

HISTORICAL VIEWS ON ENVIRONMENT AND ENVIRONMENTAL LAW IN BRAZIL

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METHODOLOGICAL NOTE

The key processes that produced Brazil today lie in the Brazilian precolonial¹ and colonial period.² Those times were responsible for laying the foundations of nationhood and creating a new society, something different, not only for the native people living in Brazil, but also for the Portuguese colonizers.³ A new “social organization defined in terms of specific relationships; and . . . a collective and particular mental attitude” emerged.⁴

We “need to go so far back [to get] facts which are indispensable for interpreting and understanding the [current Brazilian] environment” because those facts represent characteristics still present and observable in all elements of the contemporary Brazilian reality.⁵ This reality is one still under continuous, “open and active change, not yet settled along any clearly defined lines, an organism that has not yet ‘taken shape.’”⁶ Hence, a true historical description of the facts that have influenced the development of Brazilian society, with a particular focus on the legal and the environmental aspects, must begin with the inception of that cultural stew.

A. *Romans, Germans, Arabics, and the Portuguese*

From the standpoint of the European conqueror, the Portuguese “discovered” Brazil, and despite the importance of the many cultures that contributed to the civilizing process of the country,

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1. See DARCY RIBEIRO, *THE BRAZILIAN PEOPLE: THE FORMATION AND MEANING OF BRAZIL* 10-15 (Gregory Rabassa trans., Univ. Press of Fla. 2000) (1995).

2. See CAIO PRADO, JR., *THE COLONIAL BACKGROUND OF MODERN BRAZIL* 1-3 (Suzette Macedo trans., Univ. of Cal. Press 1967) (1963).

3. *Id.* at 3.

4. *Id.*

5. *Id.*

6. *Id.* at 4.

the Portuguese exerted the most marked influence in every sense.⁷ The history of Brazil begins in Portugal.⁸ Brazil was a Portuguese territory longer than it has been an independent nation—Brazil was a Portuguese colony for 322 years and became independent only 187 years ago.⁹

Historically, Portugal corresponded to what later would become the Roman province of Lusitania, with little archeological information available on the social organization, political institutions, or the law of the Lusitanian tribes that occupied the Atlantic sector of the Iberian Peninsula in pre-Roman times.¹⁰ It is asserted, with great uncertainty however, that the chief source of law during such times was custom, as inherited by ancestral, oral tradition from the previous generations (*mos majorum*).¹¹ It is also presumed that customs varied from one individual tribe to another, with the family patriarch or the tribes' chiefs holding the authority to enforce the law.¹²

The Roman conquest of Lusitania began during the third century and the last native resistance was suppressed in 60 BC.¹³ Under Roman rule, the law applied to the Lusitanian people came from a diverse array of sources, such as the primitive norms of indigenous law, which were tolerated in each conquered city as long as Roman law was applied to Roman citizens and Roman interests.¹⁴ That explains another source of law in place, that is, the *jus gentium*, a concept whose meaning has changed over time, but that has always indicated the applicable law for matters involving conflict between Roman citizens or Roman interests and non-Roman citizens or non-Roman interests.¹⁵

7. See generally SÉRGIO BUARQUE DE HOLANDA, RAÍZES DO BRASIL [ROOTS OF BRAZIL] 33-61 (18th ed. 1986) (discussing how foreigners saw the culture and society of Brazil during the colonial period).

8. RUY CIRNE LIMA, PEQUENA HISTÓRIA TERRITORIAL DO BRASIL: SESMARIAS E TERRAS DEVOLUTAS [SHORT BRAZILIAN TERRITORIAL HISTORY: SESMARIAS AND REVERTED LANDS] 11 (2d ed. 1954) ("The territorial history of Brazil begins in Portugal.").

9. See generally MANUEL DE OLIVEIRA LIMA, O MOVIMENTO DA INDEPENDÊNCIA [THE INDEPENDENCE MOVEMENT] 272-88 (5th ed. 1972) (discussing the process toward Brazilian Independence, which took place in 1822).

10. MARCELLO CAETANO, HISTÓRIA DO DIREITO PORTUGUÊS [HISTORY OF PORTUGUESE LAW] 57-59 (1981).

11. *Id.* at 60.

12. *Id.*

13. *Id.* at 62.

14. *Id.* at 81.

15. See *id.* at 82-83.

There were also Roman statutes specially enacted for the Iberian provinces, typically aiming to regulate Rome's interests in those territories on taxes, economic activities, and the like.¹⁶

Finally, there was the Roman law itself, which was too sophisticated and subtle a system to be plainly enforced in the rude populations of the provinces.¹⁷ It was necessary to interpret the Roman system according to provincial understandings and to the extent enforcement was possible, sometimes making less strict the stringent provisions of the law, other times bending their meaning to accommodate local resistance toward them.¹⁸

In AD 467, Lusitania was conquered by the Visigoths, a Germanic, barbaric¹⁹ people that were at one time allies of the Roman Empire, which itself would soon see the dismemberment of its western reaches.²⁰

It must be remembered that Christianity was no longer illegal by AD 313, with Constantine.²¹ In fact, as of then and in spite of a short period of turbulence when Julianus, the last pagan emperor, briefly ruled Rome, the Christian Church would hold a privileged position in the Roman Empire, though the Church turned out to be "as intolerant of paganism as paganism had been of Christianity" before.²² When Rome was converted to Christianity, Christianity became Roman and adopted an administration system and a body of laws like those adopted by the Empire, a situation that also meant the use of the same personnel by both.²³

When the Western Roman Empire fell under the barbarian tribes in AD 476,²⁴ it did not mean that Roman civilization had disappeared.²⁵ The barbarians never really wished to challenge the Roman Empire itself, and the idea of destroying it had never crossed their minds.²⁶ The fall of the Western portion of the Empire was not the outcome of a dramatic defeat, nor even of a series of coordinated military successes followed by a systematic col-

16. *See id.* at 83-85.

17. *Id.* at 86.

18. *Id.*

19. *See* JACQUES LE GOFF, *LA CIVILISATION DE L'OCCIDENT MÉDIÉVAL* [THE CIVILIZATION OF THE MEDIEVAL WEST] 31-38 (1967) (providing the evolving Latin meaning of the term).

20. *See* CAETANO, *supra* note 10, at 90.

21. *See* PIERS PAUL READ, *THE TEMPLARS* 27 (St. Martin's Press 2000) (1999).

22. *Id.* at 28-29.

23. *Id.* at 29.

24. Goff, *supra* note 19, at 30-31.

25. READ, *supra* note 21, at 32.

26. *Id.*

onization process developed by the barbarian victors.²⁷ It was actually the result of a “‘gold rush’ of immigrants from underdeveloped countries of the north into rich lands of the Mediterranean.”²⁸ On the other hand, the Roman Empire was a strongly established, universal, long-lasting entity entrenched in the minds of the barbarian invaders, who therefore could not remember a time they had not lived under Roman rule.²⁹

The Christian Church, though, remained with its institutional organization intact, based on the Roman state model.³⁰ Besides, the assets the Church had accumulated during the imperial times had made it able to provide for both “the material as well as the moral well-being of the people under its care.”³¹ With the biggest Roman centers destroyed, the Christian Church hierarchy remained as the only reference of authority.³² After the collapse of the commercial, legal, political, and administrative institutions of the Roman world, the Church became the sole moral force and, owing to its economic power, the last resource for public services, food for the poor, health care, and even lodging.³³ More than taking over the functions of the deceased Empire, the Church “became” the empire in the mind of the people.³⁴

The sources of law during the barbarian rule were strongly influenced by Roman legal traditions, in spite of the codification of Germanic laws such as the *Codex Euricianus* (circa AD 469–81), which is considered to have been applicable only to the Germans.³⁵

The concern with the variety of laws specifically applicable to the Roman conquered populations, however, led the Germanic invaders to prepare the *Lex Romana Visigothorum* (LRV) (AD 506), a compilation of the existing public and private Roman provisions.³⁶ The LRV had a great influence not only in the territory occupied by the Visigoths, but also throughout the Western Europe.³⁷ In addition, the content of the LRV was for a long time considered a

27. *Id.* at 31.

28. *Id.*

29. *Id.* at 32.

30. *Id.* at 33.

31. *Id.*

32. *See id.*

33. *Id.*

34. *Id.*

35. *See* CAETANO, *supra* note 10, at 101.

36. *Id.* at 102.

37. *Id.* at 103.

genuine representation of the prestigious Roman law that the Christian Church kept applying for its matters.³⁸

The conversion of the Visigoths to Christianity facilitated their interaction with the Iberian-Roman inhabitants, and the separate application of legal regimes to each group ended in 654 with the enactment of the Visigoth Code,³⁹ which had strict provisions forbidding resorting to the LRV.⁴⁰ The code is considered one of the most important legal works of the Medieval Age, reflecting the amalgamation of diverse ecclesiastic, Roman, and Germanic influences it received.⁴¹

In 711, Arab peoples from North Africa arrived in Lusitania and began to participate in Portuguese culture.⁴² In the ensuing four centuries, Christians, who had initially fled from the invaders to the North of the land, little by little struggled to overcome the Arabic occupation, eventually succeeding in taking back the territories of former Lusitania from the Arabs⁴³ and founding the kingdoms of Leao,⁴⁴ Castela,⁴⁵ Aragão,⁴⁶ Navarra,⁴⁷ Oviedo,⁴⁸ and Galiza.⁴⁹ Led by Afonso Henriques, or Afonso I, the founding kingdoms definitively expelled the Arabs after defeating them at the Battle of Ourique in 1139.⁵⁰ Although the name *Portugal* is said to have been already applied since the tenth century to portions of the territories that later would form the founding kingdoms,⁵¹ and although the Portuguese territory would only be consolidated with the conquest of Algarve in 1249,⁵² Afonso I was the first to claim himself king of Portugal, which he did by the end of the Battle of Ourique.⁵³ However, in order to bear the title of king, he needed Portugal to be recognized as a nation by the international commu-

38. *Id.*

39. *Id.* at 104.

40. *Id.*

41. *Id.* at 106.

42. *See generally id.* at 111 (describing the invasion of the Iberian peninsula by the Moors).

43. *See id.* at 119-22, 132.

44. *See id.* at 119.

45. *See id.* at 132.

46. *See id.*

47. *See id.* at 134.

48. *See id.*

49. *See id.*

50. *Id.* at 202.

51. *Id.* at 136-37.

52. *Id.* at 270.

53. *Id.* at 202.

nity according to the system then in place.⁵⁴ At that time, the Christian Church had the prerogative to proceed with such recognition, to allow the admission of a new nation to Christianity.⁵⁵ The negotiations for that purpose lasted from 1143 to 1179, when Pope Alexander III finally took the kingdom of Portugal “under the protection” of the Church,⁵⁶ showing how important the canonic role still remained in spite of the dramatic impacts generated by the Arab occupation.⁵⁷

After the Arab peoples were expelled, Portugal’s principal sources of law were the Visigothic Code (heavily influenced by pre-Justinian Roman law) and customary law.⁵⁸ These customs had been forged by a mixture of popular Roman, Germanic, canonical, and Muslim practices.⁵⁹ At the end of the thirteenth century, this blend of customs and ancient rules was subjected to an attempt at consolidation by means of written municipal charters called *forais*.⁶⁰ The principles of Roman law eventually prevailed in this achievement, and their prevailing was named *reception*.⁶¹ These Roman law principles were further strengthened in 1290 by the creation of the pillars of what later would become University of Coimbra⁶² and by the influence of the Portuguese who learned law in Italy.⁶³ Principles of canonic law were also being reinvigorated at that time.⁶⁴

In addition to the influence of wars, the demands on resources that could provide food for a nation in short supply also shaped Portuguese law.⁶⁵ By 1311, feeding the people had become such a severe problem that King Afonso III of Portugal promulgated an

54. *Id.* at 203-04.

55. *Id.* at 204.

56. *Id.* at 205.

57. *Id.* at 122-23.

58. José Carlos Moreira Alves, *A Panorama of Brazilian Civil Law from its Origins to the Present*, in *A PANORAMA OF BRAZILIAN LAW* 87, 87 (Jacob Dolinger & Keith S. Rosenn eds., 1992).

59. *Id.*

60. *Id.*

61. *Id.* at 87-88.

62. The University was originally established in the City of Lisbon in 1290 and transferred to Coimbra in 1308, where it still remains. JOSÉ MURILO DE CARVALHO, *A CONSTRUÇÃO DA ORDEM* [THE CONSTRUCTION OF ORDER] 51 (1980) [hereinafter CARVALHO, *A CONSTRUÇÃO DA ORDEM*]; see Moreira Alves, *supra* note 58, at 88.

63. See Moreira Alves, *supra* note 58, at 88.

64. See *id.*

65. See ANN HELEN WAINER, *LEGISLAÇÃO AMBIENTAL BRASILEIRA: SUBSÍDIOS PARA A HISTÓRIA DO DIREITO AMBIENTAL* [BRAZILIAN ENVIRONMENTAL LEGISLATION: SUBSIDIES FOR THE HISTORY OF ENVIRONMENTAL LAW] 3-7 (Edição Revista Forense 1999) (1991); CAETANO, *supra* note 10, at 280-81.

ordinance making the mere transportation of bread or wheat to any part outside of the kingdom illegal.⁶⁶ Resource demands would continue to play a fundamental role in development of the Portuguese legal framework for land and property, as well as in the inception of the first rules that attempted to preserve the environment, at least for the sake of human survival.

In 1375, King Fernando I of Portugal promulgated an ordinance creating the system of *sesmarias*.⁶⁷ This system replaced the regime of communal lands, which consisted of dividing the available spaces for cultivation in a specific town according to the number of citizens and distributing them by means of a lottery.⁶⁸ The *sesmarias* endowed public property to private individuals, but imposed an obligation on landowners to make appropriate use of their land, implying the duty to cultivate the area to produce crops to help tackle the shortage of food that the Portuguese still faced.⁶⁹ Disobedience of the law could lead to the seizure of the land without compensation.⁷⁰ In the event of seizure, the land would be transferred by the crown to a person able to cultivate it completely.⁷¹ The Portuguese later adapted this model of *sesmarias* as a method of fostering colonization in Brazil.⁷² In 1393, Afonso IV made cutting down fruit trees a crime against the king, likely the first legal provision aimed at protecting nature in the history of the Portuguese- (or Luso-) Brazilian legal system.⁷³

B. *A New Era*

By the thirteenth century, agricultural surpluses in other parts of Europe had already made possible the decline of feudalism and the rise of the first structured “towns and cities, in which people supported themselves not by farming but by commerce.”⁷⁴ Such advances also provoked a cycle in which land became a commodity

66. WAINER, *supra* note 65, at 7.

67. CAETANO, *supra* note 10, at 281. The origin of the word *sesmaria* is uncertain. It could either be derived from the ancient Portuguese terms “sesma” or “sesmo,” meaning the sixth part of something, or from “caesina,” which denotes cut or incision in Latin. See LIMA, *supra* note 8, at 15-18.

68. See LIMA, *supra* note 8, at 11.

69. WAINER, *supra* note 65, at 6.

70. *Id.*

71. *Id.*

72. WARREN DEAN, WITH BROADAX AND FIREBRAND: THE DESTRUCTION OF THE BRAZILIAN ATLANTIC FOREST 63 (1995).

73. WAINER, *supra* note 65, at 5.

74. RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 16 (1999).

and a new legion of tenant farmers and wage-earning rural workers emerged.⁷⁵ This, in turn, led to an increase in consumption of goods, including luxury items, which were generally only found in the East.⁷⁶ Areas closer to the Mediterranean–North Sea commerce route greatly benefited from the trade.⁷⁷

Important scientific breakthroughs occurred during the thirteenth and fourteenth centuries, including the printing press, the compass, and gunpowder.⁷⁸ These innovations and the development of navigation skills made possible the establishment of a sea route that went round the European continent, allowing an increase in commerce among countries along the Atlantic seaboard such as Holland, England, Normandy, Brittany, and the Iberian Peninsula.⁷⁹

The Spanish and the Portuguese were as eager as their competitors, but more audacious. Ignoring the “fact” that the Earth was flat and limited to Africa, Europe, and Asia, and in contrast to the Dutch, British, and French concentration of trade in the new European sea route, the Portuguese traded along the North African coast.⁸⁰ In the islands of the Atlantic, the Portuguese established a “relatively large-scale production of one of the articles most appreciated in the European market: sugar.”⁸¹ They soon improved their technology and production equipment, enabling a better sugarcane yield.⁸² Income from sugarcane production in the sixteenth century made the Portuguese colonization of Brazil possible.⁸³

In 1446, the Portuguese enacted the Afonsinas Ordinances, named in honor of King Afonso V, under whose rule their prepara-

75. *Id.* at 16-17.

76. See EDUARDO BUENO, *A VIAGEM DO DESCOBRIMENTO: A VERDADEIRA HISTÓRIA DA EXPEDIÇÃO DE CABRAL* [THE JOURNEY OF DISCOVERY: THE TRUE HISTORY OF CABRAL'S EXPEDITION] 26 (1998) [hereinafter BUENO, *A VIAGEM DO DESCOBRIMENTO*]. At the time, conservation of food stocks, in particular meat, was performed using very rudimentary techniques requiring spices such as ginger, cinnamon, and cloves, but especially black pepper, which at the time was only produced in the East. *Id.*

77. See PRADO, *supra* note 2, at 12.

78. See PATRICIA S. DANIELS & STEPHEN G. HYSLOP, *ALMANAC OF WORLD HISTORY* 132, 151 (2003). Gunpowder had actually been discovered in China long before and was therefore only improved in Europe at this time. See *id.* at 120, 151.

79. See PRADO, *supra* note 2, at 8.

80. See *id.* at 8-10.

81. CELSO FURTADO, *THE ECONOMIC GROWTH OF BRAZIL: A SURVEY FROM COLONIAL TO MODERN TIMES* 6 (Ricardo W. de Aguiar & Eric Charles Drysdale trans., Greenwood Press 1984) (1959).

82. *Id.*

83. See *id.* at 11.

tion was concluded.⁸⁴ The Ordinances were a mixture of codified prior written sources, compilation of two other older preexisting codifications, and aggregated royal resolutions, concordats, and national and local customs previously in force.⁸⁵ The roots of the system were so strongly based on Roman law, however, that “imperial law” (that is, the law of Rome) was to be applied in case of omissions in the ordinances themselves, except in cases of “sin,” when the canonic law would take over.⁸⁶

The East Roman Empire fell to the Ottoman Turks in 1453, changing the world forever.⁸⁷ With the Turks controlling the trade routes to the East, the Venetians secured a monopoly on commerce, leading to soaring prices and creating the imperative to eliminate middlemen.⁸⁸ It became essential to set up an alternative route to the East, and the Portuguese and Spanish looked to the Atlantic.⁸⁹ The Spanish elected to sail west until they arrived at the “Indies.”⁹⁰ As a result, they inadvertently reached the Americas in 1492 with the Columbus expedition.⁹¹ This event, of course, did not please their Portuguese neighbors.⁹² Even after Columbus’s feat, however, the Spanish and Portuguese still needed a new route to the area now called the “East Indies,” as the recently discovered “West Indies” had but remote economic appeal.⁹³ In 1498, Portuguese seaman Vasco da Gama succeeded in reaching this target by skirting Africa, establishing an indispensable and profitable new trade route.⁹⁴

84. See Mário Júlio de Almeida Costa, *Nota de Apresentação [Note for Submission]* to ORDENAÇÕES AFONSINAS [AFONSINAS ORDINANCES] 5, 6 (Fundação Calouste Gulbenkian 1984) (1792).

85. See Moreira Alves, *supra* note 58, at 88. The *Afonsinas Ordinances* ratified earlier provisions regarding the crime of cutting down fruit trees, as well as the law governing the productive use of the land by means of the *sesmaria*. WAINER, *supra* note 65, at 4.

86. Moreira Alves, *supra* note 58, at 88.

87. DANIELS & HYSLOP, *supra* note 78, at 132; see generally FURTADO, *supra* note 81, at 1 n.1 (discussing the influence of the Ottoman Turks on the economic development).

88. See BUENO, *A VIAGEM DO DESCOBRIMENTO*, *supra* note 76, at 28-29.

89. See PRADO, *supra* note 2, at 8-9.

90. See *id.* at 9.

91. See generally J. H. Elliot, *The Spanish Conquest and Settlement of America*, in THE CAMBRIDGE HISTORY OF LATIN AMERICA: COLONIAL LATIN AMERICA 160 (Leslie Bethell ed., 1984) (discussing the goals of Columbus’ 1492 expedition and modification of the original scheme when he returned to Spain in 1493).

92. BUENO, *A VIAGEM DO DESCOBRIMENTO*, *supra* note 76, at 85-86.

93. See JULIO BANDEIRA, *CANIBAIS NO PARAÍSO: A FRANÇA ANTÁRTICA E O IMAGINÁRIO EUROPEU QUINHENTISTA [CANNIBALS IN PARADISE: THE ANTARTIC FRANCE AND THE EUROPEAN IMAGINATION IN THE 1500s]* 20, 26-27, 35-38 (2006).

94. See generally DIÁRIO DA VIAGEM DE VASCO DA GAMA [THE JOURNEY LOG OF VASCO DA GAMA] (António Baião & A. De Magalhães Basto eds., 1945).

On the other side of the Atlantic, meanwhile, the inhabitants of Pindorama—the name some natives called the land that would become Brazil⁹⁵—survived by hunting and gathering, using slash and burn methods of subsistence.⁹⁶ One of the most interesting practices of the indigenous inhabitants of Brazil at that time was the *sambaquis* (*samba* = shell; *ki* = mound).⁹⁷ Natives used *sambaquis* as a general dump, located close to their villages.⁹⁸ They would stay on a site for as long as they could find food in the vicinity and security could be maintained.⁹⁹ During the time they remained, everything that could no longer be used or consumed was thrown in the nearby *sambaqui*.¹⁰⁰ In spite of what the etymology of the name suggests, this meant not only oyster and shellfish, but also a variety of food leftovers, stone tools, pottery, animal bones and human skeletons.¹⁰¹

C. A New World

On April 22, 1500, Portuguese navigator Pedro Alvares Cabral reached the coast of Pindorama.¹⁰² There is no account of the impressions of the natives when they saw the Portuguese ships and their visitors, who had been traveling for 44 days, had hair all over their bodies and faces, and were wearing heavy clothes in the previously naked tropics.¹⁰³ Bearing in mind the standards of hygiene on ships at the end of the fifteenth century,¹⁰⁴ however, there is no

95. José Murilo de Carvalho, *Brasil, Brazil: Sonhos e Frustrações* [Brasil, Brazil: Dreams and Frustrations] 2, <http://shial.colmex.mx/textos/JoseMurilo.pdf> (last visited July 18, 2009).

96. See RIBEIRO, *supra* note 1, at 11; see also DEAN, *supra* note 72, at 22-23.

97. DEAN, *supra* note 72, at 24-25.

98. *Id.* at 24.

99. *Id.*; see also MADU GASPAR, *SAMBAQUI: ARQUEOLOGIA DO LITORAL BRASILEIRO* [SAMBAQUI: ARCHEOLOGY OF THE BRAZILIAN SEASHORE] 42-43 (2000).

100. See generally GASPAR, *supra* note 99 (discussing the *sambaqui*). Archeological investigations are often carried out by examining hill-shaped debris, which varies in size depending on the length of time a native settlement is established in a given area. DEAN, *supra* note 72, at 24.

101. See GASPAR, *supra* note 99, at 38-39. *Sambaquis* epitomize the easy-going style of the Pindorama people. See DEAN, *supra* note 72, at 39. War among tribes, on the other hand, was not only common, but regarded as a form of entertainment. Victors, however, captured and cannibalized their enemies. The better a future meal proved himself in battle, the better for those who would consume him, as victors believed they would incorporate his courage. See *id.* at 31; see also PERO DE MAGALHÃES DE GÂNDAVO, *A PRIMEIRA HISTÓRIA DO BRASIL: HISTÓRIA DA PROVÍNCIA SANTA CRUZ A QUE VULGARMENTE CHAMAMOS BRASIL* [THE FIRST HISTORY OF BRAZIL: HISTORY OF THE PROVINCE OF SANTA CRUZ THAT WE COMMONLY CALL BRAZIL] 145-54 (Jorge Zahar ed., 2004) (1576).

102. See BUENO, *A VIAGEM DO DESCOBRIMENTO*, *supra* note 76, at 7-12.

103. *Id.* at 40-41, 45.

104. See generally *id.* at 22-46 (describing the conditions and events of Cabral's voyage).

doubt that for the natives, who bathed every day, the experience was unforgettable.¹⁰⁵ Pero Vaz de Caminha, a royal notary and part of the Portuguese crew, kept a record of the impressions of the Portuguese.¹⁰⁶ The newcomers were amazed at how naturally the natives acted in relation to their own nakedness, “with no shame.”¹⁰⁷ The natives, on the other hand, were astonished with the crew’s iron tools.¹⁰⁸ Little did they know that the natives were moving from the Stone Age to the Iron Age in the space of a few minutes.¹⁰⁹ It was just the “beginning, the foundation of settlement, of colonization and empire, of a transferred and imposed civilization.”¹¹⁰

The Portuguese conquerors would soon realize that in addition to their greed,¹¹¹ religion, lust, and Afonsinas Ordinances, they would need a great capacity for improvisation and adjustment to succeed in the colonial enterprise.¹¹² This would become one of the main characteristics of the new society that would be shaped from that moment on.

D. “*Brasileiros*”

Exploitation of *pau-brasil* (brazilwood) began immediately after “discovery.”¹¹³ The tree was crushed to obtain a powder used for dyeing fabrics red, a fashionable color at the time because it was the color of nobility.¹¹⁴

Portugal made more money from trade with the East Indies, and tended not to care much about the new lands.¹¹⁵ Nevertheless, the Portuguese crown funded an expedition including Americo Ves-

105. See RIBEIRO, *supra* note 1, at 19; see also DEAN, *supra* note 72 at 41.

106. SÍLVIO CASTRO, A CARTA DE PERO VAZ DE CAMINHA: O DESCOBRIMENTO DO BRASIL [THE LETTER OF PERO VAZ DE CAMINHA: THE DISCOVERY OF BRAZIL] 38-59 (Coleção L&PM Pocket 2003) (1985).

107. *Id.* at 45.

108. See DEAN, *supra* note 72, at 47.

109. See *id.*

110. *Id.* at 42.

111. The French would also contribute significantly to the natives’ change in perception toward the accumulation of riches. See BANDEIRA, *supra* note 93, at 133-34 (reproducing a sixteenth century dialogue between a French explorer and a Brazilian native).

112. See DEAN, *supra* note 72, at 66-68.

113. *Id.* at 45-47. *Pau-brasil* is called *ibirapitanga* in the Tupi native language, which means “red tree.” *Id.* at 45.

114. See EDUARDO BUENO, NÁUFRAGOS, TRAFICANTES E DEGREDADOS: AS PRIMEIRAS EXPEDIÇÕES AO BRASIL 1500-1531 [CASTAWAYS, TRAFFICKERS, AND THE BANISHED: THE FIRST EXPEDITIONS TO BRAZIL 1500-1531] 68 (1998) [hereinafter BUENO, NÁUFRAGOS, TRAFICANTES E DEGREDADOS]. *Brasil* is a Portuguese adjective that means “the quality of something that glows red as embers” or “glowing coal.” DEAN, *supra* note 72, at 45.

115. See DEAN, *supra* note 72, at 45-46, 49.

pucio, who reached as far as southern Brazil in 1501, and founded the village of Porto Seguro in 1503.¹¹⁶

The first Portuguese presence in Brazil was concentrated in *feitorias*, a mixture of trading stations and fortresses used to coordinate the extraction of brazilwood.¹¹⁷ The people who worked with brazilwood (the bulk of those who came from Portugal and the natives who traded with the Portuguese) were called *brasileiros* (literally “brazilers”), the same term Brazilian citizens use for themselves today.¹¹⁸ The name of the country, *Brasil* (as spelled today in Portuguese), was not adopted until the end of the nineteenth century.¹¹⁹

The brazilwood chain of production consisted of the natives hauling gigantic trunks on their shoulders, sometimes for miles, to receive in exchange axes, knives, and other objects of small economic value when compared to the profits made by the Portuguese.¹²⁰ Working with wood was very laborious for the natives at the time, owing to the rudimentary stone tools they used, so they were amazed at the efficiency of the iron tools and valued them highly.¹²¹ In Portugal, meanwhile, King Manoel I, motivated by a wish to immortalize his name in a legal compilation,¹²² ordered the Manuelinas Ordinances, which replaced the Afonsinas Ordinances in 1521, the same year that monarch died.¹²³ According to the new ordinances, Roman laws should be followed “only for the good reason upon which they were based.”¹²⁴ In spite of that, Roman law would remain of fundamental relevance in the Portuguese system,

116. See Barão do Rio Branco, *Geografia Política: História, Administração, População* [*Political Landscape: History, Administration, Population*], in *O BRASIL* [THE BRAZIL] 52, 54 (E. Levasseur ed., Luiz Cavalcanti de M. Guerra & José Augusto Carvalho trans., Bom Texto/Letras & Expressões 2000) (1889).

117. BUENO, *NÁUFRAGOS, TRAFICANTES E DEGREDADOS*, *supra* note 114, at 79-80.

118. DEAN, *supra* note 72, at 50.

119. See Carvalho, *supra* note 95, at 2 (“The names by which the new land was known of were the following: Pindorama (before 1500), Ilha [Island] (Terra [Land] de Vera Cruz [of the True Cross] (1500), Terra de Santa Cruz [Land of the Holly Cross] (1501), Terra Papagali [from the Latin, Land of the Parrots] (1502), Mundus Novus [from the Latin, New World] (1503), America (1507), Terra do Brasil [Land of Brasil] (1507), Índia Ocidental [Western Indies] (1578), Brazil [XIX century], Brasil [XX century].”).

120. DEAN, *supra* note 72, at 45, 47.

121. See *id.* at 47.

122. See Mário Júlio de Almeida Costa, *Nota de Apresentação* [*Introductory Note*] to *ORDENAÇÕES MANUELINAS: LIVRO I* [MANUELINAS ORDINANCES: BOOK I] 5, 6 (Fundação Calouste Gulbenkian 1984) (1797).

123. See *id.* The new ordinances were ordered in 1505, with the King turning down a proposal of the first commission (1512-1514) appointed by him. *Id.*

124. Moreira Alves, *supra* note 58, at 89.

and hence in the Brazilian system, at least until the eighteenth century.¹²⁵

The new Manuelinas Ordinances brought interesting precedents in provisions targeting the protection of natural assets. They maintained the crime of cutting down fruit trees, as previous ordinances and laws had done, but with the difference that sanctions now ranged from a monetary penalty to either whipping or banishment.¹²⁶ The ordinances also forbade hunting partridges, hares, and rabbits with nets or wire ropes, as well as the taking of partridge eggs. This provision also established a closed season for hunting rabbits and male hares, with the prohibition extended to the taking of their offspring.¹²⁷ Another provision of the new ordinances protected bees from being killed by people who bought their hives interested only in their wax.¹²⁸ The sanctions for this crime involved whipping and banishment “for those to whom whipping is not applicable,” which meant members of nobility.¹²⁹

In Brazil, the earliest Portuguese pioneers were completely reliant on the knowledge of the natives for their needs, as the newcomers had no idea how to deal with natural challenges.¹³⁰ Their adaptation was based not only on a market economy in which colonizers’ goods were exchanged for native knowledge, but also in attempts by settlers to strengthen social liaisons by establishing marital relationships with natives, eventually becoming part of the local tribes.¹³¹ The fruits of those initial unions were known as *mamelucos* (children of the house, in the Tupi native language), a new lineage that would be the major racial link between the Old and the New World in Brazil.¹³² But while the original tactic of the Portuguese toward native populations was one of partnership, circumstances soon changed considerably.¹³³

Colonization was essentially an “ecological phenomenon.”¹³⁴ The Portuguese brought their own food to the tropics to ensure subsistence in the new world, disrupting the natural balance of the

125. *See id.*

126. 1 ORDENAÇÕES MANUELINAS, *supra* note 122, at 301.

127. *Id.* at 252.

128. *Id.* at 295.

129. *Id.*

130. *See* DEAN, *supra* note 72, at 66-68.

131. *See* RIBEIRO, *supra* note 1, at 49-53.

132. DEAN, *supra* note 72, at 68.

133. *See id.* at 47, 57 (discussing the Portuguese taking the Tupi as slaves), 66-68 (discussing how the Portuguese were dependent upon the Tupi).

134. *Id.* at 53.

land.¹³⁵ From the Old World they brought rice, bitter oranges, lemons, and sesame.¹³⁶ From Africa and Asia they brought yams, bananas, coconuts, ginger, and okra.¹³⁷ From Portugal they brought apricots, peaches, pears, cabbages, onions, cucumbers, melons, roses, grapes, and wheat, among others items.¹³⁸ Most importantly, they brought sugarcane.¹³⁹

Simultaneously, the production of sugarcane¹⁴⁰ and the exploitation of brazilwood¹⁴¹ were fundamental to the development of the colonization enterprise, providing the economic resources to maintain defense of the colony and finance its initial administrative structure. After all, “[c]olonization, then, was among other things an environmental policy. In the broadest sense, it was a policy of expanding the accessible environment of each empire—its physical resources as well as its economic and political control—to a larger and larger portion of the world.”¹⁴²

The central cause for the change in relationship between the Portuguese conquerors and the natives derived from the enormous difficulties Portugal had getting the necessary manpower to carry out its colonial endeavor.¹⁴³ The population in Portugal was in such dramatic short supply that “as late as the middle of the sixteenth century, the greater part of its territory was uncultivated and abandoned, and there was a labor shortage in the kingdom which led to the employment of slaves on a growing scale.”¹⁴⁴

Bringing paid workers to the new land represented a very high cost, and the Portuguese invested no capital to increase the economy and land value in the colony, so there were few enticements for prospective colonizers to take their chances in the new territory.¹⁴⁵ As a result, when the Brazilian sugarcane venture began in 1530, a labor force based on white workers was never an alternative.¹⁴⁶ The decision to opt for captive natives appeared to be the easiest solution.¹⁴⁷ The Brazilian model became one based exclu-

135. *See id.* at 54-56.

136. *Id.* at 55.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* FURTADO, *supra* note 81, at 6-9.

141. BUENO, NÁUFRAGOS, TRAFICANTES E DEGREDADOS, *supra* note 114, at 75.

142. ANDREWS, *supra* note 74, at 18.

143. *See* DEAN, *supra* note 72, at 56-57; PRADO, *supra* note 2, at 19.

144. PRADO, *supra* note 2, at 19.

145. *See* FURTADO, *supra* note 81, at 20-21.

146. *See* PRADO, *supra* note 2, at 19.

147. *See* DEAN, *supra* note 72, at 56-57.

sively on slave labor, in which the use of human lives was an acceptable means to achieve mercantilist ends.¹⁴⁸ In such a system, the environment—principally the forest—represented nothing more than a barrier between the land and the profits that could be garnered from it.¹⁴⁹

While the Portuguese struggled with uncertainties about whether and how to increase their presence in Brazil, the French and Spanish showed an increasing interest in the new land, which eventually changed the attitude of the Portuguese toward the colony.¹⁵⁰ In fact, after the “discovery” of Brazil, the French had freely explored the seacoast of the new territory, paying no heed to Portuguese complaints or their treaties with the Spanish.¹⁵¹ The French interacted and traded intensively with the natives, having acquired brazilwood from them for decades.¹⁵² Later, they also attempted to establish colonies in Rio de Janeiro (Antarctic France) from 1550 to 1565,¹⁵³ and in Maranhão (Northeast Brazil—French Equinoctial) from 1612 to 1615.¹⁵⁴ The natives eventually began to prefer to deal with the French, “because they took no slaves and were generous in their supply of tools and weapons, even cannons.”¹⁵⁵

In 1532, in an attempt to thwart the French and Spanish efforts and to help initial sugarcane initiatives, as well as to make some profit from the new land which might justify its maintenance, the Portuguese King Joao III (“The Colonizer”) divided the colony into twelve horizontal territories called captaincies,¹⁵⁶ as the first

148. *See id.*

149. *Id.* at 57.

150. *See* FURTADO, *supra* note 81, at 3.

151. *See* DEAN, *supra* note 72, at 50, 52. The French king is rumored to have said that he “would like to see the clause of Adam’s will that excluded [him] from the partition of the world,” when disputing the Treaty of Tordesilhas, which divided the New World between the Portuguese and the Spanish. BUENO, NÁUFRAGOS, TRAFICANTES E DEGREDADOS, *supra* note 114, at 103.

152. *See* DEAN, *supra* note 72, at 50.

153. *See* ANDREA DAHER, O BRASIL FRANCÊS: AS SINGULARIDADES DA FRANÇA EQUINOCTIAL 1612-1615 [THE FRENCH BRAZIL: THE SINGULARITIES OF THE EQUINOCTIAL FRANCE 1612-1615] 34-43 (Albert Stückenbruck trans., 2007).

154. *See id.* at 47-72.

155. DEAN, *supra* note 72, at 50.

156. The first attempt of granting land in the new territory for colonization purposes took place in 1506, with the donation of an island off the Brazilian coast by the crown to Fernando de Noronha; the island still retains his name today. Fernão de Loronha, as some historical records refer to him, also held a contract with the Portuguese crown, signed in 1502, that gave him the right to exploit Brazilian riches, especially brazilwood, for 10 years. Noronha’s ships ultimately traveled to Brazil only until 1511. The monopoly on brazil-

strategy in pursuit of actual possession of the new land.¹⁵⁷ The captaincies followed a system similar in many ways to that of the charters used later by the British crown in sending its first immigrants to America.¹⁵⁸ Basically, donation charters regulated the duties and rights of the beneficiary before the crown, setting forth a range of general legal provisions that should be applied within the territory of the captaincy.¹⁵⁹

Captaincies were assigned to those willing to undertake the settlement and defense of the territories and assumption of full responsibility for the correspondent expenses.¹⁶⁰ The owner (the captain) had the authority to give *sesmarias*—portions of land within the captaincies—to any Christian person interested in cultivating the land.¹⁶¹ These interested parties (*sesmeiros*) were to fulfill the duty of yielding a crop from the land within five years, with failure resulting in the loss of rights of *sesmaria*, as established in the Manuelinas Ordinances.¹⁶² The captain had the right to receive five percent of the value of the extraction of brazilwood, five percent of the fishing, ten percent of the crown's general income from the area of the captaincy, ten percent of the metals, whether precious or not, and the right of passage in rivers, harbors, and "other waters."¹⁶³

The captaincies functioned as an emphyteutic¹⁶⁴ contract that ensured, on one hand, a perpetual relationship between the crown and the beneficiary of the charter, and, on the other hand, between the beneficiary and those who received *sesmarias* from him.¹⁶⁵ Private property in Brazil was thus totally derived from the Portuguese public domain, with its basis in the international trea-

wood was transferred over to Jorge Lopes Bixorda in 1513. See BUENO, NAUFRAGOS, TRAFICANTES E DEGREDADOS, *supra* note 114, at 73-74.

157. See J. CAPISTRANO DE ABREU, CAPÍTULOS DE HISTÓRIA COLONIAL [CHAPTERS OF THE COLONIAL HISTORY] 66 (1998).

158. For similarities between captaincies and British charters, see ANDREWS, *supra* note 74, at 34-37. For differences, see generally RAYMUNDO FAORO, OS DONOS DO PODER [THE OWNERS OF POWER] 137-38 (1958) (discussing the appropriation of land in Brazil).

159. See FAORO, *supra* note 158, at 134-35.

160. See THOMAS E. SKIDMORE, BRAZIL: FIVE CENTURIES OF CHANGE 10 (1999).

161. PAULO BESSA ANTUNES, A PROPRIEDADE RURAL NO BRASIL [RURAL PROPERTY IN BRAZIL] 40 (1985).

162. WAINER, *supra* note 65, at 11.

163. *Id.* at 11-12.

164. The definition of "emphyteusis" is "[a] hereditary leasehold; a nonowner's right to use land in perpetuity, subject to forfeiture for nonpayment of a fixed rent or for certain other contingencies." BLACK'S LAW DICTIONARY 542 (7th ed. 1999).

165. ANTUNES, *supra* note 161, at 40.

ties signed with Spain,¹⁶⁶ and with no regard whatsoever to the claims of the natives.¹⁶⁷

Although modest in the beginning, the size of the *sesmarias* soon grew to an average of more than thirty-six square kilometers.¹⁶⁸ In addition, land cultivated with sugarcane began to become exhausted due to environmentally disastrous slash and burn methods used.¹⁶⁹ Instead of changing the methods, *sesmeiros* found it much easier to apply regularly for more and more new tracts of land, extending their already enormous properties instead of recuperating the parts they already had.¹⁷⁰ *Sesmarias* grantees did not have to pay any taxes¹⁷¹ to the Portuguese crown or to the holder of the captaincy, although they did owe a tenth of their income to the Order of Christ as a tithe for the propagation of faith, because the new lands, as those of the motherland, were under the jurisdiction of that Catholic order.¹⁷²

E. *Wreaking Havoc*

Portugal's choice to use a native slave labor force came with a price. Natives often refused to work and escaped easily into the

166. *Id.* at 41; see LIMA, *supra* note 8, at 11.

167. See DEAN, *supra* note 72, at 63. The Vatican only considered the natives "human" after the Pope acknowledged that they had a soul in 1532. Manuela Carneiro da Cunha, *Política Indigenista no Século XIX [Indigenes' Policies in the XIX Century]*, in HISTÓRIA DOS ÍNDIOS NO BRASIL [HISTORY OF THE INDIANS IN BRAZIL] 133, 134 (Manuela Carneiro Da Cunha et. al. eds., 1992). The natives' ownership over their lands was never an undisputable issue. Although the lands occupied by their villages was recognized as their property in a royal edict of 1596 (and repeated in other royal ordinances of 1609 and 1611), slavery and "just war" against "pagans" worked as a motive for the crown to take over native lands. Beatriz Perrone-Moisés, *Índios Livres e Índios Escravos: Os Princípios da Legislação Indigenista do Período Colonial (séculos XVI a XVIII) [Free Indians and Slave Indians: The Principles of the Indigenes' Legislation of the Colonial Period (16th to 18th centuries)]*, in HISTÓRIA DOS ÍNDIOS NO BRASIL [HISTORY OF THE INDIANS IN BRAZIL], *supra* at 115, 119, 123-29. In the nineteenth century, the same rationale was apparently adopted by the Portuguese crown (1808 and 1819), as well as by the newly established Brazilian Empire (Law of Lands and Immigration of 1850) to theoretically grant natives ownership of the lands they traditionally occupied. Cunha, *supra* at 141-42. Today, however, the Brazilian Federal Constitution acknowledges "permanent possession" of native lands traditionally occupied by the Brazilian tribes. See Constituição da República Federativa do Brasil de 1988 [C.F.] [Constitution] art. 231 §§1-3 (Braz.). The ownership of such lands, however, belongs to the federal government. *Id.* art. 20(XI).

168. See DEAN, *supra* note 72, at 72-73.

169. See PRADO, *supra* note 2, at 155.

170. See DEAN, *supra* note 72, at 147-48.

171. This situation would change between 1699 and 1831, with the establishment of a royal fee called the "foro," by means of the Royal Charter [Carta Régia] of January 20, 1699. The fee was to be levied "according to the greatness and goodness of the land." See ANTUNES, *supra* note 161, at 42-43.

172. See LIMA, *supra* note 8, at 31.

forest, which they knew far better than the Portuguese.¹⁷³ Nevertheless, despite this and the fact that the few plantations that were already using an African slave force in the mid-sixteenth century were achieving better results, the colonizers continued their merciless hunt for natives, chiefly because of the higher costs of the African slaves at that time.¹⁷⁴ As a result, by the 1560s native slavery had intensified tremendously, accompanying the expansion of the sugarcane activity.¹⁷⁵ Even so, some “partnership” between the Portuguese and the natives could be still observed, in that the Portuguese acquired indigenous slaves through the services of *pombeiros* (literally, “pigeoners”).¹⁷⁶ *Pombeiros*, called by the same name as their African counterparts, were natives who hunted other natives.¹⁷⁷

The Portuguese enslaved large numbers of natives to be forced labor.¹⁷⁸ In doing so, the Portuguese killed them through armed conflict, overwork, starvation, and transmission of European diseases (smallpox, malaria, measles, respiratory diseases, and flu).¹⁷⁹ The impact was so devastating that out of the twelve indigenous communities surrounding the village of Sao Paulo at the beginning of the sixteenth century, only half remained at the beginning of the seventeenth century.¹⁸⁰ Disease eliminated 95 percent of the Tupi from Sao Vicente to Cabo Frio.¹⁸¹ This dramatic decrease in the native population brought about the increasing availability of unoccupied areas ready to be claimed by squatters.¹⁸²

Squatters were free people who occupied any unclaimed land.¹⁸³ The practice was illegal, though tolerated through the custom of *posse* (possession).¹⁸⁴ Depending on the way the right of possession was acquired and exercised, a *sesmaria* could be granted to the squatter.¹⁸⁵ This frequently occurred because of the practical difficulties in following the legal procedures to obtain a regular *sesmaria*, the granting of which did not depend on merit-based

173. DEAN, *supra* note 72, at 57.

174. *See id.*

175. *Id.*

176. *See id.* at 68.

177. *Id.*

178. *See id.* at 57.

179. *Id.* at 61, 63.

180. *Id.* at 64.

181. *Id.* at 61.

182. *See* DEAN, *supra* note 72, at 72.

183. *See* LIMA, *supra* note 8, at 47; DEAN, *supra* note 72, at 72.

184. DEAN, *supra* note 72, at 72; *see generally* LIMA, *supra* note 8, at 47 (discussing how *posse* of the land was instituted in Brazil).

185. *See* DEAN, *supra* note 72, at 72.

criteria but was rather a privilege of those who had the greatest number of slaves to produce exportable goods.¹⁸⁶ As demand for land increased, property ownership became a matter of who had more power and influence.¹⁸⁷ A *sesmeiro* thus needed not only to be white and Christian, but powerful.¹⁸⁸

In 1548 a new administrative system for the colony was established: the General Government.¹⁸⁹ One of the first measures of the General-Governor was to promulgate a regulation reaffirming the monopoly of the Portuguese crown over brazilwood, explaining that the extraction should be carried out “with the least harm to the land.”¹⁹⁰ The General Government also oversaw the beginning of the organization of the financial and judicial systems in the colony, although they remained extremely concentrated at the higher level of the imperial echelons.¹⁹¹ The chief change brought about in the colony, though, was in regulation of land rights.¹⁹²

The new administrative system came to substitute the captaincies, which had failed to produce the desired results due to the size of necessary investments they required and the financial inability of the captains to fulfill their obligations.¹⁹³ The new system, however, maintained the land disposal arrangement of *sesmarias*, and would remain in place for a long time accompanied by its primary distinguishing feature—the gigantic size of the tracts of land that were customarily granted to *sesmeiros*—which resulted in *latifúndios* (from the Latin, *latifundium*: *latus* = broad + *fundus* = landed estate).¹⁹⁴ This phenomenon has had far-reaching effects on Brazilian society and the environment.¹⁹⁵

In Brazil, the felling of trees in general, and not only of brazilwood, kept up its ferocious rhythm.¹⁹⁶ Because the supply of this

186. See *id.*; see generally LIMA, *supra* note 8, at 36 (discussing the requirements that candidates had to put forth to obtain a *sesmaria*).

187. See DEAN, *supra* note 72, at 72-73.

188. See *id.*

189. EDUARDO BUENO, *A COROA, A CRUZ E A ESPADA: LEI, ORDEM E CORRUPÇÃO NO BRASIL COLÔNIA* [THE CROWN, THE CROSS, AND THE SWORD: LAW, ORDER, AND CORRUPTION IN COLONIAL BRAZIL] 12 (2006) [hereinafter BUENO, *A COROA, A CRUZ E A ESPADA*].

190. WAINER, *supra* note 65, at 13.

191. BUENO, *A COROA, A CRUZ E A ESPADA*, *supra* note 189, at 63.

192. See LIMA, *supra* note 8, at 35.

193. ANTUNES, *supra* note 161, at 38.

194. See LIMA, *supra* note 8, at 35-36.

195. See generally ANTUNES, *supra* note 161, at 47-49 (describing issues that arise from *sesmarias* and *latifúndios*).

196. “Only in the first century of exploitation, about two million brazilwood trees were felled—an astonishing rate of 20 thousand per year or almost 50 a day.” BUENO, *NÁUFRAGOS, TRAFICANTES E DEGREDADOS*, *supra* note 114, at 75. From the same period, although it was

raw material was vital for the construction of ships for the Portuguese armada, the king promulgated another rule in 1594 regulating logging.¹⁹⁷ This rule established virtual environmental zoning, specifying areas where trees could and could not be cut.¹⁹⁸

At the same time, the expansion of sugarcane activity also entailed deep modifications to the land.¹⁹⁹ The sugarcane industry's two main sources of power were firewood and draft animals, and both could be supplied locally.²⁰⁰ Trees also were felled for lumber to be used as building material.²⁰¹ The animals served the dual purpose of feeding the population (beef was a considerable part of the diet of the slaves) and hauling trees that, given the increasing extension of lands cultivated for sugarcane and consequent devastation of the forests by slash-and-burn methods, were only to be found at ever-increasing distances.²⁰² Later, cattle raising would be responsible for colonization of great parts of the northeast, midwest, and south of Brazil.²⁰³

As Warren Dean noted,

[b]y 1600 the human relationship to the Atlantic Forest was transformed, principally because most of its original human inhabitants had disappeared and because the number of invaders was insufficient to replace them. Along the coast, after a century of constant warfare, enslavement, and epidemics, only seven of the donataries had managed to install any sort of settlement.²⁰⁴

“This most momentous event in the history of humankind—the ending of millennia of separation of the two great population pools of the species—was also its most tragic.”²⁰⁵

F. *A Preliminary Environmental Balance*

The haphazard beginning of Brazil gave the forest some respite, as those areas without suitable harbors and significant stocks of

never applied to Brazil, it is interesting to note that the *New Regime for the Protection of the Woods of the Madeira Island* set limits on the felling of trees based on their own juridical nature, for they were deemed by the law to be a “common asset.” Coincidentally or not, that same concept of (public) common asset would later be applied by the 1988 Brazilian Constitution when dealing with the characteristics of the Brazilian environment. WAINER, *supra* note 65, at 24.

197. See WAINER, *supra* note 65, at 14.

198. *Id.*

199. See FURTADO, *supra* note 81, at 62.

200. *Id.*

201. *Id.*

202. See *id.*

203. See *id.* at 62-63.

204. DEAN, *supra* note 72, at 63-64.

205. *Id.* at 41.

brazilwood were left in peace, but that did not last long.²⁰⁶ In 1603, a point when Portugal—and hence Brazil—was still under the Spanish rule (1580–1640), King Felipe II from Spain enacted the Filipinas Ordinances, compiling all the Portuguese rules that had been issued to that date, and replacing the Manuelinas Ordinances.²⁰⁷ The new ordinances remained partially applicable in Brazil until the enactment of the Brazilian Civil Code in 1916.²⁰⁸ The ordinances maintained the same notion of applicability of Roman laws only “for the good reason upon which they were based,” but in reality, Roman law “was frequently employed in contravention of the express language of the [Ordinances].”²⁰⁹

The Filipinas Ordinances maintained the felling of fruit trees as a crime, but contained the innovation of making the violator subject to the penalty of banishment, a sentence that could be served in Brazil, an option also available for various other crimes.²¹⁰ The limitations on hunting contained in the older ordinances were also reenacted, as were the provisions on hunting seasons.²¹¹ Fishing methods also received attention—the use of nets in nontidal waters was banned from March through May.²¹² The ordinances specifically regulated water pollution for the first time, with a specific provision prohibiting dumping any substance that could kill fish or their offspring or in any way contaminate rivers and lakes.²¹³

In 1605, when the best trees of brazilwood could only be found 20 kilometers away from the seashore,²¹⁴ the Portuguese court promulgated its “Rules on Brazilwood,” establishing the first law exclusively dedicated to the Brazilian forests.²¹⁵ The law stated that unauthorized felling of brazilwood trees would be subject to the death penalty, required permits for felling trees to establish a definite amount to be withdrawn by the permit holder, subjected viola-

206. *See id.* at 65.

207. WAINER, *supra* note 65, at 14.

208. *See* Código Civil [C.C.], Lei No. 3.071, art. 1.807, de 1 de janeiro de 1916, D.O.U. de 05.01.1916 (Braz.), available at <http://www.planalto.gov.br/CCIVIL/leis/L3071.htm> (last visited Apr. 6, 2009), repealed by Lei No. 10.406, art. 2.045, de 10 de janeiro de 2002, D.O.U. de 11.01.2002 (Braz.), available at <http://www.planalto.gov.br/CCIVIL/leis/2002/L10406.htm#art2045> (last visited Apr. 6, 2009).

209. Moreira Alves, *supra* note 58, at 89.

210. ORDENAÇÕES FILIPINAS: LIVROS IV E V [FILIPINAS ORDINANCES: BOOKS IV AND V] 1222 (Fundação Calouste Gulbenkian 1985) (1824).

211. *Id.* at 1236.

212. *Id.*

213. *Id.* at 1238.

214. BUENO, NAUFRAGOS, TRAFICANTES E DEGREDADOS, *supra* note 114, at 75.

215. *See* WAINER, *supra* note 65, at 19. In Portuguese, the “Rules on Brazilwood” are the “Regimento sobre do Pau-Brasil.” *Id.*

tors to sanctions ranging from monetary penalties to whipping, banishment to Angola, and confiscation of all the offender's assets, and prohibited burning forests containing brazilwood trees or the roots of brazilwood trees that had already been cut, with penalties to be assessed according to the prudent judgment of the colonial authority.²¹⁶ Although some forest rangers were scattered in areas where the extraction was more common, the tree was virtually extinct at the time the rules arrived.²¹⁷ For this reason, the *Tribunal da Relação e Casa do Brasil*, the recently created first Brazilian court, also issued in March 1609 special instructions regarding the cutting of timber, although there is no special information available on the results achieved or the cases tried in that court.²¹⁸

By the time the English founded the first British colony (Virginia) 107 years after the "discovery" of Brazil, a lot had already happened in Brazil. More than two million brazilwood trees had been chopped down, affecting about six thousand square kilometers of Atlantic Forest.²¹⁹ Sugar had been profitably planted and commercialized for more than 70 years, and about 100,000 people already lived in Brazil, only 30,000 of them white.²²⁰

In 1624, the Dutch, who were at odds with Spain (which ruled Portugal and Brazil from 1580 to 1640), invaded northeast Brazil (the location of the state of Bahia today), but were soon repelled by the locals.²²¹ Nevertheless, they established a prosperous colony in what is today an area of the state Pernambuco, in 1630.²²² The Dutch governor, Maurice de Nassau (1637–1644), brought a series of scientists and artists to document the area's fauna and flora.²²³ The Dutch enacted laws forbidding cutting the cashew tree and directed slave owners to cultivate manioc in proportion to their number of slaves to avoid food shortages.²²⁴ They also regulated water pollution and prohibited dumping sugarcane waste in rivers

216. Regimento do Pau-Brasil de 1605, available at http://www.planetaterra.org.br/biblioteca/regimento_pau_brasil.htm (last visited May 17, 2009).

217. BUENO, NÁUFRAGOS, TRAFICANTES E DEGREDADOS, *supra* note 114, at 76.

218. See WAINER, *supra* note 65, at 9, 20-21, 24-25.

219. DEAN, *supra* note 72, at 46-47.

220. IBGE: Instituto Brasileiro de Geografia e Estatística, Estimativas da População - 1550-1870, http://www.ibge.gov.br/home/estatistica/populacao/censohistorico/1550_1870.shtm (last visited May 17, 2009).

221. Rio Branco, *supra* note 116, at 57.

222. See OLIVEIRA LIMA, FORMAÇÃO HISTÓRICA DA NACIONALIDADE BRASILEIRA [HISTORICAL FORMATION OF THE BRAZILIAN NATIONALITY] 80-84 (Topbooks 1997) (1911) [hereinafter LIMA, FORMAÇÃO HISTÓRICA].

223. *Id.* at 84-86; see also SKIDMORE, *supra* note 160, at 12.

224. WAINER, *supra* note 65, at 26.

and lakes to protect the destitute sector of the populace that ate fish from them.²²⁵ The Dutch subjected game and fishing to regulation, with an express mandate to forestall the “extermination” of any species.²²⁶ In 1654, when the Portuguese were again ruling their own country, the Dutch were eventually expelled from Pernambuco by means of an association between the Portuguese and local “Brazilians of all social classes, supported by the local [sugar-cane] planters’ desire to escape their debts to the Dutch.”²²⁷

The northeastern sugar industry experienced a severe decline in the middle of the seventeenth century, following the expulsion of the Dutch and their subsequent partnership with the English in the West Indies sugar market.²²⁸ Nonetheless, the characteristics of Brazilian northeastern sugar production and stock raising acquired during the decline of the sugar-based economy remained so strongly attached to the country that they influenced the formation of the twentieth-century Brazilian economy.²²⁹ The low maintenance cost of both activities once they were established—cheap or slave workforce, no new technology, etc.—made producers continue with their activities even when sugar prices plunged.²³⁰ In addition, the means of production could not be put to alternative uses.²³¹ Therefore, the processes proceeded steadily, although the sugar-cane industry lost force and the cattle-raising sector saw only a slight increase for subsistence reasons.²³² “The Northeast became converted from a high-productivity economic system into an economy in which the major part of the population produced only what was necessary for its bare existence.”²³³

In the northern part of the colony, the effects of the persistent decline of the sugar economy and the “[l]ack of any activity capable of producing something marketable compelled each family to become completely self-sufficient, something possible only for those who managed to hold onto a number of Indian slaves. Thus Indian hunting became a prerequisite for survival.”²³⁴ This compelled the white Portuguese colonizers to become more knowl-

225. *Id.* at 27.

226. *Id.*

227. SKIDMORE, *supra* note 160, at 12.

228. *See* FURTADO, *supra* note 81, at 66.

229. *Id.*

230. *Id.* at 66-67.

231. *Id.*

232. *See id.* at 67-68.

233. *Id.* at 70.

234. *Id.* at 74.

edgeable about the forest.²³⁵ Religion was later used as a wiser expedient to tame the native people, with the Jesuits leaving the indigenous in their own communities and trying to get voluntary cooperation, again in exchange for objects of small value.²³⁶ Once the natives had been lured by a new object, a bond of dependence would begin that the natives would be unable to break.²³⁷ This created a continual system of expansion toward the forest interior in the north of Brazil, close to the Amazon River, by means of the network of native villages.²³⁸

The decline in the sugarcane cycle and the need for a subsistence alternative led to a rise in low-productivity, small-scale units and, as a result, to the "extinction of the more complex forms of social intercourse, and substitution of general law by local custom."²³⁹ But even in their decline, the sugarcane farms remained the main—if not only—source of revenue to the Portuguese and the colony as a whole, a situation that endowed the sugarcane-mill owners with increasing power.²⁴⁰ As a result, one other feature of the sugarcane cycle was created that would remain in Brazilian society: the *senhor de engenho* (lord of the sugarcane mill).²⁴¹ He was—and in many parts of Brazil still is—the reason, the law, and the final word in the business of anyone who happened to live within his *latifúndio*: his wife, children, workers, and whoever dared to step onto his land.²⁴²

The clash between the Portuguese and Spanish on one side and the Dutch on the other resulted in the weakening of the Portuguese position in the East Indies as well, which brought about increasing interest in the Brazilian colony.²⁴³ In fact, this situation resulted in the Portuguese continuing a disadvantageous colonial enterprise in the Brazilian territory, which also led to successfully cultivating in Brazil many of the spice plants that had first driven

235. *Id.*

236. *Id.*

237. *Id.* at 75.

238. *See id.* at 74-75.

239. *Id.* at 76-77.

240. *See id.* at 47-48.

241. *See generally* GILBERTO FREYRE, *THE MASTERS AND THE SLAVES: A STUDY IN THE DEVELOPMENT OF BRAZILIAN CIVILIZATION* xl-xlii (2d ed. 1986); FURTADO, *supra* note 81, at 47, 66.

242. *See generally* GILBERTO FREYRE, *THE MASTERS AND THE SLAVES: A STUDY IN THE DEVELOPMENT OF BRAZILIAN CIVILIZATION* xl-xlii (2d ed. 1986); FURTADO, *supra* note 81, at 47, 66.

243. *See* FURTADO, *supra* note 81, at 33-34.

them to look for a new route toward the East.²⁴⁴ In 1677, the Portuguese enacted several regulations to stimulate populating the new lands.²⁴⁵ These also provided for the confiscation of non-productive properties in the colony to avoid “damage to the public good.”²⁴⁶ Rules were also enacted to protect the forest that could be used for the construction of ships, and to direct the advancement of whale fishing activities.²⁴⁷

At the end of the seventeenth century, disturbed by the drop in revenues and the increasing need to find an alternative colonial enterprise to offset that, the Portuguese financed the *bandeiras*.²⁴⁸ The term is said to come from the Portuguese word *bando*, meaning “bands, which went west to capture Indians and look for precious metals.”²⁴⁹ The *bandeirantes* (those that undertook the *bandeiras*) departed from Sao Paulo (the “front door” to the *sertão*²⁵⁰).²⁵¹ There had been activities like the *bandeiras* since the beginning of the colonization process, but not until then, in the pursuit of money, did the crown officially sponsor the expeditions.²⁵² This initiative resulted in the exploration of the mineral riches of what is today the state of Minas Gerais (“General Mines,” named for the varied minerals found there), inaugurating another economic cycle, giving new life to the Portuguese colonial enterprise and permitting it to continue.²⁵³

G. *Blind Exploitation*

In response to the success of the extension of the colonization enterprise with the *bandeiras* in the eighteenth century, a fever of gold exploration took hold, principally in Minas Gerais.²⁵⁴ At the same time, the struggle of the sugarcane industry to subsist and the decline of the extraction of brazilwood, which nonetheless carried on until the 1820s, were followed by the development of cattle raising, pushing colonization further to midwest and southern Bra-

244. WAINER, *supra* note 65, at 30-31.

245. *See id.* at 31.

246. *Id.*

247. *See id.* at 32-33.

248. *See* DEAN, *supra* note 72, at 88.

249. SKIDMORE, *supra* note 160, at 9-10. It is also said that the name *bandeiras* comes from the native custom of raising a flag as a sign of war. *See* ABREU, *supra* note 157, at 128.

250. The word is derived from *desertão* (big desert), and is usually translated as “wilder-ness.” Dean translates it as “outback.” *See* DEAN, *supra* note 72, at 9.

251. SKIDMORE, *supra* note 160, at 10.

252. *See* DEAN, *supra* note 72, at 81-82.

253. *See* PRADO, *supra* note 2, at 28.

254. *See* DEAN, *supra* note 72, at 90-95.

zil.²⁵⁵ This new cycle of gold exploitation was based on the irrational, unsustainable perspective of the Portuguese colonizer, according to which Brazil was nothing more than an endless supply of resources, the fruits of the land and its people forever to be exploited.²⁵⁶ Once more, nothing would be done to preserve the land, even for the sake of profitability.²⁵⁷ The only rule during the whole colonial period was improvidence—extracting the greatest amount of benefit in the shortest time, at the cheapest cost.²⁵⁸ The state of economic exhaustion existing in Portugal and the promise of easy profits in the colony consequently encouraged the first large-scale waves of migration from the motherland, with the Portuguese population in Brazil believed to have enlarged by tenfold in this period.²⁵⁹

The first regulation of mining activity came in 1702.²⁶⁰ At the time, production of gold was so intense that the increased circulation of the metal in Europe led to an increase in the consumption of goods in general, which in turn acted as a spur to the Industrial Revolution on that continent.²⁶¹ The Portuguese crown had a monopoly over all diamonds found.²⁶² It also retained a fifth (*o quinto*) of all the gold extracted in the colony.²⁶³ In 1750, however, with the decline of the mining output, the Portuguese crown established that a minimum of 1,500 kilograms of gold be paid to the crown as of right, even if actual production was lower.²⁶⁴ This levy was called the *derrama* (the spillover).²⁶⁵ Naturally, the combination of the two circumstances—less production and higher taxes—led to further impoverishment and thus to increasing unrest in the mining area.²⁶⁶

255. See FURTADO, *supra* note 81, at 61-66.

256. JOSÉ AUGUSTO PÁDUA, UM SOPRO DE DESTRUIÇÃO: PENSAMENTO POLÍTICO E CRÍTICA AMBIENTAL NO BRASIL ESCRAVISTA, 1786-1888 [A BLOW OF DESTRUCTION: POLITICAL AND CRITICAL ENVIRONMENTAL THINKING IN SLAVERY ERA BRAZIL, 1786-1888] 82-83 (2002) [hereinafter PÁDUA, UM SOPRO DE DESTRUIÇÃO].

257. *Id.*

258. *Id.*

259. See FURTADO, *supra* note 81, at 80-81.

260. See WAINER, *supra* note 65, at 33.

261. See FURTADO, *supra* note 81, at 90-92.

262. WAINER, *supra* note 65, at 34.

263. *Id.*

264. See *id.*

265. *Id.*

266. For the economic effects of the mining production drop, see FURTADO, *supra* note 81, at 92-94. For the relationship between the Portuguese crown's political mismanagement in mining areas and the growing political unrest, see WAINER, *supra* note 65, at 34. For a discussion on the real sources of the beginning of the thoughts on independence in Brazil, see PRADO, *supra* note 2, at 424-26. For the accidental role of the *derrama* in the

Throughout the eighteenth century, the Portuguese enacted legislation showing further concern about the natural resources, especially timber, in its Brazilian colony.²⁶⁷ That is the case of the provision of the Governor and General Captain of Rio de Janeiro, enacted in 1738, forbidding the export of a specific kind of wood that was very important for building ships.²⁶⁸ A similar provision was enacted in the same captaincy in 1743, only this time making it unlawful to cut red mangrove.²⁶⁹ With the creation of the *Relação* (Court) of Rio de Janeiro in 1751, its rules received a special provision empowering its judges to show especial care as to the burning and cutting of woods.²⁷⁰ After the earthquake that destroyed Lisbon in 1755,²⁷¹ the Portuguese concern with the conservation of the timber available in the colony increased, as it was crucial for the reconstruction of the motherland capital.²⁷² There was also a royal order in 1760, which established that authorities would oversee the conservation of the mangroves of Rio de Janeiro, Pernambuco, Santos, and Ceará provinces.²⁷³ Later, in 1773, the crown again manifested its concerns about the Brazilian forests, promulgating a royal letter recommending that the viceroy of Brazil pay special attention to timber-cutting activities.²⁷⁴

As a result of the success of the gold cycle, Brazil was raised to the category of vice-kingdom in 1763, the same year the capital of the colony was moved from Salvador, today the capital of the state of Bahia, to Rio de Janeiro, where the mining business could be better controlled.²⁷⁵ The change in political status did not modify Brazil, which remained agrarian, underdeveloped, and focused on the production of a limited range of goods for subsistence and, to a lesser extent, exportation.²⁷⁶ In addition to this, the country imported everything it needed, not only because of the limitations

Inconfidência Mineira, see RICARDO TOSTO & PAULO GUILHERME M. LOPES, O PROCESSO DE TIRADENTES [THE TIRADENTES' TRIAL] 27 (2005).

267. See WAINER, *supra* note 65, at 37.

268. *Id.* at 37-38.

269. *Id.*

270. *Id.*

271. For information on that devastating earthquake in the Portuguese capital, see LILIA MORITZ SCHWARCZ, A LONGA VIAGEM DA BIBLIOTECA DOS REIS [THE LONG JOURNEY OF THE KINGS' LIBRARY] 15-36 (2002).

272. See WAINER, *supra* note 65, at 38.

273. *Id.* at 23.

274. *Id.*

275. See generally PRADO, *supra* note 2, at 357 (discussing the grant of the title "Viceroy of Brazil" to the capital-general of Rio de Janeiro, formerly the captain-general of Bahia, in 1763).

276. See FURTADO, *supra* note 81, at 92-94.

imposed by the court on attempts to establish any kind of industry, but chiefly because of the lack of interest in new lines of production and of technical skills to undertake them.²⁷⁷ The impact of that scramble for a quick return from gold, sugarcane, etc., was even reflected in the limited amounts of land set aside for the production of food staples, despite the regulatory efforts of the crown to attempt to change that scenario.²⁷⁸

It was during that same part of the eighteenth century, however, that the first significant scientific studies about the important role of nature for mankind began to appear in Europe.²⁷⁹ In 1772, the University of Coimbra, responsible for training the elite of the Portuguese kingdom (including the heirs of the Brazilian rural oligarchy), decided to adopt a new methodological line. This new line was inspired by a sort of “soft” Enlightenment, conveniently tailored not to contradict the Portuguese religious interests.²⁸⁰ It was consistent with the theory of the “economy of nature,” which advocated the need to study nature more in depth, in order to better understand, protect, and ultimately exploit it in a rational fashion, given nature’s economic and political importance (not its intrinsic value).²⁸¹

A group of Brazilian students at Coimbra began to criticize the rapacious and rudimentary character of the colonial economy.²⁸² Pursuant to their view, devastation of “natural productions” should be deemed a historical crime for depleting resources essential to development.²⁸³ The *Academia Real de Ciências de Lisboa* (Lisbon Royal Academy of Science), created in 1779, helped a great deal in propagating those ideas.²⁸⁴ The return of Brazilian students from Coimbra to Brazil gave momentum to their novel beliefs about management of natural resources in the colony.²⁸⁵ This new intel-

277. See *id.* at 87.

278. See WAINER, *supra* note 65, at 36-37.

279. See Selene Carvalho Herculano, *Do Desenvolvimento (In)suportável à Sociedade Feliz [From “Un”bearable Development to the Happy Society]*, in *ECOLOGIA, CIÊNCIA E POLÍTICA [ECOLOGICAL SCIENCE AND POLITICS]* 9, 12 (Miriam Goldenberg ed., 1992); see generally PÁDUA, *UM SOPRO DE DESTRUIÇÃO*, *supra* note 256, at 14-15, 38-51 (discussing the recognition by the Portuguese of the development and importance of natural sciences).

280. CARVALHO, *A CONSTRUÇÃO DA ORDEM*, *supra* note 62, at 69-70; see DEAN, *supra* note 72, at 118.

281. See José Augusto Pádua, *Defensores da Mata Atlântica no Brasil Colônia [Defenders of the Atlantic Rain Forest in Colonial Brazil]*, *NOSSA HISTÓRIA*, Apr. 2004, at 14, 17 [hereinafter Pádua, *Defensores*].

282. PÁDUA, *UM SOPRO DE DESTRUIÇÃO*, *supra* note 256, at 16.

283. Pádua, *Defensores*, *supra* note 281, at 17.

284. *Id.*

285. *Id.* at 17-18; see also PÁDUA, *UM SOPRO DE DESTRUIÇÃO*, *supra* note 256, at 84-92.

lectual elite²⁸⁶ considered the rustic practices of colonial entrepreneurs to have been adopted in ignorance.²⁸⁷ An example of the impact of that ideological change was the experience of the royal judge Francisco Nunes, with jurisdiction over the area of Ilhéus, Bahia, since 1782.²⁸⁸ Although not an intellectual, Nunes had great awareness about the need of protecting the forest resources of the land.²⁸⁹ In a proposal to the crown, he requested an “able remedy for the damage by means of which the admirable woods of this captaincy are being ruined.”²⁹⁰ The judge noted that the abundance of forests had obscured the need for more stringent legislation for the conservation of Brazilian natural resources, and had at the same time promoted distortions such as the great ease with which *sesmarias* were granted.²⁹¹ A special aspect of the proposal was the judge’s views on the “omission of the forest law, the use of which is widely known in all Europe.”²⁹²

In the meantime, slave labor, though employed in the mining economy, was only used as an auxiliary resource, and captives never became the majority of the population in mining areas.²⁹³ As a result, European freemen composed the majority of the population in Vila Rica,²⁹⁴ the center of the gold mining activities in the state of Minas Gerais, and the surrounding areas.²⁹⁵ This made these areas much more propitious for the seeds of liberation to germinate.²⁹⁶

The process for granting new properties for mining did not conflict with the *sesmarias* that had previously been granted, because development was driven inland toward virgin and unoccupied land.²⁹⁷ Given the inconstant nature of mining, also, the entrepreneurs did not become attached to the land, but were always ready to move to another place should the area they were mining become exhausted.²⁹⁸ The economic model of Brazilian colonial

286. “An island of literates in a sea of illiterates.” CARVALHO, *A CONSTRUÇÃO DA ORDEM*, *supra* note 62, at 51.

287. Pádua, *Defensores*, *supra* note 281, at 18.

288. PÁDUA, *UM SOPRO DE DESTRUIÇÃO*, *supra* note 256, at 98.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. FURTADO, *supra* note 81, at 81-82.

294. *Vila Rica* [Rich Village] is today the historical city of Ouro Preto [Black Gold], in the state of Minas Gerais. See PRADO, *supra* note 2, at 54.

295. See FURTADO, *supra* note 81, at 81-82.

296. TOSTO & LOPES, *supra* note 266, at 27.

297. See DEAN, *supra* note 72, at 91.

298. FURTADO, *supra* note 81, at 82.

mining was based on a completely different set of premises than those of the sugarcane system.²⁹⁹ As a consequence, the population tended to live in urban or suburban groups, making social interaction and the exchange of ideas more likely.³⁰⁰

H. *The Seeds of Independence*

Although the Coimbra graduates did not pursue such ideals in Brazil,³⁰¹ the seeds of unrest were planted for the most important political event of the eighteenth century: the first Brazilian initiative for independence, favored because of the critical economic situation at the time and the ever-increasing need of the Portuguese crown for more revenue from the colony.³⁰² The events took place in Vila Rica.³⁰³

In 1788, with the arrival of a new representative of the crown to enforce the old royal mandate of the *quinto*, a group of Vila Rica elite decided to hatch a plot to gain independence for the country.³⁰⁴ The group was inspired by the independence the American Colonies had gained, and some of its members were in contact with Thomas Jefferson by mail or in person.³⁰⁵ A soldier of the royal troops nicknamed *Tiradentes* (or “teeth-puller,” whose actual name was Joaquim José da Silva Xavier), however, would later be the leader of the Brazilian independence movement, called the *Inconfidência* (Conspiracy).³⁰⁶

The plot was discovered, however, and the movement’s leaders were arrested and tried in 1792.³⁰⁷ Six of the defendants were convicted and ordered to be hanged, but five of them were granted pardons, and Tiradentes, being the poorest and least socially influential member, was the only one to be hanged and decapitated.³⁰⁸ The remains of his body were quartered, placed in salt together

299. *See id.* at 81-82.

300. *See generally id.* at 80-83 (discussing the differences between the sugar and mining operations).

301. Notwithstanding, Carvalho accredits to that same elite the paramount role in the territorial amalgamation of independent Brazil. *See generally* CARVALHO, *A CONSTRUÇÃO DA ORDEM*, *supra* note 62 (discussing the political elite during the imperial period).

302. *See* SKIDMORE, *supra* note 160, at 31-32.

303. *See id.* at 32.

304. *See id.*

305. *See id.* The meeting took place in Nimes, France, between Jefferson and José Joaquim de Maia (one of the members of the conspiracy), in 1787, the same year that the founders drafted the American Constitution. *See id.* Jefferson was the ambassador of the American Union in France at the time. PRADO, *supra* note 2, at 424.

306. *See* SKIDMORE, *supra* note 160, at 32-33.

307. *See id.* at 33.

308. *Id.*

with his head, and taken from Rio de Janeiro, where he had been executed, to Vila Rica.³⁰⁹ The head was then displayed on a pole in the center of the city, and the other parts of his body were scattered throughout it.³¹⁰ His house was demolished, its grounds were salted so that nothing would grow on them, and all his assets were confiscated.³¹¹ He had received the Filipinas Ordinance penalty of *morte natural para sempre*, a “natural death forever.”³¹² The crown wanted no one to mistake its intentions of stamping out any insurrections.³¹³ Brazil would wait at least thirty more years for its independence.³¹⁴

Carrying on business as usual after the Conspiracy, the Portuguese crown timidly attempted by decree in 1795 to limit the pillage of Brazilian land by prohibiting the granting of *sesmarias* for coastal and riparian areas where timber suitable for use in construction activities could be found.³¹⁵ In the case of *sesmarias* already granted, the holders remained prohibited from cutting the trees without a crown’s permit.³¹⁶ A name of distinct importance appears during that time, that of the crown’s “Secretary of State for Navy and Beyond-Seas Dominions,” Rodrigo de Souza Coutinho.³¹⁷ Coutinho, who remained in the position between 1796 and 1801, was a leader in terms of promoting a more rational use of the colony’s natural resources for the general good.³¹⁸ From 1797 to 1799, under his inspiration, the crown promulgated a series of royal charters protecting forests and bushlands in the coastal zone or on riverbanks.³¹⁹ The major target of such acts was “the indiscrete and disordered ambition of the inhabitants, who under the pretext of their cultivations have harassed and destroyed precious woods with broadax and firebrand.”³²⁰ One innovative provision in particular had the crown taking possession of not only all trees

309. *See id.*

310. *Id.*

311. *Id.*

312. A “natural death forever” was the death penalty provided by the Filipinas Ordinances, for cases such as crimes that threatened the crown, where the convicted person was hanged and the deceased body abandoned “until time consume[d] it.” *See* ORDENAÇÕES FILIPINAS, *supra* note 210, at 1189.

313. *See* SKIDMORE, *supra* note 160, at 33.

314. *See infra* Part I (discussing Brazilian Independence in 1822).

315. WAINER, *supra* note 65, at 38.

316. PÁDUA, UM SOPRO DE DESTRUIÇÃO, *supra* note 256, at 61.

317. *See id.* at 51-52. In Portuguese, this title is “Secretário de Estado da Marinha e Domínios Ultramarinos.” *Id.*

318. *Id.* at 51-52.

319. Pádua, *Defensores*, *supra* note 281, at 19.

320. *Id.*

declared by law as belonging to the crown (as had already been done with the brazilwood and others), but also all woods and bushes on the sea border or riverbanks near the sea.³²¹ That particular provision apparently gained momentum with an additional rule that banned future concessions of *sesmarias* in those same areas, and also directed crown officials to take steps to return to the crown the rights on lands of *sesmarias* already granted in such spots, in exchange for other areas in the Brazilian interior.³²² The proposal to regain full royal possession to such lands, however, was never put in practice.³²³ The most significant feature of that set of measures was the rationale behind them: a discussion on limitations to liberalism, as the lessons of Adam Smith began to spread among the colonial intelligentsia.³²⁴ There was general acknowledgment that the “principles of political economics” applied in the line that private interests usually did not conflict with public interest, with the “noticeable exception,” as noted by Coutinho, of possible clashes between private and public stakes towards access to natural resources.³²⁵ Such an exception was to be handled under the light of “scientific principles” that could allow the collective use of the resources, instead of leaving them “abandoned” in the hands of private parties.³²⁶

The system was enforced by “forest conservation judges,” who held roles of law enforcement and adjudication, having the power to arrest violators and assess monetary penalties.³²⁷ Although a similar system had already been created before in Portugal, it was arguably the first time an official position was created in Brazil with specific environmental purposes.³²⁸ One of the most famous experiences of a forest conservation judge epitomizes the possibilities of the position at that time.³²⁹ Appointed for the position in Ilhéus, Bahia, in 1797, Baltasar da Silva Lisboa suffered strong resistance from the locals, especially the manioc cultivators and loggers.³³⁰ Afraid that supporting the judge’s strict measures would produce a shortage of manioc flour (a fundamental staple of the

321. PÁDUA, UM SOPRO DE DESTRUIÇÃO, *supra* note 256, at 61.

322. *Id.*

323. *Id.*

324. *Id.* at 62.

325. *Id.*

326. *Id.*

327. WAINER, *supra* note 65, at 39; *see* PÁDUA, UM SOPRO DE DESTRUIÇÃO, *supra* note 256, at 101.

328. PÁDUA, UM SOPRO DE DESTRUIÇÃO, *supra* note 256, at 101-02.

329. *See id.* at 102.

330. *Id.* at 102.

time), the governor of Bahia did not back the official.³³¹ The judge, in turn, wrote *Rebuttal to the Refutation of the Timber-Cutting Plan*, where he attacked the loggers who always profited from “the timber that [they] extracted from the Indians and private parties,” as well as the local land owners “who did not want to cultivate, but to destroy.”³³² He added that if the country insisted upon accepting a model of agriculture based on “the fell of thick timber” it would stay forever “in an analogous state as that of the nomad peoples.”³³³ The efforts of the magistrate were in vain, however, and he eventually had to compromise by 1801, when his supporters left the central government.³³⁴

In addition to the judge’s warnings, a serious writing was produced in 1799 that pointed out the tragic consequences of deforestation—whole areas of farming and mining were abandoned “after all trees [had been] leveled to ashes.”³³⁵ During this time, the Portuguese also sent the first naturalist to the area (Alexandre Rodrigues Ferreira) to study flora and fauna and transport samples of “the products of the three realms, animal, vegetal, and mineral” to the motherland.³³⁶

I. *The “Discovery” Revisited*

In 1806, during his rule in France and the wars he waged throughout Europe, Napoleon imposed a ban on commerce between the continental nations and England.³³⁷ The Portuguese, traditional allies of the British, did not and could not abide by the ban, and the French reacted strongly, invading Portugal in 1807.³³⁸ Forewarned by their British allies, the Queen of Portugal, Maria I (also known as Maria “the Mad”) fled to Brazil.³³⁹ Her son, Prince Regent João,³⁴⁰ who had assumed the regency after his mother lost her sanity in 1792, took charge of the flight from the French advance.³⁴¹

331. *Id.* at 104.

332. Pádua, *Defensores*, *supra* note 281, at 19-20.

333. *Id.* at 20.

334. PÁDUA, UM SOPRO DE DESTRUIÇÃO, *supra* note 256, at 112.

335. Pádua, *Defensores*, *supra* note 281, at 18.

336. WAINER, *supra* note 65, at 40.

337. SCHWARCZ, *supra* note 271, at 194.

338. *See id.* at 219-21.

339. *See id.* at 216.

340. In 1818, about two years after the death of his mother, João would become King João VI. *See id.* at 306, 324.

341. *See id.* at 189, 207.

The arrival of the Portuguese court in Rio in March of 1808 is one of the most significant episodes in the decline of the colonial period, one that marked the contrast between the motherland and the colony at that time.³⁴² A parallel can be traced between the arrival of the Portuguese court in 1808 to the “discovery” three hundred years before—this was the second wave of Portuguese invasion, only this time, albeit by force of circumstances, they had come to settle for a while.³⁴³

At first, there was great amusement and excitement.³⁴⁴ The population had never seen such a spectacle before.³⁴⁵ The “medicinal” pieces of cloth bound around the heads of the women who alighted from the ships were interpreted as being the latest fashion brought directly from the courts of Lisbon.³⁴⁶ The next day it was hard to find a lady in Rio not wearing a piece of white cloth around her head.³⁴⁷

Soon there was pandemonium.³⁴⁸ The city had no more than forty-six streets and a few thousand dwellings and the new inhabitants needed places to live.³⁴⁹ The local people were directed to leave their houses to make room for the Portuguese nobility.³⁵⁰ The process of selecting the houses to lodge the fugitive visitors followed no rationale other than the desire of a newcomer to have a given local house for his family.³⁵¹ Houses selected received the letters *P.R.* (*Príncipe Regente*) on the front door, considered sufficient notice for the inhabitants to leave the place immediately.³⁵² The irreverent spirit that exists in Brazilians today was already apparent: local citizens, with no alternative but to obey the royal order, ironically read the letters as “*Ponha-se na Rua*” (which in Por-

342. See generally LAURENTINO GOMES, 1808: COMO UMA RAINHA LOUCA, UM PRÍNCIPE MEDROSO E UMA CORTE CORRUPTA ENGANARAM NAPOLEÃO E MUDARAM A HISTÓRIA DE PORTUGAL E DO BRASIL [1808: HOW A MAD QUEEN, A FEARFUL PRINCE, AND A CORRUPTED COURT CHEATED NAPOLEON AND CHANGED THE HISTORY OF PORTUGAL AND OF BRAZIL] 213-27 (2007) (discussing how the colony of Brazil changed with the arrival of the Portuguese royal family).

343. Fleeing from Napoleon, the Portuguese court first arrived in Brazil in March 1808, and returned thirteen years later in April 1821. See SCHWARCZ, *supra* note 271, at 355.

344. See *id.* at 236-39.

345. See *id.* at 239-43.

346. GOMES, *supra* note 342, at 145.

347. See *id.*

348. See SCHWARCZ, *supra* note 271, at 236-39.

349. See *id.* at 234-36.

350. *Id.* at 244.

351. See *id.* at 237.

352. *Id.*

tuguese means “go to the street” or “get out”) or “*Prédio Roubado*” (meaning “stolen building”).³⁵³

The year he arrived, the Prince Regent opened the ports of Brazil to “friendly nations,” expressly revoking the measures in force until then, which had forbidden the colony from carrying out international trade.³⁵⁴ He also gave foreigners permission to become beneficiaries of *sesmarias* in 1808.³⁵⁵

Brazil rose from the status of viceroyalty to kingdom united with Portugal and the Algarve in 1815.³⁵⁶ In 1816, the French Artistic Mission arrived in Brazil, with painters such as Nicholas Antoine Taunay (1755–1830), Auguste-Marie Taunay (1768–1824), Jean Baptiste Debret (1768–1848), and Grandjean de Montigny (1776–1850), who depicted Brazil’s natural riches and customs at the beginning of the nineteenth century in works of invaluable importance to Brazilian history.³⁵⁷

The Prince enacted two important environmental measures: he inaugurated the Botanical Garden of Rio de Janeiro (1808) and established the Natural History Museum of Rio de Janeiro (1818).³⁵⁸ Though the Botanical Garden had been envisaged to receive exotic specimens of flora from the East Indies, today it contains one of the richest collections of Brazilian flora.³⁵⁹ The Natural History Museum, also still functioning, houses one of the greatest collections in Latin America of certain artifacts.³⁶⁰ Another interesting environmental law, promulgated in 1809, promised freedom to slaves who denounced brazilwood smugglers to the authorities.³⁶¹

On the marriage of Pedro, the heir to King Joao VI, to the Austrian archduchess Leopoldina in 1817, the governments of Bavaria and Austria sent a scientific expedition led by Johann Baptist Spix and Friedrich Von Martius to Brazil.³⁶² In the same year, King João VI promulgated the first regulation to protect vegetation around

353. *Id.*

354. *Id.* at 229-32.

355. ANTUNES, *supra* note 161, at 58.

356. SCHWARCZ, *supra* note 271, at 304.

357. *Id.* at 309-10.

358. DEAN, *supra* note 72, at 123-24; *see generally* ROSA NEPOMUCENO, O JARDIM DE D. JOÃO [D. JOÃO’S GARDEN] (2007) (discussing the history of the Botanical Garden).

359. *See* Jardim Botânico do Rio de Janeiro, <http://jabot1.jbrj.gov.br/jabot2.htm> (last visited May 7, 2009).

360. *See* Museu Histórico Nacional, <http://www.museuhistoriconacional.com.br/> (last visited May 7, 2009).

361. WAINER, *supra* note 65, at 42.

362. *Id.* at 43.

water sources.³⁶³ The regulation forbade the cutting of any vegetation in lands that bordered the springs of the Carioca River,³⁶⁴ the main source of water in Rio de Janeiro, at that time the headquarters of the Portuguese kingdom.³⁶⁵ This measure was only the first of many that tried to address the problem, which by the second half of the century plagued the city with severe water shortages and left it on the verge of impracticality.³⁶⁶

The country at that time was ripe for change, and it began a process that is still ongoing today. Two hundred years ago, “[t]he most fundamental practical problems of Brazil were defined and posed.”³⁶⁷

J. *The Brazilian “Empire” and the Rural Oligarchy*

In 1822, Brazil won its independence, which had been fomented by the Portuguese threat to revert Brazil to the status of a colony again, after the King João VI returned to Portugal with his court.³⁶⁸ Comparing the process of independence in Brazil to the United States, what took about 175 years in the United States³⁶⁹ came to Brazil only after 322 years of Portuguese absolute-monarchy rule.³⁷⁰ On the other hand, the United States earned its independence after a seven-year war that claimed a high toll in terms of lives and damage to property. Those events, however, led to a rupture with the old order and brought about an institutional framework—the Articles of the Confederation and later the U.S. Constitution—which provided the basis of the first true democratic system, not only for the United States but for the world.

In Brazil, conversely, the declaration of independence was made by means of a “statement” by Pedro I, the son and successor of the Portuguese king João VI.³⁷¹ The prevalent spirit at that moment was evidenced by Pedro’s manner of signing the “statement,” in fact a letter to his father: “Your Majesty’s subject who very much

363. *Id.* at 46.

364. *Id.*

365. SCHWARCZ, *supra* note 271, at 304.

366. *See* DEAN, *supra* note 72, at 223-24.

367. PRADO, *supra* note 2, at 5.

368. SCHWARCZ, *supra* note 271, at 360-61.

369. This estimate of 175 years covers the period from the founding of the colony of Virginia in 1607 to the signing of the Paris Treaty by the United States, Spain, Britain, and the Netherlands in 1783.

370. This estimate of 322 years covers the period from “discovery” by the Portuguese in 1500 to the Brazilian Declaration of Independence in 1822.

371. *See* SCHWARCZ, *supra* note 271, at 373-86.

venerates you.”³⁷² It is not surprising that the Portuguese king recognized Brazilian independence by “yielding and transferring the exercise of [Brazilian] sovereignty” to his son, to whom he also assured succession to the Portuguese crown, without a clear statement recognizing the sovereignty of the newly independent nation.³⁷³ It was a gesture that the Portuguese king liked to think was based on his magnanimous intention of “putting an end to the evils, discord, and sinister consequences . . . in detriment of [his] vassals.”³⁷⁴

In spite of the fact that it did not have to undergo a war, Brazil’s losses were high in financial terms: the payment of a huge indemnification to Portugal and the assumption of the obligations to the English assumed by that kingdom in the name of the former colony.³⁷⁵ These burdens hampered Brazil’s economic development for at least the next fifty years.³⁷⁶ For three hundred years of colonial experience in Brazil, the economy had been limited to generating surpluses for Portugal and other European countries.³⁷⁷

The colonization era was a mere succession of cycles of overexploitation and exhaustion based on one or two major items.³⁷⁸ For a large section of the coastal zone and smaller portions of inland ecosystems, the consequence of that period was irreversible degradation, with no chance of recuperation.³⁷⁹ During the centuries of colonial rule, there had been no concern for building institutional capacity, economic development, or social improvement in Brazil, let alone environmental protection.³⁸⁰

372. *Rompimento com Lisboa—Carta de D. Pedro a D. João VI de Repúdio aos Decretos das Cortes de Lisboa* [Rupture with Lisbon—Letter of D. Pedro to D. João VI Repudiating the Lisbon Courts Decretos] of September 22, 1882, in 1 *TEXTOS POLÍTICOS DA HISTÓRIA BRASILEIRA* [POLITICAL TEXTS OF BRAZILIAN HISTORY] 666-667 (Paulo Bonavides & Roberto Amaral eds., 3d ed. 2002), available at <http://www.cebela.org.br/>.

373. *Reconhecimento da Independencia do Brasil e Determinacao do Modo de Sucessao na Coroa do Portugal—Projeto de D. Joao VI* [Recognition of Brazilian Independence and the Determination of the Style for the Succession of the Portuguese Crown—Bill of D. João VI] of May 13, 1825, in *TEXTOS POLÍTICOS DA HISTÓRIA BRASILEIRA* [POLITICAL TEXTS OF THE BRAZILIAN HISTORY] 806 (Paulo Bonavides & Roberto Amaral eds., 3d ed. 2002), available at <http://www.cebela.org.br/>.

374. *Id.*

375. See SCHWARCZ, *supra* note 271, at 393-401.

376. See FURTADO, *supra* note 81, at 100.

377. See generally *id.* at 99-106 (discussing the dependence of the Brazilian economy on European factors).

378. See *supra* Parts D–G.

379. See generally DEAN, *supra* note 72, at 167 (presenting José Gregório de Moraes Navarro’s opinion against intensifying the colonial extractive economy in an independent Brazil).

380. See *id.*

The system of *sesmarias* was only revoked in July of 1822.³⁸¹ Finishing the *sesmarias* system, however, did not mean any change to the status quo of those who had already been endowed with them, nor did it do any harm to the *latifundios*.³⁸²

Independence came also in 1822 but did not mean a true opportunity for the country to build its own political identity.³⁸³ Although the Hamilton-Jefferson debate concerning access to land in the United States was in some ways reproduced in post-independence Brazil, the Brazilian debate was in a different political and cultural environment than its American counterpart.³⁸⁴ Three hundred years of colonial government, during which the granting of public land was based on no justification other than the quality of the beneficiary's connections with the crown, had not fostered a propitious environment for a sound land-distribution policy.³⁸⁵ Land distribution had consistently worked to favor those who already dominated production of income-generating goods.³⁸⁶ It was not a policy at all, but rather the means the rural oligarchy used to ensure its self-perpetuation. The occasion of the Portuguese court's arrival in Rio de Janeiro presented this caste with the opportunity to experience living with power and to learn how to take best advantage of it.³⁸⁷ At the time of Brazilian independence, the rural oligarchy was already, for all intents and purposes, the *de facto* ruling class of the country.³⁸⁸ Even the urban elite and the bourgeoisie in Brazil were derived from the power of the *latifundiários*.³⁸⁹ It is no wonder, then, that the fate of the country was tied to this class of landowners, who brought about all major political changes for centuries to come.³⁹⁰ This fact can be detected in one of the first political events of the newly independent nation.³⁹¹

381. LIMA, *supra* note 8, at 43.

382. ANTUNES, *supra* note 161, at 47.

383. See FURTADO, *supra* note 81, at 107-08 (discussing treaty restrictions on Brazil's ability to create its own economic policy).

384. See FURTADO, *supra* note 81, at 107-14.

385. *Id.* at 44, 47, 66, 109.

386. *Id.*

387. See generally GOMES, *supra* note 342, at 196-202 (discussing the arrival of the Portuguese court in Rio de Janeiro).

388. See CARVALHO, A CONSTRUÇÃO DA ORDEM, *supra* note 62, at 51-72 (discussing the fundamental role of the training received in Coimbra by the "sons of the elite" in the unification of future Brazil).

389. See *id.* at 21, 38.

390. See *id.* at 51-72; FURTADO, *supra* note 81, at 66.

391. See CARVALHO, A CONSTRUÇÃO DA ORDEM, *supra* note 62, at 51-72

Free from Portuguese control, it was important for the elite to have its own means to prepare itself to rule national affairs.³⁹² The sons of the *latifundiários* had to be trained for this mission and they could not continue to be sent to the Portuguese Faculty of Law of the University of Coimbra.³⁹³ The first two law schools were only established in Brazil in the year of 1827 in Sao Paulo and Olinda.³⁹⁴

The first Brazilian Constitution was promulgated in 1824.³⁹⁵ It was “offered and sworn” by Pedro I, the first Brazilian emperor.³⁹⁶ It meant the new constitution was enacted by the emperor, as he had dismissed the Constitutional Assembly the year before by an act of force for fearing that his imperial powers could be “rationalized” by that legislative body.³⁹⁷ The final writing of the document, nonetheless, is said to have been based (or referenced) on the draft proposal discussed by that same Assembly, which might have pacified resentment.³⁹⁸ Strong criticism exists over the legitimacy of the emperorship, in spite of its eventual approval by all the Brazilian provinces, for good results do not remedy bad means or methods.³⁹⁹ Actually, many voices have qualified the majority of the emperor’s actions between 1824 and 1826 as nothing less than despotic.⁴⁰⁰ At the time, Jeffersonian views about the need to foster a class of small farmers were to some extent echoed in Brazil by José Bonifácio, a prominent advocate of the cause of independence.⁴⁰¹ His efforts were fruitless, however, for his opponents were the powerful *latifundiários* who were striving to keep their

392. See CARVALHO, A CONSTRUÇÃO DA ORDEM, *supra* note 62, at 51-72 (discussing the movement from Coimbra to Brazilian institutions).

393. See *id.*

394. Lei de 11 de agosto de 1827 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/LIM/LIM-11-08-1827.htm. In 1854, the Olinda law school campus transferred to a location in Recife. CARVALHO, A CONSTRUÇÃO DA ORDEM, *supra* note 62, at 60.

395. GILMAR FERREIRA MENDES, INOCÊNCIO MÁRTIRES COELHO & PAULO GUSTAVO GONET BRANCO, CURSO DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW COURSE] 161-62 (3d ed. 2008).

396. *Id.* at 161.

397. *Id.* at 162.

398. *Id.*

399. LUÍS ROBERTO BARROSO, O DIREITO CONSTITUCIONAL E A EFETIVIDADE DE SUAS NORMAS [CONSTITUTIONAL LAW AND THE EFFECTIVENESS OF ITS NORMS] 7 (2d ed. 1993).

400. ISABEL LUSTOSA, D. PEDRO I 173 (2006).

401. For the Jeffersonian views in the United States, see ANDREWS, *supra* note 74, at 81-82. For an equivalent debate in Brazil regarding the reformation of land grants, see DEAN, *supra* note 72, at 149-50. José Bonifácio was also arguably the first champion of the environmental cause in Brazil; he advocated pioneer governmental courses of action in the defense of natural resources in ways that would come to fruition a century and a half later. See PÁDUA, UM SOPRO DE DESTRUÇÃO, *supra* note 256, at 156.

privileges, and the country waited almost thirty years for its first law on lands.⁴⁰²

Article 169 of the first constitution brought interesting consequences, however, as it established that all municipal activities should be regulated by a law to be enacted in the future.⁴⁰³ That provision led to the approval of a law in 1828⁴⁰⁴ that imposed a mandate for municipalities to provide for “the draining of wetlands or any stagnant areas of infected waters, the economy and neatness of corrals and cattle slaughterers, . . . deposits of dirt and everything that might possibly alter and corrupt the healthiness of the atmosphere,”⁴⁰⁵ and for the control of “voices in the streets during the hours of silence,” among other duties.⁴⁰⁶ On the other hand, the absence of a land disposal policy fostered the proliferation of squatters, whose claims and practices were an additional issue for the new Brazilian government to deal with.⁴⁰⁷

Yet in 1826 there had been the issuance of a provision directing imperial officials from Pernambuco to undertake the cultivation of brazilwood trees, in order to avoid scarcity of that material.⁴⁰⁸ The Brazilian government enacted a Criminal Code in 1830, which established illegal cutting of timber as a crime in Articles 178 and 257.⁴⁰⁹

Since the beginning of the nineteenth century, coffee had become the new economic force in the country, following the same model of large tracts of land and slavery.⁴¹⁰ This new agricultural cycle would eventually give birth to another member in the club of agricultural aristocracy, another by-product of the *latifúndio*, the coffee farmer.⁴¹¹

Brazil was an Empire in the tropics at that time.⁴¹² In 1831, the first “emperor” had to rush back to Europe, however, to fight for

402. See DEAN, *supra* note 72, at 150.

403. See Constituição Política do Imperio do Brasil de 25 de Março de 1824 [Constitution] art. 169 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao24.htm.

404. See Lei de 1 de outubro de 1828 (Braz.), available at http://www.camara.gov.br/Internet/InfDoc/conteudo/colecoes/Legislacao/Legimp-K_19.pdf.

405. *Id.* art. 66(2).

406. *Id.* art. 66(4).

407. See DEAN, *supra* note 72, at 150.

408. WAINER, *supra* note 65, at 49.

409. *Id.*

410. See DEAN, *supra* note 72, at 168-90 (discussing the rise of coffee in Brazil).

411. See FURTADO, *supra* note 81, at 124-26; PRIORE & VENÂNCIO, *supra* note 241, at 137.

412. After the declaration of independence, Pedro I was crowned Emperor of the Brazilian Empire. See SCHWARCZ, *supra* note 271, at 380.

the Portuguese crown, leaving his son under the care of regents that soon would be assigned by his opponents.⁴¹³ For the next nine years, political conflicts increased until, in an attempt to calm the situation, Brazil crowned the young emperor in 1840, in spite of the fact that he was only fourteen years old.⁴¹⁴ Four years later, an executive order was enacted regulating Law 317, of October 21, 1843, which provided for fines and impoundment of ships, in case of involvement with brazilwood smuggling.⁴¹⁵

K. *Timid Steps on Land*

After a stalemate of about thirty years on the discussion of a new policy for public lands, the first law regulating land policies in Brazil was enacted in 1850—the *Lei de Terras e Imigração* (Law of Lands and Immigration).⁴¹⁶ Absolutely no measures were adopted that gave public land an economic destination, however.⁴¹⁷

The Brazilian Law on Lands and Immigration was born obsolete.⁴¹⁸ It was not a framework for a policy of land disposal or utilization of natural resources.⁴¹⁹ In fact, it emerged as a mere, haphazard attempt to regulate private interests not completely satisfied by the past chaotic system of the *sesmarias*.⁴²⁰ The law once again ratified all *sesmarias* rights, and acknowledged squatters' rights of possession to the extent they could be verified and declared by means of a tortuous judicial procedure.⁴²¹ One of the few important innovations in law was Article 14, concerning *terras*

413. See JOSÉ MURILO DE CARVALHO, D. PEDRO II 19-25 (Elio Gaspari & Lilia M. Schwarcz eds., 2007).

414. See *id.* at 36-43.

415. WAINER, *supra* note 65, at 49.

416. See Lei No. 601, de 18 de setembro de 1850 (Braz.), available at http://www.planalto.gov.br/ccivil_03/LEIS/L0601-1850.htm; see generally LIMA, *supra* note 8, at 59-60 (discussing the the *Lei de Terras* and the legislative process before its enactment). The land law coincided with the ban on the African slave trade which, although not followed by the abolition of slavery itself in Brazil, at least compelled the government to look at immigration as the future alternative to supply manpower. See SKIDMORE, *supra* note 160, at 54-55.

417. ANTUNES, *supra* note 161, at 76 (referencing art. 12 of Lei No. 601, de 18 de setembro de 1850).

418. Arlindo Daibert, *A Brief Historical Comparison of the Public Land Disposal Policies in Brazil and In the United States*, in BIODIVERSITY CONSERVATION, LAW AND LIVELIHOODS: BRIDGING THE NORTH-SOUTH DIVIDE 423, 436 (2008). See generally ANTUNES, *supra* note 161, at 79 (discussing internal contradictions of Lei No. 601, de 18 de setembro de 1850).

419. Daibert, *supra* note 418. For the final result of such a lack of a discernible public interest objective in the law, see LIMA, *supra* note 8, at 106. For a comparison between Brazil and the United States, see Daibert, *supra* note 418, at 423-40.

420. Daibert, *supra* note 418; LIMA, *supra* note 8, at 60.

421. See *supra* note 8, at 61-62.

devolutas (reverted lands⁴²²), a kind of public land.⁴²³ Article 14 established as a general rule that ownership over such lands could be acquired by a private party only by means of a purchase and could no longer be bestowed by grant.⁴²⁴ Article 2 of the statute established administrative monetary penalties and imprisonment for two to six months for illegal cutting or burning of trees.⁴²⁵ The regulation of the law, however, is said to have endowed law enforcement agents with powers equivalent to those of national-forest-conservation rangers.⁴²⁶

Brazil had its first experience recuperating an environmentally degraded area in 1862.⁴²⁷ In Rio de Janeiro, the coffee plantations had not spared the forest surrounding the city.⁴²⁸ They removed so much of the natural-vegetation cover that the city's water supply was affected.⁴²⁹ To restore the springs that fed the rivers that guaranteed the capital's water supply, the government commissioned Manuel Gomes Archer,⁴³⁰ a former major in the Brazilian National Guard, to undertake a project replanting the trees in the forest.⁴³¹ During the whole time that the reforestation was being undertaken, it is estimated that around 127,000 trees were planted.⁴³² This feat represented the seed of one of the biggest urban forests in the world, the *Floresta da Tijuca* (Tijuca Forest), proudly embraced by the city of Rio de Janeiro today.⁴³³ The forest is once again under threat, however, this time from the growth of shanty towns, or *favelas*.⁴³⁴

422. "Reverted Lands" means lands whose tenants cannot show clear proof of ownership and must therefore "revert" to ownership by the government. See DEAN, *supra* note 72, at 63.

423. See ANTUNES, *supra* note 161, at 75-79.

424. See *id.*

425. WAINER, *supra* note 65, at 49.

426. See WAINER, *supra* note 65, at 49; see also Decreto No. 1.318, de 30 de janeiro de 1854 (Braz.), available at <http://www.planalto.gov.br/CCIVIL/decreto/1851-1899/D1318.htm>.

427. See DEAN, *supra* note 72, at 223-24.

428. See SKIDMORE, *supra* note 160, at 50.

429. DEAN, *supra* note 72, at 223-24.

430. The government commissioned Archer by means of an executive order promulgated in 1861 by the then Ministro da Agricultura, Comércio e Obras Públicas [Minister of Agriculture, Commerce and Public Works]. See PEDRO OSWALDO CRUZ, A FLORESTA DA TIJUCA E A CIDADE DO RIO DE JANEIRO [THE TIJUCA FOREST AND THE CITY OF RIO DE JANEIRO] 39 (1992).

431. See DEAN, *supra* note 72, at 224-25.

432. *Id.* at 225.

433. See generally PEDRO OSWALDO CRUZ, A FLORESTA DA TIJUCA E A CIDADE DO RIO DE JANEIRO [THE TIJUCA FOREST AND THE CITY OF RIO DE JANEIRO] (1992).

434. See Isabela Bastos, *Favela da Tijuca Cresce 625% em Oito Anos* [Shantytown in Tijuca Grows 625% in Eight Years], O GLOBO, Oct. 18, 2008, at 22, 22.

L. *Republic?*

For roughly seventy years following independence, the political, social, and economic situation in Brazil progressed little.⁴³⁵ Brazil eventually instituted a form of parliamentary monarchy, but public participation was curtailed by oligarchic rule.⁴³⁶ The core of the country's production remained agricultural and was based on the same pillars: generation of the same narrow range of goods, a slave labor force, and large tracts of land, increasingly concentrated in the hands of fewer people, this time for the sake of coffee.⁴³⁷

Slavery was abolished in 1888,⁴³⁸ a move that had been postponed for about sixty years,⁴³⁹ but which nevertheless upset the agricultural oligarchy and removed the last remaining reason they had for supporting the monarchy.⁴⁴⁰ In addition, the advances with the freedom of the slaves since 1871 had not been coupled with a consistent social policy or an agrarian reform.⁴⁴¹ The "suffering human contingents, landless and lacking equal opportunities" composed of adrift former slaves were added up with those of the migratory groups fleeing from the droughts in northeastern Brazil since 1877.⁴⁴² It is also relevant to point out that during the rule of Pedro II, there were several insurgent movements that jeopardized the unity of the country, such as the *Revolução Farroupilha* in the state of Rio Grande do Sul, the longest of them all, none of them successful.⁴⁴³

435. See SKIDMORE, *supra* note 160, at 75 (discussing the sweeping changes brought by the military coup and with the new Republic in the 1890s).

436. See *id.* at 39-40.

437. See generally *id.* at 49-52 (discussing the rise of coffee and its effects).

438. Lei No. 3.353, art. 1, de 13 de maio de 1888 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/LIM/LIM3353.htm.

439. Brazil committed itself to abolishing the slave trade in a treaty signed with the English in 1826. Although Brazil passed a law attempting to abolish it in 1931, it was never really enforced. An effective ban only came with the so-called Law Eusébio Queiroz, which actually took hold in making the slave trade illegal. See CARVALHO, *supra* note 413, at 131, 186. Other laws were enacted in the meantime, granting freedom for new-born sons of slaves, Lei do Ventre Livre [Law of the Free Womb], Lei No. 2.040, art. 1, de 28 de setembro de 1871 (Braz.), available at <http://www.soleis.adv.br/leishistoricas.htm>, and granting freedom for the slaves above 60 years old, Lei do Sexagenário [Law of the Sexagenarian], Lei No. 3.270, art. 3(10), de 28 de setembro de 1885 (Braz.), available at <http://www.soleis.adv.br/leidosexagenario.htm>.

440. CARVALHO, *supra* note 413, at 190-91.

441. WAINER, *supra* note 65, at 52.

442. *Id.*

443. BARROSO, *supra* note 399, at 12.

It was no surprise when the Republic was established by the military in 1889.⁴⁴⁴ Yet again, no essential change came about, as “the people, who should have been the protagonist of the events, watched it all stupefied, without realizing what was going on, believing [they were] behold[ing] a military parade.”⁴⁴⁵ In fact, the news was the military intervention, yet it would be just the first of many yet to come in the history of the Brazilian Republic.⁴⁴⁶

The first republican constitution saw light in 1891, and adopted a system of three separated powers and a federation of states.⁴⁴⁷ Article 34, XXIX, of the constitution empowered the federal government to legislate on lands and mines,⁴⁴⁸ but Article 64 transferred to the member-states rights over the *terras devolutas*, that is, available public lands.⁴⁴⁹ This transfer of rights did not represent a conscientious decision towards administrative decentralization.⁴⁵⁰ On the contrary, it represented a compromise with the regional rural aristocracies, allowing them to finally eliminate the “middleman” and control the land distribution issue directly.⁴⁵¹

It should be mentioned that during the first decade of the 1900s, Brazil became the sole exporter of natural rubber for the international market, something that was especially meaningful considering the demands for the product to be used in automobiles' tires.⁴⁵² That monopoly was lost, however, as a result of a case of what now could be reasonably called biopiracy that made possible the cultivation of the rubber tree in other parts of the globe, under British control.⁴⁵³

Brazil enacted a Civil (Private Law) Code in Brazil in 1916, finally superseding the remains of the seventeenth century Filipinas Ordinances, exactly fifty years after the first time the word

444. See generally CARVALHO, *supra* note 413, at 215-20 (discussing the events regarding the proclamation of the Republic).

445. JOSÉ MURILO DE CARVALHO, *OS BESTIALIZADOS: O RIO DE JANEIRO E A REPÚBLICA QUE NÃO FOI* [THE STUPEFIED: RIO DE JANEIRO AND THE REPUBLIC THAT WAS NOT] 9 (3d ed. 1989) (quoting Aristides Lobo).

446. See BARROSO, *supra* note 399, at 7-39 (discussing the Brazilian constitutional experience and the role of the military).

447. See Constituição da República Dos Estados Unidos do Brasil de 24 de Fevereiro de 1891 [Constitution] (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao91.htm.

448. *Id.* art. 34(XXIX).

449. *Id.* art. 64.

450. ANTUNES, *supra* note 161, at 81.

451. See *id.*

452. SKIDMORE, *supra* note 160, at 91.

453. *Id.*

“ecology” had been used by Ernest Haeckel.⁴⁵⁴ Some of the articles of the code dealt with neighborhood rights in a fairly environmental fashion.⁴⁵⁵ These included regulation of the harmful use of property,⁴⁵⁶ trees on property limits,⁴⁵⁷ waters,⁴⁵⁸ and construction rights.⁴⁵⁹ The code also contained provisions for game⁴⁶⁰ and fishing.⁴⁶¹ Although these provisions took a rather private, anthropocentric approach to the issues instead of giving them the public treatment that they received later, these provisions took a true step forward in terms of protection of the environment for a more socially relevant reason, and were not solely the result of concern for an array of commodities.⁴⁶² In this sense, the Brazilian Civil Code played a pioneering role in Brazilian environmental law, similar to the role that the case law on torts has played in the evolution of the U.S. environmental legal system.⁴⁶³

The Brazilian executive promulgated a federal executive order in 1923 with environmental provisions concerning health and sanitation.⁴⁶⁴ The most remarkable aspect of the rule was that it also included a provision on pollution.⁴⁶⁵ It forbade establishing “industrial activities noxious or harmful to the surrounding neighborhood.”⁴⁶⁶

In the political realm, the military authorities purported to carry out serious elections but always pulled strings to ensure that at least one of them remained in power until 1894, when the first civilian was elected president in Brazil.⁴⁶⁷ However, during the whole period of the Old Republic (*República Velha*),⁴⁶⁸ the electoral sys-

454. WAINER, *supra* note 65, at 52, 56.

455. *See id.* at 56.

456. Código Civil [C.C.], *supra* note 208, arts. 554-55.

457. *Id.* arts. 556-58.

458. *Id.* arts. 563-68.

459. *Id.* arts. 572-87.

460. *Id.* arts. 594-98.

461. *Id.* arts. 599-602.

462. Principles like “public order” and “collective good” began to prevail in the assessment of rights involved. WAINER, *supra* note 65, at 56.

463. For information about the role of common law for torts and the evolution of environmental remedies in the United States, see ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 84-89 (5th ed. 2000).

464. *See* Decreto No. 16.300, de 31 de dezembro de 1923 (Braz.), available at <http://www.camara.gov.br/Internet/InfDoc/novoconteudo/Legislacao/Republica/leis1923v3-607p/leis1923v3-434pg/pdf-02.pdf>; WAINER, *supra* note 65, at 58.

465. WAINER, *supra* note 65, at 58.

466. *Id.*

467. The civil president was Prudente de Morais. *See* BARROSO, *supra* note 399, at 12-13.

468. The Old Republic lasted from 1891 to 1930. *See* MENDES, COELHO & BRANCO, *supra* note 395, at 165.

tem was flawed in such a way that even a civilian in charge did not signify the advent of true democracy.⁴⁶⁹ The rural oligarchy continued to pay only lip service to democracy⁴⁷⁰ until 1930, when a revolution—again supported by the military—placed Getúlio Vargas in power.⁴⁷¹ In any case, once again,

most Brazilians hardly noticed the break in the legal succession in 1930. Their lives had been far more affected by the great crash, which had cost jobs and income. . . . Nor had the revolution of 1930 brought major change in property relations or working conditions The source of most wealth was still rural and there was still no talk of serious land reform.⁴⁷²

In the meantime, *Decreto* (Executive Order) Number 4,421 of December 28, 1921, created the Forest Service of Brazil.⁴⁷³

M. *The “New State”*

Getúlio Vargas made his mark on the history of Brazil not only in the length of time he ruled the country and the institutional changes he undertook, but because he was the first president in Brazil to talk about the “social question.”⁴⁷⁴ The chief motives alleged for the revolution he led were democratization of the country by means of moralization of the electoral process and inclusion of the situation of the masses of destitute on the government agenda.⁴⁷⁵ Time would soon show, however, that the price would be a further postponement of true democracy.⁴⁷⁶

During the Vargas years, two constitutions were promulgated, the first in 1934.⁴⁷⁷ Article 5, XIX, of the constitution empowered the federal government for the first time to legislate on water, for-

469. *See generally id.* at 165-66 (discussing the difficulties facing the civilian government between 1891 and 1930); *see also* SKIDMORE, *supra* note 160, at 106 (discussing how “elections had lost their perceived legitimacy as a means of allocating political power in republican Brazil”).

470. *See generally* SKIDMORE, *supra* note 160, at 103-05 (discussing the rising discontent with liberalism and democracy).

471. *Id.* at 107-08.

472. *Id.* at 108.

473. BEGONHA BEDIAGA & RENATO PIZARRO DRUMMOND, CRONOLOGIA: JARDIM BOTÂNICO DO RIO DE JANEIRO [CHRONOLOGY: BOTANICAL GARDEN OF RIO DE JANEIRO] 22 (2007), *available at* www.jbrj.gov.br/publica/cronologia.pdf.

474. *See generally* BARROSO, *supra* note 399, at 18-19 (noting the first appearance of social and economic rights provisions in a Brazilian Constitution).

475. *See generally id.* at 19-20 (discussing the enactment of the 1937 Constitution).

476. *See id.* at 20-25 (describing the events surrounding the dictatorship established by Vargas from 1933-1945).

477. *See* Constituição da República Dos Estados Unidos do Brasil de 16 de Julho de 1934 [Constitution] (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao34.htm; BARROSO, *supra* note 399, at 20-22.

ests, game, and fishing.⁴⁷⁸ Article 10 imposed a mandate on the federal government and the states to protect sites of natural beauty and monuments of historical value.⁴⁷⁹ Some argue that this constitution was the first to mention the concept of the social function of property, which would be expressly adopted by law later.⁴⁸⁰ The wording of Article 113(17), however, only stated that property rights could not be “exercised against the social or collective interest, in the way determined by the law.”⁴⁸¹

The year 1934 brought three environmental statutes, all promulgated by executive orders (*Decretos*).⁴⁸² *Decreto* Number 24,645 established criminal sanctions for harassing animals.⁴⁸³ *Decreto* Number 23,793 established a Forest Code (*Código Florestal*),⁴⁸⁴ which, for the first time, defined forests subject to permanent preservation, classified by the statute as “protector forests.”⁴⁸⁵ These were forests on riverbanks and the shores of lakes, as well as those necessary for conservation of aesthetic, scientific, or historic value, for the protection of the local fauna and flora, and for the preservation of the environment of indigenous peoples, among other purposes specified in the rule.⁴⁸⁶

Decreto Number 24,643 promulgated the Code of Waters (*Código de Águas*),⁴⁸⁷ the stated purpose of which was, among others, to “change the state of affairs, endowing the country with an adequate legislation that, in accordance with the contemporary trend, may permit control by the public power and promote the use of indus-

478. See Constituição Da República Dos Estados Unidos Do Brasil De 16 De Julho De 1934 art. 5(XIX)(j), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao34.htm.

479. *Id.* art. 10(III).

480. ANTUNES, *supra* note 161, at 87-98.

481. Constituição da República Dos Estados Unidos do Brasil de 16 de Julho de 1934 [Constitution] art. 113(17) (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao34.htm.

482. See WAINER, *supra* note 65, at 59-64.

483. Decreto No. 24.645, art. 2, de 10 de julho de 1934, D.O.U. de 14.07.1934 (Braz.), available at <http://www.lei.adv.br/24645-34.htm>.

484. See Código Florestal [C. FLOR.], Decreto No. 23.793, de 23 de janeiro de 1934, D.O.U. de 21.03.1935 (Braz.), available at http://www.planalto.gov.br/ccivil_03/decreto/1930-1949/D23793.htm.

485. *Id.* art. 4.

486. *Id.*

487. See Código das Águas [C. AC.], Decreto No. 24.643, de 10 de julho de 1934, D.O.U. de 27.07.1934 (Braz.), available at http://www.planalto.gov.br/ccivil_03/decreto/D24643.htm.

trial waters.”⁴⁸⁸ The code classified waters, according to who “owned” them, as public, common, and private.⁴⁸⁹

The majority of the Water Code provisions regulated the rights of private parties concerning waters, but some parts also set out environmental obligations and rights.⁴⁹⁰ Article 98, for instance, prohibited construction that could “pollute or make unsuitable for ordinary consumption the water from the well of a pre-existing third party.”⁴⁹¹ Violation of the terms of this article resulted in the demolition of the construction and a penalty for damages.⁴⁹² Article 109 made it illegal for anybody to “maculate or contaminate waters that [the person] does not consume, causing damage to a third party.”⁴⁹³ Sanctions for this conduct obligated the violating party to pay for the recovery of the quality of the water plus damages, as well as imposed criminal and administrative penalties.⁴⁹⁴

Pollution was allowed with a permit, and the farmers or industrialists were obliged either to “purify” the waters or make them “follow their natural sewer,”⁴⁹⁵ but polluters had to pay for the damages caused to parties which in some way suffered injury as a consequence of the “favor granted.”⁴⁹⁶ Parties who could claim damages included the federal government, the states, and the municipalities, in addition to private parties.⁴⁹⁷ Article 113 of the Water Code contained a provision authorizing the government to drain wetlands when their “unhealthy nature had been declared,” if the owner of the land had not performed such work before.⁴⁹⁸ The owner was responsible for the costs of the work, as well as paying a “levy for the value added to the sanitized land.”⁴⁹⁹

The Vargas “provisional government” imposed its second constitution in 1937.⁵⁰⁰ It was to be the inception of what the dictator called the “New State,” which, in his words, would build a new set of institutions, in contrast to the corrupt practices of the former

488. *Id.*

489. *See id.* arts. 1-8.

490. *See id. passim.*

491. *Id.* art. 98.

492. *Id.* art. 99.

493. *Id.* art. 109.

494. *Id.* art. 110.

495. *Id.* art. 111.

496. *Id.* art. 112.

497. *Id.*

498. *Id.* art. 113.

499. *Id.* art. 115.

500. *See* Constituição Dos Estados Unidos do Brasil de 10 de Novembro de 1937 [Constitution] (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao37.htm.

regime, which he called the “Old Republic.”⁵⁰¹ Article 16, XIV, of the 1937 constitution restated the provision on the legislative powers of the federal government concerning the environmental aspects such as flora, fauna, game, and fishing.⁵⁰² In Article 134, the constitution extended to the municipalities the power, formerly only exercised by the federal government and the states, to enact laws to protect historic and natural monuments, as well as landscapes and other sites “particularly endowed by nature,” and upgraded violations against these assets to the status of crimes against the natural public patrimony.⁵⁰³

During the “New State,” by means of *Decreto* Number 1,713 of June 14, 1937, Vargas created the first Brazilian national park (Itatiaia) in the state of Rio de Janeiro.⁵⁰⁴ Among the purposes mentioned in the *decreto* were the goals of protecting nature, helping natural sciences, increasing the number of tourists, and preserving the existing forests for future generations.⁵⁰⁵

The most conspicuous piece of environmental legislation of the “New State” was the *Decreto-Lei* (Law-Executive-Order) 25,⁵⁰⁶ promulgated on November 30, 1937.⁵⁰⁷ The importance of the law rested first on the subject covered—the organization of the national historic and artistic patrimony in the hands of private individuals and corporations.⁵⁰⁸ Following the thread of the constitutional provision, the statute conferred to the federal government, states, and municipalities the necessary legal tools to protect such assets, without having to expropriate them.⁵⁰⁹ The three levels of administration were empowered to intervene in private property, real estate, or otherwise, by imposing limits on the rights of the owner in the name of the public interest in preserving the historical or artistic value of a given asset.⁵¹⁰ These limitations ranged from the prohibition of altering the characteristics of a building to,

501. See BARROSO, *supra* note 399, at 21-22.

502. See Constituição Dos Estados Unidos do Brasil de 10 de Novembro de 1937 [Constitution] art. 16(XIV) (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao37.htm.

503. *Id.* art. 134.

504. See Decreto No. 1.713, de 14 de junho de 1937 (Braz.), available at <http://www.lei.adv.br/1713-37.htm>.

505. *Id.*

506. In Portuguese, Law-Executive-Order is *Decreto-Lei*, which is an executive order / *decreto* with the force of law.

507. See Decreto-Lei No. 25, de 30 de novembro de 1937, D.O.U. de 6.12.1937 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del0025.htm.

508. *Id.* arts. 1-2.

509. *Id.* art. 5.

510. *Id.* arts. 6-7.

for instance, restrictions on the right of the owner to take a specific artwork out of the country.⁵¹¹ This law is still in force today.

As Brazil began its industrialization process, the dictator enacted the framework of what remains the basis of Brazilian labor law, including the labor courts.⁵¹² Due to this, he gained the epithet “father of the poor.”⁵¹³ He also created the system of Electoral Justice, which continues to be the body of the judiciary responsible for the control of elections.⁵¹⁴ In addition, during his first period in power, he extended the right to vote to women.⁵¹⁵ The “provisional government” kept Vargas in office until the end of World War II in 1945, when global circumstances played their part in forcing him out and the military, once again, to intervene.⁵¹⁶

N. *A Breeze of Democracy*

It was not until 1946 that Brazil first truly experienced democracy, in an era that lasted less than twenty years.⁵¹⁷ During this period, the debate about how to insert Brazil into the world economic context came to the forefront, although industrialization was still a slow process and Brazil a “backward” country.⁵¹⁸

Naturally, the new democracy promulgated a new constitution, in 1946.⁵¹⁹ The constitution maintained the environmental legislative powers which had been established for the federal government in past constitutions.⁵²⁰ The mandate to the three levels of government (federal, state, and local) to oversee natural riches endowed

511. *Id.* arts. 12, 14, 17.

512. *See* Consolidação das Leis do Trabalho [C.L.T.], Decreto-Lei No. 5.452, de 1 de maio de 1943, D.O.U. 9.08.1943 (Braz.), *available at* <http://www.planalto.gov.br/ccivil/Decreto-Lei/Del5452.htm>.

513. *See generally* ROBERT M. LEVINE, PAI DOS POBRES?: O BRASIL E A ERA VARGAS [FATHER OF THE POOR?: BRAZIL AND THE VARGAS ERA] 13-30 (Anna Olga de Barros Barreto trans, Companhia Das Letras 2001) (1998) (giving a summary of the main characteristics of the Vargas government).

514. *See* Decreto No. 21.076, art. 5, de 24 de fevereiro de 1932 (Braz.), *available at* <http://www6.senado.gov.br/legislacao/ListaPublicacoes.action?id=33626>. Today, Chapter III, Section VI of the Brazilian Constitution regulates the Electoral Judiciary branch. *See* Constituição Da República Federativa Do Brasil De 1988 [C.F.] [Constitution] arts. 118-21 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

515. *See* Decreto No. 21.076, *supra* note 514, art. 56.

516. *See* SKIDMORE, *supra* note 160, at 124-25.

517. This estimate begins from elections and the new constitution in 1946 and ends with the 1964 coup.

518. *See* SKIDMORE, *supra* note 160, at 129.

519. *See* Constituição Dos Estados Unidos Do Brasil De 18 De Setembro De 1946 [Constitution] (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao46.htm.

520. *Id.* arts. 5(XV)(b), (l).

with particular beauty and historical sites also remained in force.⁵²¹ The strong incentive for social advances that its Article 145 seemed to create were apparently not strong enough, as the legislature never passed the implementing statutes necessary to effectuate the relevant constitutional provisions.⁵²² The democratic times, on the other hand, did not inspire the Brazilian legislature to produce new and more sophisticated environmental statutes, however.⁵²³ The only prominent piece of environmental legislation was the *Decreto-Legislativo*⁵²⁴ Number 3 of February 13, 1948, by means of which the legislature ratified a convention for the protection of the flora, fauna, and natural scenic beauties of the American countries, signed by Brazil on December 27, 1942.⁵²⁵

Skidmore presents quite an accurate view of the Brazilian profile of the late 1940s and 1950s, which can be synthesized as follows. On the one hand, Brazil was a country undergoing a population explosion, mainly in the urban areas that were submitted to a chaotic process of occupation, with large economic discrepancies between regions and erratic waves of migration producing ever-growing megacities and spreading shanty towns therewithin.⁵²⁶ On the other hand, still more than half of Brazilians were still living in a countryside, some parts of which seemed to have stopped developing in the previous century, still depending on a subsistence economy; while other parts yielded a considerable economic output.⁵²⁷ Amidst all that, a gross inequality in terms of income distribution generated even greater social differences in rural areas and significant stratification in urban parts.⁵²⁸

Democracy existed and created room for environmental non-profits. Opinions vary, but two of the first environmental NGOs were created in a period from 1954 to 1955.⁵²⁹ A couple years

521. *Id.* art. 175.

522. See BARROSO, *supra* note 399, at 25.

523. See *id.* at 25-34 (discussing the favorable democratic times).

524. Historically, since 1946, the *decreto-legislativo* (legislative order) has been a kind of legislative act that shall be used by the legislature only to regulate matters of its sole interest, such as its own administrative structure or the remuneration of the congressmen, for instance. For that reason, the Constitution does not require the participation of the president in the necessary procedures for the promulgation of a *decreto-legislativo*, as neither sanction nor veto are required.

525. WAINER, *supra* note 65, at 66.

526. See SKIDMORE, *supra* note 160, at 138-43.

527. *Id.* at 142-43.

528. See *id.* at 143.

529. ADEFLOFA, Associação de Defensores da Flora e da Fauna [Association of the Flora and Fauna Defenders], is said to have been founded in 1954. See Roberto Ramos & Liège Zamberlan, *Mídia e Previsão do Tempo: Uma Questão de Interpretação* [Media and Weather

later, the *Fundação Brasileira para a Conservação da Natureza* (Brazilian Foundation for the Conservation of Nature), associated with the World Conservation Union (IUCN), was established.⁵³⁰ At the time, the actions of the NGOs were limited by the minimal awareness existent toward environmental issues.⁵³¹

Despite this period being an unusually democratic time for Brazil, the Cold War and fear of communism led to another military coup in 1964, which sank the country into another twenty years of dictatorship.⁵³²

O. "Years of Lead"

The "years of lead" were named in contrast to the golden period that had come before, and in reference to the material used to make the bullets that the military used in the unrestrained political repression carried out during this stage of Brazilian history.⁵³³ At the risk of courting controversy, it can be said that attention to the poor was not a high priority of these military governments, nor was there any place for free speech and debate about the matter.⁵³⁴

Nevertheless, during the military governments' rule, a surprising number of laws concerning land, the environment, or both were enacted.⁵³⁵ Although one of the motives for military intervention had been unrest in rural areas and the decision of the deposed government to undertake agrarian reform, the government enacted an unexpected statute on November 30, 1964, only eight months after the coup.⁵³⁶ The *Estatuto da Terra* (Statute of the Land)⁵³⁷ was the first law in roughly a century to outline a policy of

Forecast: a Matter of Interpretation], *INTEXT*, July-December 2005, at 1, 4, available at http://www.intexto.ufrgs.br/n13/ramos_art.html. UPN, União Protetora da Natureza, was allegedly founded in 1955. See Material sobre Roessler é repassado ao Arquivo Histórico [Materials on Roessler (Brazilian environmentalist Henrique Luiz Roessler) are sent to the Historical Archive], Secretaria do Meio Ambiente do Estado do Rio Grande do Sul (2002), <http://www.sema.rs.gov.br/sema/jsp/descnoticias.jsp?ITEM=360&TIPO=1>.

530. Eduardo J. Viola, *O Movimento Ambientalista no Brasil (1971-1991): Da Denúncia e Conscientização Pública Para a Institucionalização e o Desenvolvimento Sustentável* [The Environmental Movement in Brazil 1971-1991: From Denunciation and Public Awareness to Institutionalization and Sustainable Development], in *ECOLOGIA, CIÊNCIA E POLÍTICA* [ECOLOGY, SCIENCE AND POLITICS] 49, 54-55 (Mirian Goldenberg ed., 1992).

531. *Id.* at 55.

532. See SKIDMORE, *supra* note 160, at 152-57, 159.

533. See *id.* at 160-66, 171-76.

534. See *id.* at 164, 181-83.

535. See discussion *infra* Part L.

536. See generally JORGE CALDEIRA, *VIAGEM PELA HISTÓRIA DO BRASIL* [A TRIP IN THE BRAZILIAN HISTORY] 300 (1997).

537. See Lei No. 4.504, de 30 de novembro de 1964, D.O.U. de 31.11.1964 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L4504.htm.

settlement for those who claimed a small piece of land to cultivate, although practical implementation of the statute never took place.⁵³⁸ Albeit unintentionally, it was the first time that official Brazilian policy included terms of “agrarian reform.”⁵³⁹

The most famous feature of the Statute of the Land is its reference to the *social function of property*, something that from that moment on would remain a canon, at least in the theoretical world.⁵⁴⁰ According to the law, a property is deemed to be entirely fulfilling its social function when it concomitantly:

- a) favors the welfare of the owners and employees that worked on the land, as well as their families;
- b) maintained satisfactory levels of productivity;
- c) assured the conservation of natural resources; and
- d) abided by the legal provisions that regulated fair labor relationships between those who owned the land and those who cultivated it.⁵⁴¹

Should the property not fulfill its social function, it could be condemned for agrarian reform purposes.⁵⁴² Yet despite the beauty of its concepts and the sophistication of its speech, the Statute of the Land was not enough to make agrarian reform materialize.⁵⁴³

The 1946 constitution, in Article 141, Paragraph 38, had granted all Brazilian citizens the right to sue for claims against acts injurious to assets of any public entity.⁵⁴⁴ On June 29, 1965, Law 4,717 extended the subjects of the then called popular lawsuits to encompass claims against acts injurious to historic and cultural public assets.⁵⁴⁵ On September 15, 1965, the Brazilian government

538. The military government created the INCRA, Instituto Nacional de Colonização e Reforma Agrária [National Institute for Colonization and Agrarian Reform], the executive agency for that matter, by means of *Decreto-Lei* Number 1.110 in 1970, almost six years after the enactment of the Statute of the Land. See *Decreto-Lei* No. 1.110, de 9 de julho de 1970, D.O.U. de 10.07.1970 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Decreto-Lei/1965-1988/De1110.htm. Today, the website of that same Institute states that the agrarian reform during the military regime never actually took place. See *Instituto Nacional de Colonização e Reforma Agrária*, http://www.incra.gov.br/portal/index.php?option=com_content&view=category&layout=blog&id=270&Itemid=288 (last visited May 17, 2009).

539. See *Decreto-Lei* No. 1.110, *supra* note 538. The absence of concrete actions to put a plan of agrarian reform into place speaks to the lack of intention. See *supra* note 538.

540. See *Lei* No. 4.504, *supra* note 537, art. 2.

541. *Id.* art. 2(1)(a)-(d).

542. See *id.* art. 18(a).

543. See *supra* note 538 and accompanying text.

544. Constituição Dos Estados Unidos Do Brasil De 18 De Setembro De 1946, art. 141(38), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao46.htm.

545. See *Lei* No. 4.717, art. 1(1), de 29 de junho de 1965, D.O.U. de 5.07.1965 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L4717.htm.

enacted Law 4,771,⁵⁴⁶ which set forth a new Forest Code, still in effect in Brazil today.⁵⁴⁷

A legislature under control of the military enacted yet another constitution in 1967.⁵⁴⁸ The federal government retained the power to enact laws concerning forest, game, fishing, and water,⁵⁴⁹ as well as the protection of historic, artistic, and natural monuments in this constitution.⁵⁵⁰ Law 5,197 of January 3, 1967, established protective measures for fauna.⁵⁵¹ Brazil created the *Instituto Brasileiro do Desenvolvimento Florestal* (Brazilian Institute for Forest Development) (IBDF) the same year, as an autonomous agency attached to the Ministry of Agriculture.⁵⁵² *Decreto* Number 62,127 of January 16, 1968, Article 9, XIV, empowered the national agency to mandate the use of pollution reducing devices in automobiles.⁵⁵³

By 1969, the atmosphere had changed, and the honeymoon of the “liberals”—who had supported the coup—and the military soured.⁵⁵⁴ The legislature was closed and an amendment to the constitution was approved by the ministries of the Army, Air Force, and Navy.⁵⁵⁵ The amendment entered into effect making so many modifications to the previous constitution that it is considered to have been another constitution itself.⁵⁵⁶

In the middle of the worst restrictions on civil liberties and in spite of the “official terrorism” performed by the Brazilian state at that time against its citizens, 1971 brought good news in terms of

546. See Código Florestal [C. FLOR.], Lei No. 4.771, de 15 de setembro de 1965, D.O.U. de 16.09.1965 (Braz.), available at http://www.planalto.gov.br/ccivil_03/LEIS/L4771.htm.

547. See *id.*; see generally PAULO AFFONSO LEME MACHADO, DIREITO AMBIENTAL BRASILEIRO [BRAZILIAN ENVIRONMENTAL LAW] 733-67 (16th ed. 2008) (describing the main provisions of the Forestry Code).

548. See Constituição Da República Federativa Do Brasil De 1967 [Constitution] (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao67.htm.

549. *Id.* arts. 8(XVII)(h), (l).

550. See *id.* art. 172.

551. See Lei No. 5.197, de 3 de janeiro de 1967, D.O.U. de 5.01.1967 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L5197.htm.

552. See Decreto-Lei No. 289, de 28 de fevereiro de 1967, D.O.U. de 28.02.1967 (Braz.), available at http://www.planalto.gov.br/ccivil_03/decreto-lei/1965-1988/Del0289.htm, repealed by Lei No. 7.732, art. 2, de 14 de fevereiro de 1989, D.O.U. de 15.02.1989 (Braz.), available at http://www.planalto.gov.br/ccivil_03/LEIS/L7732.htm#art2.

553. Decreto No. 62.127, de 16 de janeiro de 1968, D.O.U. de 22.01.1968 (Braz.), available at http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D62127.htm.

554. See generally BARROSO, *supra* note 399, at 37-39 (discussing the period between 1969 and 1985, which brought the election of the first civilian government).

555. MENDES, COELHO & BRANCO, *supra* note 395, at 179.

556. See *id.*

public participation in environmental issues.⁵⁵⁷ In the state of Rio Grande do Sul, Brazilian environmentalist José Lutzemberger founded *Associação Gaúcha de Proteção ao Ambiente Natural* (Rio Grande do Sul State Association for the Protection of the Natural Environment) (AGAPAN), with a broad environmental profile influenced by the American environmental movement, which had increased significantly in the 1960s.⁵⁵⁸

While the world was celebrating the first Earth Day in 1972, Brazil was suffering its worst political repression it had ever seen.⁵⁵⁹ This was also the time of the so-called economic miracle, though, with the Brazilian GDP breaking record after record.⁵⁶⁰ The economic miracle was financed by an increase in foreign debt to finance the *Transamazonica* (the highway that still struggles against the forest to cut across Amazonia) and dozens of hydroelectric dams like *Tucuruí* (*Amazônia*) and *Itaipú* (southern Brazil), among other “pharaonic public works” (*obras faraônicas*), as these and similar projects were called.⁵⁶¹ Many of these projects took place for “national security” reasons, in particular the colonization of Amazonia.⁵⁶² It was a time when government actions caused the worst social and environmental impacts.⁵⁶³

Although there was apparently no space to consider environment and social issues, several groups interested in improving sanitation in Brazil founded the *Associação Brasileira de Engenharia Sanitária e Ambiental* (Brazilian Association for Sanitation Engineering and Environment) (ABES).⁵⁶⁴ During this decade Brazil also saw isolated movements against the destruction of the environment, such as one for the preservation of Sete Quedas Falls (next to the construction of the Itaipú hydroelectric dam), and protests against construction of a nuclear power plant in Rio de Janeiro, in addition to demonstrations motivated by similar concerns in São

557. For information on the repression by the military, see SKIDMORE, *supra* note 160, at 173-75.

558. Viola, *supra* note 530, at 55.

559. See SKIDMORE, *supra* note 160, at 173-75 (discussing some effects of repression).

560. See DEAN, *supra* note 72, at 292-94. For this reason, at the Stockholm conference, the Brazilian government zealously defended the right of poor nations to make free use of their natural development. See *id.* at 292.

561. See *id.* at 294. Tucuruí and Itaipú are two of the biggest plants in Brazil, built during the military dictatorship in environmentally sensible areas. For more information about the impact of the hydroelectric dams on nature, see *id.* at 294-98.

562. See *id.* at 294-98.

563. See generally Viola, *supra* note 530, at 56 (discussing four particular examples).

564. *Id.* at 55-56.

Paulo and Amazonia.⁵⁶⁵ None of these environmental movements was successful.⁵⁶⁶

The Brazilian government created the *Secretaria Especial do Meio Ambiente* (Special Secretariat of the Environment) (SEMA) within the Ministry of the Interior in 1973.⁵⁶⁷ SEMA later led to the *Sistema Nacional do Meio Ambiente* (National Environmental System) (SISNAMA) and an attempt by the military government in Brazil to diminish the international pressure being exerted on the country to protect the environment following the Stockholm Conference of 1972.⁵⁶⁸ In Rio de Janeiro, the first book on environmental law was released, although the subject was named "ecological law."⁵⁶⁹

The Brazilian government imposed strict liability for the first time on October 17, 1977, with Law Number 6,453, Article 4.⁵⁷⁰ The statute regulated liability for injuries related to atomic activities, as the nuclear program in Brazil had begun recently.⁵⁷¹ Other environmental regulations also came into force at this time.⁵⁷² A *decreto* of 1977 established standard rules concerning safe drinking water.⁵⁷³ Two years later, another *decreto* regulated the national park system.⁵⁷⁴

565. *See id.* at 56.

566. *See id.*

567. *See* Decreto No. 73.030, de 30 de outubro de 1973, D.O.U. de 30.10.1973 (Braz.), available at <http://nxt.anp.gov.br/NXT/gateway.dll/leg/decretos/1973/dec%2073.030%20-%201973.xml>.

568. *See* História do Ibama [History of Ibama], <http://www.ibama.gov.br/institucional/historico> (last visited May 17, 2009). For information on the influence of international affairs and the international environmental movement on the military rule, see generally Herculano, *supra* note 279, at 9-11, 15 (discussing the international pressure exerted during the 1960s and 1970s); *see also* DEAN, *supra* note 72, at 307-09.

569. *See generally* DIOGO DE FIGUEIREDO MOREIRA NETO, INTRODUÇÃO AO DIREITO ECOLÓGICO E AO DIREITO URBANÍSTICO [INTRODUCTION TO ECOLOGICAL LAW AND TO LAND USE LAW] (2d ed. 1977) (discussing the events leading to the development of Brazilian ecological and land use law).

570. *See* Lei No. 6.453, art. 4, de 17 de outubro de 1977, D.O.U. de 18.10.1977 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L6453.htm (imposing strict liability for nuclear accidents).

571. *See id.*

572. *See generally* WAINER, *supra* note 65, at 82 (listing six laws and five decrees from the 1970s that contain environmental provisions).

573. *See* Decreto No. 79.367, de 9 de março de 1977, D.O.U. de 10.03.1977 (Braz.), available at <http://www6.senado.gov.br/legislacao/ListaPublicacoes.action?id=123878>.

574. *See* Decreto No. 84.017, de 21 de setembro de 1979, D.O.U. de 21.09.1979 (Braz.), available at <http://www.ibama.gov.br/siucweb/unidades/legislacao/coletanea/dec84017.htm>.

On December 19, 1979, Law 6,766 extensively regulated land use issues on a national basis.⁵⁷⁵ This law is in effect today and is applied by all municipalities in carrying out the approval of plans for the subdivision of land.⁵⁷⁶

On July 2, 1980, Law 6,803 established environmental zoning for critical areas of industrial pollution.⁵⁷⁷ The beginning of the new decade also brought growing public awareness regarding the seriousness of the environmental disaster affecting the industrial city of Cubatão, in the state of São Paulo, an episode of fundamental importance in the Brazilian environmental movement.⁵⁷⁸ The number of environmental NGOs that year was around forty.⁵⁷⁹

Law 6,938 came into effect on August 31, 1981, instituting the *Política Nacional do Meio Ambiente* (National Environmental Policy) and creating the SISNAMA and the *Conselho Nacional do Meio Ambiente* (National Council on the Environment) (CONAMA).⁵⁸⁰ In 1983, the state of Rio Grande do Sul enacted the first statute in Brazil regulating and discouraging the use of pesticides, an initiative that led to a real reduction in consumption of pesticides in that state.⁵⁸¹ The following year, 1984, the *Movimento dos Trabalhadores Rurais Sem Terra* (Rural Landless Workers Movement) (MST) was founded.⁵⁸²

In 1985, an executive order created the first Brazilian Ministry of Urban Development and the Environment.⁵⁸³ The same year, Law 7,347 of July 24 created the civil public lawsuit, granting standing to public entities and civil associations to sue any person whose conduct might allegedly harm environmental assets.⁵⁸⁴ The esti-

575. See Lei No. 6.766, de 19 de dezembro de 1979, D.O.U. de 20.12.1979 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L6766.htm.

576. See generally JOSÉ AFONSO DA SILVA, DIREITO URBANÍSTICO BRASILEIRO [BRAZILIAN LAND USE LAW] 294-312 (1981) (describing the main dispositions of Brazilian zoning law).

577. See Lei No. 6.803, de 2 de julho de 1980, D.O.U. de 3.07.1980 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L6803.htm.

578. Viola, *supra* note 530, at 56-57.

579. *Id.* at 57.

580. Lei No. 6.938, de 31 de agosto de 1981, D.O.U. de 2.09.1981 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L6938.htm.

581. Viola, *supra* note 530, at 57.

582. See Movimento dos Trabalhadores Rurais Sem Terra, Quem Somos (2007), <http://www.mst.org.br/mst/pagina.php?cd=4151>.

583. See Decreto No. 91.145, de 15 de março de 1985, D.O.U. de 15.03.1985 (Braz.), available at <http://www2.camara.gov.br/internet/legislacao/legin.html/visualizarNorma.html?ideNorma=441412>.

584. See Lei No. 7.347, de 24 de julho de 1985, D.O.U. de 25.07.1985 (Braz.), available at http://www.planalto.gov.br/ccivil_03/LEIS/L7347orig.htm.

mated number of environmental NGOs in that same year had increased to 400.⁵⁸⁵

There was a score of other environmental statutes enacted during the 1980s in Brazil.⁵⁸⁶ It is amazing that a significant part of the environmental statutes still in use in Brazil were enacted in the midst of a military dictatorship,⁵⁸⁷ although this never assured that laws at the time were applied in a proper manner.⁵⁸⁸

P. *Democratic Brazil*

In 1985, the long awaited return to civilian power took place, by means of a compromise with the military that resulted in the indirect election of a civilian president.⁵⁸⁹ By that time there was a synergetic interrelation of environmental organizations in Brazil with other groups whose goals centered around social causes, creating socioenvironmentalism.⁵⁹⁰

The Brazilian Green Party was founded in 1986 and presented its own candidate for governor of the state of Rio de Janeiro, gaining 8 percent of the votes.⁵⁹¹ This was also the year of the rise of Chico Mendes, the great Brazilian environmentalist leader, who was acknowledged by the United Nations in 1987 for his work in defense of Amazonia⁵⁹² but was killed a few years later by a *latifundiário* from the state of Acre, where they both lived.⁵⁹³

With the end of another period of suppression of civil liberties, Brazil called a Constituent Assembly to discuss and approve a new constitution.⁵⁹⁴ The intent was to “proofread” Brazil institutionally.⁵⁹⁵ A constitutional patchwork began to be sewn together with

585. Viola, *supra* note 530, at 61.

586. For a comprehensive list of those statutes, see WAINER, *supra* note 65, at 93-94.

587. The most conspicuous examples are the civil public lawsuit and the national environmental policy. See Lei No. 6.938, *supra* note 580; Lei No. 7.347, *supra* note 584.

588. See DEAN, *supra* note 72, at 309 (“The military appeared unable to formulate more effective solutions, or, indeed, to impose obedience of the laws that they had devised . . .”).

589. See SKIDMORE, *supra* note 160, at 189-90.

590. Viola, *supra* note 530, at 63.

591. *Id.* at 65.

592. For a profile on Chico Mendes and info on the UN Global 500 Award he received in 1987, see Jorge Cappato, *Who Was Chico Mendes?*, http://www.global500.org/feature_6.html (last visited May 17, 2009).

593. See generally ZUENIR VENTURA, CHICO MENDES: CRIME E CASTIGO [CHICO MENDES: CRIME AND PUNISHMENT] (2003) (discussing his murder and the following trial).

594. See SKIDMORE, *supra* note 160, at 190-91.

595. The expression (in Portuguese “passar a limpo”) was traditionally used by former Brazilian Senator Darcy Ribeiro (1922-1997). For an example, see Darcy Ribeiro, Brazilian Senator, Último Discurso no Senado [Final Speech in the Senate] (Dec. 5, 1996), *available*

the little reminders that had been posted on the billboard of citizenship during centuries of forced abstinence.⁵⁹⁶ The product of the Constituent Assembly saw light in 1988: a set of 250 articles for the constitution itself, not to mention the 83 articles of the Provisory Constitutional Provisions Act, regulating everything from civil liberties to public transport, with an entire chapter “On the Environment,” plus a variety of other scattered provisions, establishing unprecedented environmental legal protection.⁵⁹⁷ The astonishing range of subjects encompassed by the constitution reflected the anxiety of different sectors of the public.⁵⁹⁸ Each wanted to exorcise the devils of centuries of tyranny, but above all to “constitutionalize” their rights and the obligations of the state, paying no heed to Milton Friedman’s dictum that “there is no free lunch.”⁵⁹⁹ Institutional euphoria is easy to understand from a historical standpoint, however.

The “citizen’s constitution” could not be a panacea for all the social ills, however, because real life does not always abide by programmed rules, even if they bear a constitutional label.⁶⁰⁰ The great expectations that were raised by the constitution produced even greater frustrations when it became apparent that the social debt was too high to be so easily paid.⁶⁰¹ There were also two heavy burdens still weighing down on the country: the need to come to terms with the legacy of the past and the need to find its place in a planet in the grip of frenzied globalization.

Environmental participation boomed.⁶⁰² The number of environmental NGOs in 1989 had grown to around 700,⁶⁰³ 90 percent of them located in the south and southeast regions.⁶⁰⁴ In that

at http://www.pdt.org.br/personalidades/darcy_historia_5.htm. For a profile of Darcy Ribeiro, see Fábio I. Pereira, *Darcy Ribeiro: Vida, Obra, Pensamento*, <http://www.ensayistas.org/filosofos/brasil/ribeiro/introd.htm> (last visited May 7, 2009).

596. The abstinence resulted from 322 years of colonial rule, followed by the imperial rule and its political flaws, and the constant presence of the militaries during the republican era. See SKIDMORE, *supra* note 160, at 190-91.

597. See *Constituição da República Federativa do Brasil De 1988 [C.F.] [Constitution] (Braz.)*, available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

598. See SKIDMORE, *supra* note 160, at 190-91.

599. See *id.*

600. The expression “citizen’s constitution” was carved by former congressman Ulysses Guimarães. See Ulysses Guimarães, *Presidente da Assembléia Nacional Constituinte, O povo nos mandou fazer a Constituição, não ter medo* (July 27, 1988), http://www.fugpmdb.org.br/c_cidada.htm.

601. For more information about the general social situation at the time, see SKIDMORE, *supra* note 160, at 199-203.

602. See Viola, *supra* note 530, at 67.

603. *Id.* at 61.

604. *Id.* at 62.

same year, Law 7,735 of February 22, 1989,⁶⁰⁵ created the *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis* (Brazilian Institute for the Environment and the Renewable Natural Resources) (IBAMA) which absorbed, among others, the structures of *SEMA*⁶⁰⁶ and *IBDF*,⁶⁰⁷ which became extinct by the same law.⁶⁰⁸

The true return to total democracy occurred in 1990 with the election of a civilian president by means of direct ballot.⁶⁰⁹ Also in 1990, the Brazilian government created an office answering directly to the President, the *Secretaria do Meio Ambiente da Presidência da República* (Secretariat for the Environment of the President).⁶¹⁰ One year later the *Sociedade Brasileira para o Desenvolvimento Sustentável* (the Brazilian Society for Sustainable Development) was founded, composed of private corporations willing to abide by sustainable methods of production.⁶¹¹ The year 1990 also saw the murder of Brazilian-environmentalism champion Chico Mendes and an international commotion that clamored for punishment of the killers and stronger, more effective environmental measures to protect Amazonia and other natural riches in the country.⁶¹²

The international public opinion strongly stimulated the country to take steps toward changing its internal policies towards the environment, to show to the world a more effective profile in handling its natural resources.⁶¹³ It also worked as an incentive for the Brazilian government to work on his international image.⁶¹⁴ The president, then, decided to show the world that Brazil was able to cope

605. See Lei No. 7.735, de 22 de fevereiro de 1989, D.O.U. de 23.02.1989 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L7735.htm.

606. See Decreto No. 73.030, *supra* note 567567.

607. See Decreto-Lei No. 289, *supra* note 552552.

608. See Lei No. 7.735, *supra* note 605605.

609. See SKIDMORE, *supra* note 160160, at 217-18. In that election the Green Party, whose presidential candidate polled only 0.2% of the votes, lost their electoral permit, as determined by the law. See Viola, *supra* note 530530, at 65.

610. História do Ibama, *supra* note 568568.

611. Viola, *supra* note 530530, at 69.

612. See generally História do Ibama, *supra* note 568568 (discussing the international pressure following Chico Mendes' death); VENTURA, *supra* note 593593 (discussing Chico Mendes' murder and the following trial).

613. See generally Murillo de Aragão & Stephen Bunker, *Brazil: Regional Inequalities and Ecological Diversity in a Federal System*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 475, 503 (Edith Brown Weiss & Harold K. Jacobson eds., 1998) (discussing how Brazil's efforts and adherence to treaties in the area of ozone depletion reflected a desire to engage in an "environmental offensive" in the international arena).

614. *Id.*

with its own environmental challenges.⁶¹⁵ That was the main reason why Brazil championed the country's undertaking of the conference that later would be known as the 1992 Rio de Janeiro Conference or simply Rio-92, formally known as the U.N. Conference on Environment and Development (UNCED).⁶¹⁶

Brazil eventually impeached its new president for crimes related to corruption in 1992, in a process that fortunately followed all the necessary constitutional steps to achieve the result.⁶¹⁷ The problem was, however, that the impeachment process took place as the preparations for the Rio-92 conference and the conference itself took place in Brazil.⁶¹⁸

During the Rio-92 conference, the Brazilian socioenvironmentalists joined forces with members of other international NGOs in an attempt to bring to international forums the discussion of the impact of poverty and other social issues on the environment.⁶¹⁹

The Brazilian government could not help feeling the international embarrassment of an inept environmental policy, or rather the lack of one. A specific ministry for Environment was finally created by Law 8,490 of November 19, 1992.⁶²⁰

CONCLUSION

About two decades have passed since the 1988 Brazilian Constitution was enacted with its significant provisions on the environment, Brazil was the host of the Rio-92 conference, and the Ministry for the Environment was created. During this time, one way or another, relevant public efforts have been made, general awareness amongst citizens appears to have increased, and the government has promulgated a series of important environmental stat-

615. *Id.*

616. *Id.*

617. SKIDMORE, *supra* note 160160, at 220-21.

618. The conference in Rio took place between June 3 and June 14, 1992. Earth Summit (May 23, 1997), <http://www.un.org/geninfo/bp/enviro.html>. The impeachment of Fernando Collor de Melo, the Brazilian president at the time, was a long process that had started at the beginning of the same year but was only voted on by Parliament on December 29, 1992. SKIDMORE, *supra* note 160160, at 221.

619. *See* Viola, *supra* note 530530, at 67-69.

620. *See* Lei No. 8.490, art. 14(XX), de 19 de novembro de 1992, D.O.U. de 19.11.1992 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Leis/L8490.htm. The name of the agency became "Ministry of the Environment and of the Legal Amazon" in 1993. *See* Lei No. 8.746, art. 1, de 9 de dezembro de 1993, D.O.U. de 10.12.1993 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Leis/1989_1994/L8746.htm.

utes,⁶²¹ such as the National Policy for Hydrological Resources,⁶²² the law that created the National Agency for Waters,⁶²³ the Law for Environmental Crimes and Administrative Violations,⁶²⁴ the National Policy for Environmental Education,⁶²⁵ the Statute of the City,⁶²⁶ and the National System of the Unities for the Conservation of Nature.⁶²⁷

As the intention of this work was to present a brief, historical account of facts that have influenced Brazil, its society, and its environment, this is a good enough point to stop. This Article does not assess the current state of the Brazilian environment or the effectiveness of Brazilian environmental law or policy. What lessons should we learn from the past? How should present actions be judged? What does the future hold? These questions, though very tempting, are reserved for the reader, according to the weight such historical background may deserve.

621. For other examples of statutes promulgated in the 1990s, see WAINER, *supra* note 65, at 95-96.

622. See Lei No. 9.433, de 8 de janeiro de 1997, D.O.U. de 9.01.1997 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L9433.htm.

623. See Lei No. 9.984, de 17 de julho de 2000, D.O.U. de 18.07.2000 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L9984.htm.

624. See Lei No. 9.605, arts. 29-69, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L9605.htm.

625. See Lei No. 9.795, arts. 6-19, de 27 de abril de 1999, D.O.U. de 28.04.1999 (Braz.), available at http://www.planalto.gov.br/ccivil_03/LEIS/L9795.htm.

626. See Lei No. 10.257, de 10 de julho de 2001, D.O.U. de 11.07.2001 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/LEIS_2001/L10257.htm. Estatuto da Cidade, which regulated articles 182 and 183 of the Constituição Federal [C.F.], established guiding principles for the national urban policy. See *id.*

627. See Lei No. 9.985, de 18 de julho de 2000, D.O.U. de 19.07.2000 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/L9985.htm.