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CLOVIS BEVILAQUA AND THE BRAZILIAN CIVIL CODE

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COMMENTS

CLOVIS BEVILAQUA AND THE BRAZILIAN CIVIL CODE—Clovis Bevilaqua is a monument in the history of Brazilian law. His death on July 26, 1944, closed the door on an epoch. When he began his career in the eighties, Brazilian law, with the exception of the commercial code, was uncoordinated and outmoded. Now Brazil is in a period of very active work on the recodification of its laws and their adaptation to the needs of modern life. Not all of this change is the work of one man, but Bevilaqua was the principal lingering representative, among the lawyers, of the intellectual movement that accompanied the setting up of the Republic in 1889.

He was born on October 4, 1859, in the town of Vigosa in the present State, then the Province, of Ceará and educated at the Ateneu Cearense in his native town, at the preparatory schools in Fortaleza and Rio de Janeiro, and in the Law Faculty at Recife. He took his law degree in 1882 and shortly thereafter was appointed *promoter público*, an office similar to the district attorneyship, in a town in Maranhão. When

the Republic was proclaimed in 1889 he was elected deputy for Ceará to the Constituent Assembly, and entered upon the duties of the only political office he was ever to hold. Later he declined the opportunity to be a member of the new national Chamber of Deputies and the senate. From 1906 to 1934 he was juridical adviser to the Ministry of Foreign Affairs, and in 1920 was invited to become a member of the Committee of Jurists at the Council of the League of Nations.

His chief activities throughout his life were in teaching and writing on the law, and it was through these that he was so closely linked, during the last decade of the nineteenth century, with the growth in Brazil of the social and juridical ideas known as the "Recife School." He had been trained in the Law Faculty of Recife, the most distinguished law school in Latin America at that time. He was a close friend of Isidoro Martins Junior, the legal historian and was himself librarian of the Recife Law Faculty between 1884 and 1889, and subsequently professor of philosophy. His *Estudos de direito e economia politica*, a group of essays published in 1886, was the culmination in juridical studies of the influence of the Positivism that had seized the Brazilian imagination and had underlain the republicanism that overthrew the Empire.

It was the high priest of Brazilian Positivism, Benjamin Constant Bothelho de Megalhaes, who, by fostering the adoption of the celebrated "Benjamin Constant Reform," brought about the standardization of education in Brazil. Under the new system the candidate for a law degree was required to receive instruction in philosophy and history of law; public and constitutional law; Roman, civil, commercial and criminal law; legal medicine; procedural law; administrative law; and court practice. The reform, as it applied to legal education, further required each law faculty to have its own academic review, and Belivaqua became editor-in-chief of the newly founded *Revista de Faculdade de Direito do Recife*.

The Brazilians had not developed their ideas in a vacuum; the reforms in legal education, the attempts at systematization of law, and at codification—three separate but closely related matters—were reflections of similar activities in Europe. As a leader in this reform movement, Bevilaqua was guided by the works of the European masters, Comte, Ihering and Savigny and stimulated to seek perfection in the law by Tobias Barreto de Menezes, teacher of legal philosophy, and the most important figure in popularizing these ideas in Brazil. His effect on his generation of law students was profound and although his want of sympathy for his two most distinguished contemporaries, Bevilaqua and Martins Junior was marked, his work was inspiring.

The fame that Bevilaqua achieved in his *Revista* had much to do with his appointment to draft a new civil code. The difficulties encountered by Brazilians in codifying their law are apparent from the

long history of attempts at a civil code. In 1856 Augusto Teixeira de Freitas, Latin America's finest constructive jurist published an "*Esboço*" (a sketch), the draft he had prepared at the request of the government. He had at that time already prepared a "Consolidation of the Civil Laws" which served Brazil in the place of a civil code for sixty years. He had thus laid the groundwork which his successors were to follow throughout the subsequent redraftings, and he had in mind the idea of an integration of the civil and commercial law, an idea persisting even today with some prospective reformers of the Brazilian law. His work served as a model for the Argentinian and Uruguayan codes, which in turn have served several of the other Latin American republics as models for their own. It was followed in Brazil by three other attempts: one by Nabuco de Araújo in 1872, who did little to change the Teixeira de Freitas draft; another by Felício dos Santos in 1881; and the third by Coelho Rodrigues in 1890-93. Time rolled by and Brazil, having been an independent empire for seventy years and now at last a republic, had no civil code. It was still getting along with colonial legislation enacted for it by Portugal and patched and amended in detail.

On January 25, 1899, Epitácio Pessoa, the Minister of Justice, wrote thus to Bevilacqua:

"Everyone is in agreement in lamenting the fact that Brazil has no civil code and is today governed by the *Ordenações do Reino* and an infinite number of sketchy, tangled, incongruous and contradictory laws . . . It seems to me that, up until now, the most complete and perfect draft we have is Coelho Rodrigues'; the project I have in mind could take as a basis or point of departure the study of that draft in the light of the criticisms made by Gonçalves Chagas in the Senate, comparing these with those made by Nabuco, Teixeira de Freitas, Felício dos Santos, etc., and making in it the alterations or additions indicated by the study of these elements and by the personal opinion of whomsoever is charged with the work. As you see, we do not lack for material. What we lack is a jurisconsult who will make up his mind to offer this service to his country and to the government."¹

Bevilacqua was that jurisconsult. He was an indefatigable worker, and once he set to work in March, 1899, he did not pause until his draft was completed. The scheme of classification he used was in general that adopted by the draughtsmen of the German Civil Code, which had been under discussion for twenty-five years. He divided the whole into three parts: the introductory section, in which were enunciated the gen-

¹ This letter is reproduced in the law review, 20 DIREITO 113 (1943). (Author's translation).

eral principles to be used in the interpretation of the remainder and the rules relative to conflict of laws; the general part, on persons, property, and the creation and extinction of rights; and the third, or particularized part, on the law of the family, of property, of obligations, and succession. In defending the system he adopted, Bevilaqua declared that, in considering man as the nucleus of society, and man in the social group as taking precedence over the individual, he placed the law governing family relationships first. The laws governing property, obligations and inheritance are thus most naturally seen as developing from the central idea of the individual and the family. He concluded:

“It is plain from this observation that there is a manifest interdependence of concepts and of rules in the whole field of the civil law; that the institutions, as organs belonging to an all-embracing organism, present in their structure, evidence of mutual debts and frequent contacts. And, furthermore, this circumstance, which is reproduced in all aspects of the civil law, cannot be an objection to the precedence given to one of them.”²

In November, 1899, he submitted his draft with an explanatory report, which was sent by the President to the Congress on November 17, 1900. The Chamber of Deputies appointed a committee of twenty-one which held its first session on July 27, 1901. The Chamber approved the draft on April 8, 1902, and then sent it to the Senate, where it was greeted with well-prepared objections. Its chief critic was Senator Ruy Barbosa, who, from the height of his immense prestige, criticized its wording for want of clarity. All the criticism offered did not come from the Senate, however. Naturally, the debut of this child of its age was the chief subject of discussion among men who realized the importance of the codification of the law and of the ideas represented in the particular method adopted. Judges, law professors, lawyers throughout the country had been invited to comment. Inglez de Sousa, for instance, thought all codifications to be “works inadequate to our times,” unable to cope with the changing character of the society reflected in the relationships of private law.³ These criticisms stirred up polemics in defense of the draft, some by Bevilaqua himself, others by Ernesto Carneiro Ribeiro and José J. de Oliveira Fonseca. In fact, the discussions aroused by the draft, some constructive, some acrimonious, involved every Brazilian lawyer with pretensions to intellectual worth and prompted the publication of some of the best legal studies that Brazil has seen.

By far the most brilliant, if not the most fundamental, of the attacks

² PICAÑO, MACÁRIO LEMOS, CLOVIS BEVILAQUA, SUA VIDA E SUA OBRA, 1st. ed., 192-193 (Rio de Janeiro, 1936). (Author's translation).

³ Id. at 190.

upon the draft was Ruy Barbosa's. The author of the draft, he said, lacked a knowledge of the "chaste correctness" of the written language.⁴ It was expecting too much perhaps, that the Senator would receive otherwise a civil code for Brazil drafted by anyone but himself. The great Ruy, as he was called, the genius of the republican regime, the planner of the judicial reforms of the new government, the brilliant orator, the most eminent philologist of his day, had the interests of his country at heart. But on this one occasion he could not put aside his personal vanity. The "young man" chosen for this important task, he said, had not the maturity nor the breadth of attainment necessary.

"He lacked the consecration of the years, of authority. . . . There was, in his books, a slovenliness, a negligence, a disdain for good language, that deprived them of conciseness, destroyed their clarity, crippled their vigor. . . . His phrases do not have the true Portuguese flavor. They are foreign, corrupted by Germanisms and Gallicisms, falling thus into improprieties and obscurities which blur their meaning. The verbal guise of a code must be irreproachable. Any lack in its idiomatic structure assumes the proportions of a deformity. Such works, on each one of which must be impressed the seal of an age and the character of a people, are made to endure. But the limpidity of the language is the varnish that preserves the creations of the pen from corruption. A code does not tolerate flaws, inequalities, vices, blots in the wording."⁵

Criticism from so powerful a source not only stirred up defenses and further objections; it resulted also in suspending enactment of the draft for fourteen years. But after further consideration and debate, the draft was finally adopted by both houses, and approved and promulgated by the President on January 1, 1916, to go into effect on January 1, 1917. It is a conservative document, but its virtues have been frequently enumerated: it is concise, sufficiently general and flexible, comprehensive, and, above all, practical. It has been described as "occupying a place in the very first rank of civil legislation in Latin America,"⁶ and as a necessary model for other countries about to revise their civil law, since it is sound "in methodology, in technical structure, in science, and in the modern liberal tendencies."⁷ The interest it aroused outside Brazil is exemplified by the fact that French, English and German

⁴ Ruy Barbosa made this statement in an article which originally appeared in the newspaper, *A IMPRENSA*, March 15, 1899, reproduced in 20 *DIREITO*, 131-135.

⁵ *Ibid.* (Author's translation).

⁶ *D LA VEGA, CAPACITÉ DE LA FEMME MARIÉE DANS LE DOIT L'AMERIQUE LATIN* 240 (Paris, 1933).

⁷ Alfredo Colmo, in an article published in the law review, *REVISTA JURIDICA Y DE CIENCIAS SOCIALES DE BUENOS AIRES* (1916), quoted by Eduardo Espinola Filho, in 20 *DIREITO* 95 (1943). (Author's translation).

translations appeared within a few years after its adoption. The Brazilian civil law has not remained static since 1916, but the framework created for it by Bevilaqua gave coherence to the structure and permitted scope for further development.

Bevilaqua's writings went beyond the code to comprise a long list of books and articles, mainly on law and legal history. Throughout his life he remained primarily a legal scholar. Although twice he was offered a seat on the Federal Supreme Court, he declined because he could not, he said, harmonize the duties of that office with his fixed habits; his natural setting was his study. It was truly a triumph that a man so immersed in the scholar's life should have produced one of the most practical civil codes of the modern world.

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