

# THE CIVIL CODE IN PORTUGAL AND GOA: COMMON HERITAGE AND FUTURE PROSPECTS\*

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## I

### The idea of codification and the codification movement of the 19<sup>th</sup> Century

The word «code» stems from the Latin *codex*. This was the term used in the Roman Empire to identify the collections of imperial constitutions, the most prominent of which was the *Codex Justinianus*, of 534, that became the 3<sup>rd</sup> part of the *Corpus Iuris Civilis* compiled under the auspices of Emperor Justinian<sup>1</sup>.

In the Middle Ages, codes basically still consisted of collections of laws, arranged in alphabetic, chronological or some other order. They were also called «constitutions», «books» or «ordinances». Their main purpose was to facilitate access to the applicable law, which at that time was still largely fragmentary and scattered<sup>2</sup>.

The modern notion of code is somewhat different. It means a text that contains the fundamental rules that govern a given category of legal relationships, organized according to a scientific criterion<sup>3</sup>.

Codes in this sense only emerged after the French Revolution of 1789. They are, in fact, the product of a revolutionary idea: the *principle of equality*, which requires the general application of the law. Thus understood, a code should in principle prevail over all local or personal laws, as well as over customs.

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<sup>1</sup> Cfr. Paul Krueger (ed.), *Corpus Iuris Civilis*, vol. II, *Codex Iustinianus*, Berlin, 1906.

<sup>2</sup> See the *Ordenações do Senhor Rey D. Affonso V*, reprint, Lisbon, 1998, book I.

<sup>3</sup> See Franz Wieacker, «Aufstieg, Blüte und Krisis der Kodifikationsidee», in *Festschrift für Gustav Boehmer*, Bonn, 1954, pp. 34ff.; Vincenzo Piano Mortari, «Codice», in *Enciclopedia del Diritto*, vol. VII, Milan, 1960, pp. 227 ff.; Reinhard Zimmermann, «Codification: history and present significance of an idea. À propos the recodification of private law in the Czech Republic», *European Review of Private Law*, 1995, pp. 95 ff.; Mário Bigotte Chorão, «Código», in *Polis*, 2<sup>nd</sup> ed., vol. I, Lisbon/São Paulo, 1997, columns 952 ff.; and Afonso Rodrigues Queiró, «Código», in *Enciclopédia Verbo Luso-Brasileira de Cultura. Edição Século XXI*, vol. 7, Lisbon/São Paulo, 1998, columns 264 f.

The first code drafted according to this model was the French Civil Code of 1804, which embodied the ideals of the French Revolution: *freedom, equality and solidarity*. It also aimed at ensuring the certainty of the law and its stability. The latter aim was certainly achieved, since the French code has lasted for more than 200 years and survived ten constitutions<sup>4</sup>.

From France, the Civil Code disseminated to other countries, such as Spain, Belgium and Holland, which took it as the basis of national codifications. The Portuguese Civil Code of 1867 was also influenced by it, although, as we shall see later, it is arranged according to a different system and is to some extent based on different philosophical premises.

A very different Civil Code, the so-called *Bürgerliches Gesetzbuch*, entered into force in Germany in 1900. It is much more concerned with conceptual rigour and economy of thought than the French code. Its rules are, in fact, the expression of an *abstract approach to law*, according to which instead of dealing directly with the types of situations that occur most frequently in social life, such as contracts or wills, the Code should strive to regulate first what is common to those situations, e.g. the so-called declaration of will (*Willenserklärung*)<sup>5</sup>. In order to understand and apply the provisions of such a code, a specific training is required; the code is thus inaccessible to laymen. This notion of code was very influential in Portugal, notably in the 1966 Civil Code<sup>6</sup>.

The prestige acquired by the French and the German codes explains why almost all continental European countries have adopted a Civil Code, which eventually became a symbol of the Civil Law legal family<sup>7</sup>.

Even some countries that do not belong to this legal family are presently in the process of adopting a Civil Code. This is the case, for example, of the People's Republic of China.

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<sup>4</sup> See the papers collected in *1804-2004. Le Code Civil, un passé, un présent, un avenir*, Paris, 2004; and L. Beaudoin/P.-G. Jobin, *Le Code Civil 1804-2004. Livre du Bicentenaire*, Paris, 2004.

<sup>5</sup> See, on this, Folke Schmidt, «The German Abstract Approach to Law. Comments on the System of the Bürgerliches Gesetzbuch», *Scandinavian Studies in Law*, 1965, pp. 131 ff.; Reinhard Zimmermann, «Characteristic Aspects of German Legal Culture», in Mathias Reimann/Joachim Zekoll (eds.), *Introduction to German Law*, Munich, 2005, pp. 1 ff.

<sup>6</sup> See Antunes Varela, «Código Civil», *Polis*, vol. I, columns 930 ss.; António Pinto Monteiro, «La codification en Europe: le Code Civil portugais», *Boletim da Faculdade de Direito da Universidade de Coimbra*, 1992, pp. 1 ff.

<sup>7</sup> See Dário Moura Vicente, *Direito Comparado*, vol. I, *Introdução e parte geral*, Coimbra, 2008, specially pp. 124 ff.

## II

### The Portuguese Civil Code of 1867

Let us now turn to the Portuguese Civil Codes. The first one was the 1867 Code. It was drafted by António Luiz de Seabra, a judge at the Oporto Court of Appeal, whom the Queen of Portugal had appointed to that task in 1850. His draft code, originally submitted in 1858 and subsequently revised by a committee of experts, was approved by a Law of 1 July 1867, and entered into force on 23 March 1868.

The code was preceded by very important doctrinal works, among which one should mention those of Borges Carneiro, Correia Teles and Coelho da Rocha, which Seabra used when preparing the code<sup>8</sup>.

Although inspired by the French Code, the Portuguese Civil Code of 1867 follows a different system. It is divided into four parts, dealing respectively with civil capacity, the acquisition of rights, the right of property and the breach of rights and its remedies.

The Code embodies an *individualistic vision* of the law: it puts its emphasis on the individual holder of the rights, not on social institutions. Party autonomy knows very few limits. The consequences of the lawful exercise of individual rights are not relevant<sup>9</sup>. The influence of the German philosopher Immanuel Kant on the author of the code is visible throughout its provisions<sup>10</sup>.

Nevertheless, the Portuguese code didn't share the secularism of its French counterpart: catholic marriage, for example, was awarded civil effects, which was not the case in France.

## III

### The Portuguese Civil Code of 1966

A different vision of Civil Law inspired the Portuguese code of 1966. Its preparatory works began in 1944 and were undertaken by a commission composed

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<sup>8</sup> See António Pedro Barbas Homem, *O movimento de codificação do Direito em Portugal no século XIX*, Lisboa, 2007.

<sup>9</sup> See article 13 of the Code, according to which: «*He who exercises a right in conformity with the law shall not be liable for the damages that may arise from such exercise*».

<sup>10</sup> See Francisco José Velozo, «Orientações Filosóficas do Código de 1867 e do futuro Código», *Scientia Iuridica*, 1967, pp. 155 ff.; and António Braz Teixeira, «Sobre os pressupostos filosóficos do código civil português de 1867», *Fides. Direito e Humanidades*, 1994, pp. 137 ff.

mostly by law professors and chaired by Adriano Vaz Serra, a former Minister of Justice and professor at the University of Coimbra. Once concluded, those preparatory works underwent a comprehensive revision, in which a major role was played by Antunes Varela, a professor at the University of Coimbra who at the time held the office of Minister of Justice.

The code was approved by a Decree-Law of 25 November 1966 and entered into force on the 1<sup>st</sup> of June 1967.

The system of this code is very similar to the German one. It is divided into five books: a General Part comprising the provisions that are common to all categories of civil law relationships; the Law of Obligations; the Law of Things; Family Law; and the Law of Successions. The style of the code's provisions, which are highly abstract and technical, is similar to those of the German one.

The code was preceded by a long doctrinal evolution in which the writings of Guilherme Moreira and Manuel de Andrade, both law professors at the University of Coimbra, played a significant role.

It reflects the evolution of Portugal towards a social State and a higher concern with the protection of the weaker party and the compliance with ethical standards in civil law relationships. Several important restrictions are thus imposed on the free will of the parties, which the previous Code did not provide for. The principle of good faith (*boa fé*) in the formation and performance of contracts, the prohibition of the abuse of rights (*abuso de direito*) and a certain *favor debitoris* are three hallmarks of the new code, which overcame the liberal ideology that inspired the 1867 Civil Code<sup>11</sup>.

It what concerns Family Law, the new code reinstated adoption as a source of family relationships and established the communion of acquired assets (*comunhão de adquiridos*) as the default matrimonial regime, instead of the general communion of assets provided for in the previous code.

In Succession Law, the code provides that the portion of the testator's property that he or she cannot dispose of (*legítima*) varies according to the heirs at stake and thus no longer consists, in all circumstances, of ½ of that property, as was the case under the Civil Code of 1867.

By widely adopting general clauses, such as good faith, the code also gives judges a much wider discretion when deciding cases than its predecessor.

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<sup>11</sup> See Antunes Varela, «Do projecto ao Código Civil», *Boletim do Ministério da Justiça*, vol. 161 (1966), pp. 5 ff.

The 1966 code underwent some substantial changes after the 1974 Revolution.

The first one ensued from the Additional Protocol to the Concordat between Portugal and the Holy See, entered into in 1975, by virtue of which divorce became applicable to those married through the Catholic Church.

On 25 November 1977, a major reform of the code aimed at adapting it to the 1976 Constitution was enacted. It affected mostly Family and Succession Law<sup>12</sup>.

By virtue of the reform, the principle of equality between spouses in what concerns their rights and duties before each other and when exercising parental authority was introduced in the code. Also, parents must now take into account children's opinions and recognize their autonomy in organizing their lives. Nubile age was set at 16 for both genders. The dotal regime was abolished.

As for Succession Law, the 1977 reform awarded the spouse the status of mandatory heir (*herdeiro legitimário*), along with the children and parents of the deceased. In intestate succession, the spouse is now in the 1<sup>st</sup> succession group, competing with descendants. He or she may never receive less than ¼ of the inheritance. He or she is also in the 2<sup>nd</sup> group, competing with ascendants. Finally, he or she cumulates his or her capacity as heir with his or her rights to ½ of the goods eventually corresponding to the communion. Discrimination between children born in and outside wedlock (*filhos ilegítimos*) for succession or other purposes was also abolished in 1977.

Other amendments of the Code, related *inter alia* to Family Law, have taken place since 1977<sup>13</sup>. This was the case of the 2003 reform of the rules on adoption. Also, a law enacted in 2010 has allowed same-sex marriages, thus abolishing the centuries-old requirement of diversity of genders for matrimony.

#### IV

#### **The reception of the Portuguese Civil Code in Goa, Daman and Diu**

By a Decree of 18 November 1869, the Civil Code of 1867 was extended to the Overseas Provinces of Portugal.

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<sup>12</sup> See, on the impact of the 1977 reform in Family Law, Antunes Varela, *Direito da Família*, vol. I, 5th ed., Lisbon, 1999, pp. 58 ff.; and Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo*, 3rd. ed., Lisbon, 2010, pp. 88 ff.

<sup>13</sup> See Heinrich Hörster, «Evoluções legislativas no Direito da Família depois da reforma de 1977», in *Comemorações dos 35 anos do Código Civil e dos 25 anos da reforma de 1977*, vol. I, *Direito da Família e das Sucessões*, Coimbra, 2004, pp. 63 ff.

In Portuguese India, however, the usages and customs of the New Conquests, as well as those of Daman and Diu, as compiled in their respective codes, were preserved by that Decree, insofar as they were not contrary to morality and public policy. Parties to whom this exception applied could nevertheless opt in for the Civil Code.

Thus, when Goa, Daman and Diu were integrated in the Indian Union, as territories thereof, the Civil Code of 1867 was fully applicable there.

By virtue of the *Goa, Daman and Diu (Administration) Act 1962*, all laws in force in these territories, including the Civil Code, were kept in force «until amended or repealed by a competent Legislature or other competent authority». Accordingly, they became internal laws of the new Union Territories (as they then were)<sup>14</sup>.

Since then, some legal acts of the Indian Union concerning Civil Law matters, such as the *Indian Contract Act 1872* and the *Indian Transfer of Property Act 1882*, were extended to Goa, Daman and Diu and the corresponding provisions of the Civil Code were repealed.

The remaining provisions of the Code, notably those concerning Family and Succession Law<sup>15</sup>, Property Law (except its transfer) and Tort Law, are however still in force in Goa, Daman and Diu. They apply not only to Christians born there during Portuguese administration and to their descendants, but also to non-Christians in all matters not regulated in their Codes of Usages and Customs<sup>16</sup>. In this sense, the Civil Code should be characterised as a uniform (although local) code, not as a personal

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<sup>14</sup> On the status of Portuguese Law in Goa, Daman and Diu, see Dirk Otto, «Das Weiterleben des portugiesischen Rechts in Goa», in Erik Jayme (ed.), 2. *Deutsch-Lusitanische Rechtstage. Seminar in Heidelberg 20.-21.11.1992*, Baden-Baden, 1994, pp. 124 ff.; Carmo D'Souza, *Legal System in Goa*, vol. II, *Laws and Legal Trends (1510-1969)*, Panaji, 1995, pp. 253 ff.; *idem*, «Evolução do Direito português em Goa», *Revista da Faculdade de Direito da Universidade de Lisboa*, 1999, pp. 275 ff.; Manohar Sinai Usgãocar, «Bird's Eye View of the Portuguese Civil Code of 1867 and of the Portuguese Civil [Procedure] Code of 1939», *Revista da Ordem dos Advogados*, 1998, pp. 19 ff.; *idem*, «Civil Code as a Source of Civil Rights», *Goa Law Times*, 2001, vol. 1, pp. 1 ff.; and F. E. Noronha, *Understanding the Common Civil Code. An Introduction to Civil Law*, Nagpur, 2008, pp. 95 ff. and 111 ff.

<sup>15</sup> See, for an English translation of those provisions, Manohar Sinai Usgãocar, *Family Laws of Goa, Daman and Diu*, 2 vols., Goa, 1979/1988; Dário Moura Vicente *et al.* (eds.), *O Direito da Família e das Sucessões no Código Civil português de 1867: uma perspectiva do século XXI – Family and Succession Law in the Portuguese Civil Code of 1867: a XXIst Century Approach*, Lisbon, 2008; and Ave Cleto Afonso, *The “Portuguese Law of Goa” (Succession and Inventory)/O Direito “Português” de Goa (Sucessão e Inventário)*, Goa, 2009.

<sup>16</sup> *I.e.*, the *Code of the Usages and Customs of the Non-Christian Inhabitants of Daman*, of 31 August 1854; the *Code of Usages and Customs of Gentile Hindus of Goa*, compiled in the Decree of 16 December 1880; and the *Code of Usages and Customs of Non-Christian Inhabitants of Diu*, approved on 10 January 1894. See on the second of these codes Luís da Cunha Gonçalves, *Direito hindú e mahometano. Comentário ao Decreto de 16 de Dezembro de 1880 que ressalvou os usos e costumes dos habitantes não cristãos do distrito de Goa na Índia Portuguesa*, Coimbra, 1923.

law<sup>17</sup>. In these territories of India, the aspiration to a uniform Civil Code, as expressed in article 44 of the Constitution<sup>18</sup>, has thus found its realisation<sup>19</sup>.

## V

### **The reception of the Civil Code in other Portuguese-speaking countries**

A similar phenomenon occurred in other former Portuguese territories.

By a Decree (*Portaria*) of 4 September 1967, the new Civil Code was extended to the Overseas Provinces, where it entered into force on the 1<sup>st</sup> of January, 1968.

When these Provinces became independent<sup>20</sup>, the Civil Code was therefore applicable in their territories.

The new States expressly kept Portuguese laws in force until amended or repealed and insofar as they are not contrary to their Constitutions.

Thus, the Portuguese Civil Code of 1966 became the Civil Code of five new African countries. To be sure, these countries have in the meantime extensively modified or revoked certain parts of the code, notably the book on Family Law (which is no longer in force in Angola and Mozambique); but in its essential traits their Civil Codes are still the same as the Portuguese one.

A different process took place in Macao. The administration of this territory was formally handed over by Portugal to the People's Republic of China on 20 December, 1999. By virtue of the *Joint Declaration of the Government of the Portuguese Republic and of the Government of the People's Republic of China on the Question of Macao* entered into by the two countries in Beijing on 13 April, 1987, the Portuguese legislation in force in that territory at the moment of handing over the administration to China should remain «basically unchanged» for 50 years thereafter. This is why the Civil Code is still applicable in Macao, albeit in a reformed version enacted on 3 August, 1999.

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<sup>17</sup> See, in this sense, Y. V. Chandrachud, «Inaugural Speech on the Goa Lawyers' Symposium on "Family Laws in Goa"», in *Glimpses of Family Laws of Goa, Daman and Diu*, Margão, Goa, 1982, pp. 1 ff. (at p. 3); and Manohar Sinai Usgaocar, «Family Laws in Goa, Daman and Diu: Are they uniform?», in *ibidem*, pp. 85 ff. (at p. 89).

<sup>18</sup> Which provides that: «The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India».

<sup>19</sup> See Gustavo Filipe Couto, in *Glimpses of Family Laws of Goa, Daman and Diu*, p. VII.

<sup>20</sup> In Guinea-Bissao, independence was unilaterally declared by the People's National Assembly on 24 September 1973; in Mozambique, Cape Verde, São Tomé e Príncipe and Angola, it was a consequence of the agreements negotiated between Portugal and the liberation movements of those territories and took place on 25 June, 5 July, 12 July and 11 November 1975, respectively.

Still another situation is that of East Timor. This former province of Portugal was annexed by Indonesia in 1975, after its independence was unilaterally proclaimed on 28 November of that year; as a consequence of that aggression, Portuguese laws *de facto* ceased to apply. However, in a referendum held on 30 August 1999, the East Timorese people voted to become independent from Indonesia. The independence of the Democratic Republic of East Timor was accordingly restored on 20 May, 2002. It has in the meantime adopted its own laws. A draft Civil Code was published in 2008, which is highly based on the Portuguese Civil Code of 1966.

In Brazil, which became independent in 1822, a Law of 20 October 1823 provided that the ordinances, laws and regulations of the King of Portugal would remain in force there until a new Code was adopted and insofar as they were not amended. By virtue of this law, the Ordinances of King Philip applied in Brazil until January the 1<sup>st</sup>, 1917, when the Brazilian Civil Code came into force. This code, notwithstanding its original traits, reflected to a large extent Portuguese legal tradition (according to some authors, even more faithfully so than the Portuguese Civil Code of 1867).

In 2002, a new Civil Code was adopted in Brazil. It had been drafted in 1975 by Professor Miguel Reale, of São Paulo. One of its major inspirations was, unsurprisingly, the Portuguese Civil Code of 1966, from which it took several of its innovations, such as the protection granted to personality rights, the rules on legal acts (*negócios jurídicos*) and on agency (*representação*), as well as the relevance awarded to good faith (*boa fé*), to the prohibition of the abuse of rights (*abuso de direito*) and to unjust enrichment (*enriquecimento sem causa*) as a source of obligations.

From this brief outline one may conclude that a reception of the Civil Code has taken place in several Portuguese-speaking countries and territories, by virtue of which that code has either become a part of the law of these countries and territories or has at least highly influenced it.

A *legal community* comprising these countries and territories has thus emerged, within which jurists share many fundamental legal values and concepts and can therefore easily understand each other<sup>21</sup>.

## VI

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<sup>21</sup> See, on this, Dário Moura Vicente, «O lugar dos sistemas jurídicos lusófonos entre as famílias jurídicas», in AAVV, *Estudos em homenagem ao Professor Doutor Martim de Albuquerque*, Coimbra, 2010, pp. 401 ff.

## **The age of *de-codification***

Notwithstanding its dissemination in four continents, the codification ideal has undergone some erosion during the 20<sup>th</sup> Century.

In Europe, the growing intervention of states in social life, in particular through the regulation of economic activities, has led to the adoption, in recent years, of a large number of special statutes on Civil Law matters, many of which are the result of the transposition of European Union Directives. This is the case, for example, of recent laws on product liability, unfair contract clauses, time-sharing, e-commerce, etc.

A phenomenon of *de-codification* has thus occurred in Europe, by virtue of which Civil Law to a large extent now consists of rules not included in Civil Codes. This phenomenon became so widespread that our times have been baptised by one author as the *age of de-codification*<sup>22</sup>.

Eventually, de-codification also reached the legal systems of the Portuguese-speaking countries that received the Civil Code. This is what happened, *inter alia*:

- In Angola, Cape Verde and Mozambique, where, as mentioned above, new family laws have replaced the corresponding provisions of the Civil Code;
- In Brazil, where a Consumer Defence Code enacted in 1990 absorbed the regulation of many Civil Law relationships;
- In Goa, where Indian laws on contracts and transfer of property have been extended to this State and a Bill on Succession Law, intended to replace the corresponding provisions of the Civil Code, was published in 2008<sup>23</sup>.

## **VII**

### **The trend towards re-codification and modernisation of Civil Codes**

More recently, however, the negative consequences of de-codification, notably the incoherencies it generates and the difficulties it gives rise to in what concerns access to law, have forced national legislators to *re-codify* Civil Law and, at the same time, to modernise Civil Codes.

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<sup>22</sup> *L'età della decodificazione* is precisely the title of the book on this subject originally published by the Italian writer Natalino Irti in 1978. See also on this Hein Kötz, «Taking Civil Codes Less Seriously», *The Modern Law Review*, 1987, pp. 11 ff.

<sup>23</sup> See Legislative Assembly of the State of Goa, *The Goa Succession, Special Notaries and Inventory Proceeding Bill, 2008 (Bill No. 36 of 2008)*, Porvorim, Goa, 2008. For criticism of this Bill, see Ave Cleto Afonso, *op. cit.*, pp. xi f.

This is what happened, e.g., in Holland, with the Civil Code of 1992; in Quebec with the Civil Code of 1994; in Russia, with the Civil Code of 1994; in Germany, with the modernisation in 2002, of the Part of the Civil Code on the Law of Obligations; and in France with the enactment, in 2006, of a new book IV of the Civil Code on guarantees and with the 2008 reform of the Code's rules on prescription.

Some therefore say that in the 21<sup>st</sup> Century codification of Civil Law is *en vogue* again<sup>24</sup>.

This vogue has also reached Portugal. In 2002, the Portuguese Government announced an ambitious plan to reform the Civil Code. This plan was, to be sure, not continued by subsequent Governments, which gave precedence to procedural law reforms; but in 2006 a new law on tenancies re-inserted in the Civil Code many rules governing this subject, which were previously contained in special statutes. Recodification of Civil Law is therefore, although on a smaller scale, also taking place in Portugal<sup>25</sup>.

In Mozambique, the Commercial Code of 2004 has, to a certain extent, had the same role, since it incorporates several provisions that frequently stand outside the Civil Code in other countries, including Portugal, such as those on general contract terms.

In Guinea-Bissao, a law recently approved by the National Assembly has inserted in the Civil Code several provisions contained in the Uniform Act on Guarantees enacted by the Organization for the Harmonisation of Business Law in Africa (OHADA), of which that country became a member in 1996, thus adapting national law to this Act.

## VIII

### The intrinsic value of a Civil Code

These developments indicate that, in spite of the de-codification of Civil Law occurred in the 20<sup>th</sup> Century, Civil Codes retain an intrinsic value.

In fact, codes present major advantages over case-law and statutes.

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<sup>24</sup> See Olivier Remien, «On the Trend Towards Recodification and Reorientation in Private and Business Law», *Electronic Journal of Comparative Law* (disponível em <http://www.ejcl.org>), vol. 12.3, December 2008, p. 1.

<sup>25</sup> See António Menezes Cordeiro, *Da modernização do Direito Civil, I, Aspectos gerais*, Coimbra, 2004; and Paulo Mota Pinto, «O Código Civil Português: “de uma possível tendência para o esvaziamento a uma também possível necessidade de reforma”? Algumas reflexões», *Themis*, 2008, pp. 25 ff.

First and foremost, given their uniform nature, codes ensure, much more effectively than statutes and case-law, that equal treatment is given to identical cases.

Moreover, being systematic and coherent bodies of rules, codes avoid conflicts between rules contained in different statutes or precedents. Intrinsic, or internal, harmony of laws is thus ensured.

Finally, codes considerably facilitate the task of finding the applicable rules and of anticipating the solution of individual cases, since for that purpose lawyers don't have to make extensive researches in law reports or official journals. Certainty of the law and legal security are thus enhanced.

In many countries, civil codes have, with the passing of time, become symbols of national or local identity. Its provisions were assimilated by their addressees and are wilfully accepted and followed. The code then fulfils one of the most important tasks performed by the law: that of ensuring peaceful coexistence among the members of a human community.

Of course, this does not mean that codes, once enacted, should remain untouched. Updating or modernising codes, as was recently done in Germany and France, is essential in order to keep them in line with the evolution of society. Such a task should, however, not be taken lightly. Often, it takes many years of hard work by a nation's most qualified jurists.

## IX

### **Major problems faced by the contemporary codification of Civil Law**

So what are, one may ask, the major problems that legislators face when considering a reform of the Civil Code?

We would like to point out just a few of them.

One may, in the first place, ask whether a general part should be included in the Code.

Both the Portuguese Civil Code of 1966 and the Brazilian Civil Code of 2002 contain a general part; but the Italian one of 1942 and the Dutch one of 1992 do not.

A general part is certainly a great intellectual achievement. It ensures economy of rules and equal treatment of identical cases. But the application of its provisions can raise difficult problems due to their high level of abstraction<sup>26</sup>.

A possible alternative is to lay down in the Code only the provisions dealing with the most common cases (e.g. contracts) and to determine that those provisions may be extended, with the necessary adaptations, to cases that occur less often (e.g. unilateral acts)<sup>27</sup>.

Secondly, a question arises as to the place that should be reserved to Private International Law in a Civil Law codification. Should it be included in the Civil Code, as was the case in the Portuguese Civil Codes of 1867 and 1966, in the Russian Civil Code of 1994 and in the Dutch 2009 draft for the Book 10 of the Civil Code? Or should Private International Law be the subject-matter of a special statute, as currently happens in Germany, Switzerland, Italy and Belgium?

The first solution greatly enhances the scope of a Civil Code. But Private International Law also comprises rules on jurisdiction and the recognition and enforcement of foreign judgements<sup>28</sup>, which necessarily fall outside the scope of a Civil Code. In order to ensure the coherence of those rules, a better option may therefore be to codify Private International Law autonomously<sup>29</sup>.

Thirdly, one should address the problem of whether Commercial Law ought to be included in the Code.

In France and Portugal, Commercial Law is the subject-matter of specific codes; but a *code unique approach* in what concerns Private Law has prevailed in the Swiss, Italian, Dutch and Brazilian Civil Codes, which also comprise rules on some

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<sup>26</sup> See, in recent literature, Claus-Wilhelm Canaris, «Funções da Parte Geral de um Código Civil e limites da sua prestabilidade», in Faculdade de Direito da Universidade de Coimbra (ed.), *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, vol. II, *A parte geral do Código e a teoria geral do Direito Civil*, Coimbra, 2006, pp. 23 ff.; and António Pinto Monteiro, «A Parte Geral do Código, a Teoria Geral do Direito Civil e o Direito Privado Europeu», in *ibidem*, pp. 57 ff.

<sup>27</sup> This technique is used, for example, in article 1324 of the Italian Civil Code.

<sup>28</sup> See, in this sense, in Portuguese literature, António Ferrer Correia, *Lições de Direito Internacional Privado*, vol. I, Coimbra, 2000, pp. 64 ff.; Rui de Moura Ramos, *Direito Internacional Privado. Relatório sobre o programa, conteúdos e métodos de ensino da disciplina*, Coimbra, 2000, pp. 21 ff.; Maria Helena Brito, *Direito do Comércio Internacional*, Coimbra, 2004, pp. 180 f.; Dário Moura Vicente, *Direito Internacional Privado. Problemática internacional da sociedade da informação*, Coimbra, 2005, pp. 73 ff.; and Luís de Lima Pinheiro, *Direito Internacional Privado*, vol. I, *Introdução e Direito de Conflitos. Parte geral*, 2nd ed., Coimbra, 2008, pp. 153 ff.

<sup>29</sup> This is advocated, *inter alia*, by Luís de Lima Pinheiro, «Algumas reflexões sobre a codificação portuguesa do Direito Internacional Privado», in *Estudos em homenagem ao Prof. Doutor Sérvulo Correia*, Lisboa, 2010, vol. III, pp. 743 ff. (at p. 768).

Commercial Law issues (although not all: industrial property, for example, is regulated autonomously)<sup>30</sup>.

Now, if Civil Law is to be understood as the common core of Private Law, and Commercial Law as a special branch of Private Law dealing with relationships arising from acts of trade and with the specific needs of trade, it would seem that Commercial Law should remain outside the Civil Code<sup>31</sup>.

Yet, many acts of trade are nowadays performed by ordinary people in order to satisfy personal needs; and many rules that were formerly reserved to Commercial Law, such as those aiming at the protection of reliance, have also flourished in Civil Law, which to a certain extent takes into consideration commercial interests as well<sup>32</sup>.

Fourthly, one may ask what is the proper place of Consumer Law in the legal system.

Some countries, such as Brazil, France and Italy, have adopted Consumer Codes. In Portugal, a draft Consumer Code, which reflected the influence of the Brazilian code, was published in 2006; but it has so far not been enacted<sup>33</sup>.

The fact is that «consumers are us all», as President Kennedy once said. Thus, as a repository of common rules applicable to common persons, the Civil Code should also regulate consumer relationships.

To this one may add that one of the major purposes of Consumer Law – the protection of the weaker party in relationships entered into between professionals and consumers – has also become a major concern of modern Civil Codes.

The fifth issue to be addressed in this context concerns the role that should be reserved to custom in a Civil Code. In particular, one may ask whether the aspiration to a uniform law is compatible with the applicability of customary rules.

As is well known, custom has great relevance as a source of law in many African and Asian societies. In several European countries, however, customary law is

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<sup>30</sup> See Jan Peter Schmidt, *Zivilrechtskodifikation in Brasilien*, Tübingen, 2009, pp. 163 ff.; *idem*, «Code unique», in Jürgen Basedow, Klaus J. Hopt e Reinhard Zimmermann (eds.), *Handwörterbuch des Europäischen Privatrechts*, Tübingen, 2009, vol. I, pp. 263 ff.

<sup>31</sup> See, in this line of reasoning, Rabindranath Capelo de Sousa, *Teoria geral do Direito Civil*, vol. I, Coimbra, 2003, pp. 28 f.; José de Oliveira Ascensão, *O Direito. Introdução e teoria geral*, 13th ed., Coimbra, 2005, pp. 348 ff.; Carlos da Mota Pinto, *Teoria geral do Direito Civil*, 4th ed., Coimbra, 2005 (by António Pinto Monteiro e Paulo Mota Pinto), p. 49.

<sup>32</sup> See Menezes Cordeiro, *Tratado de Direito Civil Português*, I, *Parte geral*, tome I, 3rd ed., Coimbra, 2005, pp. 169 ff.

<sup>33</sup> See, on the issue of whether a Consumer Code should be adopted, with very different opinions, José de Oliveira Ascensão, «O Anteprojecto do Código do Consumidor e a publicidade», in *Estudos do Instituto de Direito do Consumo*, vol. III, Coimbra, 2006, pp. 7 ff.; and António Pinto Monteiro, «Sobre o Direito do Consumidor em Portugal e o Anteprojecto do Código do Consumidor», in *ibidem*, pp. 37 ff.

regarded with less favour. This is the case of France, where the law that approved the Civil Code revoked all general and local customs<sup>34</sup>. More recently, the Russian Civil Code denied any effect to custom *contra legem*<sup>35</sup>.

Other Civil Codes, however, have regulated the effects of custom and even provided for its applicability *ex officio* by the courts. This is the case of the Portuguese Code of 1966, which deals with this issue in art. 348<sup>36</sup>.

If a legal system is to be in line with the sense of justice prevailing among its addressees, it should not ignore the phenomenon of *legal pluralism*, nor should it attempt to suppress custom<sup>37</sup>.

But, as is the case of other sources of the law, the applicability of custom is necessarily limited by certain fundamental values, notably those that are enshrined in the Constitution.

This is remarkably expressed in the East-Timorese constitution of 2002, which provides in article 2, paragraph 4: «*The State recognizes and values the customary norms and usages of East-Timor that are not contrary to the Constitution and to the legislation that specifically deals with customary law*». Likewise, the Mozambican Constitution of 2004 states in article 4: «*The State recognizes the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental values and principles of the Constitution*». More recently, the Angolan Constitution of 2010 has declared in article 7 that: «*The validity and legal force of custom is recognized insofar as it is not contrary to the Constitution and it does not offend the dignity of human persons*».

Finally, the drafters of civil codes are faced with the question of whether courts should be allowed to decide disputes on the basis of non-normative criteria, such as equity and general principles.

This is sometimes a requirement of justice, since legislators cannot foresee all possible cases. That's why general clauses, such as good faith, have been inserted in

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<sup>34</sup> See art. 7 of *Loi du 30 ventôse an XII*.

<sup>35</sup> Art. 5, § 2.

<sup>36</sup> Which states: «*1. He who pleads customary, local or foreign law must prove its existence and content; but the court must seek to establish it on its own motion. 2. The court must also ex officio establish customary, local and foreign law, whenever it has to decide on the basis of such law and none of the parties has pleaded it, or the opposite party has admitted its existence and content or has not objected to its application. 3. If it is impossible to determine the content of the applicable law, the court must resort to the rules of Portuguese law*».

<sup>37</sup> According to Oliveira Ascensão, the admission of custom as a source of law reflects a concept of social existence in which there is respect for difference: see «O costume como fonte do direito», *Revista Trimestral de Direito Civil*, 2000, pp. 39 ff.

several provisions of the German and the Portuguese Civil Codes<sup>38</sup>. The latter Code also allows equity decisions, as long as a specific provision of the law permits them or the parties have agreed thereto and provided also that the case does not refer to a non-disposable legal relationship<sup>39</sup>.

But the Dutch Civil Code goes farther in this respect, by stating in article art. 2 (2) of book 6: «A rule that is binding upon the parties by virtue of the law, of usages or of a legal act is not applicable if, in the occurring circumstances, that is unacceptable according to the criteria of reasonableness and equity»<sup>40</sup>.

## X

### The future prospects of the Civil Code in Portugal and Goa

So what are the future prospects of the Civil Code? Are Civil Codes doomed to disappear, given the intricate problems faced by their draftsmen, notably when trying to reconcile uniformity and pluralism? Should codes be replaced by statutes and personal laws?

We do not think so. As long as Civil Law remains faithful to the ideals of justice and legal certainty, which to some extent necessarily require equal treatment of identical cases and foreseeability of judicial decisions, codes – even if enacted in the 19<sup>th</sup> Century – should prevail as the central elements of a legal system.

It is however crucial that codes keep abreast of times and stay in line with the notions of justice that prevail in society. They should therefore be updated whenever this proves necessary. That is probably the greatest challenge that jurists presently face both in Portugal and Goa.

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<sup>38</sup> See, on the general clause of good faith, Franz Wieacker, *Zur rechtstheoretische Präzisierung des § 242 BGB*, Tübingen, 1956; António Menezes Cordeiro, *Da boa fé no Direito Civil*, Coimbra, 1985; and Reinhard Zimmermann/Simon Whittaker (eds.), *Good Faith in European Contract Law*, Cambridge, 2000.

<sup>39</sup> See article 4.

<sup>40</sup> See, on this provision, Arthur Hartkamp, «Judicial Discretion under the New Civil Code of the Netherlands», *American Journal of Comparative Law*, vol. 40 (1992), pp. 551 ff.