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Family Law from Pufendorf to the Twenty-First Century: systems and microsystems¹

Introduction

Among the traditional branches of civil law², family law is certainly the one that has been the most visibly affected by the major changes undergone by contemporary society³. The crisis this subsystem faces is of such magnitude that not even its key idea (“family”) is clear (most textbooks avoid any attempts at a definition because of its polysemic nature⁴).

Nevertheless, efforts are underway in Brazil to redefine through legislation the traditional notion of family by placing emphasis (and reevaluating) certain aspects of the phenomenon. Without a doubt, the most prominent among such aspects is “affection”, especially in light of the recent bills drafted for the purpose of entirely repealing book four of the 2002 Brazilian Civil Code and replacing it with a “Family Act” (Senate Bill No. 470/2013, which generally follows House of Representatives Bill No. 2.285/2007⁵)⁶. Today, affection is considered a “fundamental principle” (“guiding value”⁷) of the family (Article 5, Section IV of Senate Bill No. 470/2013 and Article 5 of House of Representatives Bill No. 2.285/2007)⁸. What is new about the concept is that it is construed as one of the pillars of the very notion of family⁹ (given that its relevance

¹ This paper was translated from the original Portuguese by TOMÁS OLCESE (Master of Laws and PhD candidate at the Faculty of Law of the University of Sao Paulo – FDUSP). A slightly shorter Portuguese version of this paper (especially with regard to items 2 to 5) entitled “Código Civil e Direito de Família: (in)conveniência de um microsistema” was previously published in: *Revista de Direito Civil Contemporâneo* 4 (2015), pp. 211 to 238.

² V. ROPPO, *Diritto privato*, 4^a ed., Torino 2014, p. 30.

³ Cf. R. ZIMMERMANN, Codification: history and present significance of an idea – à propos the recodification of private law in the Czech Republic, in: *European Review of Private Law* 3 (1995), pp. 108 and 109.

⁴ Cf. W. B. MONTEIRO – R. B. TAVARES DA SILVA, *Curso de direito civil 2 – Direito de família*, 42^a ed., São Paulo 2012, p. 17.

⁵ Both bills received the support of the Brazilian Institute of Family Law (*Instituto Brasileiro de Direito de Família – IBDFAM*).

⁶ Two other bills are currently under consideration in the National Congress: House of Representatives Bill No. 699/2011, submitted by Representative Arnaldo Faria de Sá, and House of Representatives Bill No. 6.583/2013, submitted by Representative Anderson Ferreira (this bill focuses on issues regarding principles of family law). These bills adopt principles and concepts that are substantially different from the ones espoused in the bills cited above, as they propose various amendments to the 2002 Brazilian Civil Code that include the book on family law, although they do not intend to have the whole of Book IV (of the special part) repealed.

⁷ A. A. BARBOSA, *Por que estatuto das famílias?*, in: *Direito das famílias – Contributo do IBDFAM em homenagem a Rodrigo da Cunha Pereira*, São Paulo 2009, p. 46.

⁸ Cf. M. BERENICE DIAS, *Manual de direito das famílias*, 7^a ed., São Paulo 2010, p. 70.

⁹ Cf. P. L. NETTO LÔBO, *Código Civil comentado XVI – Direito de família – Relações de parentesco – Direito patrimonial*, São Paulo 2003, p. 41; N. NERY JUNIOR – R. M. A. NERY, *Código Civil comentado*, 11^a ed., São Paulo 2014, p. 1712 (regarding the influence socioaffective theories). M. BERENICE DIAS, *Manual* (nt. 8), p. 71, goes as far as to state that: “the multiple-family law has ushered in a new legal era for the family by attributing legal value to affection”.

in determining the new conception of family has been advocated for decades)¹⁰. In a nutshell, a sentiment (affection) has been elevated to the status of a principle alongside more traditional principles such as the dignity of the human person (Article 5, Section I of Senate Bill No. 470/2013 and Article 5 of House of Representatives Bill No. 2.285/2007), which is one of the foundations of the Federative Republic of Brazil (Article 1, Section I of the 1988 Brazilian Constitution)¹¹.

On the one hand, it is not clear whether the emergence of this principle comes as a consequence of the need to justify (for reasons of practical convenience) the detachment of a subject that has traditionally been kept within the civil code system for the past century. On the other, it has not been settled whether uncoupling the book on family law from the rest of the Brazilian Civil Code stems from the imperatives of our time (in which case the purpose of the separation would be to create a microsystem that would purportedly ensure “a more agile and fact-conscious justice system”¹²). If the first hypothesis is correct, the detachment will be artificial (and therefore undesirable); should the second proposition be true, the uncoupling would contribute towards an improved understanding of the subject. Thus, it is relevant to investigate the alleged autonomy of family law *vis-à-vis* the 2002 Brazilian Civil Code and the Brazilian legal system as a whole. In other words, the study inquires into whether it is convenient to constitute family law as a microsystem apart from the Brazilian Civil Code.

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1 Canon Law and the Autonomy of Family Law

Among the various branches of civil law, family law was historically the last one to have its autonomy recognized (within the codification system)¹³.

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Originally, the reason for this belatedness was that family law, which was centered on the institution of marriage, was regulated for centuries by canon law¹⁴. On the issue of marriage, the distinction between *ius canonicum* and *ius civile* was so clear-cut and precise that a renowned Portuguese legal scholar felt compelled to justify (in a separate item) the treatment of marriage in

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¹⁰ H. LEVY- BRUHL, *Aspects sociologiques du droit*, Paris 1955, p. 147: the family is becoming “*de moins en moins un groupe organisé et hiérarchisé, et de plus en plus un groupement fondé sur le sentiment, sur l’affection mutuelle ...*” (“less of an organized and hierarchical group and more of an association based on sentiment and mutual affection...”).

¹¹ For a critique on the subject, cf. W. B. MONTEIRO – R. B. TAVARES DA SILVA, *Curso 2* (nt. 4), p. 45.

¹² Cf. Justification of the Bill.

¹³ S. PATTI, *Il diritto civile tra crisi e riforma dei codici*, in: *Codificazioni ed evoluzione del diritto privato*, Roma 1999, p. 50. The autonomy of family law was almost concomitant with that of succession law, which is currently considered a “traditional” branch of civil law. Cf. A. B. SCHWARZ, *Zur Entstehung des modernen Pandektensystems*, in: *ZRG RA* 42 (1921), p. 606.

¹⁴ Cf. W. MÜLLER- FREIENFELS, *The problem of including commercial law and family law in a civil code*, in: S. J. STOLJAR, *Problems of codification*, Canberra 1977, p. 112. The rule was consolidated in the famous canon of the Council of Trent: *si quis dixerit causas matrimoniales non spectare ad iudices ecclesiasticos anathema sit*. Even protestants were bound by the same rules: cf. H. COING, *Europäisches Privatrecht I – Älteres gemeines Recht* (1500 bis 1800), München 1985, §38.

his civil law textbook¹⁵ as recently as the nineteenth century. Today, religious marriage is clearly independent from its civil law counterpart, although the former may produce civil effects¹⁶.

Long before the influence of canon law became decisive, however, the autonomy of family law in legal systems that adopted secular marriage was far from settled. The Romans, for instance, did not consider family law a specific branch of the law (in other words, they did not develop a “*trattazione sistematica della struttura e dell’organizzazione del gruppo designato con questo nome*”¹⁷ – “systematic arrangement of the structure and organization of the set of norms designated by that name”), notwithstanding their definitions of “family”¹⁸ and “matrimony”¹⁹, as well as their rather lengthy treatment of certain related institutions, such as marriage (*nuptiae, matrimonium*), betrothals (*sponsalia*), dowry (*dos*) etc. (several books of the Digest, under the influence of Christianity, were dedicated to those subjects).

More recently, the method adopted to incorporate the subjects that typically characterize “family law” into the systematic structure of the French *Code civil* (one of the first modern civil codes) is significant: following the tripartite division (persons – things – actions) set forth in the Institutes of Gaius, the *Code* included those topics in Title V of Book I (“*des personnes*”), but stopped short of bundling them into an independent system. Notably, the French system was structured around the concept of ownership and avoided any intermediate categories between the individual and the State²⁰.

15 M. A. COELHO DA ROCHA, *Instituições de direito civil I*, São Paulo 1984, p. 223 (nt. “K” to §213). This civilian scholar from Coimbra (whose textbook was published in 1844) pointed out that “none of the scholars who wrote about our national laws included [the doctrine of marriage] in their treatises”. He justified this attitude by saying that “there is no impediment to the inclusion of the present article in the context of the civil law, as it does not go against ecclesiastical law”.

16 Regarding this subject, it must be pointed out that Article 22 of House of Representatives Bill No. 2.285/2007 was drafted rather poorly. Interpreted literally, it imposes on religious marriages the same requirements applicable to civil marriages. The draft text for Article 21 of Senate Bill No. 470/2013 is more adequate on that point.

17 E. VOLTERRA, *Famiglia (diritto romano)*, in: *E D* 16 (1967), p. 723.

18 In various senses (according to the evolution of the Roman society), cf., e.g., *Ulp. 46 ad ed.*, D. 50, 16, 195, 1-2: “1. ‘*Familiae*’ appellatio qualiter accipiatur, videamus. Et quidem varie accepta est: nam et in res et in personas deducitur. In res, ut puta in lege duodecim tabularum his verbis ‘*adgnatus proximus familiam habeto*’. Ad personas autem refertur familiae significatio ita, cum de patrono et liberto loquitur lex: ‘*ex ea familia*’, inquit, ‘*in eam familiam*’: et hic de singularibus personis legem loqui constat. 2. *Familiae* appellatio refertur et ad corporis cuiusdam significationem, quod aut iure proprio ipsorum aut communi universae cognationis continetur. Iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae, ut puta patrem familias, matrem familias, filium familias, filiam familias quique deinceps vicem eorum sequuntur, ut puta nepotes et neptes et deinceps. Pater autem familias appellatur, qui in domo dominium habet, recteque hoc nomine appellatur, quamvis filium non habeat: non enim solam personam eius, sed et ius demonstramus: denique et pupillum patrem familias appellamus. Et cum pater familias moritur, quotquot capita ei subiecta fuerint, singulas familias incipiunt habere: singuli enim patrum familiarum nomen subeunt. Idemque eveniet et in eo qui emancipatus est: nam et hic sui iuris effectus propriam familiam habet. Communi iure familiam dicimus omnium adgnatorum: nam etsi patre familias mortuo singuli singulas familias habent, tamen omnes, qui sub unius potestate fuerunt, recte eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt”.

19 A frequently mentioned source is *Modest. 1 reg.*, D. 23, 2, 1: *Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*.

20 Cf. W. MÜLLER-FREIENFELS, *The problem* (nt. 14), p. 112; W. MÜLLER-FREIENFELS, *The emergence of droit de famille and Familienrecht in continental Europe and the introduction of family law in England*, in: *JFH* 28 (2003), pp. 34 sqq.

2 Caught Between Worlds: Public Law and Private Law

Another dilemma involved (and still involves) defining whether the norms that regulate family law belong (at least predominantly) in the field of public or private law²¹ (some have argued that family law belongs in the field of public law or that it is, at the very least, an “*institution de droit privé orientée vers le droit public*”, that is, “a private law institution oriented towards public law”²²). Evidently, only the latter argument would justify the inclusion of the subject matter in a civil code.

Consequently, the task of classifying family law was clearly a difficult one in the eighteenth century²³. One may gain some perception of the challenge from the approach adopted by C. WOLFF²⁴ in one of the most important legal treatises of the time (“*Jus naturae methodo scientifico pertractum*”)²⁵. In it, the prominent German philosopher (who was a contemporary of I. KANT – see below) unsystematically covers various points of family law in several chapters by randomly merging topics such as marriage, cohabitation, sodomy, bestiality, pederasty, chastity, education of minors, bigamy, betrothal, parental rights etc. (and enumerating corresponding rights, duties, crimes, penalties, principles etc.).

This feature of legal scholarship on family law influenced early codification efforts such as Part II (essentially on public law) of the 1794 ALR (*Allgemeines Landrecht für die Preussischen Staaten*), which presented a disorderly sequence of topics. What is currently denominated “family law” was regulated primarily in Title I (marriage), Title II (parental rights) and Title XVIII (guardianship and curatorship) alongside other topics such as nobility rights (Title IX), the rights and duties of the Church (Title XI), the rights and duties of the State (Title XIII), the public treasury (Title XIV), delict (Title XX) etc. Remarkably, the expression “*Familienrecht*” (Title IV – “*Von gemeinschaftlichen Familienrechten*”) was used, although it did not carry its current meaning.

On the whole, the systematic arrangement of the ALR derives from the notion that the family is “an instrument of the utilitarian sovereign, the family being seen as serving the felicity of the citizen as well the state’s population”²⁶. Not coincidentally, Part II of the ALR begins by stating the rules regarding marriage and parental rights – precisely the part that regulates the relations of private individuals as members of a society-community – as opposed to Part I, which deals with a

²¹ Cf. G. SOLARI, *Storicismo e diritto privato* (1940), Span. trans. by O. CALETTI, *Filosofía del derecho privado II – La idea social*, Buenos Aires 1950, p. 54; S. PULEO, *Famiglia II – Disciplina privatistica: in generale*, in: EGT 15 (2007), p. 7.

²² R. SAVATIER, *Du droit civil au droit public a travers les personnes, les biens et la responsabilité civile*, Paris 1945, p. 15.

²³ For a brief account regarding the factors that led to the drafting of the modern civil codes during this period, cf. R. ZIMMERMANN, *Codification: The civilian experience reconsidered on the eve of a Common European Sales Law*, in: ERCL 8 (2012), pp. 374 sqq.

²⁴ Regarding the author and his contribution to legal development in the eighteenth century, generally cf. T. REPGEN, *Christian Wolff*, in: M. STOLLEIS (eds.), *Juristen – Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert*, München: 2001, pp. 675 and 676.

²⁵ *Jus naturae methodo scientifico pertractum VII – De imperio privato in qua tam de imperio ac societate in genere, quam de officiis ac iure in societatibus conjugali, paterna, herili atque domo agitur, seu ius omne personarum demonstratur*, Halle 1747.

²⁶ W. MÜLLER-FREIENFELS, *The problem* (nt. 14), p. 115.

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body of rules that is more individualistic in nature. Albeit unlikely, it is possible that the rules of family law were intentionally left a somewhat haphazard lot in order to avoid the direct influence of canon law²⁷.

3 Toward the Systematization of Family Law: from Pufendorf to Wolff

This state of affairs did not preclude academic efforts to arrange the rules of family law into a distinct branch of civil law from the seventeenth century onward. One must keep in mind, however, that the development of a systematic approach to family law was a rather slow process that went through clearly defined stages and only reached its consolidated form between the late eighteenth and early nineteenth century. 12

In fact, it is possible to identify two intermediate stages between hotchpotch regulation of family relations and genuine systematization of “family law”²⁸: clustering closely related subjects and explicitly articulating a fundamental idea that could unify them into a coherent whole. 13

S. PUFENDORF (a German legal scholar notorious for masterminding one of the first attempts to develop a “general system, blending rational deduction and empirical observation”) had clearly achieved the first stage by the second half of the seventeenth century²⁹. More specifically, he devoted the greater part of Book VI of his most famous work³⁰ to two subjects that are fundamental to family law: marriage (Chapter I) and parental rights (Chapter II). Notwithstanding the significance of this approach³¹, giving S. PUFENDORF the credit for having “conceptualized” 14

²⁷ On this subject, see W. MÜLLER- FREIENFELS, The problem (nt. 14), p. 112.

²⁸ While the debate regarding the adequate definition of a “system” falls outside the scope of this paper, it is generally accepted that any system involves a core idea and unifying principles. In the words of a leading authority on the subject: “*Nicht technisch, wegen der Aehnlichkeit des Mannigfaltigen, oder des zufälligen Gebrauchs der Erkenntniß in concreto zu allerley beliebigen äusseren Zwecken, sondern architectonisch, um der Verwandtschaft willen und der Ableitung von einem einigen obersten und inneren Zwecke, der das Ganze allererst möglich macht, kan dasienige entspringen, was wir Wissenschaft nennen, dessen Schema den Umriß (monogramma) und die Eintheilung des Ganzen in Glieder, der Idee gemäß, d. i. a priori enthalten und dieses von allen anderen sicher und nach Principien unterscheiden muß. Niemand versucht es, eine Wissenschaft zu Stande zu bringen, ohne daß ihm eine Idee zum Grunde liege*” – I. KANT, Critik der reinen Vernunft, Riga 1781, pp. 833 and 834. Needless to say, the Kantian notion of “system” had a pivotal influence on the development of classical German philosophy – cf. M. LOSANO, Sistema e struttura nel diritto I – dalle origini alla scuola storica (2002), Port. trans. by C. A. DASTOLI, Sistema e estrutura no direito I – das origens à Escola Histórica, São Paulo 2008, p. 134. Given the historical period and the subject matter under analysis, the term “system” designates an “external” abstract conceptual system – cf. J. RÜCKERT – R. SEINECKE, Zwölf Methodenregeln für den Ernstfall, in: Methodik des Zivilrechts – von Savigny bis Teubner, 2^a ed., Baden-Baden 2012, pp. 28 and 29. Despite the inconveniences such a conception may present, its widespread acceptance throughout the nineteenth and twentieth centuries can hardly be disputed. Cf. K. LARENZ, Methodenlehre der Rechtswissenschaft (1991), Port. trans. by J. LAMEGO, Metodologia da ciência do direito, 5^a ed., Lisboa 2009, pp. 230 sqq, 621 sqq – evidently, any evaluation of this textbook must take into account that it is a work of its time – J. RÜCKERT, Einführung, in: Methodik des Zivilrechts – von Savigny bis Teubner, 2^a ed., Baden-Baden 2012, pp. 11 and 12; R. FRASSEK, Methode und Zivilrecht bei Karl Larenz (1903-1993), in: Methodik des Zivilrechts – von Savigny bis Teubner, 2^a ed., Baden-Baden 2012, pp. 216 sqq. Along the same line of thought, see also J. SCHRÖDER, Recht als Wissenschaft, 2^a ed., München 2012, pp. 186 sqq, 247 sqq, 416 sqq.

²⁹ F. WIEACKER, Privatrechtsgeschichte der Neuzeit (1967), Eng. trans. by T. WEIR, A history of private law in Europe with particular reference to Germany, Oxford 1995, p. 244. Cf. J. SCHRÖDER, Recht (nt. 28), p. 104, 105, 172 e 173.

³⁰ De jure naturae et gentium libri octo, Lund 1672.

³¹ A. B. SCHWARZ, Zur Entstehung (nt. 13), pp. 603 e 604.

and systematized family law would be an overstatement³², the reason being that he failed to single out the fundamental idea that compelled him to group those chapters into a single book (despite the fact that the notion of “family” is recurrent throughout Book VI)³³. On the other hand, the inclusion of the topic of Chapter III (persons subjected to the power of another, such as servants and slaves) at the end of Book VI within the more general framework of the “family” is decidedly artificial³⁴. Furthermore, had the term “family” been meant to serve a systematic purpose within the context of the work, there would certainly be an explicit reference to that effect (as was the case for various other terms)³⁵.

It is well to emphasize that a mere grouping of topics akin to the family without clearly defining a core idea and establishing autonomy in relation to other branches of private law does not qualify as a “system” in the strict sense of the word. More importantly, even if a broad definition of “system” were to be adopted, account must be taken of the fact that such topics had already been grouped in the Digest of Justinian. Remarkably, books 23 through 27 of the sixth-century work grouped topics such as betrothals (D. 23, 1), the ceremony of marriage (D. 23, 2), dowry (D. 23, 3-5), donations between husband and wife (D. 24, 1), dissolution of marriage (D. 24, 2-3), management of property during marriage (D. 25, 1-2), recognition and maintenance of children (D. 25, 3), unborn children (D. 25, 4-6), concubinage (D. 25, 7), guardianship and curatorship (D. 26, 1 through D. 27, 10).

Evidence to support the claim that S. PUFENDORF did not intend to effectively systematize family law lies in the fact that by the end of the eighteenth century no other major work had adopted the scheme he devised, despite the influence his overall work exerted on the subsequent evolution of legal scholarship. A case in point is a slightly later work by C. THOMASIIUS that was admittedly influenced by that of S. PUFENDORF³⁶. Following a general exposition of “*societas*” (Book III, Chapter I), it addresses “*societas conjugalis*” (Chapters II and III)³⁷, “*societas paterna*” (Chapter IV) and “*societas herilis*” (Chapter V). The fundamental idea is clearly not the “family” (which was not

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³² Cf. H. COING, Savigny und die Deutsche Privatrechtswissenschaft, in: *Ius Commune* 8 (1979), pp. 14 e 15. In the seventeenth century, a “system” was usually conceived as the plain exposition of a topic of the law – cf. M. LOSANO, *Sistema I* (nt. 28), pp. 88 and 89. Evidently, this conception was very similar to ancient Roman ideas on the subject (and quite far removed from pandectist thought) – cf. L. RAGGI, *Il metodo della giurisprudenza romana*, Torino 2007, pp. 57 sqq.

³³ “*Sequitur, ut investigemus tum originem & naturam imperii humani, tum quae praecepta juris naturalis & gentium illud praesupponunt. Sed cum imperium non nisi inter plures possit intelligi ... igitur prius quam de imperio civili agamus, dispiciendum fuerit de matrimonio, ex quo familiae proveniunt, & inde imperii & civitatibus constituendis velut materies oritur*” – *De jure naturae et gentium* (nt. 30), pp. 749 and 750. Despite the frequent and often ambiguous use of the word “family” throughout the text, the prevalence of “matrimony” over “family” is such that the thematic index (pp. 1228 sqq.) does not even reference it.

³⁴ S. PUFENDORF justifies the inclusion of the chapter as follows: “*Quemadmodum familiae ex marito & uxore tanquam primariis partibus constant, quorum conjunctione soboles excitatur: ita secundo iisdem accedunt servi, quorum opera in obeundis ministeriis capita familiarum utuntur*” – *De jure naturae et gentium* (nt. 30), p. 838.

³⁵ “Pufendorf did not allot a single collective heading to the laws relating to the family and did not give a more substantial, exact justification” – W. MÜLLER- FREIENFELS, *The emergence* (nt. 20), p. 33.

³⁶ *Institutiones jurisprudentiae divinae III*, Frankfurt 1688. Despite this influence, his proposed new method is not to be underestimated – cf. J. SCHRÖDER, *Recht* (nt. 28), pp. 123 sqq and 136 sqq.

³⁷ “*Incipiemus autem a simplicibus societatibus, quoniam ex his componitur civitas. Inter eas maxime naturalis est societas conjugalis, quia communiter omnes homines in se deprehendunt instinctum ad eandem ineundam*” – *Institutiones III* (nt. 36), p. 24.

regarded as a separate branch of the law), but “*societas*” instead (in the general sense). In fact, the idea of “*societas*” was of great importance to the “new system of natural law”. In that context, the family was conceived as an intermediate category between the (private) corporation and the State³⁸.

Among later attempts to group the topics that currently make up family law, perhaps the most comprehensive was that of G. TITTIUS. In his main work³⁹, he divides Book VI (which comes immediately after the books on the law of obligations) into twenty topics related to the notion of family⁴⁰. Once again, however, the term “*societas*” (in the general sense) and not “family” has a key systematizing function⁴¹ (which explains why family law was not construed as a separate branch of law). Put another way, despite having grouped related topics, G. TITTIUS did not propose an idea (“family”) capable of consolidating them into a coherent whole.

A conceptual shift, however, is already discernible in a work by J. G. DARJES⁴² where the “family” is expressly assigned a systematic (even if somewhat limited) function. In his account of what he termed “*ius familiae*” (Section IV, Chapter I), J. G. DARJES justifies the adoption of that criterion and explains his understanding of “family”⁴³. Despite the significance of this new approach (which was not mentioned in any of his other major works⁴⁴), the text of the chapter clearly shows that the notion of “family” remained somewhat entwined with the concept of “*societas*”. Topics such as “*societas matrimonialis*”, “*societas paterna*” and “*societas herilis*” are discussed in a different section of the work (Chapters II and III of Section III), preventing them from being adequately grouped.

As mentioned previously, despite having consolidated these developments and providing the basis for further advances, C. WOLFF (whose influence on G. HUGO and I. KANT is considerable⁴⁵) also failed to make a definite break with earlier doctrine. Nevertheless, he did have the merit of attempting to develop a more systematic approach⁴⁶ by clearly separating “*imperium privatum*” from “*imperium publicum*”⁴⁷ and placing topics that are typical of family law within the

³⁸ J. SCHRÖDER, *Recht* (nt. 28), p. 187.

³⁹ *Juris privati romano-germanici ex omnibus suis partibus, puta jure civile ecclesiastico & feudali, hactenus separari solitis, secundum genuina jurisprudentiae naturalis fundamenta composite, a tricis & obsolete jure purgari, ex necessario suppleti ac ordine naturali planoque, adjectis etiam summariis capitum & rerum indice, Statui Reipublicae Germanicae attemperati*, Leipzig 1709.

⁴⁰ *I – De sposalibus; II – De conjugio; III – De consanguinitate & affinitate; IV – De jure conjugum in bona; V – De dissolutione conjugii; VI – De repetitione illatorum; VII – De usu jurisjurandi in re matrimoniali; VIII – De adulterio; IX – De reliquis delictis carnis; X – De patria potestate; XI – De agnoscendis & educandis liberis; XII – De peculio liberorum; XIII – De legitimatione & adoptione; XIV – De societate domestica; XV – De tutela constituenda; XVI – De effectu tutelae constitutae; XVII – De modis declinandi vel tollendi tutelam; XVIII – De cura; XIX – De curatore mulieris saxonico; XX – De restitutione minorum.*

⁴¹ Unsurprisingly, there is an entry in the thematic index for “*societas domestica*”, but not for “*familia*”.

⁴² *Institutiones jurisprudentiae universalis in quibus iuris naturae socialis et gentium capita*, 2^a ed., Jena 1745 (the first edition is from 1740).

⁴³ “*Connectuntur personae, quatenus in earum altera aliquid est, quod sine altera non possibile. Personae itaque cum societate connectuntur, quatenus quaedam earum determinationes ex hac concipiendae. Eiusmodi personarum nexus ex societate connubiali concipiendus vocatur familia*” – *Institutiones* (nt. 42), p. 334.

⁴⁴ See, for instance, *Institutiones jurisprudentiae privatae romano-germanicae*, Jena 1749.

⁴⁵ See the following item.

⁴⁶ This he did in the third part of the *Institutiones juris naturae et gentium in quibus ex ipsa hominis natura continuo nexu omnes obligations et jura omnia deducuntur*, Halle 1750.

⁴⁷ The distinction was the basis of an earlier work – *Jus naturae* (nt. 25).

former (despite not being able to create a specific category for “family law”). In any case, C. WOLFF is clearly hesitant in his work, which is why he does not assign the “family” a systematic function⁴⁸. In that context, marriage is conceived as “*societas conjugalis*”.

4 Systematic Approaches to Family Law by Hugo and Kant

G. HUGO⁴⁹ deserves the credit for both grouping related topics (akin to family law) and proposing an idea (“family”) that could unify them into a coherent whole. Published in 1789, his remarkably brief textbook on Roman law is arranged into five sections: property law (“*ius in rem*” – “*Realrechte*”), personal obligations (“*ius in personam*” – “*persönliche Obligationen*”), family law (“*Familienrechte*”), rules of inheritance (“*Verlassenschaften*”) and procedure (“*Proceß*”)⁵⁰. The only topics covered in the chapter on family rights are marriage and parental rights. Incidentally, the author underscores the challenge of classifying a subject that hovers between personal rights and property rights⁵¹.

Written in his youth, the textbook does not clearly state the grounds for this new systematization. Quite likely, his intention was simply to follow the sequence of the topics in the Digest of Justinian⁵² and adapt their content to the law of the time, which seems rather evident when one considers the arrangement of the Digest. Although lacking an explicit systematization, after the books on introductory topics (*Prota* – D. 1 to D. 4), the Digest covers subjects primarily related to the law of property (D. 5 to D. 11), the law of obligations (D. 12 to D. 22), family law (D. 23 to D. 27)⁵³ and the law of succession (D. 28 to D. 38). Procedural rules, which permeate the entire spectrum of Roman law, are covered in the last part of the textbook.

In later studies, however, G. HUGO was reluctant to assert the independence of family law. Thus, for instance, in another textbook he published on the same subject thirty-seven years later⁵⁴, the topic concerning family relations (which now included guardianship and curatorship) was placed under the heading “*ius in rem*”⁵⁵. In this particular case, his reluctance may have been caused by the need to adapt the content of the Roman sources (especially the Institutes of Justinian) to the law of his time⁵⁶.

⁴⁸ In fact, the concept of “family” only appears in §877 of Institutiones (nt. 42), pp. 548 and 549, for the purpose of discussing the specific topic of kinship.

⁴⁹ Institutionen des heutigen römischen Rechts, Berlin 1789.

⁵⁰ W. MÜLLER- FREIENFELS, The emergence (nt. 20), p. 37.

⁵¹ Institutionen (nt. 49), p. 59.

⁵² Cf. P. CAPPELLINI, Systema iuris II – Dal sistema alla teoria generale, Milano 1985, pp. 32 and 33.

⁵³ All the books on family law are located in the middle section of the Digest. Remarkably, Justinian gave it the epithet “*Umbilicus*”, because it was deemed to contain the most beautiful and expedient part of the law – Cons. *Tanta* 5 (“... et memoratam ordinationem octo librorum mediam totius operis reposuimus, omnia undique tam utilissima quam pulcherrima iura continentem”).

⁵⁴ Lehrbuch der heutigen römischen Rechts, Berlin 1826.

⁵⁵ Family law is the subject of the second part of his “*Lehre von Sachen*”, which is titled “*Einfluß der Familienverhältnisse auf die Sachen*” – Lehrbuch (nt. 54), pp. 133 sqq. See also HKK/*Schmoeckel*, vor §1, n. 19.

⁵⁶ Cf. Lehrbuch (nt. 54), pp. 15 and 16. Cf. W. MÜLLER- FREIENFELS, The emergence (nt. 20), p. 37; M. LOSANO, Sistema I (nt. 28), pp. 309 and 310.

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In various other works unencumbered by this concern, G. HUGO explicitly adhered to the tripartite division of private law devised by I. KANT: the law of persons (“*Personenrecht*” – which corresponds to the Kantian category of a “personal right that is real in kind”), the law of property (“*Sachenrecht*” – which corresponds to the Kantian category of “real right”) and right of credit (“*Recht der Forderungen*” – corresponding to the Kantian category of “personal right”)⁵⁷. 23

At this early stage, the theoretical basis needed to conceptualize and systematize family law was formulated by I. KANT⁵⁸. Indeed, in one of his most important mature works (*Die Metaphysik der Sitten*, published towards the end of the eighteenth century), he did not hesitate to move away from the German law in force at the time and affirm the autonomous nature of family law (by emphasizing only the subjects that involved relations between private persons and creating a specific legal category for them). 24

He went about his task in a peculiar way. He divided his universal doctrine of right into two parts: private right and public right. As to the first part (“*das Privatrecht vom äußeres Mein und Sein überhaupt*” – “the private right of the external mine and thine generally”), the second chapter (“*von der Art etwas Äußeres zu erwerben*” – “the mode of acquiring anything external”) is divided into three sections: real right (“*Sachenrecht*”), personal right (“*persönlichen Recht*”) and, finally, “personal right that is real in kind” (“*von dem auf dingliche Art persönlichen Recht*”)⁵⁹. This last section focuses on the key issues of “family law” (“*das Eherecht*” – “conjugal right”, “*das Elternrecht*” – “parental right”, “*das Hausherren-Recht*” – “household right”). Clearly, the objective was to solve one of the most troublesome issues regarding the adequate systematization of family law: whether the rights attached to it were real or personal in nature⁶⁰. 25

I. KANT goes on to explain that this “personal right that is real in kind” consists of “the right to the possession of an external object as a thing, and to the use of it as a person” (“*dieses Recht ist das des Besitzes eines äußeren Gegenstandes als einer Sache und des Gebrauchs desselben als einer Person*”) and that the relations involved are those of a community of free beings that constitutes a “household”⁶¹ (he refers to a “domestic society” further ahead). By his own account, this conception amounted to “a new phenomenon in the juristic sky” (“*neues Phänomen*” 26

⁵⁷ Lehrbuch des Naturrechts, als einer Philosophie des positiven Rechts, 2^a ed., Berlin 1799, p. 134. The influence of I. KANT is explicitly mentioned on p. 135. Cf. J. SCHRÖDER, *Recht* (nt. 28), p. 206.

⁵⁸ Cf. P. KÖNIG, §§ 18-31, Episodischer Abschnitt, §§ 32-40, in: O. HÖFFE, *Metaphysische Anfangsgründe der Rechtslehre*, Berlin 1999, pp. 133 and 138 sqq.; G. L. PETRONE, *Metafisica dei costumi*, Milano 2006, p. 633 (nt. 79). Regarding his contribution to legal development, generally cf. R. HARZER, *Immanuel Kant*, in: M. STOLLEIS (eds.), *Juristen – Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert*, München 2001, p. 344 sqq.

⁵⁹ On the other hand, a real right that is personal in kind (“*auf persönliche Art dinglichen Recht*”) is inconceivable – I. KANT, *Die Metaphysik der Sitten*, in: *Kant’s gesammelte Schriften VI*, 2^a ed., Berlin 1914, p. 358.

⁶⁰ Indeed, the classification of subjective rights hinges on the fundamental dichotomy between real and personal rights. For a historical overview of the subject, cf. HKK/*Michaels*, vor §241, n. 38 and 42 sqq.

⁶¹ I. KANT, *Die Metaphysik* (nt. 59), p. 276. An extensive exposition of the basis of this new category may be found in the appendix – pp. 357 sqq.

am juristischen Himmel”), a veritable “*stella mirabilis*”⁶², notwithstanding the fact that it had always been tacitly in use in accordance with the Science of Natural Law⁶³.

However questionable this category may be⁶⁴, the fact remains that a clear distinction was drawn between family law, on the one hand, and property rights and personal rights (law of obligations), on the other. Furthermore, although family law was unequivocally classified as a branch of private law⁶⁵, its ambivalent character (which hinges on whether the nature of the rights attached to it is real or personal) was reinforced and still presents a challenge when attempting a systematization of family law (as is currently the case with the 2002 Brazilian Civil Code).

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5 The Systematic Organization of Family Law in Nineteenth-Century Germany: From Heise to the BGB

It was not long before civilian scholars perceived the significance of this idea and began to incorporate this “new” branch of civil law into the codified systems they proposed (an increasingly recurrent topic among late eighteenth-century and early nineteenth-century German scholars, specially, and European jurists, generally).

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One of the first to do this was A. HEISE (in the early nineteenth century)⁶⁶. He structured his system in six books: “general theory”, “real rights”, “obligations”, “real-personal rights”, “inheritance law” and “*in integrum restitutio*”. Consistent with Kantian conceptual categories⁶⁷, the fourth book covers what the author denominates a “*dinglich-persönliche Rechte*” (“real-personal right”)⁶⁸ or a “*persönliche Rechte auf dingliche Art*” (“personal right of a real kind”) (he explicitly refers to a “*Familienrecht*” elsewhere⁶⁹) and divides the subject into three sections: marriage, parental rights and guardianship⁷⁰. The “Hugo-Heise system” went on to become the “pandectist system” *par excellence*⁷¹, which propounded “an arrangement of the subject matter accomplished through

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⁶² I. KANT, *Die Metaphysik* (nt. 59), p. 358.

⁶³ I. KANT, *Die Metaphysik* (nt. 59), p. 361.

⁶⁴ Cf. HKK/*Michaels*, vor §241, n. 42 (especially nt. 319).

⁶⁵ See generally on these passages from I. KANT, cf. F. DONATO, *Nei limiti della ragione – Il problema della famiglia in Kant*, Pisa 2004, p. 18 sqq.

⁶⁶ A. HEISE, *Grundriss eines Systems des gemeinen Civilrechts zum Behuf von Pandecten-Vorlesungen*, 3rd ed., Heidelberg 1819 (the first edition was published in 1807). Cf. HKK/*Schmoeckel*, vor §1, n. 20; W. MÜLLER-FREIENFELS, *The emergence* (nt. 20), p. 37; F. WIEACKER, *Privatrechtsgeschichte* (nt. 29), p. 296.

⁶⁷ He is explicit on this point. Cf. A. HEISE, *Grundriss* (nt. 66), p. 129; HKK/*Michaels*, vor §241, n. 42; P. CAPPELLINI, *Systema iuris II* (nt. 52), p. 102.

⁶⁸ Remarkably, in the first edition of this work (1807), A. HEISE used the expression “*jura potestatis*”. Cf. A. B. SCHWARZ, *Zur Entstehung* (nt. 13), p. 609.

⁶⁹ A. Heise, *Grundriss* (nt. 66), p. 17.

⁷⁰ To this day, these topics comprise the core of family law. Cf. N. NERY JUNIOR – R. M. A. NERY, *Código Civil* (nt. 9), p. 1707. C. BEVILAQUA famously defined family law as “the set of norms that regulate the celebration of marriage, its validity and the effects it produces, the personal and economic relations that arise from the conjugal society, its dissolution, the relations between parents and their children, kinship and the complementary institutions of guardianship and curatorship” – *Código Civil dos Estados Unidos do Brasil comentado II*, 7^a ed., Rio de Janeiro 1943, pp. 6 and 7.

⁷¹ P. CAPPELLINI, *Systema iuris II* (nt. 52), p. 4.

inductive reasoning, that is, by consideration of the content of individual rules in order to arrive at increasingly general concepts, as well as classifications or groupings that exhaust the subject (...) the reasoning most befitting this type of system is not deductive, but inductive”⁷².

Put simply, it was I. KANT who laid the groundwork in German legal culture for the system of thought that would influence the structure of the *Bürgerliches Gesetzbuch* (BGB) decades later⁷³ (incidentally, the BGB exerted one of the most potent influences upon the systematic approach adopted in the 2002 Brazilian Civil Code). Although discussions on the legal nature of family law did not draw much attention at first (the debate was to take hold in the twentieth century), the conceptual categories created by I. KANT were consolidated in the work of F. SAVIGNY⁷⁴ and influenced nineteenth-century pandectist scholarship⁷⁵ (F. SAVIGNY, who was widely believed to aspire to become “the Kant of jurisprudence”⁷⁶, certainly came into contact with the work of A. HEISE⁷⁷).

The system put forth by this renowned German jurist rests on the notion of “legal relation” (*Rechtsverhältnis*)⁷⁸, conceived as a “*Beziehung zwischen Person und Person, durch eine Rechtsregel bestimmt*”⁷⁹ (“relation between person and person, determined through a rule of law”). Among the various kinds of legal relations, the “family relation” (*Familienverhältnis*) is the one that comprises relations concerning marriage, parental authority and kinship⁸⁰. These relations he collectively denominated “family” (*Familie*), and the legal institutions such relations refer to he

⁷² N. BOBBIO, *Teoria generale del diritto*, Torino 1993, p. 207: “...ordinamento della materia, compiuto con procedimento induttivo, cioè partendo dal contenuto delle singole norme allo scopo di costruire concetti sempre più generali, e classificazioni o partizioni dell'intera materia...il procedimento tipico di questa forma di sistema non è la deduzione, ma la classificazione”. For a comparison with the Roman idea of “system”, see L. RAGGI, *Il metodo* (nt. 32), p. 57.

⁷³ G. SOLARI, *Storicismo* (nt. 21), p. 54.

⁷⁴ Cf. HKK/*Schmoeckel*, vor §1, n. 21; G. Solari, *Storicismo* (nt. 21), p. 60; J. RÜCKERT, *Sechzehn Exempel und drei Berichte*, in: *Methodik des Zivilrechts – von Savigny bis Teubner*, 2^a ed., Baden-Baden 2012, p. 46. Many scholars, however, sustain that the innovation cannot be attributed to A. HEISE (nor I. KANT), but to F. SAVIGNY: cf. S. PATTI, *Cento anni del codice civile Tedesco: il diritto di famiglia*, in: *Codificazioni ed evoluzione del diritto privato*, Roma 1999, p. 72.

⁷⁵ Cf. E. VOLTERRA, *Famiglia* (nt. 17), p. 726; W. MÜLLER-FREIENFELS, *The emergence* (nt. 20), p. 38.

⁷⁶ F. BEISER, *The german historicist tradition*, Oxford 2011, p. 224. Despite the evidence that I. KANT did in fact influence F. SAVIGNY, whether the latter embraced or rejected Kantian philosophical ideas remains a matter of heated debate. Cf. A. MAZZACANE, *Jurisprudenz als Wissenschaft*, in: *Friedrich Carl von Savigny – Vorlesungen über juristische Methodologie 1802-1842*, 2^a ed., Frankfurt 2004, pp. 1 sqq.; P. CARONI, *La cifra codificatoria nell'opera di Savigny*, in: *Quaderni Fiorentini* 9 (1980), pp. 96 sqq. Specifically regarding the most important institutions of family law, cf. S. BUCHHOLZ, *Savignys Stellungnahme zum Ehe- und Familienrecht – Eine Skizze seiner rechtssystematischen und rechtspolitischen Überlegungen*, in: *Ius Commune* 8 (1979), pp. 156 sqq.

⁷⁷ The influence of the systematic approach adopted by A. HEISE on F. SAVIGNY is undoubtable – cf. G. MARINI, *Friedrich Carl von Savigny*, Napoli 1978, p. 49; O. LENEL, *Briefe Savignys an Georg Arnold Heise*, in: *ZRG RA* 36 (1915), pp. 96 sqq.

⁷⁸ *System des heutigen römischen Rechts I*, Berlin 1840, p. 6 and sqq. On his contribution to legal development, cf. J. RÜCKERT, *Friedrich Carl von Savigny*, in: M. STOLLEIS (eds.), *Juristen – Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert*, München 2001, p. 555 sqq.; J. RÜCKERT, *Sechzehn Exempel* (nt. 74), pp. 41 and 42; H.-P. HAFERKAMP, *Methode und Rechtslehre bei Georg Friedrich Puchta (1798-1846)*, in: *Methodik des Zivilrechts – von Savigny bis Teubner*, 2^a ed., Baden-Baden 2012, pp. 77 and 78; J. SCHRÖDER, *Recht* (nt. 28), pp. 219, 217, 223, 224, 235 and 236; H. COING, *Savigny* (nt. 32), pp. 18 sqq.

⁷⁹ *System I* (nt. 78), p. 333.

⁸⁰ *System I* (nt. 78), p. 342.

called “family law”⁸¹ (*“Familienrecht”*). He also emphasized that family law is one of three main classes of rights (the other two are the law of property and the law of obligations)⁸². The influence of I. KANT is evident.

This notion of legal relation, save for minor modifications, became the cornerstone of the (still in force) BGB system⁸³ and was explicitly consolidated in the work of B. WINDSCHEID⁸⁴. This legal scholar divided private law into two branches (one relating to property relations and the other to family relations) and subdivided property relations into two groups (legal relations over things and legal relations between people), thereby setting them apart from inheritance law⁸⁵. Hence the sequence of the topics in the BGB: the “general part” deals with the three fundamental concepts necessary for any legal relation (“persons”, “property” and “legal relation” – regulated in the first three sections), while the special part governs specific legal relations (the law of obligations, the law of property, family law and inheritance law)⁸⁶. The arrangement, which was consolidated by the time of G. HUGO⁸⁷, became a typical feature of the “*Pandektensystem*”, as it came to be called, and has been an integral part of the structure of civil codes ever since⁸⁸ (which typically feature an independent body of “family law” within the system⁸⁹).

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6 The Systematic Organization of Family Law in Brazil

The influence of this arrangement on the system adopted by the Brazilian civilian tradition is evident. In the second half of the nineteenth century, the tripartite division created by I. KANT was adopted by A. TEIXEIRA DE FREITAS in his *Consolidação das Leis Civis*⁹⁰ (or Consolidated Civil Laws, i.e., a consolidation of the existing national laws) and was later incorporated, with minor changes, to his *Esboço* (literally, a sketch for a draft civil code). The special part of the *Esboço* is divided into three major areas: “on personal rights in family relations” (Book I, Section I), “on personal rights in civil relations” (Book I, Section II) and “on real rights” (Book II). The Brazilian jurist believed, however, that “this arrangement of the subjects does not correspond to that which our spirit regards as the most perfect” (Introduction to the *Consolidação das Leis Civis*, p. CXV) and

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⁸¹ The influence of this conception is evident in the work of LAFAYETTE RODRIGUES PEREIRA, *Direitos de família*, Rio de Janeiro 1918, *passim*.

⁸² System I (nt. 78), p. 345. Cf. S. BUCHHOLZ, *Savignys Stellungnahme* (nt. 76), pp. 148 sqq.

⁸³ HKK/*Michaels*, vor §241, n. 42; H. COING, *Savigny* (nt. 32), p. 21.

⁸⁴ *Lehrbuch des Pandektenrechts I* (1862), Ital. trans. by C. FADDA and P. E. BENZA, *Diritto delle Pandette I – I*, Torino 1902. Specifically on the notion of legal relation, cf. p. 172.

⁸⁵ *Lehrbuch I* (nt. 84), pp. 40 and 41.

⁸⁶ The codification of family law in a distinct book within the system of the code is one of the great innovations of the BGB – cf. S. Patti, *Cento anni* (nt. 74), p. 72.

⁸⁷ J. SCHRÖDER, *Recht* (nt. 28), p. 187. For an opinion from a slightly different perspective (based on G. F. Puchta), cf. H.-P. HAFERKAMP, *Methode* (nt. 78), pp. 85 sqq.

⁸⁸ J. P. SCHMIDT, *Pandektensystem*, in: *The Max Planck Encyclopedia of European Private Law II*, Oxford 2012, p. 1238 sqq.

⁸⁹ J. P. SCHMIDT, *Pandektensystem* (nt. 88), pp. 1239 and 1240.

⁹⁰ *Consolidação das Leis Civis*, 3^a ed., Rio de Janeiro 1876.

observed that the systematization of family rights “is a kind of innovation” (p. CXLIV)⁹¹. Although he did not explicitly mention I. KANT (he may not have applied his ideas consciously), he was greatly influenced by the German scholarship of the first half of the nineteenth century (such as F. SAVIGNY – cf. supra) (cf. e.g. pp. CXLIV sqq.).

The 1916 Brazilian Civil Code followed the division into a general and a special part. The latter was systematized into four books: family law, property law, the law of obligations and inheritance law. The 2002 Brazilian Civil Code maintained this structure but changed the sequence of the books in the special part. From a systematic perspective, however, the main novelty was the inclusion of an additional book on commercial law (Book II), evidently influenced by the 1942 Italian Civil Code (although the autonomy of commercial law in Brazil is somewhat less apparent). As far as family law is specifically concerned, the fact that the 2002 Brazilian Civil Code divides the subject into two distinct subheadings entitled “Personal Rights” and “Property Rights” is quite significant⁹². In fact, this division implies a direct reference to the dual nature of the subject, as I. KANT had already pointed out (by asserting that family law was, in fact, a set of “personal rights of a real kind”).

For a long time, this systematic coherence remained unchallenged. Occasionally, however, debates on whether family law is a branch of public or private law surfaced⁹³. The reason is twofold: certain prerogatives ascribed to the family (as a collective unit) belong to the field of public law and the individuals who compose this unit are bound “*par une sorte de service public*” (“by a kind of public service”)⁹⁴. In other words, the family is an institution of public law or, more specifically, a group (between the individual and the State) “*auquel l’individu sacrifie une partie de ses libertés, mais que représente le bien commun des membres du groupe*”⁹⁵ (“to which an individual sacrifices a portion of his or her liberties, for it represents the common good of the members of the group”).

This idea clearly failed to take root, but even its most radical proponents did not advocate the need to remove family law from the civil code (with the exception of advocates of the socialist legal system, referred to below). This was so because no one was challenging the organic unity of the rules of family law. The eighteenth-century collage (cf. supra) of topics of family law interspersed with rules of public law (such as criminal offences) was no longer a reality in the twentieth century. The focus was not on criticizing the largely private nature of the family, but on affirming its role in society instead.

⁹¹ For similar reasons, an innovative approach is also the mark of LAFAYETTE RODRIGUES PEREIRA, *Direitos* (nt. 81) – the first edition was published in 1869. Therein the “jurist from the Brazilian State of Minas Gerais” praises the work of A. HEISE (p. 5) and regrets the “scarcity and deficiency of the sources of our Civil Law... Regarding *Family Rights*, in particular, we do not possess a law that regulates the subject fully and systematically” (p. 10).

⁹² Through the initiative of CLÓVIS COUTO E SILVA. Cf. M. REALE, *O projeto de código civil – situação atual e seus problemas fundamentais*, São Paulo 1986, pp. 43 and 113; CLÓVIS COUTO E SILVA, *Exposição de motivos do Anteprojeto de Código Civil – Direito de Família*, in: *Arquivos do Ministério da Justiça* 135 (1975), pp. 153 and 154.

⁹³ One of the first scholars to raise this issue in the beginning of the twentieth century was A. CICU, *Il diritto di famiglia – teoria generale*, Roma 1914, *passim* (specially p. 205 sqq.).

⁹⁴ R. SAVATIER, *Du droit civil* (nt. 22), p. 19.

⁹⁵ R. SAVATIER, *Du droit civil* (nt. 22), p. 23.

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7 Family Law Conceived as a Microsystem

Indeed, the Brazilian debate regarding the convenience of preserving family law as part of the Civil Code is very much associated with the recognition of microsystems within larger legal structures. 37

Since the second half of the twentieth century legal scholarship has gradually come to terms with the idea that “l’unità del sistema giuridico nasconde una pluralità di micro-sistemi, ciascuno dotato di una propria logica e di un proprio ritmo di sviluppo”⁹⁶ (“behind the apparent unity of the legal system there is a multitude of microsystems, each with its own logic and its own pace of development”). There are significant differences between microsystems and the traditional systems enshrined in the main codes of law (among which civil codes play a prominent role). A code, according to the modern understanding of the subject, is a collection of various complex legal texts that form the basis for a branch of law, are arranged according to a particular system and follow specific principles⁹⁷. These characteristics hold true for the 2002 Brazilian Civil Code currently in force, whose core principles (among others) are ethical treatment, social relevance and operational application⁹⁸. 38

A striking feature of microsystems is their interdisciplinary nature, which prevents their assimilation into one of the traditional branches of law. The Brazilian Consumer Protection Code is a case in point⁹⁹. It contains roughly one hundred articles that govern issues of civil law, administrative law, criminal law and even civil and criminal procedure (54 rules belong to the field of private law and 64 to that of public law). It is, indeed, a typical (micro)system – it has principles of its own and could hardly be incorporated into any of the traditional branches of law. Moreover, a fragmented and piecemeal treatment of the subject in the various existing codes would also be inconvenient from a practical standpoint. Thus, the only possible solution was to adopt a new model of lawmaking that could accommodate a “cross-discipline between private law and public law”¹⁰⁰. 39

Likewise, some have claimed that the particular logic family law follows is an obstacle to its integration into a civil code, since “modern civil codes incorporate rules of [family] law that do not strictly belong to civil law, for they govern issues of public law, or commercial law, or even criminal and procedural law”¹⁰¹. According to such views, family law is clearly interdisciplinary¹⁰². 40

⁹⁶ N. IRTI, *L’età della decodificazione*, 4^a ed., Milano 1999, p. 71. On this subject, cf. S. PATTI, *Il diritto civile* (nt. 13), p. 37 sqq.

⁹⁷ On some of those characteristics, cf. R. ZIMMERMANN, *Codification: history* (nt. 3), pp. 96 and 97.

⁹⁸ M. REALE, *O projeto* (nt. 92), pp. 37 sqq.

⁹⁹ J. P. SCHMIDT, *Zivilrechtskodifikation in Brasilien – Strukturfragen und Regelungsprobleme in historisch-vergleichender Perspektive*, Tübingen 2009, pp. 148 and 225 sqq.

¹⁰⁰ C. L. MARQUES, *Introdução ao direito do consumidor*, in: A. H. V. BENJAMIN – C. L. MARQUES – L. R. BESSA, *Manual de direito do consumidor*, 3^a ed., São Paulo 2010, p. 29.

¹⁰¹ F. C. PONTES DE MIRANDA – R. M. A. NERY, *Tratado de direito privado VII – Parte especial – Direito de personalidade, direito de família – Direito matrimonial (existência e validade do casamento)*, São Paulo 2012, p. 261.

¹⁰² This is also one of the reasons why regulating family law as a separate body of rules would at least partially extinguish the debates regarding the legal nature of those rules (whether they belong in the field of public or private law): cf. P. RESCIGNO, *Il “codice della famiglia” della Repubblica democratica tedesca*, in: *Codici – Storia e geografia di un’idea*, Roma 2013, pp. 164 and 165; M. BERENICE DIAS, *Manual* (nt. 8), p. 35.

8 The Interdisciplinary Essence of the New Systematic Arrangement of Family Law

However, the prevalence of precepts of civil law can hardly be overstated¹⁰³. In fact, this distinctive trait can be easily perceived in the two bills regarding the enactment of a “Family Act” currently under the consideration of the National Congress. Of the 303 Articles that comprise Senate Bill No. 470/2013, 137 refer to topics of substantive law currently governed by the 2002 Brazilian Civil Code, while 156 deal with “process and procedure”, a subject already governed by the Brazilian Code of Civil Procedure. In other words, the bill has two autonomous sets of rules that could easily remain incorporated within their respective codes. Thus, the interdisciplinary nature of the branch of law under consideration is far from evident, because there are no apparent disadvantages that could arise from the separate treatment of the two sets of rules. Nor is it clear that the amalgamation of substantive and procedural rules “facilitates the prompt dispensation of justice by simplifying procedures and promoting judicial economy” (Justification of the Bill). Were this true, the argument would be applicable to other areas of law (e.g. the substantive rules regarding possession and the procedure for its defence – including purely procedural rules – would have to be structured jointly).

Specifically regarding procedural rules, the Justification of the Bill states that they constitute “specific rules” designed to resolve family conflicts and promote orality, swiftness, simplicity, procedural economy and facilitated reconciliation. However, these principles permeate the whole structure of civil procedure (they generally apply to cases that involve a “dispute over assets”¹⁰⁴) and some are applicable even in civil law. In fact, the 2002 Brazilian Civil Code professedly seeks to “overcome the attachment of the [1916] Brazilian Civil Code to legal formalism”, aims to “overcome the individualistic nature of the law in force” and intends to “establish normative solutions that facilitate the interpretation and application of the law”¹⁰⁵.

The convenience of uncoupling the rules of substantive family law from the Brazilian Civil Code could be justified if there were a jurisdiction specialized in family law. There may be benefits in providing specialized judicial training in order to educate judges who would decide such cases “more sensibly”. However, the bills do not propose any significant procedural changes¹⁰⁶ and, even if they did, it is noteworthy that in countries that created a specific jurisdiction for family law (separate from the common jurisdiction), the dependence of family law on the rules of the civil code in fact increased (an apparent paradox)¹⁰⁷. In other words, the enactment of special procedural rules alone does not justify the creation of a Family Code. As those are the only types of rules covered by the

¹⁰³ S. PULEO, *Famiglia* (nt. 21), p. 7; F. C. PONTES DE MIRANDA – R. M. A. NERY, *Tratado VII* (nt. 101), p. 261.

¹⁰⁴ See, for example, Articles 3°, §§2° and 3° (prevalence of a consensual solution to conflicts), 4° and 6° (full resolution on the merits within a reasonable period of time), of the 2015 Brazilian Code of Civil Procedure (there are no direct equivalents to these rules in the 1973 Brazilian Code of Civil Procedure).

¹⁰⁵ M. REALE, *O projeto* (nt. 92), pp. 37, 38 and 40.

¹⁰⁶ The recently enacted 2015 Brazilian Code of Civil Procedure does not innovate significantly on the subject (cf. Articles 693 to 699, which have no direct equivalent in the 1973 Brazilian Code of Civil Procedure).

¹⁰⁷ W. MÜLLER-FREIENFELS, *The problem* (nt. 14), p. 113.

bill (Senate Bill No. 470/2013), the proposal fails to demonstrate the interdisciplinary nature of and the need to create a separate microsystem for family law.

House of Representatives Bill No. 2.285/2007 faces the identical objections, as its structure is very similar to that of the above-mentioned Senate Bill. House of Representatives Bills No. 699/2011 and No. 6.583/2013 do not aim to create a microsystem for family law.

To sum up, there are no grounds, from a systematic standpoint, for the removal of the book on family law (Book IV) from the 2002 Brazilian Civil Code or the creation of a separate microsystem, because the bills under consideration are not of an interdisciplinary nature (in stark contrast to the situation in the eighteenth century, when family law was in fact composed of an array of civil, criminal, administrative and procedural rules, among others).

9 The Demise of a Codified System in Socialist Law

In fact, maintaining the norms regarding family law within the civil code would ensure systematic coherence, since the codification as a whole is subject to the fundamental principles of private law (the civil code guarantees the unity of the legal framework and the continuance of the values it enshrines¹⁰⁸). In other words, “the main objection to microsystems is the implied loss of a codified system; although each book of the code has institutions of its own, they are intertwined within an organized and regulated system of general rules contained in the corresponding general part”¹⁰⁹.

Undeniably, the idea of creating a “Family Code” is not new and was actually implemented in countries that belonged to the socialist legal system¹¹⁰ (and in fact constitutes an almost inevitable feature of socialist ideology¹¹¹). According to this view, the inclusion of “family law” as a specific

¹⁰⁸ On the issue, cf. N. IRTI, *L'Età* (nt. 96), p. 71 sqq. See also J. P. SCHMIDT: “But what my research on this matter showed, is that the separate codification of family easily creates problems. Because family law is of course not disconnected from the rest of private law. For example, it's very hard to separate family law from the law of persons. So what happens when you deal with these matters in different codes? You easily lose sight of these connections. I have seen various examples in Latin American jurisdictions where this danger materialized. The legislature lays down a rule in the Family Code and does not realize that it is inconsistent with a rule from the Civil Code. The more legal sources you have, the greater the legal fragmentation, the greater this danger is. Where in turn you deal with everything in one code, then it's much easier for the legislature to see: well, if I have this rule here, and that rule there, then I should make sure that they don't contradict each other. In general, I would say that it is very difficult to cut out family law from the Civil Code without mutilating both” – O. L. RODRIGUES JUNIOR – S. RODAS, Interview with Reinhard Zimmermann and Jan Peter Schmidt, in: RDCC 4 (2015), p. 409.

¹⁰⁹ Legal opinion given by Regina Beatriz Tavares da Silva to IASP regarding the Family Act Bill – IASP Process No. 07/2010 (p. 12); W. B. MONTEIRO – R. B. TAVARES DA SILVA, *Curso 2* (nt. 4), p. 36. For a critique on the idea of “decodification”, cf. R. ZIMMERMANN, *Codification: history* (nt. 3), p. 103 sqq.; J. P. SCHMIDT, *Zivilrechtskodifikation* (nt. 99), pp. 145 sqq.

¹¹⁰ Cf. O. GOMES, *Novas tendências do direito de família*, in: *Novos temas de direito civil*, Rio de Janeiro 1983, pp. 178 and 179.

¹¹¹ Z. KÜHN, *Development of comparative law in central and eastern Europe*, in: *The Oxford handbook of comparative law*, Oxford 2006, p. 223. A specific example can be found in a summary on the development of this debate in Poland, cf. A. GULCZYNSKI, *Der allgemeine Teil und das Familienrecht im Kontext des Diskurses um die Einheit des Privatrechts in Polen*, in: *Der allgemeine Teil des Privatrechts – Erfahrungen und Perspektiven zwischen Deutschland, Polen und den lusitanischen Rechten*, Frankfurt 2013, p. 430 sqq. Another interesting example is the Family Code enacted in the former German Democratic Republic – cf. P. RESCIGNO, *Il codice* (nt. 102), p. 162 sqq. See also R. ZIMMERMANN and J. P. SCHMIDT, in: O. L. RODRIGUES JUNIOR – S. RODAS, Interview (nt. 108), p. 408, especially the following passage: “Well, if I

branch of civil law in nineteenth century codifications was a convenient way to consolidate a set of rules that for centuries had been regulated by the *ius canonicum*. At the dawn of the twenty-first century, however, the detachment of the body of family law from the rest of the civil code would allegedly promote a more adequate response of the law to social transformation¹¹². It would thus elicit “effective public participation in drafting the law”¹¹³ (within a microsystem in which “*la forza regolatrice delle sue norme si esercita su una realtà preesistente e socialmente determinata*”¹¹⁴ – “the regulatory power of its rules is applied to a preexisting and socially determined reality”) and uphold fundamental principles of public law. Doubtlessly, this would once again pose the old question of whether family law belongs in the field of private or public law¹¹⁵. Furthermore, a separate code might regulate intra-family relations more adequately¹¹⁶.

According to socialist ideology, separating family law from codified civil law came as a consequence of acknowledging the supranational character of the family and attempting to have the State shape society¹¹⁷ (by emphasizing the public nature of the family) according to the model adopted by the USSR¹¹⁸. Significantly, a key element of Soviet law is its educational function, which was essential to produce a new collective consciousness based on the alleged moral superiority of that legal system¹¹⁹.

Nevertheless, the supranational character of the family is not a feature most Western societies readily accept¹²⁰. On the contrary, the prevailing view is that family law is the branch of civil law most susceptible to the peculiarities of each country¹²¹ (notwithstanding the tendency to accept

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want to be facetious, I would say one legal system in Europe, which had removed family law from the general civil code, was the German Democratic Republic... And also many other former socialist countries had a separate code for family law... If family lawyers are dissatisfied with certain institutions and rules of present family law, well, then change the corresponding rules. But why take the whole family law out of the Civil Code? I don't see which advantages this would encompass, I only see many dangers. Because a reform of such a scale always creates problems no one foresees”.

¹¹² Cf. P. RESCIGNO, *Il codice* (nt. 102), p. 162 sqq: “*redattori e primi commentatori sottolinearono la scelta di un linguaggio popolare e la semplicità dello stile apparve confermata da un dato statistico – il numero elevatissimo di lettori – che rispecchiava l’interesse manifestato dal cittadino comune all’apprendimento del nuovo regime dei rapporti inter privati, e già dal 1965 al diritto familiare*” (“editors and commentators stressed their choice of a popular language and the simplicity of the style was confirmed by a statistical analysis – the high number of readers – that demonstrated the interest of ordinary citizens in learning the new rules regarding relations among private persons and, since 1965, those regarding family law”).

¹¹³ A. JUNQUEIRA DE AZEVEDO, *O direito pós-moderno e a codificação*, in: *Estudos e pareceres de direito privado*, São Paulo 2004, p. 62.

¹¹⁴ V. ROPPO, *Diritto* (nt. 2), p. 871.

¹¹⁵ Cf. P. RESCIGNO, *Il codice* (nt. 102), pp. 164 and 165.

¹¹⁶ W. MÜLLER- FREIENFELS, *The problem* (nt. 14), p. 109.

¹¹⁷ Specially the youth, with regard to the family – N. HAZARD, *Le droit soviétique II – Le droit et l’évolution de la société dans l’U.R.S.S.*, Paris 1954, p. 293.

¹¹⁸ There are historical reasons as well for uncoupling family law from the civil code – cf. B. ELIACHEVITCH – P. TAGER – B. B. NOLDE, *Traité de droit civil et commercial des soviets III – Les biens – Droit de famille – Successions et testaments*, Paris 1930, p. 280 sqq. On the model adopted in the USSR and its influence, cf. *Idem*, p. 294 sqq.

¹¹⁹ R. DAVID, *Le droit soviétique I – Les données fondamentales du droit sociétique*, Paris 1954, pp. 203 sqq.

¹²⁰ On this issue, cf. M. ANTOKOLSKAIA, *Family law and national culture – Arguing against the cultural constraints argument*, in: *Utrecht Law Review* 4-2 (2008), p. 25 sqq.

¹²¹ On these issues, cf. W. MÜLLER- FREIENFELS, *The problem* (nt. 14), pp. 109 sqq.

supranational regulation of certain topics, such as adoption¹²²). The fact that it has not been included in the various projects for the unification and harmonization of the law of states that belong to the same economic bloc should not come as a surprise (the European Union offers the clearest example of this phenomenon¹²³).

Since the Middle Ages, proponents of the separation of family law have stressed that family relations derive from the *ius naturale* and that they exist regardless of recognition by positive law¹²⁴ (“*la famiglia è una realtà pregiuridica, che esiste indipendentemente dal diritto*”¹²⁵ – “the family is a prelegal reality that exists irrespective of the law” – it is the “*seminarium rei publicae*”¹²⁶). Lastly, another argument often mentioned is that the pace of development of family law is very different from that of other branches of civil law (and the most susceptible to rapid social change). In Brazil, specifically, Book IV of the 2002 Brazilian Civil Code (which deals with family law) is the one that “most intensely suffers from a lack of systematic harmony”¹²⁷.

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10 The Advantages of Preserving the Systematic Arrangement of the Civil Code

However, the danger of this vision is that it may potentially deprive family law of its “*funzione ordinatrice*” (“organizational function”) and constrain it to “*inseguire i nuovi fenomeni cercando di offrire i desiderati strumenti di regolamentazione e di tutelare i soggetti più deboli*”¹²⁸ (“be aware of new phenomena in order to provide the desired regulatory instruments and protect the weakest subjects”). It is important to emphasize that a civil code exerts a cohesive force within a legal system. As such, it prevents disaggregation, maintains coherence and ensures greater certainty in the application of the law¹²⁹ (by inhibiting casuistry abuse, notwithstanding the importance of case law¹³⁰).

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¹²² Cf. the Hague Convention of 05.29.1993, enacted in Brazil by Decree 3.087/1999.

¹²³ With regard to the European Union, the most encompassing of the various drafts for the harmonization of law (DCFR) explicitly excludes family law from its scope. Cf. DCFR I-1:101 – “(1) These rules are intended to be used primarily in relation to contracts and other juridical acts, contractual and non-contractual rights and obligations and related property matters. (2) They are not intended to be used, or used without modification or supplementation, in relation to rights and obligations of a public law nature or, except where otherwise provided, in relation to: (...) (c) family relationships, including matrimonial and similar relationships (...)”.

¹²⁴ This opinion was consolidated by F. SAVIGNY, *System I* (nt. 78), pp. 345 and 346.

¹²⁵ V. ROPPO, *Diritto* (nt. 2), p. 871.

¹²⁶ Cic. *de off.* 1, 54: “*Nam cum sit hoc natura commune animantium, ut habeant libidinem procreandi, prima societas in ipso coniugio est, proxima in liberis, deinde una domus, communia omnia; id autem est principium urbis et quasi seminarium rei publicae*”.

¹²⁷ M. REALE, *O projeto* (nt. 92), p. 106.

¹²⁸ S. PATTI, *Il “principio famiglia” e la formazione del diritto europeo della famiglia*, in: *Diritto private e codificazioni europee*, 2^a ed., Milano 2007, p. 245.

¹²⁹ F. SIEBENEICHLER DE ANDRADE, *Da Codificação – Crônica de um conceito*, Porto Alegre 1997, p. 157 sqq. “The absence of systematic overview is thus apt to damage the intellectual integrity of the law” – R. ZIMMERMANN, *Codification: history* (nt. 3), p. 111.

¹³⁰ Cf. R. ZIMMERMANN, *Codification: history* (nt. 3), pp. 114 to 116 (regarding the BGB).

Today, a code is primarily the internal reference of a legal system¹³¹. Codification is no longer expected to be complete, nor is it meant to cover every subject of private law¹³². Essentially, it must “regulate the more stable legal categories” and “let specific legislation regulate new categories”. Thus, despite its “incompleteness”, a code remains at the center of private law¹³³. “*Modern disillusionment with codification can, to a considerable degree, be ascribed to exaggerated and unrealistic expectations*”¹³⁴. 52

Moreover, the unity brought about by a code prevents the “proliferation of unjustified distinctions” based on historical and political events¹³⁵. It is well to point out that, on the whole, the attempts to uncouple family law from the civil code throughout the twentieth century spawned from totalitarian ideologies (whether right-wing or left-wing) whose goal was to “place the family under permanent and constant state control”¹³⁶. 53

Moreover, one cannot ignore the political interests that permeate any civil code and that family law has a sociopolitical function¹³⁷: “*La decodificazione è uno strumento di politica legislativa. Oggi che la società politica è scossa dalla crisi, e i fondamenti dello Stato controversi e messi in questione, la società civile si offre garante di continuità e stabilità. Il codice assume un plusvalore storico; le leggi speciali, ormai spoglie di raccordi ed impulsi costituzionali, si mostrano povere ed effimere. I fenomeni di decodificazione perdono vivacità creativa e dinamismo interiore*”¹³⁸ (“Decodification is an instrument of legislative policy. Now that the political society is facing a crisis and the foundations of the State have become controversial and precarious, the civil society guarantees continuity and stability. Codes have acquired historical value, while specific legislation, practically bare of any constitutional articulations and impulses, appears to be poor and fleeting. The phenomena of decodification have lost their creative vitality and internal dynamism”). 54

Perhaps the issue would be best understood not as a technical debate (whether or not to accept decodification)¹³⁹, but as a political dispute¹⁴⁰ over a code that ensures values regarded as essential 55

¹³¹ Cf. J. P. SCHMIDT, *Zivilrechtskodifikation* (nt. 99), pp. 155 sqq.

¹³² N. Irti, *Introduzione allo studio del diritto privato*, Padova 1990, p. 59. The preamble of the Quebec Civil Code puts it rather interestingly: “*Le Code est constitué d’un ensemble de règles qui, en toutes matières auxquelles se rapportent la lettre, l’esprit, en termes exprès ou de façon implicite, le droit commun. En ces matières, il constitue le fondement des autres lois (“foundation of all other laws”) qui peuvent elles-mêmes ajouter au code ou y déroger*” (“The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it”).

¹³³ C. PREDIGER, *A noção de sistema no direito privado e o Código Civil como eixo central*, in: *A reconstrução do direito privado – reflexos dos princípios, diretrizes e direitos fundamentais constitucionais no direito privado*, São Paulo 2002, pp. 169 to 171.

¹³⁴ R. ZIMMERMANN, *Codification: history* (nt. 3), p. 106.

¹³⁵ W. MÜLLER- FREIENFELS, *The problem* (nt. 14), p. 90.

¹³⁶ O. GOMES, *Novas tendências* (nt. 110), pp. 179 and 180.

¹³⁷ Cf. O. GOMES, *Novas tendências* (nt. 110), p. 179; W. MÜLLER- FREIENFELS, *The problem* (nt. 14), p. 118; N. HAZARD, *Le droit soviétique II* (nt. 117), p. 294.

¹³⁸ N. IRTI, *L’Età* (nt. 96), p. 10.

¹³⁹ From a logical standpoint, it may in fact be impossible to justify whether family law is to be incorporated into or uncoupled from civil law – W. MÜLLER- FREIENFELS, *The problem* (nt. 14), p. 90.

by civil society¹⁴¹. As such, family law must be capable of ensuring private autonomy and be able to withstand any attempts by public agents to artificially transform institutions that are dynamic by nature¹⁴². There are no technical grounds for the uncoupling, nor is it possible to claim that preserving family law within the civil code would perpetuate values that are no longer relevant to modern society (which would be the same as claiming that separating family law from the code would promote a more liberal conception of the “family”). In order to refute such claims one must only to point out that in the mid-twentieth century conservative Catholic groups supported the creation of a family code¹⁴³.

Equally unfounded is the assertion (widely emphasized in Brazil at the time the “Family Act” bill was submitted) that a Family Code would enable this subsystem to adapt more readily to the rapid transformations our society is undergoing. Again, comparative law provides strong grounds to refute this claim. Most scholars consider that the current Russian Family Code (1995), though uncoupled from the system enshrined in the Russian Civil Code, is on many points below current international standards. This has led the Russian legislature (especially in recent years) to amend its content regarding several topics, which has been a slow (and certainly still incomplete) process¹⁴⁴.

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11 Harmonization of Law and Supranational Codes

An in-depth analysis of these issues is of paramount importance to the harmonization of the law of countries that belong to the same economic bloc (such as BRICS or the European Union). Usually, discussions tend to focus on the legal aspects of legal transactions in general, but steps have already been taken to discuss topics related to family law (such as the creation of the Commission on European Family Law – CEFL, in partnership with the University of Utrecht). Despite the fact that some issues are more recurrent (such as child protection, equal treatment for men and women etc.), any attempt to draft legal texts (on family law) must necessarily address whether it is more expedient to approach the subject as part of a larger body of rules or as a separate (micro)system.

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¹⁴⁰ Interestingly, notwithstanding the political undertones, codes are not usually drafted by elected representatives from the legislature or even bureaucrats, but by renowned specialists from every relevant area (this was the case of the draft for the 2002 Brazilian Civil Code). This is also the reason why codes are more likely to solve problems and follow the opinion of jurisprudence and the courts. Cf. R. ZIMMERMANN, *Codification: The civilian experience* (nt. 23), p. 378.

¹⁴¹ N. IRTI, *L'Età* (nt. 96), p. 12; F. SIEBENEICHLER DE ANDRADE, *Da Codificação* (nt. 129), p. 157.

¹⁴² O. GOMES, *Novas tendências* (nt. 110), p. 180.

¹⁴³ I specifically refer to the experience of the International Union of Social Studies – cf. *Code familial – synthèse doctrinale*, Paris 1951.

¹⁴⁴ The most widely amended section of this family code was the one dedicated to the protection of minors. On the issue, see also R. ZIMMERMANN: “Probably the main reason why a country might want to take family law out of the general civil code is that it changes so quickly... I think it is wrong to look at a code in that way. You can also change a code and you should in fact change it in an incremental way. But you will then always be reminded that the different parts of private law are in many ways interconnected. Of course, the code may lose a bit of its aura as a timeless monument and will become like a building site. But it may be better to be involved with a building site than to live in a legal museum” – O. L. RODRIGUES JUNIOR – S. RODAS, *Interview* (nt. 67), p. 409.

One of the latest and most significant attempts to harmonize family law is the 2006 Model Family Code. Its scope is not limited to the European Union (it is intended to serve as a global model) and its purpose is to offer “modern solutions” that can be implemented in legal systems with very different historical backgrounds. For this reason, the code is characterized by general clauses, thus leaving the specific details of each topic to national lawmakers¹⁴⁵. 58

Although the scope of harmonization is not to draft a common civil code or family code¹⁴⁶ (but only to regulate certain “sectors” of family law that are more sensitive from an international viewpoint¹⁴⁷), the economic bonds that tie certain countries (which do not always imply cultural bonds) certainly increase the influence the legislative choices of one country have on the construction and renovation of the legal system of another. Evidently, supranational codes promote harmonization among the legal systems of a group of countries¹⁴⁸. Nevertheless, even “simple” national codes facilitate comprehension and bring countries with (usually economic)¹⁴⁹ common interests closer together, because they centralize the principles and fundamental rules of a branch of law¹⁵⁰, and this is what ultimately plays a harmonizing role in the external arena¹⁵¹. 59

12 Harmonization of Law and the Case of BRICS

In the specific case of BRICS (of which Brazil is a member), the issue takes on a different hue on account of the different codification model (that codifies family law separately) adopted in socialist countries (which traces its roots to the recent history of two BRICS members: China and Russia). 60

Remarkably, the efforts undertaken in recent years by two members of BRICS (China¹⁵² and India¹⁵³) to renovate and unify their own national private law have prompted a debate regarding 61

¹⁴⁵ Cf. I. SCHWENZER, Preface to the Model family code – from a global perspective, Antwerpen 2006, pp. V and VI.

¹⁴⁶ Among the various areas of private law, family law (as opposed to the law of obligations, for instance) is more difficult to harmonize (which is why harmonization efforts are better put to use in other areas of private law) – cf. S. PORCELLI – Y. ZHAI, The challenge for the harmonization of law, in: *Transition Studies Review* 17 (2010), p. 431; W. MÜLLER- FREIENFELS, The unification of family law, in: *Am. J. Comp. L.* 16 (1968), pp. 175 sqq.

¹⁴⁷ In general, the close kinship between the major institutions, rules and legal principles that guide family law, on the one hand, and human rights, on the other, highlight the convenience of harmonization (even if only partial) of family law. Cf. D. COESTER-WALTJEN, Human rights and the harmonization of family law in Europe, in: *European Challenges in Contemporary Family Law*, Antwerpen 2008, p. 3 sqq.

¹⁴⁸ F. SIEBENEICHLER DE ANDRADE, *Da Codificação* (nt. 129), p. 163 sqq.

¹⁴⁹ India is a case in point. There is a multitude of sources and this makes it difficult even for nationals to know the law (naturally, this fosters legal uncertainty) – cf. J.C. BONNAN, *Inde (Culture juridique)*, in: *Dictionnaire de la culture juridique*, Paris 2003, p. 817.

¹⁵⁰ “*L’organizzazione sistematica, l’individuazione di regole e principi comportano un’elasticità che sembra possa ben coniugarsi con le esigenze dei nostri giorni?*” – S. PORCELLI, *Diritto romano, diritto cinese contemporaneo, diritto e glocalizzazione*, in: *Chaos e Kosmos* 11 (2010), p. 98.

¹⁵¹ “*L’esperienza cinese ci mostra come questo stia funzionando anche in realtà culturalmente profondamente diverse da quella in cui è sorto?*” – S. PORCELLI, *Diritto romano* (nt. 150), p. 98.

¹⁵² For a small summary on the development of the Chinese legal system since the beginning of the twentieth century and the recent initiative to codify their private law, cf. S. PORCELLI, *Diritto romano* (nt. 150), p. 89 sqq. Generally, since the 1980s, “*l’orrore per la legislazione e per la codificazione scampare?*” – A. GAMBARO – R. SACCO, *Sistemi giuridici comparati*, 2^a ed., Torino 2002, p. 538.

codification models¹⁵⁴. Evidently, they could simply resort to creating their own models of codification. However, the time necessary to accomplish such an undertaking (decades, at least) does not seem reasonable in light of the pattern of socioeconomic development in the current global political context¹⁵⁵.

Specifically regarding China, “the transition from a socialist system to one that is based on freedom and the rule of law has entailed such a significant change of the ethical foundations of society that courts and legal doctrine alone cannot achieve the necessary adjustment of private law. New legislation is required, and it should be in the nature of recodification rather than piecemeal reform”¹⁵⁶.

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Conclusion

For the reasons mentioned above, it seems inadequate to regulate family law separately. The question remains, however, and the issue must be tackled in order to avoid neglecting values and human rights whose protection is considered essential by most modern societies, in which the family has visibly acquired international and intercultural features¹⁵⁷.

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In countries (such as China) that are in the process of recodifying their private law based on foreign models, this does not mean, however, that a draft civil code must be approved all at once. The discussion and enactment of each part of the code could very well be carried out in consecutive stages. In this case, clear priority should be given to the most sensitive areas of trade, leaving family and inheritance law (due to their peculiarities) for a later time¹⁵⁸. The only thing that seems inadequate (because it would disrupt the systematic structure of private law) is for the rules of family law to be separated from the civil code (as was the case in Russia during the nineties¹⁵⁹).

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¹⁵³ In the case of India, there are various circumstances that stand in the way of the adoption of a civil code of private law. Specifically, the influence of the common law, normative pluralism and the ever-present religious element in legal relations – cf. J.C. BONNAN, *Inde* (nt. 149), pp. 817 and 818. Regarding family law, the categories and concepts are extremely particular – A. GAMBARO – R. SACCO, *Sistemi* (nt. 152), p. 502. However, “*l’India è aperta alle codificazioni. Lo testimonia un articolo della costituzione, che auspica la promulgazione di un codice civile unificato per tutta la nazione*” (“India is open to codification. The evidence of this is an Article of the Constitution that calls for the enactment of a uniform civil code throughout the nation”) – IDEM, p. 513.

¹⁵⁴ On Chinese family law, “*la differenza fra il diritto cinese comune e il diritto applicabile nelle province ci aiuta a percepire la misura della occidentalizzazione che il diritto cinese ha subito durante il XX secolo*” (“The difference between Chinese law and the common law applicable in the provinces reinforces the perception of the extent to which Chinese law was Westernized during the twentieth century”) – A. GAMBARO – R. SACCO, *Sistemi* (nt. 152), p. 541, nt. 39.

¹⁵⁵ On the time necessary to draft a code in an open-market socialist country, cf. R. ZIMMERMANN, *Codification: history* (nt. 3), pp. 116 and 117.

¹⁵⁶ R. ZIMMERMANN, *Codification: history* (nt. 3), p. 112 (the statement does not specifically refer to China, but the context is clearly equivalent).

¹⁵⁷ C. L. MARQUES – B. MIRAGEM, *O novo direito privado e a proteção dos vulneráveis*, São Paulo 2012, pp. 100 and 101. For an in-depth analysis of the subject, cf. M. ANTOKOLSKAIA, *Family law* (nt. 120), p. 25 sqq.

¹⁵⁸ In favor of this view, but in a different context, cf. R. ZIMMERMANN, *Codification: history* (nt. 3), pp. 117 and 119.

¹⁵⁹ On this issue, see also J. P. SCHMIDT: “It is much more advisable to take small steps, to reform provisions that are outdated or no longer satisfactory, but to leave the Code as it is” – O. L. RODRIGUES JUNIOR – S. RODAS, *Interview* (nt. 108), p. 409. The Russian Civil Code currently in force provides an interesting example

of codification. The draft was discussed and approved in stages (three, in this case). The law of inheritance was incorporated into the codified system (it was approved in the last stage). Family law was discussed at the same time, but was eventually left in a separate code (which was approved in 1995). Some scholars consider this code to be out of step with the reality of the twenty-first century. For this reason, it has been amended in recent years in order to bring it up to “international standards”.