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REPORTS

DRAFT CIVIL CODE OF PERU

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I. INTRODUCTION

The Civil Code is of singular importance in those countries with a civil law tradition where, as a legal institution, it is considered second in importance only to the constitution. Peru is a case in point.

In essence, the Civil Code regulates, among other fundamental legal relationships, the relations between persons, domestic relations, as well as the subjects of wills, property, contracts, prescription and the expiration of obligations. Additionally, it covers such important subjects as the general principles of law and rules governing the conflict of laws.

In this brief analysis of the Draft Civil Code of Peru it is pertinent to review its background, beginning with the Peruvian Civil Code of 1852.

The 1852 Code, as many of the civil codes promulgated in the last century, had its genesis in the French Civil Code of 1803, but with such modifications as were indicated by the Spanish legislation then effective in Peru, Canon Law and certain immutable principles of Roman law.

By 1921, the need to modify or replace the existing code had become apparent and in that year a Reform Commission was appointed whose work culminated in a Draft Code. A commission was next appointed by the Peruvian Congress to review the Draft Code. Concurrently, the Congress authorized the Executive to promulgate a new Civil Code based on the conclusions reached by the Reviewing Commission. Accordingly, a new code was promulgated in 1936.

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The 1936 Code was heavily influenced by the Code of 1852 as well as the Napoleonic Code of 1803. Societal trends and other legislation also had a marked impact on its contents and structure. By this time, the German Civil Code of 1900, the Swiss Civil Code of 1911 and the Brazilian Civil Code of 1917 had all been well implanted. Thus, the orientation of the 1930 Peruvian Code was not predominantly French, but global, corresponding to universal concepts in the area of the civil law.

In 1965, Peru's Constitutional President, Fernando Belaunde Terry, considered it advisable to revise the current Code and named a Commission to either propose modifications thereto, or submit a Draft Code to replace the existing legislation. The Commission chose the second alternative on the grounds that, even though the 1936 Code had served the nation well, the social, political, cultural and economic changes in Peru since 1936, required a major revision of its civil law.

The Commission appointed by President Belaunde Terry performed its mission conscientiously, and on July 15, 1981 presented to the President and subsequently to the Peruvian Congress, a new Draft Civil Code. The new Draft does not ignore Peru's rich legal tradition; neither does it intend to eliminate juridical institutions. It merely seeks to adapt the civil law to present trends and realities, and to the new constitution which became effective on July 28, 1980. This last point is of special significance. When the 1930 Civil Code was promulgated, the Constitution of 1933 was in effect, and that Code religiously followed the constitutional principles then in effect. In 1965, when President Belaunde Terry appointed the Reform Commission, the 1933 Constitution was still the supreme law of the land. However, in 1978, a Constitutional Assembly drafted a new constitution which, as previously stated, became effective on July 28, 1980. Thus, the need to modify the 1936 Civil Code was made necessary not only by the societal changes that had taken place in Peru, but also by the fact that provisions of the 1936 Code were now in conflict with certain provisions of the Constitution of 1980.

The foundation of the new Draft Civil Code (hereafter the Draft Code) is the Civil Code of 1936, which is still effective in Peru. Nevertheless, the Draft Code incorporates trends found in more modern civil codes and codes still to become effective. Thus, in certain subjects the influences of the Italian Civil Code of 1942 and the Portuguese Civil Code of 1966 are specially marked. On

other subjects, for example that of Domestic Relations, the Draft Code is written to harmonize with present day Peruvian realities, and also with the 1980 Constitution. Additionally, on strictly legal matters such as Juridical Acts and Obligations, the provisions of the 1936 Code are clarified and improved.

Following the submission of the Draft Code to the Congress, the Executive sought a law designating a Reviewing Commission, to be composed of nine jurists, three Senators, three Deputies and three representatives from the Ministry of Justice. The proposed bill contemplated a joint effort by the Reviewing and Reform Commissions and the submission of their work-product to the President of Peru for promulgation. On May 27, 1982, the Congress passed a law acceding to the request of the Executive. Presently, a Reviewing Commission is working jointly with the Reform Commission, the author of the Draft Code, with the objective of providing Peru with a new Civil Code in the near future. The time period given the Reviewing Commission to evaluate, study and modify the Draft Code expires on July 28, 1985.

II. PROVISIONS OF THE DRAFT CODE

The major modifications and adaptations proposed in the Draft Code are listed below under the respective Titles.

Preliminary Title

1. A mandatory order of priorities to be observed by the Judiciary in the application of the law is established so that in this area no legal lacunae will exist for the judges.
2. The principle of abuse of process (*abuso del derecho*) is clearly defined and fundamentally made to rest on the social function upon which the laws are based, circumscribed by the principles of good faith.
3. The absolute supremacy of international treaties signed and ratified by Peru is established for conflict of laws cases, but where such treaties are inapplicable the local rules of Peruvian Private International Law will control.
4. In the field of international relations, the concept of legal fraud (*fraude a la ley*)¹ is introduced. This is a significant departure from the current Civil Code which does not cover

1. Fraude a la ley - An attempt to avoid conflict of laws rules by seeking to apply the laws of a particular jurisdiction. *ENCYCLOPEDIA JURIDICA OMEBA* 686 (Vol. XII 1960).

the subject expressly. The principle of legal fraud, which is distinguished from that of public order, is needed to prevent interested parties from manipulating the rules of Private International Law for their own benefit.

5. Peruvian courts are invested with competency to adjudicate cases where the defendant is domiciled in Peru. This provision, singular to the Draft Code, relies on the defendant's domicile as the sole basis for jurisdiction and rejects the dual basis of the present Code (nationality and domicile). At times, unjust discrimination occurs when nationality is a required factor in determining jurisdiction.
6. Peruvian courts are authorized to issue preventive measures aimed at the protection of natural persons found within Peruvian territory.
7. Detailed rules of International Civil Law and International Civil Procedure are incorporated with the purpose of integrating these rules, to the extent possible, with the norms of International Law contained in treaties signed and ratified by Peru.

Book I: Concerning Juridical Acts

1. A Title on the subject of Agency is added, under which juridical acts may be executed by a voluntary agent or one designated in accordance with the law.
2. The interpretation of juridical acts is regulated through legal interpretative rules to be applied by the judges so as to facilitate the understanding and interpretation of a particular juridical act.
3. The concept of the legal simulation (*simulación relativa*) is introduced, through which the parties give a juridical act an appearance which hides its true character. The simulation is law, between the parties, and is valid as long as legal requirements are met and the rights of third parties are not prejudiced.
4. A distinction is made between the invalidity and the inefficacy of the juridical act. Invalidity arises when the juridical act fails to satisfy the requirements set forth in the law; inefficacy presumes the existence of a valid juridical act which, subsequently and for reasons extrinsic to the act itself, fails to produce legal effects.
5. The concept of conversion (*conversión*) is introduced with respect to the recognition (*convalidación*) of juridical acts.

Under conversion, an invalid juridical act may be recognized if it is converted into another type of act in which the parties attain the objectives which they seek.

Book II: Concerning Persons

1. The Draft Code contains provisions dealing with the rights of natural persons, including the right to life, liberty and personal dignity; equality of the sexes; privacy; reputation; confidentiality of written communications and voice recordings; and other similar matters. The Draft also covers the subject of copyright.
2. Provisions are also included to cover the donation of bodily parts such as vital organs, tissues or non-regenerative parts of the body.
3. The subject of proper names is regulated in detail. The concept of the protection of fictitious names, as well as the right of foundlings to a name are introduced.
4. Also included in the Draft Code are novel provisions relating to the disappearance of persons, as well as judicial pronouncements concerning absences, presumptive death and existence of the person.

Book III: Concerning Family Rights

A. *Modifications Proposed In Compliance With the Norms Of The New Constitution*

1. Equality of the sexes before the law requires extensive reformation of the legislation, in effect since 1936, governing the rights and obligations arising from the marital relationship, community property, non-community property, dowry and the separation of assets during marriage.
2. The Draft Code gives patrimonial effect to *de facto* marriages, but such effect will not be recognized until the law establishes the time requirements and the conditions such marriages must meet in order to comply with the pertinent constitutional provisions.
3. A provision is included to the effect that all children have equal rights. This provision requires modification of the Titles dealing with legitimate and illegitimate children, as well as those dealing with legitimation and adoption of children.
4. The Draft Code further provides that types of marriages will be regulated by the law. This necessitates that consid-

eration be given to the inclusion of different types of marriage, other than the single one recognized by the present Code.

5. Recognition is also given in the Draft Code to non-attachable family assets, which calls for a modification of the pertinent Title in the current code dealing with the subject of family assets in general.

B. *Modifications Suggested By Judicial And Forensic Experiences And By Developments In The Legal Order*

1. The Draft Code provides for liberalization of adoption procedures in order to aid in the solution of problems raised by abandoned children or those in physical or moral danger.
2. The concept of full adoption is extended through the incorporation of the concept of adoptive legitimization (*legitimación adoptiva*) which seeks to give adopted children parity with legitimate children.
3. Marriage partners are given greater freedom in the selection of the patrimonial regime which is to apply to the marital relationship.
4. The Title dealing with dowry is eliminated because of its obsolescence; that concerning gifts on account of marriage because it is considered superfluous.
5. The rules relating to the indivisibility of inheritances are stricken because they are deemed to belong in the Book of Successions. Rules relating to family foundations are also eliminated since the subject may be covered through specific rules in the Title covering Foundations.

Book IV: Concerning the Law of Succession

1. Structurally, rules in concordance with present legislation are left undisturbed and those deemed defective are either eliminated or modified. Concurrently, some contemporary comparative law principles are incorporated.
2. The provision in the 1936 Civil Code which nullifies a testamentary disposition made during the last illness of the testator in favor of his confessor, religious minister or medical doctor, is eliminated.
3. The rules dealing with wills are clarified. The so-called "Military Will," previously regulated by the Civil Code of 1852 and the Code of Military Justice of 1898, is

introduced.

4. The much controverted Article 704 of the current Civil Code, covering the incompatibility between a spouse's legitime,² and his or her share of community property, is eliminated. Thus, the spouse's right to the legitime is independent of the share to which he or she is entitled at the time the marital relationship is dissolved.
5. An interesting new rule relates to families of limited economic means. This provision grants the surviving spouse the right of habitation for life in the house where the couple resided.

Book V: Concerning Real Rights³

1. The most significant innovation with respect to the current Civil Code of 1936 is the new classification of property. The proposal seeks to change the present classifications of movables and immovables. The new classification is registered and non-registered property. Security interests in Peru are deemed to be in a state of disarray, as shown by the fact that there are mortgages (an institution reserved for immovables) affecting ships and aircraft which are really movables. A similar difficulty is encountered in the subject of pledges (reserved for movables) in the present legislation. Pledges vary greatly with respect to type and number. Some civil and commercial pledges require delivery of the goods pledged; others, such as the agrarian, industrial, mining and transportation pledges, only require registration. The new classification would avoid the present legislative tangle and bring simplicity and clarity to the system. Additionally, the present movable/immovable classification is obsolete because it does not include legal rights which may be the object of real rights. The Civil Code of 1936 faces this issue and classifies rights arbitrarily, considering, for example, a concession to exploit a public service as an immovable. Rights in industrial and literary property, on the other hand, are considered movables.

2. Legitime - That interest in a succession of which forced heirs may not be deprived. BLACK'S LAW DICTIONARY 1047 (rev. 4th ed. 1968).

3. Real Right - That which entitles him who is invested with it to possess the subject as his own. . . . Real rights affect the subject itself. BLACK'S LAW DICTIONARY 1488 (rev. 4th ed. 1968).

2. A presumption of good faith possession in favor of the one in possession is introduced.
3. The time required to make title effective through adverse possession is the subject of another provision in the Draft Code.
4. A new definition, which takes into account the provisions of the new constitution under which property should be used in a manner consistent with the social interest, clearly delimits the legal institution of property (*la propiedad*).
5. The statutory periods for adverse possession are reduced on the grounds that improved means of communication warrant such reductions.

Book VI: Concerning Obligations (*Obligaciones*)

A. *Concerning Obligations Per Se*

1. The Draft Code covers the loss or deterioration of goods before delivery, whether through the fault of the seller or buyer, or when neither is at fault. Clear and comprehensive rules are set forth dealing with the types of obligations, i.e. to give (*dar*), do (*hacer*), and not to do (*no hacer*); alternative and facultative (*alternativas y facultativas*); divisible and indivisible; and joint and several obligations.
2. The existing controversy regarding the validity of the nominal regime (*régimen nominalista*) is settled with respect to obligations concerning the payment of money.⁴ The Draft Code contemplates, however, that the parties may agree on the application of a "value system" (*sistema valorista*) which provides for the release of the debtor upon the tender of either a sum equivalent in purchasing power to the original sum owed or the sum owed in Real Economic Terms (*valor constante*). The obligations to pay in foreign currency are also carefully regulated.
3. Rules regarding delays and defaults on the part of the obligor, not covered in the Civil Code of 1936, are provided for.
4. The rules relating to objective novation are clearly set forth, and the rules concerning payments in kind to settle a debt, are eliminated on the grounds that such payments constitute a form of objective novation.

4. The controversy arises when the sum stated in paper evidencing a debt does not reflect the present market value of the obligation to the creditor.

5. The legal rate of interest — five percent under the present Code — is abolished, and the Central Reserve Bank of Peru is charged with the duty of establishing rates of interest.
6. The regime pertaining to obligations carrying criminal sanctions has been substantially modified. The pertinent language provides that the totality of the sanctions cannot exceed half the value of the unperformed obligation. However, when the failure is one of delay in performing the obligation, or the obligation is in the nature of a guarantee, the penalty will not exceed one fourth the value of the obligation in the original contract.
7. The concept of assignment of rights is incorporated in the provisions governing the transfer of obligations on the premise that an assignment is only a transfer of an obligation, not a contract as such.
8. In the area of failure of performance, distinctions are made between acts of God or *force majeure* on the one hand, and cases where the fault or the absence thereof cannot be attributed to either of the above two causes.
9. Deficiencies and omissions in the current law, with respect to the means of extinguishing obligations, such as offset, waiver, consolidation, and settlement, are corrected.

B. *Concerning Contracts: General Part*

1. The Draft Code stresses the principle that private parties have the right to contract freely (*autonomía de la voluntad*), but limits the principle so as to avoid injustices and abuse of process, a position consonant with Peru's new constitution. In short, the objective sought is the protection of a fundamental value (juridical stability) while avoiding excessive governmental intervention in, and control of, the contractual relations between private parties.
2. A new type of contract is introduced; the *contrato-ley* or *ley-contrato*. Under this type of contract, the State provides private parties certain statutory assurances and guarantees, based on public policy.
3. Contractual agreements between spouses in specific cases not contemplated in the present Civil Code, are permitted.
4. The subject of interference with pre-contractual negotiations is regulated. The provision calls for damages and payment of costs whenever such interference occurs without justification.

5. The Draft Code incorporates novel rules dealing with public offers and auctions, defining their juridical nature and legal effects. General contractual clauses, adhesion contracts, and standard form contracts are also covered, thus providing for "mass contracting" (*contratación en masa*).
6. The concept of the preliminary contract, separated into the agreement to contract and the option contract, is introduced to facilitate the making of contracts.
7. The doctrine of unforeseeability is adopted with respect to cases where performance by one of the parties has become excessively burdensome. This clears the way for the restoration of the original balance between the parties which may have been destroyed by extraordinary, unforeseeable, or unavoidable events.

C. *Concerning Special Contracts*

1. In the area of sales, the Draft Code incorporates the concept of assignment of rights, and regulates the sale of documents of title, giving due consideration to the covenants which may be added to the latter contract.
2. Given the importance it has gained as part of the manufacturing process, the supply contract (*contrato de suministro*) has been adopted.
3. The donation contract has been restructured, making it more simple and requiring less formalities for its validity.
4. Lodging contracts are regulated, given the importance they have acquired in the areas of tourism and urban development.
5. A new approach is taken with respect to employment contracts—they are subdivided into autonomous labor contracts, dependent labor contracts, agency, bailments and repair or construction contracts.
6. Business services rendered without benefit of a formal contract (*gestión de negocios*) appears in another Title since the institution is not considered a contract. Although the institution preserves its present legal framework it is distinguished because it is not linked with the agency contract.
7. Civil partnership contracts are shifted to the Book on Persons; life annuity contracts are eliminated; and surety contracts are substantially modified.
8. Following the contemporary trend, the Draft Code also regulates arbitration agreements.

D. *Concerning Extracontractual Responsibility*

1. In this section, the Draft Code tries to overcome the ancient theories governing fault and objective liability in order to adopt a position which will permit an adequate allocation of the risks inherent in societal co-existence. It is clear that technology has evolved significantly since 1936. The damages likely to be caused by technological developments have become more complex because in many instances the perpetrator of the wrong cannot be identified, and the victims have had to bear the consequences due to the lack of clarity of the 1936 Code. Therefore, new solutions are sought for these "modern risks," which result not only from technological advances but from changes in society itself. It is evident that insurance contracts have a necessary and effective function to perform in this area. Modern statutory enactments have recognized this fact in developed as well as underdeveloped countries.
2. *Dolo* or gross negligence on the part of the victim defeats a claim against the perpetrator of the wrong.
3. Damages resulting from defamation are recoverable under the conditions set forth in the Draft Code.
4. Moral damages are contemplated, but only as an additional element in the computation of actual damages and loss of profits.
5. Professional responsibility is dealt with separately, adopting a single standard applicable to both contractual and extracontractual liability. The standard is less stringent and calls for an extremely casuistic assessment of the facts.

Book VII: Concerning Prescription and Extinguishment of Rights

1. This Book refers only to extinctive prescription (Statutes of Limitations) because acquisitive prescription or *usucapio* (adverse possession), which is a means of acquiring property, is covered in the Book on Real Rights.
2. The distinction between prescription and the extinguishment of rights is clearly explained. The former extinguishes the cause of action, but not the right; the latter extinguishes the right.
3. The interruption of prescription is given a different treatment from that found in the current Civil Code and some technical defects are corrected. Following present day

trends, the grounds for interrupting the prescriptive term are classified as *interpelativas* (those arising from a claim by the creditor) and *cognocitivas* (those arising from an act of the debtor).

III. CONCLUSION

It is difficult to synthesize the most significant changes proposed in the Draft Code prepared to replace the current Peruvian Civil Code of 1936. The Draft Code, consisting of 2,070 articles, has been extensively publicized and is being evaluated continuously in seminars organized by the Judiciary, universities, bar associations and other interested entities. The Draft has been published in Peru's official journal and numerous comments have been received from individuals and institutions.

The Reform Commission trusts that the jurists constituting the Revision Commission will evaluate the Draft Code most carefully so that the new Civil Code may, within the constraints of Peruvian constitutional norms, meet the realities of present day Peru. All Peruvians sincerely trust that the Civil Code which will replace the Code of 1936 will meet the aspirations of the citizenry.