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978-1-107-18354-4 — The Brazilian Legal Profession in the Age of Globalization

Edited by Luciana Gross Cunha , Daniela Monteiro Gabbay , José Garcez Ghirardi , David M.

Trubek , David B. Wilkins

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## THE BRAZILIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION

This book provides the first comprehensive analysis of globalization's impact on the Brazilian legal profession. Employing original data from nine empirical studies, the book details how Brazil's need to restructure its economy and manage its global relationships contributed to the emergence of a new "corporate legal sector" – a sector marked by increasingly large and sophisticated law firms and in-house legal departments. This corporate legal sector in turn helped to reshape other parts of the Brazilian legal profession, including legal education, pro bono practices, the regulation of legal services, and the state's legal capacity in international economic law. The book, the second in a series on Globalization, Lawyers, and Emerging Economies, will be of interest to academics, lawyers, and policy-makers concerned with the role that a rapidly globalizing legal profession is playing in the development of key emerging economies and how these countries are integrating into the global market for legal services.

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# The Brazilian Legal Profession in the Age of Globalization

THE RISE OF THE CORPORATE LEGAL SECTOR  
AND ITS IMPACT ON LAWYERS AND SOCIETY

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## Foreword

Ary Oswaldo Mattos Filho

This book is an important and pioneering analysis of transformations in the world of legal practice being undertaken today by lawyers in Brazil. Through a detailed survey of the major changes the legal world in Brazil has gone through over the last decades, this book illuminates the most recent phase in the evolution of the profession.

From the creation of law courses in Brazil in the early nineteenth century to today, Brazil's legal profession has gone through several major phases. This has occurred, as is natural, because of the different political and economic phases that the country has gone through since independence. In order to facilitate the understanding of those not familiar with the reality of Brazil, I trust it will assist the reader's understanding to divide this history into three major phases the legal profession and lawyers have gone through. For this analysis to make sense, we should bear in mind that, as in any country, political and economic developments tend to shape the actions of Brazil's citizens and, as such, the creation of laws and their application. Therefore, in this analysis, it will be important to illustrate the historical facts that resulted in the current practice of the legal profession, richly researched in this book.

### I PHASE 1: FROM COLONY TO AN AGRICULTURAL EXPORTING REPUBLIC

The first phase commences timidly in the then colony of Portugal with the arrival of the Portuguese court in 1808. Up until that time, Brazil was one of Portugal's lethargic colonies like the innumerable ones existing on the African continent. The application of the law, if it even existed, was erratic. The center of political, economic, and cultural power was Lisbon, where an absolutist monarchy prohibited any economic activity not in the interests of the king and the exports of the colony had to be sent first to Lisbon before they could be

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traded with other countries. Until 1808, the colony was prohibited from having any equipment for the reproduction of newspapers, books, or pamphlets of any type. In addition, there could be no factories, financial institutions, universities, or any other facilities that would allow the inhabitants of the colony to develop an idea of technical, cultural, or industrial progress.

We should be grateful to Napoleon Bonaparte for the introduction of the minimum elements for the process of modern civilization among us, because, with the beginning of the invasion of Portugal by French troops in 1808, the Portuguese king, when fleeing from Lisbon, transferred to Brazil the seat of the Portuguese kingdom. This change forced the creation of the first bank (Banco do Brasil), the first printing presses for printing books and newspapers, most importantly, the official gazette of the Crown, the creation of the first rudimentary local industries, and the establishment of the first Brazilian university, the university of medicine in Bahia.

We should also be grateful to the English for the independence of Brazil to the extent that, with the defeat of Napoleon Bonaparte, there was the beginning of the movement toward the return of the king and the kingdom to Portugal, leaving the king's son as regent. At this time, an incipient Brazilian legal elite who had graduated from Coimbra started to develop separatist ideas that culminated in 1821 in the independence of the country and the severing of relations with Portugal.

Owing to this break, the country lost the possibility of having its nascent legal elite graduate in Portugal, and this led to the creation of our law courses in 1827. The creation of law schools in Brazil was due to the fact that the youth of the former colony were perceived as enemies of the Portuguese kingdom and were not allowed to continue attending the schools in Coimbra. This forced the creation of the first two universities, one in São Paulo and the other in Olinda. In this first phase, which lasted until the beginning of the twentieth century, preparation in law courses was more focused on forming a ruling elite to conduct the affairs of the young and independent country than on preparing students for the exercise of the legal profession itself.

It was these two law schools that came to supply Brazil with almost all of its political/administrative elite. Almost all of the deputies, senators, ministers of state, judges, and other professionals who were engaged in making and applying the law emerged from their ranks. But what was this youth supposed to learn? In the absence of a better paradigm, the new schools copied the curriculum of the law school in Coimbra, which was already outdated in dealing with the economic progress occurring at the time in Europe and the United States. If we analyze the parliamentary discussions in Brazil as to the composition of the subjects that would necessarily be taught, we will see that a good

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part of the discussions – if not the hottest parliamentary debate – was about the usefulness of making it compulsory to teach Roman law and canon law. Even if Roman law did not appear as one of the mandatory subjects in 1827, canon law did.<sup>1</sup> However, Roman law has survived to this day in the curriculum of some good law schools.

This first phase, in practice, ultimately formed personnel for the exercise of activities relating to the administration of the emerging Brazilian state. In the early years, the most important area of legal practice involved application of the rules of family law, succession, and matters relating to property. This occurred due to the low level of business development at that time, with the country focusing on the production and export of agricultural goods, mainly coffee. This phase, in my view, lasted until the beginning of the twentieth century, when the second phase, with more specialized legislative production and a growing number of judges and public prosecutors, started.

## II PHASE 2: LAWYERS AND INDUSTRIALIZATION

The demand for the exercise of the legal profession in several areas of commercial law commenced in the 1930s with the beginning of the process of industrialization. This process was kicked off by the growing capitalization of coffee producers who invested in industry and by the efforts of entrepreneurs, many of whom were descendants of immigrants from Europe and the Middle East. The process of industrialization accelerated considerably with the Second World War, which led to increased demand from European countries and the United States. As a consequence, demand for the provision of legal services grew in the areas of corporate law, bankruptcy, and insolvency, as well as in export and import law, and contract law became an important area of work in legal practice.

At the same time, as a result of the growth of the role of the state in the life of the country, the dictatorship of Getulio Vargas demanded expanded legal services in the area of administrative law. Yet, while more and more lawyers were engaged in professional work, members of the profession also continued to play important roles in politics. If we research the professional background of the senators, deputies, governors, and even presidents of the republic established after World War II, we will note that they mostly came from

<sup>1</sup> The curriculum of the two law schools, created by law, provided that the following subjects be taught during the five years of the course: natural law, public law, analysis of the constitution, *ius gentium*, diplomacy, ecclesiastic public law, civil law, criminal law, criminal procedure, mercantile and maritime law, political economics, and theory and practical procedure.

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law schools, although occasionally, a medical doctor, engineer, or another professional pursued a political career.

The second phase is characterized by a greater insertion of lawyers in professional work, with an increase in tax laws, a new corporate law, and the enactment of the criminal code. But in this second phase, while the demand for legal services increased, Brazilian lawyers and lawmakers of the Republic established after World War II continued to look to Europe for inspiration, and the influence of French, Italian, and Iberian European law was strongly maintained. The profession was exercised by sole practitioners, and usually with the death of the founding partner, the law firm died also. The profession was exercised by individuals, never by firms of lawyers.

The greatest changes occurred after 1964, upon the removal of the president and assumption of power by the military. With the establishment of a dictatorial regime, the world of law went into decline, power being taken over by a group of economists who sought a great change of direction, moving much closer to the US model as to the management of the economy, without, however, decreasing the leading role of the state.

For such purpose, there were created, among other state bodies, the central bank, the national monetary council, the national housing bank, and a national tax code. Also, there was an attempt to create a securities market, and several laws on securities were passed. In 1976, still under the military regime, the Brazilian securities commission was created, as well as new corporation law. In other words, ironically, the repressive regime created new fields of law for lawyers, even though it had erased human rights from the rule of law.

At this time, the US government, through the US Agency for International Development (USAID), along with the Ford Foundation, supported scholarships to the United States for lawyers as well as other professionals.<sup>2</sup> This phase caused an increasing number of Brazilians to go to the United States to undertake master's or doctoral degrees in the most varied professions. As such, lawyers, economists, engineers, company administrators, and so on, radically changed their preferences to US education, to the detriment of the universities of Europe, until then absolute in the preference of graduate students.

These professionals returned to Brazil impregnated with values different from those with which they departed. This preference of lawyers and economists to do their graduate courses in US universities had a profound impact on the life of the country after the decade of 1970–1980. The economists brought new paradigms for the activities of the financial market

<sup>2</sup> This writer was one of the persons selected, obtaining a scholarship to study at the Harvard Law School in 1967.

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and, consequently, for Brazilian companies. The merger of ideas of the economic world with the legal world brought for lawyers a growing area of work in what is today called business law. This included new ways of financing the private sector, which generated an enormous increase in practice in the area of contracts.

### III PHASE 3: LAWYERS AND GLOBALIZATION

In the early 1990s, two other factors created an enormous and different line of work for Brazilian lawyers. On one hand, foreigners were permitted to invest directly in the Brazilian capital markets, and Brazilian companies were permitted to issue securities in foreign markets. Both overseas and here, there was the beginning of the participation of large investment funds sponsoring capitalization mechanisms for the large Brazilian private companies, as well as some Brazilian companies going overseas by means of branches. With all of this, there was the beginning of a process of conglomeration of Brazilian financial institutions, creating large-sized banks capable of generating extensive funding for the business sector.

On the other hand, the process of privatization of state-owned companies began, which continue in the form of concessions of activities previously exercised by the state. These two new activities – the contact with the capital markets overseas and the arrival of foreign capital to participate in privatizations or concessions of state assets – necessarily require cooperation between Brazilian and US or UK lawyers, since, normally, the laws of both countries are applied. This contact between lawyers of both countries – fed by the growing number of Brazilians returning with master's degrees from the United States – facilitated and came to influence national practices. These professional connections reached another level when many of those who finished their LL.M.s started to get training in US law firms. Economists, who at an increasing number started to work in financial institutions and even with governmental entities, also contributed with the adoption of new financing models that became part of the national legal world, with alien names such as leasing, factoring, merger, spin-off, board, swaps, and derivatives.

It was only from the convergence of the aforementioned factors that the services of the corporate legal profession began to be demanded on a large scale, thus creating the need for the emergence of a much larger number of full-service law firms in addition to the very few that had existed up to then (which were dedicated almost exclusively to servicing foreign capital companies). As such, it is possible to mark in time the emergence of the large law firms at the beginning of the 1990s. At the same time, there were other transformations.



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One was the rise in the prestige of the general counsels, many of them now with an overseas LLM degree and ready to follow the changes brought by the internationalization of law. They started to dialogue with financial directors and discuss agreements overseas, and a completely new range of legal services appeared, demanding a different type of professional.

But this brave new world includes only a portion of the lawyers. As also occurs in other countries, lawyers, for the most part, continue to provide everyday legal services. This majority has the voting power in the Bar, causing the entity that represents lawyers to act partly in defense of the greatest interests of the country and partly in defense of the interests of its members. In this latter case, sometimes it is confronted with the dilemma between serving the interests of the majority of its members – preserving exclusive fields of work – and more generous interests, such as what occurred in the case of pro bono, which was initially outlawed by the Bar. In this area, despite initial hostility, the large law firms finally won the right to provide free legal services to non-governmental organizations. It is to be praised that generosity won.

Major transformations occurred in the world of business law, with enormous effects on the law of obligations, which had remained static. Even criminal law started to absorb new possibilities of financial crimes, in the defense of nature, against pollution, in the defense of the capital markets investor, and so on. This world that globalizes increasingly quickly has also elevated the importance of women in the legal profession, also due to the influence of international feminist movements. Today the number of female students at law schools is greater than the number of male students.

However, if the world of the legal profession has been transforming rapidly, the same cannot be said of the willingness or capacity of the law schools to adapt to the not-so-new role that the lawyer has come to play in Brazilian society. This gap between the demands made on lawyers by Brazilian society and the training offered in most law schools exists in the choice of subjects taught and in other areas. Most of the law faculties continue to ignore transformations occurring all around them and fail to prepare lawyers for the demands now made on the providers of legal services.

This book illuminates the transformations and the challenges they create. It is the first time the new reality of the Brazilian legal profession has been surveyed through extensive empirical research. As such, it is one of the most important contributions ever made for legal educators, lawyers, and representatives of professional associations in Brazil, all of whom should take ownership of the results so that we can work to meet the demands that are emerging from the worlds of entrepreneurs and society. Not only is this book important to understanding what is happening in Brazil: being part of surveys of the

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corporate legal profession in China and India, it will also help people understand general trends for legal professions in all emerging economies in the age of globalization.

Good reading and good ideas are necessary for the practice of law in this globalized world.