new Business Restructuring and Bankruptcy Law being enacted in 2005. Borrowing heavily from Chapter 11 of Title 11 of the United States Code, the Law shows a change of mindset on the part of legislators. Now it is clear that great efforts must be made to keep companies in trouble in business. Also, the adoption of fiduciary transfers (alienações fiduciárias), in particular, relating to real property (which occurred in 1997) and securitisations, giving further comfort to creditors in business transactions and to financial institutions, thus increasing the availability of credit in the market.

Unfortunately, it is in the key areas of Labour Law and Taxation Law that little has changed. In relation to the former, rules and regulations date back to a time when there was a much clearer employer-employee relationship than today. Created during the Getulio Vargas government in the 1940s, Labour Laws are both complex and very demanding on employers. The detail and complexity of the laws reflects in major bureaucratic costs whose clear beneficiaries are not altogether clear. Taxation Law, on the other hand, became a major source of litigation with the coming into force of the Federal Constitution in 1988. The burdensome procedures for passing tax-related laws and a poor level of procedural compliance on the part of the Congress saw hundreds of thousands of cases litigated before the courts. Tax laws have grown in an unstructured manner, with loopholes being included amidst relevant changes in various statutes not always connected with one another. This myriad of laws and regulations has now made Brazil one of the hardest places in the world to comply with tax norms. Hopefully, the newly elected legislators will make the required changes.

This book aims to provide the reader with sufficient knowledge to navigate through the major areas of Brazilian law. It is hoped that it will allow foreign lawyers and scholars to begin looking into the issues faced by Brazil and consider undertaking closer research and analysis into the laws that govern this very large developing economy that over the years has been much better known for its soccer successes than for its compliance with the rule of law.

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Chapter 1
History and Sources of Brazilian Law

*Celso Campilongo**

I. BRAZIL IN COLONIAL TIMES

To introduce Brazilian Law to the foreign reader implies setting out, from the beginning, the important differences between Portuguese America and Spanish America, as well as to point out the other specificities of Brazilian history and geography.

Unlike the European tradition of lengthy processes for the creation of political institutions and the formation of the State, Brazil was, at the time of discovery (i.e., the arrival of the Portuguese in Brazil in the year 1500), a large and scantly inhabited area (it is estimated that there were between 3 and 5 million individuals in Brazil). Unlike other parts of Latin America, Brazil did not have local people with developed cultures and institutions (such as those created by Incas, Aztecs and Mayas, for instance).

Portuguese colonisation was also different from the Spanish and English model. The relationship with the indigenous population, the distribution, occupation and exploration of the land (hereditary captaincies and *sesmarias*, that is, the large landholdings granted by the Portuguese Crown), the ways, speed and difficulties in advancing towards the inner lands, the multi-deity, polygamous and nomadic characteristics of the indigenous people, the collective use of the land and the

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non-existence of equivalent concepts or of private property relationships – or even writing (despite the important and old cave paintings) – made the Brazilian circumstances one of a truly new world, primitive and exotic in the eyes of the Portuguese coloniser.

At the time, Portugal had all factors required for maritime expansion. The early establishment of the monarchic State, the inner peace, intense commercial activity, favourable geographic position, a succession of nautical conquests and old navigational technical knowledge, as well as cartography and astronomy, for instance, explain the Portuguese leadership in the process. Portugal created the Imperial colony in 1415 (with the conquest of Ceuta) which lasted until 1999 with the handing over of Macau to China. The Portuguese domains extended through Africa, America, Asia and Oceania.

Colonial life was not easy. The distance from Portugal as well as poverty, isolation, the feeling of abandonment and the shock created by the new world persisted throughout the colonial period. From the beginning, the Portuguese prioritised the exploration of African and Asian colonies and only in the year 1530 the colonisation of Brazil began. At first, the administrative and territorial division was established, aiming to occupy the territory and to control the economic activity. After that, in 1548, in light of the failure of the hereditary captaincies, Portugal created a central body to manage the colony: the general-government (*governo-geral*). The 'Gift Letters' (*Cartas de Doação*) of the hereditary captaincies and the *forais* (Portuguese royal decrees which set land borders and granted administrative powers) are among the first legal documents relevant to the colony. The Gift Letter granted possession of the land to the grantee. Title, however, continued to belong to the King. A *foral* gave wide powers to the grantee, including applying Portuguese Law in the land, imposing taxes and organising the military defence of the area.

There is, thus, from the colonial period, a use of land which is governed by legal norms transplanted to Brazil following the Portuguese tradition and the strong influence of Roman Law. The land gifts known as *sesmarias* date back to 1375 and continue to exist throughout the colonial period up until close to the declaration of Independence of Brazil in 1822. Without a doubt, from the point of view of the origins of the Brazilian legal system, Brazil's tradition is definitely linked to western European continental law: the civil law tradition.

Customs and social, religious, political and legal practices of the local people which inhabited Brazil originally were ignored, disqualified and oppressed by the Portuguese colonisers. Clearly, with the exception of legal practices, these indigenous habits exerted great influence on the making of Brazilian culture. Family, property rights, language, the relationship with nature, food, medicine, agricultural production and various other types of the creation of colonial Brazil were influenced by indigenous practices. Portuguese Law applied during the colonial years was not totally insensitive to the local social situation. However, these were at odds with their social practices prevailing at the time, both from an indigenous and Portuguese point of views – the latter now distant from the motherland and surrounded in an enormous territory, with new people and products, and in an environment which

was largely unknown and hostile. All of this contributed to the low effectiveness, difficulty of access and lack of legitimacy of the colonial legal order. It was not the type of environment which foments the establishment of a rule of law culture. The disdain with which customary practices ignored the protests from the *quilombos* (communities of former slaves who had escaped from their masters) and the indigenous segments (*reduções indígenas*, which were communities founded on collective practices).

The Portuguese administrative practices developed slowly, from the time Brazil was discovered until 1815, when Brazil was recognised as a kingdom and, finally, in 1822, when it became a monarchy, separate from Portugal.

Brazilian economic activity went through many cycles. These cycles shaped both Brazilian economic and legal history. Initially, the Portuguese explored the extraction of *pau brasil*, a type of wood which was very useful in Europe. Soon after, the cultivation and exploration of sugar cane became widespread, especially in the north-eastern part of Brazil. It was called the 'sugar cane cycle'. A system of very large rural properties was used. Economic activity was associated with a regime of land grants by the king which also aimed at establishing settlements in the colony. Subsequently, during the eighteenth century, the colony lived the 'gold cycle', in Minas Gerais. After independence, especially in São Paulo, the 'coffee cycle' prevailed (from nineteenth century to the beginning of the twentieth century).

Unlike Spanish America, which after independence of the colonies created various countries, the area controlled by the Portuguese, even though it had administrative divisions (Brazil, on one side, and Grão Pará and Maranhão, on the other), capped its territorial unity even after independence. Despite the significant regional differences – perfectly comprehensible in light of the size of the territory, the different economic activities and climate, and by the various types of settlement, colonisation and migration – Brazil kept its unity and this, today, represents a great advantage in the country as compared to its neighbours. Since colonial times, the bases were set for the construction of an enormous internal market.

Until recently, a great part of the literature on Brazil in colonial times considered that the stratified society, the concentration of rural property in a few hands, the submissive position vis-à-vis the motherland and the dependence on exports and the slavery regime, as social-political model with feudal roots. This model was perceived as having major difficulties for the adaptation and expansion of capitalism, the establishment of an internal market, the construction of a middle class set between the wealthy large landowners and their slaves. The polarisation between the large landholdings and the slave workforce set the standards for colonial exploration. For this reason many believe that the chances for the establishment of a successful representative democracy and of the rule of law in Brazil were remote. Yet, in the last twenty years various studies have been reviewing this previous analysis. They are studies which portray the strength of the small land owners and urban merchants during the colonial years. Clearly, however, it is not a Brazilian reproduction of the utilitarianism which was then commonplace in capitalist Europe. Traits of personal interdependence, trust and mateship made

the differentiation between economic system, legal rules, religious practices and family relationships less clear.

But none of this excluded or shunned the beginnings of a slow process of accumulation, financing and investment in the colony itself.

The colonial years received different and contradictory interpretations. This debate is far from being superseded. It involves explanations that identify feudal elements in the creation of the nation. Other authors, on the other hand, tend to support the capitalist expansion and give greater weight to the participation of the colony in the international community and Brazil's role as a mere supplier of raw materials.

Some theories seek to identify and describe a peculiar and local slave-based production method. Finally, in more recent studies, the idea that Portuguese America was poor and explored by the European colonisers is being reviewed. The reasons for Brazil's slow development were more recent and a consequence not of the colonial exploration, but of political and economic decisions made by Brazil's elites.

None of this neglects or dismisses the analysis which identified a patrimonial, bureaucratic and authoritarian tradition that was part of the making of the Brazilian State. The individual power of rural landowners, sprawl around an immense country, combined with the centralising efforts of the Portuguese Crown, allowed for the construction and maintenance of the country as a unit. At the same time, the slave-master mentality and a strong Catholic influence made Portuguese America – and the motherland – insensitive to the cultural advances of European Renaissance.

The legal system in force during colonial times (the period which goes from the arrival of the Portuguese in Brazil up until independence, from 1500 to 1822) is made up by the Royal Ordinances which compiled laws and customs in use in the motherland: Alfonsine Ordinances (*Ordenações Afonsinas*), from 1446 (during the Alfonse V reign); the Philippine Ordinances (*Ordenações Filipinas*), from 1603 (during the reigns of Philip II in Spain and Philip I and Portugal – countries which remained united, under Spanish rule and known as the Iberian Union, from 1580 to 1640). The Alfonsine Ordinances are the most unique of the three compilations and can be considered among the first attempts of compiling norms in a similar manner to the modern codes. The Manueline Ordinances (*Ordenações Manuelinas*), which were an improved version of the Alfonsine Ordinances, are regarded as the first ever printed out code anywhere. The Philippine Ordinances are mere copies of the Manueline Ordinances. The Alfonsine Ordinances drew heavily from Roman Law, which was considered both as a source as well as a complementary set of rules. They include uses, customs, general laws, court rulings, agreements made with the Holy See, in addition to canonical and Visigothic Law. Book V of the Philippine Ordinances, known for the violence of the penalties imposed (generally, natural death), remained in force even after the proclamation of independence, up until the time when the Criminal Code of 1830 became law. Book IV extended its term until 1 January 1917, when the Civil Code drafted by Clovis Bevilacqua came into force.

The colony's court system encompassed a trial court comprised of single judges and special judges, with separate and decentralised territorial jurisdiction.