

## Power and Family Law in Luso-Brazilian Thought: Enlightenment and the circulation of juridical ideas and legal culture\*

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### Abstract

This text focuses on juridical ideas, with reference to the issue of power and discipline in the family in the transition to modernity. It analyses the range of juridical and political ideas permeating the heated debates that have taken place in Portugal and Brazil, when much was made to modernize civil codes (19<sup>th</sup> century). It considered firstly the process in which Enlightenment ideas circulated in the field of Law, and it focussed on *potestas* and the ideological conditionings of the discussion over civil marriage, which accompanied the secularisation and modernization process in Portugal and Brazil. This issue seems to have constituted the touchstone for the conservative resistance that hampered the reforms. These subjects have assumed enormous importance today, in view of the reform of civil code in Brazil and the debate on abortion and same sex marriage. The empirical research is based in the bibliographical production published during the 19<sup>th</sup> century (theses, books, and articles in juridical journals) in Brazil and Portugal.

**Keywords:** Family Law; juridical ideas; legal culture.

### Poder e Direito de Família no Pensamento Luso-brasileiro: Iluminismo e a circulação de ideias e da cultura jurídica

#### Resumo

Esse texto enfoca nas ideias jurídicas, referidas ao poder e da disciplina familiar na transição para a modernidade. Analisa o leque das ideias jurídicas e políticas durante o debate acalorado presente em Portugal e no Brasil na época da modernização dos respectivos códigos civis (século XIX). Em um primeiro momento, consideramos o processo no qual as ideias do Iluminismo circularam no campo do Direito, destacando o pátrio poder e os condicionamentos ideológicos do debate sobre o casamento civil que acompanharam o processo de secularização e de modernização de Portugal e Brasil. Este debate constituiu o marco da resistência conservadora contra essas reformas nas codificações. Esta questão continua tendo uma enorme importância até a atualidade, se considerarmos a reforma do código civil brasileiro na virada para o século XXI e o debate sobre o aborto e o casamento de pessoas do mesmo sexo. A pesquisa empírica baseou-se na produção bibliográfica jurídica publicada durante o século XIX (teses, livros e artigos em revistas jurídicas) no Brasil e em Portugal.

**Palavras-chave:** Direito de Familiar; ideias jurídicas; cultura jurídica.

### Poder y derecho de familia en el pensamiento luso-brasileño: la Ilustración y la circulación de ideas jurídicas y cultura legal

#### Resumen:

Este texto se centra en las ideas jurídicas, con referencia a la cuestión del poder y la disciplina en la familia en la transición hacia la modernidad. Analiza el rango de ideas jurídicas y políticas que impregnaron los acalorados debates que tuvieron lugar en Portugal y Brasil, cuando fueron muchos los esfuerzos destinados a modernizar los códigos civiles (siglo XIX). En primer lugar, considera el proceso en el que las ideas ilustradas

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circulaban en el mundo jurídico y se centra en *potestas* y los condicionamientos ideológicos del debate sobre el matrimonio civil que acompañó el proceso de secularización y modernización en Portugal y Brasil. Esta cuestión parece haber constituido la piedra angular para la resistencia conservadora que obstaculizó las reformas. Hoy en día, con el cambio de milenio, estos temas han adquirido una enorme importancia en vista de la reforma del código civil brasileño y el debate sobre el aborto y el matrimonio de personas del mismo sexo. La investigación empírica se basa en la producción legal bibliográfica publicada durante el siglo XIX (tesis, libros y artículos y publicaciones jurídicas) en Brasil y Portugal.

**Palabras clave:** derecho de familia; ideas jurídicas; cultura jurídica.

### **Pouvoir et politiques familiales dans la pensée luso-brésilienne : les Lumières et la circulation des idées et de la culture juridiques**

#### **Résumé**

Ce texte s'intéresse aux idées juridiques relatives au pouvoir et à la discipline familiale lors du passage à la modernité. Il s'agit ici d'analyser l'éventail des idées juridiques et politiques qui se sont invitées dans le débat acharné ayant eu lieu au Portugal et au Brésil lors de la modernisation des Codes civils au XIX<sup>e</sup> siècle. On s'intéressera d'abord aux processus de circulation des idées des Lumières dans le champ juridique et aux conditionnements idéologiques de la discussion sur le mariage civil qui a accompagné le processus de sécularisation et de modernisation du Portugal et du Brésil. Ce thème semble constituer la pierre angulaire de la résistance conservatrice qui a cherché à entraver ces réformes. Ces sujets sont encore d'une extrême importance aujourd'hui, au tournant du millénaire, en vue de la réforme du Code civil brésilien et du débat sur l'avortement et le mariage de personnes de même sexe. Cette recherche empirique est basée sur la production bibliographique juridique du XIX<sup>e</sup> siècle (thèses, livres et articles de revues juridiques) au Brésil et au Portugal.

**Mots-clés :** politiques familiales ; idées juridiques ; culture juridique.

### **巴西-葡萄牙法制思想中的权力和家庭法：启蒙运动与法律思想和文化的传播**

#### **摘要**

本文侧重分析司法思想，涉及家庭向现代性过渡中的权力和纪律问题。它分析了民法典现代化(19世纪)进程中贯穿葡萄牙和巴西激烈辩论的司法和政治思想。它首先回顾了启蒙运动的思想在法律领域的渗透过程，侧重于讨论司法权力与执行权力(*potestas*)和围绕世俗婚礼所产生的有关神权与政权关系的辩论。这种辩论一直伴随着葡萄牙和巴西的法制世俗化和现代化进程。这个议题似乎构成了阻碍改革的保守派抵抗现代化的试金石。这些议题于当今仍然具有重要的意义，在千年之交，关于巴西民法典的改革，堕胎和同性婚姻的辩论。本文研究是基于19世纪发表在巴西和葡萄牙的文献资料(论文、书籍、发表在法学期刊上的文章)。

**关键词：**家庭法；司法观念；法律文化。

### **Circulation of juridical ideas (Europe, Portugal and Brazil)**

This text focuses on juridical ideas, with reference to the issue of power and discipline in the family as a key institution in the array of practices of social control and discipline in the transition to modernity. It analyses the range of juridical and political ideas permeating the heated debates that have taken place in Portugal since the end of the 18<sup>th</sup> century and in the context of Brazil's political emancipation (1822), when much was made of the intention to modernize both the criminal and civil codes. The analysis extends to the conclusion of this process in the early 20<sup>th</sup> century, when the Brazilian Civil Code was promulgated (1916), working with the bibliographical production published during this period (theses, books, and

articles in juridical journals). It considered firstly the process in which Enlightenment ideas circulated in the field of Law, bearing in mind the relationship between the metropolitan centre and the periphery as regards the sources of these ideas. Secondly, it focussed on *potestas* and the ideological conditionings of the discussion over civil marriage, which accompanied the secularisation and modernization process in Portugal and Brazil. This issue seems to have constituted the touchstone for the conservative resistance that hampered the reforms. The delay in modifying the civil code in Brazil was due to difficulties that reformers encountered in articulating the restrictions that the modern view of the rights of the person imposed (sullied by individualism, under the influence of the French civil code) on *potestas*, which in Brazil continued to be grounded in a pre-modern conception and a conservative and clerical affective attitude towards authority in the family (NEDER; CERQUEIRA FILHO, 2007).<sup>a</sup> These subjects have assumed enormous importance today, at the turn of the millennium, in view of the fact that a new civil code is being drawn up and discussed in Brazil.

Of particular interest to this study is to map situations of cultural appropriation with a view to identifying the advance of juridical Enlightenment, which proposed reforms to legal codes from the late 18<sup>th</sup> century onwards. The reformers' proposals led to an ideological struggle waged over various different political force fields.

It examines Portuguese-Brazilian juridical thought and culture in terms of their relationship to the most significant idea-producing centres in Europe – that is, Italy, France and Holland. The historical and ideological dynamics of late 18<sup>th</sup> century Europe were polycentric: in the late 18<sup>th</sup> century, a vast process was under way in which ideas circulated, accompanying the circulation of people, goods, etc., not only on the European continent, but throughout its overseas extensions. The issues that set the framework for this discussion are thus the origin of the ideas (that is, the place of ideas), and authenticity and mimicry (in Portugal and in Brazil).

In both Portugal and Brazil, the urge to reform that accompanied the transition to modernity set up a dialogue with the major currents of thought in the rest of Europe. On the threshold of the 19<sup>th</sup> century, introduction of the legalist paradigm, which takes the rule of Law as the axis, on which the field of politics and ideology, hinges heralded the need to adopt modern criminal and civil codes. This meant going far beyond merely introducing constitutionalist principles designed to limit the absolute powers of Europe's monarchies,

and was related to the ongoing process of secularisation. In both countries, it was being argued that these codes were in need of reform.

In Portugal, there was considerable activity, spurred at first by commissions from the monarchy itself. During the reign of Dona Maria I, in the wake of the Marquis of Pombal's reform of Law teaching (1772), which fostered an Enlightenment intellectual training, two draft codes were commissioned from the jurist Pascoal José de Mello Freire: one of public law and another of criminal law.<sup>1</sup> By the end of the 18<sup>th</sup> century, this legal consultant from Coimbra had prepared a draft reform of the *Regimento para o Santo Offício* (Rules of the Holy Office), this time on commission from the Archbishop Inquisitor-General.<sup>2</sup> None of the proposals drafted by Pascoal de Mello Freire was approved. Portugal was not to have new criminal and civil codes until the mid-19<sup>th</sup> century (in 1852 and 1867, respectively).

As readers of Bentham and Voltaire (FREYRE, 2000),<sup>a</sup> among others, Portuguese-Brazilian intellectuals showed a concern for political and juridical reform in the Empire. As regards Enlightenment theory more generally, jurists converged in taking care to refer to authors and books. Superficially they joined the drive to reform the hegemonic centre of thought: in Europe, Beccaria in Italy, and Grotius and Puffendorf in Holland, were paving the way for reform of criminal codes. The latter two authors particularly were greatly mentioned by both Portuguese jurists and their Brazilian counterparts who had studied at Coimbra. After all, it was the Coimbra training that lay behind the first generation of public figures to take the political helm in Brazil after its political emancipation. Meanwhile, the winds of modernity blowing from France heralded reform of the civil code. It was at this point that the core of political, ideological and affective resistance to the changes lay among Portuguese-Brazilian jurists, because the new conception of Family Law that had grown up in the process of the French Revolution entailed a secularised view of marriage, admitting divorce. Throughout the 19<sup>th</sup> century, the French civil code (of 1804, but known as the Napoleonic Code) was the ideological watershed that divided – passionately – the political universe of jurists.

In Brazil, the independence movement that culminated in political emancipation in 1822 also raised the need to produce a civil code and a criminal code for the young nation

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<sup>1</sup> FREIRE, Pascoal Melo (Manuscript) *Direito Público de Portugal*, Reserved Section of the Lisbon National Library, COD. 8.527;<sup>a</sup> FREIRE, Pascoal Melo. *Ensaio de código criminal a que mandou proceder a Rainha D. Maria I*, Lisbon: Typographia Maignense, 1823.<sup>a</sup> Rare Works Section of the Rio de Janeiro National Library.

<sup>2</sup> See by the same author: *Projecto de hum novo Regimento para o Sancto Officio*, Reserved Section of the Lisbon National Library, COD. 92.<sup>a</sup>

that was emerging. In 1830 the criminal code was approved. A close reading of the 1830 Criminal Code reveals the strong presence of the draft code commissioned from Pascoal José de Mello Freire in the late 18<sup>th</sup> century, along with Enlightenment penal ideas inspired in Beccaria and Bentham (NEDER, 2000).<sup>a</sup> Brazil was to wait nearly another century for the civil code. It was not until 1916 that the Brazilian Civil Code was approved – that is, 94 years after political emancipation (1822) and 27 years after the Republic was proclaimed (1889). Until then Family Law had been ruled by the *Ordenações Filipinas* (Ordinances of King Dom Felipe II) of 1603. The historical situation was thus one where the pendulum swung alternately between rupture (political emancipation, drafting of a new criminal code, change of political regime from monarchy to republic, etc.) and continuity (the *Ordenações* remained in force in Portugal, and were the basis of Family Law in Brazil). The relationship between centre and periphery thus acquired unprecedented complexity depending on the point of view adopted. Where was the centre: in Italy, Holland or Portugal?

By and large, this study takes as its frame of reference the strong links that existed between Portuguese and Brazilian political thinking during the period in question. In considering the relationship between centre and periphery as regards the Enlightenment in the juridical sphere, it refers to a single historical and ideological formation in Portuguese Brazil and its relation to the various European centres mentioned above, where Enlightenment ideas were produced. In particular, it focuses on the framing of a plan to build a Portuguese-Brazilian empire drawn up by a portion of the intellectual field influenced by the political orientation of the Marquis of Pombal and his project of conservative modernization. In this project, historical updating was undertaken in such a way as to ensure the historical formation's placement in the overall panorama of the world market, without altering the (strongly hierarchized) social structure or the dominant Thomist world-view (NEDER, 2000).<sup>b</sup>

It goes without saying that these subjects have assumed enormous importance today, at the turn of the millennium, in view of the fact that a new civil code is being drawn up and discussed in Brazil. To what extent is the delay in Brazil's approving a civil code symptomatic of the lingering presence of a political (and juridical) culture strongly grounded in absolutist and Thomist conceptions of power, hierarchy and obedience? To what extent does the reach of *potestas*, as formulated in the *Ordenações do Reino* (Ordinances of the Realm), perpetuate a holistic, extended model of family where the *paterfamilias* is plenipotent and the idea of the individual very tenuous? What are the implications of this structure of family

for the rights of women and of the *filius familias* (succession, dowry, emancipation, etc.)? Lastly, how has this structure affected (and how does it still affect) women's situation and the institutional model for caring for orphans and other "at-risk" children as they are known today? Moreover, are the contempt for life and the genocidal practices associated with extermination, mainly against Afro-Brazilians, not also anchored in the omnipotent absolutism of this *paterfamilias* and in the State's reiterated absence from the parental function? This study is informed by the belief that many of the problems experienced today in the field of public policies on care for children and teenagers (child prostitution, sexual abuse, rape, domestic violence, neglect) cannot be solved unless the underlying historical and cultural process is clearly understood. The fact that public policies for caring for children and teenagers, the elderly and the mentally ill have failed over more than one hundred years of the Republic (in the welfare, judicial, police or educational fields) can be said to be largely due to the timid manner in which the (more often than not, paradoxically strong and authoritarian) State has performed its parental function (LEGENDRE, 1983,<sup>a</sup> 1992<sup>a</sup>). This is to say that political and cultural culture in Brazil gives a degree of ideological support to the *paterfamilias* that is all-powerful in the juridical text of the law (CERQUEIRA FILHO, 1993<sup>a</sup>),<sup>3</sup> holding sway over a broad swath of kin (wife, children, other relatives, godchildren, servants and retainers). This support, in addition to its macro-political effects, which have been given considerable attention in studies in the field of Political Science (VIANNA, 1974<sup>a</sup>),<sup>4</sup> produces ideological and political effects, which hamper efforts to institutionalise and professionalize effective public policies. In other words, violence against women, asylums (for the mentally ill and the elderly), orphanages, prisons (including those for young offenders) – as well as the public education system – do not act fully to ensure the ideological support necessary for the State to exercise its parental function.

### **Family Law: continuity and discontinuity**

There are strong ideological and affective links between social formations in Brazil and Portugal, which point to certain specific features in the transition to modernity. Although these social formations' place in the international market has modernized and updated them historically, by breaking with the previously dominant political and juridical mentality, clerical

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<sup>3</sup> In the text of the law alone. Such absolute powers have meant the absence or degradation of the paternal figure (in the psychoanalytical sense) in Brazil's historical and ideological formation, which has had its effect on the process of identity building.

<sup>4</sup> The reference was written in 1949, which is still a fundamental source of reference for these studies.

conservatism has acted to produce psychological, political and even juridical effects favouring the continuance of Thomist conceptions. Studies of social control and discipline focussing on the issue of the family as an institution seen as a part of social control technologies constitute a privileged field for observing this process.

Proposals for reform of the penal code, which arose first in 18<sup>th</sup> century Italy with Beccaria, introduction of the 1804 French revolutionary civil code which proposed civil marriage and, later, the 1897 German civil code which was much mentioned by Brazilian jurists dealing in Family Law, led to a debate where the circulation of juridical ideas can be seen clearly.

Above all, what has to be borne in mind is how the idea of the individual was accepted (or rejected) in Brazil's historical formation during the transition to modernity (as in Europe) and, in view of the authority of the State and the family (*potestas*) in Brazilian civil law, how that idea was incorporated. At the same time, it is important to consider, on the basis of juridical thinking and the family as an institution, how forms of social control and discipline either did or did not change.

Especially as regards juridical thinking, we identified a set of absolutist fantasies of absolute social control, expressing vestiges of a rather ancient juridical and political culture, which are an enduring presence where penetration by Enlightenment proposals was insufficient to bring significant change to the social and political organization underlying juridical practices in Portugal and Brazil (BATISTA, 2000).<sup>a</sup> The Thomist worldview that was spread throughout the Iberian Peninsula by the political and ideological action of the Roman Church and which upheld a rigidly hierarchical conception of society produced effects of long-lasting cultural permanence, the developments from which have strongly influenced the affective and emotional dimensions of historical formations (CERQUEIRA FILHO; NEDER, 1997).<sup>a</sup> The later resist, to this day, the results of all the changes brought about by Enlightenment and liberal conceptions of rights.

We identified these permanencies by analysing the metaphors/ metonymies, and condensations/ displacements, taken here as *symptoms/ signs* revealing what is very often unconscious affective and emotional content. The Italian historian Carlo Ginzburg (1991)<sup>a</sup> proposes a heuristic method centring on *marginal data, details* and *residues*. These are manifest involuntarily and enable the analyst to perform significant interpretative procedures, which we applied with outcomes in the field of the emotions and affect. Our methodological approach is heterodox. On the one hand, we are adopting the method of clues and the idea

of symptom in combination with, and in a manner extended by, a psychoanalytical perspective; on the other, we are not tied rigidly to the conception of culture and cultural permanency adopted by the Italian historian (grounded in the structuralism of Levi Strauss), as we are considering the process of cultural appropriation from a dynamist perspective.

In both Brazil (1889) and Portugal (1910), the Republican project made for a series of modernizations, after the fashion of the Pombal reforms, by separating Church and State. However, we have found evidence of a psychological and ideological continuity guaranteeing authoritarian social control practices, with emphasis on a penal juridical dogma in detriment to disciplinary procedures applied by Criminology, which, on an interdisciplinary basis, could take in issues raised by Sociology, Anthropology and by Psychology and Psychoanalysis. The permanencies and the continuity are more evident in the field of Family Law (civil law): merely discussing them has had neuralgic psycho-affective implications for the conservative clergy in the two historical formations. The outcomes of this process in the republican 20<sup>th</sup> century can be observed in how extremely difficult it was to alter the juridical statutes of Family Law and in the major obstacles positivist republicans encountered in Brazil in, for example, implementing a public education policy. Pressure from the Church against full-time public schooling, for instance, cannot – in our opinion – be understood solely as the Church, with its enormous network of confessional schools, preserving its economic interests. The cultural and ideological core of this resistance to public education and beneficent policies is strongly imbued with the idea of the Tridentine family, as a civilizational project of the Church, and constitutes the affective basis of the ideological struggles that hinder public policies in these sectors (NEDER; CERQUEIRA FILHO, 2007).<sup>b</sup>

We feel that, at this turn of the millennium, the education and professional training of efficient social operators (doctors, judges, prosecutors, police officers, teachers, social workers, etc.) will have to be taken as a prime strategic point of reference for social development. Social operators must know how to deal, politically and ideologically, with these historical and cultural permanencies.

We consider Portuguese juridical thought a matrix – far more in the sense of a cultural permanency (in juridical culture), a substrate, than as a “source of inspiration” – for Brazilian juridical and political thought. The inspiration came from liberal juridical thinking as such, in terms of appearance and of thematic and ideological preferences.

This, we feel, is the reason for a certain kind of historical updating that channelled the transition towards modernity with authoritarian traits. Institutional aspects of modernization



were incorporated, while a conservative interpretation of the reforms resulted in inflexions in certain liberal ideas. The reforms brought about by the Marquis of Pombal in the mid-18<sup>th</sup> century are an example of this situation. Their formula of historical updating (grounded in political pragmatism) continues to influence the processes of modernization in Portugal and Brazil (FAORO, 1994).<sup>a</sup>

### **Circulation of Enlightenment ideas and reforms in the field of Law**

This study of the circulation of ideas is historically coextensive with the debate over reform to the civil and criminal codes, a debate, which, in Brazil, has dragged on practically from the moment of political emancipation from Portugal when the need for reform was first aired. It runs through the 1850's, when Augusto Teixeira de Freitas was commissioned by the Emperor to draft a reform law, and culminates at the other extreme of the process with heated debate at the turn of the 19<sup>th</sup> to the 20<sup>th</sup> century, when another draft law was commissioned, this time of the jurist Clovis Bevilacqua. Bevilacqua draft was questioned and reformulated by the Republican government, the principal senator and the mediator being Rui Barbosa.

Detailed scrutiny of this process can help clarify our references for the key points of the current debate over (once again) reforming Brazil's civil code. How far did the influence of the German Civil Code, mentioned above, mould the Brazilian Civil Code? Where is the much-mentioned tendency to individualism (French influence?) in the Brazilian code drawn up by Clovis Bevilacqua?

Indeed, at the turn of the 18<sup>th</sup> to the 19<sup>th</sup> century these questions were being discussed in both Portugal and Brazil. Modernization of the French code brought ideological pressure to bear for alterations to be made. Resistance from the conservative clergy (in both the historical formations studied: Portugal and Brazil) satanized the winds of modernity (NEDER, 2011);<sup>a</sup> jurists addressed their arguments particularly to legitimate of civil marriage. As a result, in addition to the two countries' legislations, there is a vast body of documentation is available, including theses, books, articles and pamphlets produced at the centre of this discussion.

The framing of practices of control and discipline can be found in the Church and its strong influence on European Christianity. Michel Foucault (1978)<sup>a</sup> situates the birth of the prison in the 16<sup>th</sup> century houses of correction, while his friend Philippe Ariès (1978)<sup>a</sup> underlines the importance of the Council of Trent (1545-1563) in defining the Roman

Church's civilizational strategy, in view of its delimiting a model of family and standards of control of social and sexual behaviour.

The social and ideological implications of law and rights, in terms of a broader consideration of questions relating to control and discipline outside the prison, have been highlighted by Michel Foucault (FOUCAULT; FARGE, 1982<sup>a</sup>)<sup>5</sup> and by Pierre Legendre (1983).<sup>b</sup> The subtle workings of the micro-powers operating insidiously through the “docile bodies”; the art of distributions, through schools, barracks, timetables, hierarchical oversight, eye-play and a plethora of other control technologies, that push us out onto the street and into police control of urban space. On the other hand, we are also invited to consider these same issues within four walls: the juridical institutionalization of the family in the transition to modernity (BURGUIÈRE; LEBRUN, 1998).<sup>a</sup>

The delay in modifying Brazil's civil code was due to the difficulties encountered by reformers in the juridical field in articulating the restrictions that the modern view of personal rights (tainted by individualism) imposed on *potestas*, which in Brazil continued to be grounded in a still medieval and clerical conception of authority in the family (NEDER, 2016).<sup>a</sup>

The difficulties facing Augusto Teixeira de Freitas, author of the first draft civil code for Brazil, were not far from the situation described above. The first foundation for modern conceptions in the field of Family Law lay in the individualism of the Napoleonic Code. Accompanying the spread of Napoleonic influences through Europe at the turn of the 18<sup>th</sup> to the 19<sup>th</sup> century, there was a major expansion of revolutionary ideas, which drove a process of secularisation, even in formations strongly controlled by the Church, as was the case with Portugal (and Brazil), Spain and Italy (SAINT-JOSEPH, 1856).<sup>a</sup> On the other hand, the obstacles of an emotional and affective-religious order encountered by Augusto Teixeira de Freitas reveal the enormous difficulty of gaining acceptance for the idea of marriage outside the control of the Church. Evidently, one cannot disregard the other obstacles and difficulties – relating to his opposition to slavery – that doomed his undertaking to failure and have been exhaustively studied by authors in the field of Law in Brazil. Nonetheless, we consider the affective-religious obstacles to have been more decisive in the failure of the first draft civil code in Brazil.

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<sup>5</sup> One should stress the importance of studies following a Foucaultian approach in interdisciplinary research groups. Outstanding in the field of social history is the work of Arlette Farges in co-authorship with M. Foucault himself.

From a quantitative survey of the country of origin of the bibliographical references contained in Augusto Teixeira de Freitas's *Esboço de Código Civil* (1852), considered the by clerical conservative as the most brilliant Brazilian jurist certain significant inferences may be made.

Firstly, one finds quite a restricted set of bibliographical references (a total of 106 works), such as the *Traité du Droit Romain* by Von Savigny (translated to French in 1860), which is much quoted. On the other hand, there is a considerable series of references to codes and laws in the finest style of pre-modern juridical commentaries. Notice that Von Savigny's work reached Portugal and Brazil by way of the French translation.

By contrast, the collection of bibliographical references contained in the footnotes of Clovis Bevilacqua's *Código Civil dos Estados Unidos do Brasil* (Brazilian Civil Code), half a century later, displays the variety and wealth of influences, and the ideological and political openness of this author. The percentage of mentions of works originating in French juridical Enlightenment production in the field of Family Law is greater than from any other centre of production of ideas, and second only to the Brazilian references (NEDER, 2017).<sup>a</sup>

The code that was approved, which restricted *potestas* by a number of individualist articles (such as children's attaining full majority at 21 years of age, and so on), was considered to have been influenced by the German Civil Code (particularly in the imprint left by Rui Barbosa on parliamentary debate over reform of the code). However, there are a number of indications that allusion to the German code may have occurred as a way to disguise (or dissent from) the influences of the French code, given that there was great political, ideological and affective resistance to accepting the latter in the Brazilian (and Portuguese) historical formations, because they were associated with the revolutionary process the Napoleon Civil Code, that contained the idea of civil marriage as a civil contract (and as consequence, introduced divorce).

Family Law in Brazil may thus be supposed to have been subject to multiple influences, although juridical literature originating in France is a conspicuous presence. A survey of the origin of the works available in the library of the Institute of Brazilian Lawyers (IAB) also shows the strong French influence in terms of the circulation of ideas and book. There are 66 books on Civil Law from France, 20 books from Italy and 23 from Brazil. We hadn't found books from Germany.

The IAB was set up in 1843, and inaugurated its library in 1896. Note that the collection in this library is exclusively the product of donations by jurists who are members of the Institute.

Most interestingly, there is a complete absence of works originating in Germany, the country that is supposed to have influenced Brazilian Civil Law. If the much-mentioned influence of the German civil code on Brazilian civil laws ever existed, it was as a result of the exhaustive participation of the senator Rui Barbosa (who was indeed a Germanophile and representative of catholic conservative thought) in the Senate Special Commission's discussions of the lower house's draft civil code<sup>6</sup>.

### **Potestas in Brazil: hierarchy and obedience**

From a broader point of view, here we are dealing with relations among Church, State and Society. Church efforts to interfere in the authority of the *paterfamilias* go back many centuries. Although, at the core of the reform of the Catholic religion, it was the Council of Trent (BOSSY, 1990)<sup>a</sup> that decisively implemented a civilizational and disciplinary project centred on the institution of the family, the Council of the Lateran (1215) stands as the first landmark in the Church's intervention in authority in the family (LEBRUN, 1993).<sup>a</sup> Marriage became a sacrament in the dogma of the indissolubility of the bonds of matrimony. What was more important, the fiancés' consent (free, of course) opened the way for strengthening the individual *vis-à-vis* the family, thus undermining the authority of the father and his legal substitutes. No longer would he alone decide on and arrange marriages. One thus had, on the one hand, the strong presence of Christianity, which left a decisive mark on the Iberian Peninsula, imprinting on it historically and ideologically a culture that was holistic, patriarchal and openly misogynist. On the other hand, we have identified a number of steps in the construction of a certain notion of the individual, which coexists paradoxically with a holistic outlook, based particularly on Thomist philosophy (MORSE, 1989).<sup>a</sup>

Modern times are considered the period when a secular ideology developed that cemented Society and shaped the State, and thus supplanted the liturgy of religious thought; this occurred particularly in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries. In the two social formations

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<sup>6</sup> The report by Rui Barbosa was published in 1902, under the title: *Projecto de Código Civil Brasileiro – Trabalhos da Comissão Especial do Senado – Parecer do Senador Ruy Barbosa sobre a redacção do projecto da Camara dos Deputados*, 2 v. Rio de Janeiro, Imprensa Nacional, 1902.

in question (Portugal and Brazil) this process displays specific features and ambiguities, which deserve special mention.

One thus had a patriarchal universe where the *paterfamilias* was invested with authority and responsibility over all members of his household, including employees (GRAHAM, S., 1992).<sup>a</sup> Each one was expected to lend obedience according to their place – as wife or as child, as retainer or as slave – as demanded by this kind of strongly hierarchized order.

The power of the head of a family was far-reaching and very broad in scope. Legally, he administered the family's properties and assets, both those of his wife and his unmarried children, and granted or denied permission for his sons to marry, or even for a widowed daughter to remarry (CAULFIELD, 2000).<sup>a</sup> The marriages of his subordinates, particularly servants, depended on his consent and his participation. Male authority extended to all members of the household. According to the *Ordenações*, the head of the family had the right to inflict physical punishment on his wife, his children, his servants and his slaves. All were subject to their lord's authority. They were also implicitly under his protection. The *potestas* thus extended to all who lived or worked in the same house. At the same time, marriage was considered a sacrament administered by, and under the jurisdictional authority of, the Church, as provided for in Canon Law.

The ideas of household and family had a profound effect on the nature of politics. They came to constitute the basic units of political order, and proved particularly resistant to change. The father exercised legal authority over everyone. Legally, he could even imprison any child living with him, regardless of age. Under the *Ordenações do Reino*, children gained emancipation at the age of 25. However, “[...] *the law considered the property of children living with the family, regardless of their age, as belonging to their father*” (GRAHAM, R., 1997, p. 34).<sup>a</sup> The term *paterfamilias* (father of the family) implied not only care (protection), but authority (obedience). In any case, unmarried daughters and sons remained under the yoke of *potestas* beyond 25 years of age, particularly if they lived in their father's house.

The cultural and political extent of *potestas* in Brazil affected the development of public policies on education and social assistance. Here, we feel, lies the explanation for why State intervention in these sectors has been so ineffective, even when one considers historical junctures where the State was a strong presence (the dictatorship of *Estado Novo* – 1937-1945 - or the recent military dictatorship – 1964-1984), when the legitimacy of State action was not open to question. Unlike England and its colonies, where charity and poverty

relief were undertaken by the State (the *Poor Law* came into existence in the Elizabethan period), in Portugal and Brazil these practices were restricted to the Church and the charity instituted by it, the *Santas Casas de Misericórdia* (Holy Houses of Mercy). Care for children and the elderly has been treated as a problem of the private (family) sphere: a problem for the *paterfamilias*, from whom all expect protection as a counterpart to unqualified obedience.

The family's limits extended beyond the father, the mother and their children. Protection in exchange for loyalty imposed by family bonds extended firstly to a broad range of kin by blood and by marriage. The family, with its blend of force and benevolence, was the paradigm that oriented social relations. Lack of obedience or loyalty would expose the individual to exploitation by others. In families, the threat of punishment and the promise of benevolence described the lives of wives and children, slaves, retainers, copyholders, small traders and other followers of the lord. This authority also coloured power relations, particularly in politics. It was this authority of the *paterfamilias* that the Civil Code was designed to limit.

The Brazilian Civil Code provides for the emancipation of children at 18 (partial) and 21 (total). A number of restrictions on *potestas* were signed into law. Custom however continued to dictate that children remain at home (living under their father's roof) as a duty of protection and obedience to their father. Marriage thus came to constitute a very important factor in breaking down *potestas*, in terms of building up the idea of the individual.

Throughout the period in which reform of the civil laws was being discussed in Brazil, opinions were divided for and against civil marriage. The forces of clerical conservatism and the patriarchy were particularly reluctant to transfer the whole civil register from Church to State hands, mainly as regards marriage. This was because, once under civil control, marriage would cease to be a sacrament and come to be considered a contract, as it is in most modern societies. All contracts, in juridical terms, provide for dissolution. The discussion was thus coloured by the issue of divorce and the indissolubility of marriage.

Once the Republic was proclaimed under the leadership of positivists, some who were candidly anti-clerical, the provisional government passed the law of civil records and marriage by decree in 1890, with Rui Barbosa as its mentor. When the new draft civil code, commissioned of Clovis Bevilacqua in the closing years of the 19<sup>th</sup> century, was discussed, it ran into strong opposition from Rui Barbosa, whose activities greatly delayed its approval. San Tiago Dantas (1949)<sup>a</sup> interprets Rui Barbosa's intervention, notable for its criticism of the errors of language in the bill drafted by Clovis Bevilacqua, as having been a political

strategy of the then senator of the newly-proclaimed Republic to prevent the code's being approved hastily, as he believed that it should be lasting and carefully prepared. For our part, we prefer to stress Rui Barbosa's ideological and affective disagreements with the individualism present in the draft law (which reflected the influence of French juridical ideas).

It should be remembered that when the Marriage and Civil Registry Law was passed by decree, along with the 1890 Penal Code – that is, before Brazil's first republican constitution, the liberal Constitution of 1891 – the intention was anticipatory, to ensure authoritarian and repressive legal and institutional support for the technologies of social control. As was to be expected, institutionalization of the republican regime in Brazil entailed the separation of Church and State. Civil marriage was going to be introduced, one way or another. The law of 1890 (Decree No. 181) paved the way for the inevitable, though without providing for divorce, and the indissolubility of marriage was maintained until 1977.

## **Conclusion**

To conclude, we would like to return to the subject of the ineffectiveness of public care policies for children and teenagers in Brazil.

As already said, *potestas* was restricted by the letter of the Brazilian Civil Code. However, the extent of obedience to the father conferred by custom and political practice continued to give political and ideological support to plenipotent paternal authority. Here one is dealing with a paternal figure which makes it difficult to identify limits imposed by law, in both the juridical and psychoanalytical senses. The idea that care for the infirm (the elderly, abandoned or neglected children and the insane) should be provided by setting up a state institutional structure accompanied the modernization of Brazil in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Nonetheless, the permanency of the power of the head of the family was to produce ideological effects that hindered the process of legitimating public policies in the sector. Successful public policies in this field (carried out by governmental or non-governmental institutions) depend, at least partly, on building an ideological and affective framework to support the parental function vested in an authority capable of replacing the all-embracing figure of the *paterfamilias*.

Certainly, the debate over the new criminal and civil codes constituted the privileged setting where Brazilian society confronted social changes – which, after all, were not all that radical – regarding modernization, the formation of the Republican State, and the shifting

and diversified senses of national identity in a period of economic and social change and cultural turbulence.

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