THE UNITED STATES COMMERCIAL LAW UNDER A CIVIL LAWYER VISION (A COMPARATIVE STUDY)

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PREFACE

I would like to express my feelings before explaining my work. Anxiety, disorientation and all sorts of difficulties - inevitable in works like this - were superseded by the work itself.

It is obvious that I am not in the best position to evaluate it. But the simple fact of having done it, was just enough for me.

My hopes lie, though, in the possibility that this work, much more than a simple exercise, might be interesting somehow to students and professionals of law.

EXPLANATORY NOTE

The present work attempts to reveal the differences betwen two distinct systems of law. The Civil Law and the Common Law.

Differences will be traced and the most important similarities in both Civil and Common Law subjects will be pointed out.

The American Common Law system will be compared to the Brazilian system of Civil Law. With the clear scope to limit the field of analysis, the two mentioned systems will be seen under the Commercial Law subject. It is important to say that in Brazil and also in the United States the Commercial Laws, Patents and Copyright, for example, have been changed. Actually, it would be better to say that the Intellectual Property has been changed in both country. We can have in mind that in recent years a new Patent Brazilian Law and a new Copyright Law have been enforced. In the United States, the same phenomena has occurred and will keep on occurring throughout all further statements of the said subjects. But the both system of Commercial Law will only be rederred as a complet system, as said before, to limit the scope of the field of analysis.

On the other hand, it is necessary to quote that this work was done under the inevitable influence of the Civil Law, due the author's personal experience.

THE AMERICAN COMMERCIAL RULES

At a first sight American Common Law could be identified as a branch of the English Law. Though the English influence is clear, the American Common Law is very different from the English system. Reneé David, a French scholar, observed in his work "The English Law", that the Common Law System is still present in England and Wales. In other countries, which follow the mentioned system, there are substantial differences and they are not at all similar to the ancient or English Common Law System.

Thus, we do not find any parallel between the real American Common Law system and other systems of law in the common-law world. The American system was built in a Common law system, but deviated from this original route it has been constructed on its own bases.

Probably, the most important difference between the American and the other Common law countries is that in America the written law subsists side by side with *traditions.*

America's legislation is well advanced and structured. There is a mixture of Common and Civil laws.

The Federal Statement shows 50 different subjects of rules. There are fifty different titles in the federal Code, in the United States disposition.

Moreover, States have preserved the power to legislate and we can see, therefore, in each State an enormous number of legislative. Yet another aspect must be mentioned. The American system is structured in certain given power to the Federation by the States, but with reservations. The States, members of the federation, holds part of power[1]. As we can see afterwards, there is an American Uniform Commercial Code. It is not a federal legislation like the *Federal Code.* That means that despite being called *Code*, it is not a national law. Therefore, the States, within their own territorial spaces can adopt other commercial laws, despite the existence of the Uniform Code. Actually, the Uniform Commercial Code is an experiment created to give the same treatment to the trade in the whole American territory, as we will see later.

On the other side, there are several topics treated by The *United States Code* (a federal provision) related to commercial subjects. For example, the titles, 9. (Arbitration), 11. (Bankruptcy), 12. (Banks and banking), 15. (Commercial and trade), 17. (Copyrights) and 35. (Patents).

Restating: The Uniform Commercial Code is not a federal Code, albeit the American's States are trying to develop a system to permit the facilities between the internal trade with that experience, that is, trying to create a uniform commercial rules to be used by all American States. Moreover, the Uniform Code deals with only about limited topics of commercial law.

[1] Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (The Constitution of the United States).

HISTORY

To well understand the present moment it is important to mention voices from the past. History, itself.

A group of English separatists that had fled to Holland in search of religious freedom requested and received permission from the Virginia Company to colonize the northern part of its territory in North America. In the summer of 1620, about 30 pilgrims set out stopping first in England to pick up supplies and another group of Colonists. In September of 1620 the Mayflower sailed with 101 passengers to start a new colony in America.

When the Pilgrims arrived in the new country they signed a Treaty that bound them together in a government modeled after the church convenient that puritans made within their own churches congregations. They signed "The Mayflower Compact", a treaty stressed by religious feelings.[2]

It is likely that the "Mayflower Compact", although a Treaty between the Pilgrims, was the first American written law. This treaty was a real convention that established not only the seed of a new Nation, but also the new formula of the American law.[3]

To give an idea of the American model of Law is not less important to inform about the Declaration of Independence, in 1776, and the date which the United States Constitution was signed (1787). The thirteen Colonies were disenchanted with British rule and sent delegates to the Continental Congress in Philadelphia in 1776. There they adopted the Declaration of Independence, which was confirmed in 1783. The Colonies became independent states. In the meantime they had also established a Confederation. But not long after the Confederation was already weak. The central government was dependent upon the States. In 1787, dissatisfaction was clear.

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[2] "In the name of God, Amen. We, whose names are underwritten... having undertaken for the glory of God and advancement of the Christian faith, .. do.. solemnly and mutually in the presence of God, and of one another, convenient and combine ourselves together into a civil body politic; for our better ordering and preservation... to enact... such just and equal laws...".

[3] In 1780 all 13 States had written Constitutions. In 1783 was signed the Treaty of Paris (between England and the Americans), whose won recognition as a sovereign nation.

The thirteen States gave up the Confederation system and created then the Federation in 1787, and in the following year the United States Constitution was ratified.

These experiences, since the arrival in the American land, until the Constitution, determined a new system of law. It is impossible to affirm in present days, whether the American system of law is a Common law or a Civil law system. It seems a hybrid system that takes the most important points of both mentioned systems.

AMERICAN SOURCES OF COMMERCIAL LAW

The United States of America is a Federal State. It is well known. Although there is an understandable link between the English and the American history, the Pilgrims made the American Constitution based upon the historical facts that they, Pilgrims, had lived. Thus, the States delegated *certain* powers to the national government but all the power not delegated *remains* with the States (Members of the Federation) or the people, in a totally different approach from that in England, which remains as a Unitary State.

The Commercial acts were some of those which States gave power to the Federal Government. The so called *"commerce clause"* rules:

"The Congress Shall Have the Power to Regulate Commerce With Foreign Nations, and Among Several States, and With the Indian Tribes."

Therefore, one of the most important power is granted to Congress in the United States Constitution.[4]

Although the "commerce clause" is a simple article, it is possible to notice that the commercial activity is understood in three different levels. The International, the National and with the Indians Tribes. Today this third category, it is possible to say, belongs to the past. On the other hand, the States granted to

[4] Article I, section 8, number 3. (American Constitution)

Congress - through the Constitution - the power to regulate the commerce. "The Congress shall have the power to regulate the commerce..." as explained before.

Thus, the Congress will regulate the International commerce and also the commece among the several States. It means that the intern or intrastate commerce is not to be regulated by the Congress. The States have held the right to create rules in their territories. There will be two kinds of rules. The Federal (to regulate the international and the interstate commerce) and the intrastate (to regulate the intern commerce). So, the internal commerce must be understood as an activity that occurs inside the territorial limits of each of the Federal States. Eventually, Courts have been discussing several theories about the intrastate and interstate commerce.[5]

THE FEDERAL CODE

Obviously, the rules made by the Congress are the second source of the American Commercial Law. The Federal legislation will be applied in the federal level. Therefore, in interstate commercial relations - and also with the Indians Tribes - Federal rules will be used. Federal rules were condensed in a Statement, which some people used to call the *American Code.*

The American Statute, actually, the *United States Code*, contains the most important federal regulation. As said, the United States Code brings the most important federal regulation. The commercial activity is awarded with several topics, like those previously mentioned. Then, the *United States Code* (all Federal rules) is the second source of American Commercial Law. The Federal Code is divided into fifty titles, each one dealing with a given subject. The Federal Code brings not only commercial rules

[5] Among others, "The Concurrent Power Theory", "The Mutual Exclusiveness Theory", The Selective Exclusiveness Theory" (in Constitutional Law of the Federal System, C. Herman Pritchett). See also article II. Section 2. of the American Constitution which gives to the President Power to make Treaties.

but also all those rules in which the Constitution grants power to the Federal government legislate.

TREATIES

Treaties, with other Nations, are also a source of Law. In the United States, Treaties are in the same level of the Federal legislation.

The American Constitution states that "... The President shall have the power to, by and with the advice and consent of the Senate, *make treaties*..."[6] Consequently, follow the same path of Federal rules.

International treaties will be understood as a federal rule.

THE LOCAL LAWS AND THE UNIFORM COMMERCIAL CODE

The third source of American Commercial Law is the local or municipal legislation. But is important to remember that in the respective territory each of the American States shall have the power to regulate the intrastate commercial activity. Each of the American States has the power in its own territories to make law just because the power not delegated to the United States is reserved to the States.

We can conclude that there is a particular legislation in each State to those remaining subjects which the power was not given to the United States. Thus, each state can exercise the Judicial, the Executive and the Legislative powers in its domain.

THE UNIFORM COMMERCIAL CODE

At this point it is necessary to bring up the notion about the Uniform Commercial Code again. The Uniform Commercial

[6] Article II; section 2 of the Constitution of the United States of America.

Code is neither a Federal rule nor a State rule. As the States in their own territories make their own rules, it is easy to understand the difficulties of the commercial activity before the existence of the fifty different local (Municipal) rules. In the attempt to join the identities and avoid the disparities between the municipal laws, the States have adopted the uniform Code, voluntarily. But there was a problem. The States have a proper Jurisdiction and respective Courts. As the States in their territories have the power to decide about juridical matters, it is easy to see that decisions can alter the Uniform Commercial Code. Despite being a rule, it is not an actual law that shall be observed by the States.

The legislative dichotomy resulted by historical facts provokes a big difficulty to establish a uniform pattern to the commercial rules not belonging to the federal legislation.

And also is necessary to say that the Uniform Commercial Code deals with certain commercial areas. It rules, for example, about SALES, but does not about other commercial contracts.

BRAZILIAN COMMERCIAL RULES

The Brazilian commercial rules are similar to the American rules. The Constitution mentions the commercial rules and grants the Congress the power to legislate. Other sources are similar, but before identifying those rules it is important to take a look at the past.

HISTORY

The Brazilian Commercial Code was promulgated in 1850. Probably to an ordinary law jurist the Code age would not be a problem, for the common law is based on tradition. To a codified law jurist, however the first question could be "how old is that Code?" or "how can it still work?".

Actually, the code longevity is the greatest problem to us, in Brazil.

First of all, the Brazilian last King, Pedro II heir of Brazilian's kingdom, signed the Commercial Code, as Brazilian's King. The Brazilian independence from Portugal took place in 1822. In 1889, The Republican movement was well succeeded. Between the mentioned dates the Brazilian Code, as already said, was promulgated. Until then - the Brazilian Commercial Code promulgation - the Portuguese laws called "Kingdom Ordinations" were also effective in Brazil. Therefore, the first law used in Brazil was the Portuguese law, until the Commercial Code was edited.

After the Commercial Code promulgation, it is obvious; the Brazilian Law was, and still is, even today, in force. The Brazilian Commercial Code was the first codified law in the country. The Civil Code came after in 1916.

BRAZILIAN SOURCES OF COMMERCIAL LAW

At the present moment, as Brazil is a Republican country and have adopted a Constitutional system, we can say that the main source of the Commercial Law is the Constitution. The Constitution only mentions some aspects of the Commercial Law, such as a definition about national companies, and the social function of the commercial activity. The same Constitution gives power to the Congress. The Congress in Brazil has the power to make laws.

Brazil is a Federation. The States were granted competence from the Federation, in a different way of that occurred in the United States.

The States in Brazil have their competence limited by the Constitution and by the Federal and Municipal competence. The Federal legislation, like the commercial law, and other several codes (commercial, civil, criminal, for example), is a national law. Neither states-members, nor municipalities have the power to legislate about those matters. Thus, there is a legal uniformity in the whole country. Like in the United States, the Constitution in Brazil is the main source of law.

Apart from Constitution, the Commercial Code is the most important source. That rule, as previously seen, comes from the mid 19th century.

The Brazilian Commercial Code has three parts. In the first part it is given the notion of entrepreneur, contracts and commercial obligations, contracts in specimen, commercial societies and titles of credit. In the second part the topic is the Maritime Commerce. The third part deals with the Bankruptcy. This superficial view shows the Code in its original version. Changes have been taking place. The Code has been modified by a great number of laws.

BRAZILIAN COMMERCIAL CODE

It is important to know that the Brazilian Commercial Code is a national law. Brazil is a Federative country and the Magna Charter grants to Congress the nation wide power to make laws.

The Code is an ordinary law. It is below the Constitution. A simple law is enough to change or revoke the earliest. The Commercial Code has been changed several times since it became a national law a century ago.

Brazilian Commercial Code has been adapted to the new times, but it is still an ancient law. The Civil Code (1916), for example, changed the Commercial Code in subjects relating contracts and obligations. In the Commercial Societies field more than 30 laws altered the original. In the bankruptcy almost ten laws modified the Commercial Code. Also the Titles of Credit topic was entirely modified. There are 31 laws, just mentioning the most important ones, about the matter.

Over 160 rules, new laws, modified The Brazilian Commercial Code. As we can see a "too" great number of laws. The Code became then an actual puzzle even for Civil Law lawyers. A real patch fabric.

In another view, it is important to say that the tittle 2 of our Code, Commerce Maritime, is not taught in the graduation course. It is less studied than the other Commercial Code parts.

The Brazilian Commercial Code is a fine example of a law made specially to a category of people, *"id est"*, the *merchants* (the entrepreneurs). As we have in Brazil two distinct fields of law, Public Law and Civil Law ("Direito Publico" and "Direito Privado"), the commercial laws belong to the Private field. The most important branches of Private Law (Direito Privado) are The Commercial law and the Civil law. I reckon that to an ordinary lawyer the mentioned division is not easy to be understood. I will try to explain it in a few words, though. The Commercial law treats only about a certain kind of people and their relationship. All that involves the "Mercator" is foreseen by Commercial Code. Any other relationship among people, things, obligations are ruled by the Civil Code.

TREATIES

Brazilian Constitution, as the American, reveals a role to International Treaties. This kind of agreement has an important role in the Brazilian Commercial laws.

The international agreements in Brazil are similar to those in The United States of America, and after being approved by the Congress they appear in Brazilian ordainment as a national law.

Here is an example which gives us the actual importance of this source.

In 1942, Brazil signed the Geneva Convention in order to adopt an Uniform Law about titles of credits. The mentioned Convention was signed in 1930. After that, the Convention takes some years to be approved by the Brazilian Congress, and in 1966 it turned out to be a national law.[7]

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[7] The Geneva Convention had occurred in June of 1930. Brazil has adhered to that Convention in 1942. Only in 1966 the Convention was "approved" by a rule. Despite to be necessary the Congress approval, was used a Decree (an executive rule) to be enforceable the Convention. The Congress had lasted 24 years to say if that Convention could be understood as a Brazilian

OTHERS SOURCES

The great majority of Brazilian scholars understand the Civil Code, the Uses and Costumes as other sources of Brazilian Commercial Law.

The Civil law, actually *Civil Code*, is mentioned by the commercial Code as a source of Commercial Law.[8]

Civil laws (civil code) are also apllied like a source of Commercial Law when, for example, commercial rules say about capacity. Actually capacity is not treated by commercial rules but by civil rules.[9] Uses and Costumes are other sources of Commercial Law in Brazil. In commecial contracts, *exempli gratia,* Brazilian Commercial Code shows that those other sources are foreseen law.[10]

The Uses and Costumes are mentioned several times in the Brazilian commercial laws, without any distinction about the terms or meaning. The scholars, notwithstanding, have traced a difference. *Use* is a fact that is repeated. *Costumes* are qualified facts. Costume is a repeated use with a juridical intention. There is a psychological aspect in the costume. People think that they are making an agreemente protected by law. Therefore, *Costume is a qualified Use.* Both Use and Costume are sources of Brazilian Commercial law.

CONCLUSION

We can conclude then, that Brazilian and American systems of commercial rules show not only differences but also similarities.

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law without decision. In a revolutionary period of Brazilian history (military) branch "gave" the authorization that Congress never given.

[8] Article 122, Brazilian Commercial Code: "All rules of Civil Law to contracts in general are apllied to commercial contracts, with the modifications and restrictions established in this Code."

[9] Article 1, Commercial Code: "Can make commerce in Brazil... all people which... are free in administration of themselves and goods, and would not expressly avoided by this Code".

[10] Article 130 of Commercial Code: "The words of the contracts and mercantile conventions must be understand in conformity the costume and the uses that commerce did..".

The American Constitution gives competence to a certain power to legislate about commercial law.

The Brazilian Constitution makes the same work. Besides the powers, which emerge from the Constitutions, in USA there are a national legislation (Codes) and a municipal legislation. In Brazil there is only a national legislation (Commercial Code), which covers - at least presupposes - all national and local necessities.

It is important to notice that in the United States there is a kind of movement which is going to make a high number of written laws exactly like those existent in a civil law country in order to put in a uniform law all rules about commercial interests.

The Uniform Commercial Code, despite the fact that it is a law which treats only about sales, is an experiment to give the intrastate commercial activities an equal treatment in the Country as a whole.

On the other hand, The United States Code (an American national law) rules about Commercial law in various titles like: 11 (Bankruptcy); 12 (Banks); 15 (Commerce and trade); 17 (Copyrights), and 35 (Patents). Basically, this statement covers very subject in commercial matters.

In the same way, the Brazilian Commercial Code (a national law) rules about commercial law, obviously, but there is a marginal legislation, which has abrogated - partially - the mentioned Code. For example, the Bankrupcty Law (decree-law 7.661/45), Patents (Law 9.279/96) and Copyrights (Law 9.609/98), among others. Thus, we can conclude that the Brazilian Commercial Code has the same "format"of the United States Code.

Several titles driven to an identical objective, even though the application of both laws is made in a different way as it was explained before.[11]

[11] In Brazil there is No State or Municipal law treating about commerce. In United States besides the Federal law there are municipal commercial laws.

Treaties are, in both American and Brazilian legislation, sources of commercial law, and with few differences they play the same role in both countries.

The other sources, for example Uses and Costumes, are explicity used in Brazil, enforced by the Code itself, and in the United States enforced by the case law system. In Brazil there is a legal prevision and in the United States there is a kind of a legal prevision that comes from customs, comes from *"traditions"*.

If United States are going to use more and more written laws, Brazil is going to use the common law system (the case system). There is the probability; that soon, Brazilian Supreme Court decisions will be enforceable like those in the Common Law systems. The Brazilian Supreme Court decisions will works like precedents.

We know that the Civil Law is not perfect and we also know that the Common Law system is not unfeasible.

It is impossible to say or to know whether a mix between both Common and Civil Law systems will give us all the answers to solve problems that American and Brazilian societies have been facing.

But, certainly, we all know, I am sure, that "DAS PROBLEM DER GERECHTIGKEIT"[12] passes through by the eternal fight by and for the rights.[13]Here, there and everywhere the law can make sense to justified injustices. But, here, there and everywhere, whatever the place, whatever the system, law can be the way to the real Justice, to make the law be fair. Law can be the way to make a new and fair society.

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[12] ORIGINAL TITLE OF Hans Kelsen book "The problem of the Justice", in which the author treaties the law with and as a juridical value. It is unnecessary to say that Kelsen had treated about law rote.

[13] Rudolf Von Ihering wrote: "Every humanity rights were conquered in fight; all important rules of law, in theirs origin, should had been took out from that others which to them were opposed, and every right, right of a population or a private one, gives a presumption that is the intention to preserve and keep it firmly."(A Luta Pelo Direito, a Portuguese version from the outhor's book The Contend by the Law).

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