

WORKING WITH PRECEDENTS TO DEVELOP THE RULE OF BRAZILIAN COMMERCIAL LAW IN A WORLDWIDE SCENARIO

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INTRODUCTION

The Brazilian legal system was developed based on Roman law. As a Roman legal system, the rule of law in Brazil focuses on the ordinary person and the private relations between individuals. The philosophy behind the system is the sense of justice and morality present in all civil code legal systems.¹

While Brazil was colonized by the Portuguese, who introduced civil law to the country, the American legal system was shaped in accordance with the common law applied by English settlers. The common law system was originally developed in the U.S. as a direct link to the power of the British Empire. The common law was developed to organize life in society so that a judge only had power to intervene in a conflict between people when public order was threatened. The sense of justice and morality so present in the civil law was superseded by the sense of societal organization under public control in the common law legal system.²

In the modern age, the world seems to be one. The technology of information and the increase of commercial transactions between different countries and cultures has been the main reason for the deep transformation experienced by the international community. Consequently, the essence of both systems has been changed and it is more common to see characteristics of one system present in the other.³ The Brazilian legal system is no longer considered a pure Roman system and the rules encoded are no longer considered the only one source of law. Modern Brazilian legal scholars have given more importance to the study of court precedents as a method of legal

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1. RENÉ DAVID, OS GRANDES SISTEMAS DO DIREITO CONTEMPORÂNEO [THE GREAT SYSTEMS OF CONTEMPORARY LAW] 23 (Martins Fontes ed., 4th ed. 2002).

2. *Id.* at 25.

3. *Id.* at 26.

development. Some court decisions have been so important to Brazilian law that they have actually had the power to change the law.

In the same sense, over the past several years, American common law has been developing under a legal concept different from the original system introduced by Britain. We can find several rules encoded by the American legislature and applied in court decisions. For example, the Commercial and Debtor-Creditor Statute, the Bankruptcy Code, and the Consumer Credit Protection Act have recently been studied in American law schools as sources of American law. According to the scholar Richard Newmann,

a common law country has two types of sources of law: judicial precedent, on one hand, and, on the other, statutes and statutes-like material, such as constitutions, administrative regulations, and court rules [. . .] [I]n English common law, courts were the original lawmakers, and legislatures arose afterward, acquiring the power to make new law and to change law already made by courts. Courts, of course, retained the ultimate power to enforce all law. And, because of interpretation is essential to enforcement, courts used their power to limit the effect of intrusive statutes, which judges treated with suspicious and even condescension until well into this century.⁴

Under this new legal reality, there is been no longer a material difference between the civil code and the common law legal system. Similar cases have received similar final decisions comparing when democratic jurisdictions with different legal systems. The sense of justice has been considered equal in countries with democratic principles.⁵

Thus, this paper will discuss the importance of judicial precedents in the development of the Brazilian Law in a global context. After proving the importance of judicial precedents, this paper will hold that the study of court decisions is a recommend method of teaching law inside universities. American legal reasoning might be a good method of studying and developing law even in Brazil, a civil law country.

The discussion will mainly focus on Brazilian commercial law. It will be demonstrated that judicial precedents have had a significant influence on the development of Brazil commercial law. In a civil law system, commercial law is the body of law concerned with all legal entities created with the scope to

4. RICHARD K. NEWMANN, JR., *LEGAL REASONING AND LEGAL WRITING* 137 (Little, Brown and Company, 2d ed. 1994).

5. DAVID, *supra* note 1, at 26; both Brazil and United States are constitutionally democratic countries following theory of Montesquieu.

conduct business in the country⁶ and may be also called corporate law.⁷ For this reason, commercial law is considered a legal tool for the economic development of a capitalist country.⁸ And as a tool for increasing capital, commercial law requires less strict rules and much more flexibility for the courts to decide any conflict arising inside or outside of corporations.

I. THE COMMERCIAL LAW

A. *The Origin of Commercial Law*

Most scholars say that the first rules of commercial law for western civilization originally appeared in the Roman Empire, around the 1st century B.C. The terms *mercatura* (market) and *commercium* (business) first appeared during this period.⁹ At that time, Rome was the center of commerce and therefore received goods from all over the world, especially grain that had been shipped from Asia to Rome.¹⁰

Even though the commerce of goods was present in the Roman Empire, it was only during the Middle Ages that commercial law appeared as an independent body of law. During the Roman Empire the legal compilations by Justinian, the *Corpus Juris Civilis*, had been considered effective enough to rule the business relations between private parties. However, during the medieval ages, society felt the need to organize the life of businessman, and the *consuetudini*¹¹ had a great impact on the development of the law of merchants.¹² The commercial law arose out of usages and customs of Italian merchantmen. At that time, Italian Merchant Courts¹³ had the authority to recognize usages and customs as principles and rules of actions so that the

6. 1 RUBENS REQUIÃO, CURSO DE DIREITO COMERCIAL [COURSE OF COMMERCIAL LAW] 14 (Saraiva eds., 25th ed. 2003).

7. The study of Commercial Law has the scope to study the law of corporations and all institutes related to them, such as the bankruptcy law, antitrust law, letter of credit law, contracts law, and industrial property law.

8. REQUIÃO, *supra* note 6, at 6-7.

9. ALFREDO ROCCO, PRINCÍPIOS DE DIREITO COMERCIAL [PRINCIPLES OF COMMERCIAL LAW] 9 (Ricardo Rodrigues Gama trans., LZN ed., 2003).

10. *Id.*

11. “*Consuetudini*” is a Latin word that means personal of market that was able to provide professional advice.

12. ROCCO, *supra* note 9, at 14-15.

13. Nowadays, the Court of Merchants is world known as Board of Trade, which means “an organization of merchants, manufactures, etc., for furthering its commercial interests, advancing its prosperity, etc.” BLACK’S LAW DICTIONARY 119 (5th ed. 1991).

decisions provided by the courts were the real origin of the commercial law and are still applied by western civil law systems.¹⁴

B. The Commercial Code in Brazil

By the time Brazil was becoming independent of Portugal, in 1823, the country adopted the Commercial Code of Napoleon¹⁵ as the body of commercial law.¹⁶ The Commercial Code of Napoleon was edited in 1808 and was adopted as law by others European countries, such as Belgium, Greece, Holland, Italy, Spain, Portugal, and some South America countries due to Napoleon's imperialism.¹⁷ Decisions of Merchant Courts and famous scholars' opinions were both used as legal authority by the French legislature during the Napoleonic Empire. The Napoleonic Code's purpose was to compile all the rules of most European courts in order to make them easily enforced throughout the whole of continental Europe.¹⁸

The first Brazilian commercial code was dated in 1850 and, according to Brazilian scholars, was the first adopted in all of the Americas and drew from the French Code of 1808, the Spanish Code of 1829, and the Portuguese Code of 1833.¹⁹ The Brazilian Code of 1850 was only revoked by the Brazilian Civil Code of 2002, which joined the civil and commercial law into one code. This Brazilian law unification followed the European civil law system's tendency to have only one code for all private law.²⁰ However, this unification does not mean that commercial law disappeared in favor of civil law. The Civil Code of 2002 has one part dedicated to corporate law. It means that the civil code keeps in its body the commercial law of Brazil, providing rules that concern

14. ROCCO, *supra* note 9, at 17.

15. The Napoleon Commercial Code was the code applied in some countries of continental Europe.

16. REQUIÃO, *supra* note 6, at 16

17. CESARE VIVANTE. INSTITUIÇÕES DE DIREITO COMERCIAL [INSTITUTIONS OF COMMERCIAL LAW] 16 (LZN eds., 3d ed. 2003).

18. ROCCO, *supra* note 9, at 30-34.

19. REQUIÃO, *supra* note 6, at 16-17.

20. All countries that have a civil law legal system have the Law divided into two kind of Law: (i) Public; and (ii) Private. "Private law means the portion of law which defines, regulates, enforces, and administers relationship among individuals, associations, and corporations. As used in contradistinction to public law, the term means all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals."

BLACK'S LAW DICTIONARY, *supra* note 13, at 830.

to the legal entities (corporations and partnerships) with social and economical scopes to develop the Brazilian capitalism.²¹

C. The Brazilian Commercial Law Legal Sources

One of the most legendary Brazilian commercial scholars is a professor of commercial law at the Law School of Federal University of Paraná State, Professor Rubens Requião. In his book “Course of Commercial Law,” he argued that the first source of the commercial law is the law stated in the form of a code or statute. According to Requião, the commercial law of Brazil must first follow the legislative law and can rely on national usages and customs only as a secondary source. Requião taught that

[b]y the reasoning of having been a customary law, founded in the style of medieval merchantmen, the commercial law keeps traditionally usages and customs as a subsidiary rule. The codes rising in the 19th century had complied usages and customs incorporated by the original Boards of Trade in Italy. The legislators of the Boards of Trade did not therefore unknown or not recognize the technical capacity of the merchantmen to create their own rules for development of their business.²²

Some articles of the former commercial code provided usages and customs as sources of commercial legal transactions.²³ Furthermore, the Supreme Court of Brazil has ruled that usage and customs contribute to the law of merchants. In a case before the Supreme Court addressing imputed liability for damages, the Court held in accordance with the usage of trade and it considered the beginning of a requested performance a reasonable mode of acceptance to the law.²⁴

Since the scope of this paper is to demonstrate the enlarged effect of the Brazilian courts’ decisions, it is worth pointing out that judicial precedents have developed the commercial law even in a civil law system such as Brazil. The technical capacity or technical knowledge of merchants must be recognized to develop of the commercial law, and Brazilian courts have begun doing so. Some recent Brazilian scholars, have said that “[l]aw is a word that

21. The capitalism principle is provided by BRAZ CF §§ 1 and 175.

22. REQUIÃO, *supra* note 6, at 29.

23. There were some articles in the former Commercial Code that clearly provided usages and customs as legal source of Brazilian Commercial Law. BRAZ C.CO § 154, 168, 179, 186, 201, 207, and 291.

24. Maria Elvira Siciliano Villares, Fernando C. de S. Barros & others v. Corretora S.B. Câmbio e Títulos S.A Superior Tribunal de Justiça [STJ] (Highest court of appeals on all non-constitutional matters) Agravo Regimental no Agravo de Instrumento nr. 6.418-SP (1990).

means (i) rule; (ii) decisions and (iii) legal structure (. . .) Studying law only as rule is, however, partial and incomplete.”²⁵

Thus the law, even in a civil code legal system, is not only the law stated by the legislature in the body of statutes or codes. It also includes the precedent of courts because it is also considered law for historical reasoning by the major scholars, and an important legal reasoning to the legislature, lawyers, and students of law.

D. The German Law and the Science of Positive Law Scholar

The idea that law is only rules stated by the legislature in a body of statutes or codes came from the positive law philosophy mainly derived from German and Austrian scholars. According to positive law, the law is only that which is “actually and specifically enacted or adopted by proper authority for the government of an organized society.”²⁶ Even though the influence of this concept of law in the western world is considerable, the history and the practice of law have not accepted positivist legal theory completely enough to explain the “Science of Law.”

Historically, the influence of Roman law on the law of Germany was also very significant. In 1495, during the imperialism of Maximiliano, German jurisprudence reached some importance in the whole country. The same philosophy appeared in Germany in the 18th and 19th centuries with the study of law being isolated to the morality and customs applied during several centuries in other countries of continental Europe.²⁷

One famous and classic German jurist, Rudolf von Jhering, introduced the concept of jurisprudence as “a science to be utilized for the further advancement of the moral and social interest of mankind.”²⁸ Jhering defined the law as a “complex of legal effected rules of a specific State.”²⁹ Under this concept, Jhering isolated rules stated by the legislature from rules issued by courts. For Jhering, only encoded rules are a part of the “Science of Law.”³⁰

25. EROS ROBERTO GRAU, O DIREITO POSTO E O DIREITO PRESSUPOSTO [THE PLACED LAW AND THE PRESUMED LAW] 18 (Malheiros eds., 5th ed. 2003).

26. BLACK’S LAW DICTIONARY, *supra* note 13, at 806.

27. DAVID, *supra* note 1, at 59 and 60.

28. WIKIPEDIA ENCYCLOPEDIA (visited Nov. 28, 2006), http://encyclopedia.jrank.org/JEE_JUN/JHERING_RUDOLF_VON_1818_1892_.html.

29. 1 RUDOLF VON JHERING. A FINALIDADE DO DIREITO [LAW AS A MEANS TO AN END] 218-19 (Bookseller eds., 2002).

30. *Id.* at 230.

The judicial decisions, in accordance with Jhering's theory, are the application and/or interpretation of the law in an individual case drawn from society.

Jhering's legal philosophy influenced Hans Kelsen, an Austrian-American legal philosopher, who influenced all new constitutions of western countries. According to him, "a theory of law should validate and give order to law itself. By 'pure' he meant that a theory of law should be logically self-supporting and should not depend on extralegal values."³¹ In his theory of pure law, Kelsen defended the science of jurisprudence, reasoning that "[t]he courts of justice rule on individual law; however, under a judicial order which institutes the legislative power or recognize customs as fact of law, courts of justice should apply the general law previous enacted by Legislative or by customs. Judicial decisions are the continuation of the creation of law process, not the start."³²

Kelsen's legal methodology was very important in consolidating the democracy and legality in most civil law countries. This was a positive aspect of the Kelsen's Pure Theory of Law. Notwithstanding, in the middle of the last century, German jurists have admitted Roman law as always presented in German's legal institutes, as well in France, Austria, and other countries that have suffered the deep influence of Roman law in their legal systems.³³

Such acceptance was very important to the study of law (including the meaning of legal precedent) in the civil law legal systems. In accordance with the scholars of 19th century, the law is a product of popular interest.³⁴ In this aspect, David has already held that "customs carry out an important function; they are the structure upon the law creation and provide instructions for legislator, judges, and scholars to apply them in accordance with the law."³⁵

This is the current legal opinion in Brazil.³⁶ During the last century, customs have influenced decision makers and even the legislature. In addition,

31. BRITANNICA ENCYCLOPEDIA (visited Nov. 28, 2006), <http://concise.britannica.com/ebc/article-9045034/Hans-Kelsen>.

32. HANS KELSEN, *TEORIA PURA DO DIREITO [PURE OF LAW THEORY]* 272 (Martins Fontes eds., 2d ed., 1987).

33. DAVID, *supra* note 1, at 60-61.

34. *Id.* at 144.

35. *Id.*

36. Possessing large and well-developed agricultural, mining, manufacturing, and service sectors, as well as a large labor pool, Brazil's GDP (PPP) outweighs that of any other Latin American country, being the core economy of Mercosur and the 9th biggest in the world List of countries by GDP. The country has been expanding its presence in world markets. Major export products include aircraft, coffee, vehicles, soybean, iron ore, orange juice, steel, textiles, footwear, comed beef and electrical equipment.

judicial decisions have been taken a position of ruling the law, mainly in the commercial sphere, as we can see in the two precedents discussed below.

III. SOME RELEVANT CASES THAT RULED THE COMMERCIAL LAW

A. The Disregard Legal Entity Theory

In the Appeal to the Supreme Court of Justice,³⁷ the Minister of the Supreme Court of Justice, Ruy Rosado de Aduiar, applied the theory of disregard legal entity in order to impute liability to the shareholders of a share company for whose acts they were responsible. In the opinion of the judge that decided the case, the legal entity in fact has not existed. The shareholders had used the legal entity with the scope to perform acts against the law and benefit themselves. The judge reasoned the theory of disregard legal entity was based on Kant's theory and accepted by the America legal system. Since there was not a law stated by the legislature which allowed the application of this theory, the Supreme Court of Justice held that the Brazilian Courts of Justice had the power to disregard the existence of any legal entity whose acts had been in fact performed by shareholders, or directors of the company against the law.³⁸

Later, the Brazilian Civil Code of 2002 was amended to include Article 50 with the purpose of giving legal authority to several judicial decisions that had been based on the theory of disregard legal entity all over the country. Article 50 of the Brazilian Code states that a judge, in case of parties' or Prosecutor's claiming, might consider a legal entity as if it has not existed for liability purpose. In such event, the shareholders or the administrators of the legal entity might be personal liable for the legal entity's liability due the fraud against law committed in fact by them, not by the legal entity.

The theory of disregard legal entity was discussed by many good scholars.³⁹ The judicial decision mentioned above was also a case discussed by jurists and used by the jurisprudence as precedent for other several decisions taken in the future.

37. Case nr. REsp 86506-SP.

38. Teleparker Ltda Serviços Gerais v. Alarbank Industria e Segurança Ltda. Superior Tribunal de Justiça [STJ] (Highest court of appeals on all non-constitutional matters) Resp nr. 96.47596-SP (1996).

39. Fabio Ulhoa Coelho, Lineamentos da teoria da desconsideração da pessoa jurídica [Lines of the theory of disregard legal entity] 39; 528 João Casillo, Desconsideração da pessoa jurídica [Disregard Legal Entity] (Revista dos Tribunais,) at 25-37, quoted in Teleparker Ltda Serviços Gerais v. Alarbank Industria e Segurança Ltda. Superior Tribunal de Justiça [STJ] (Highest court of appeals on all non-constitutional matters) Resp nr. 96.47596-SP (1996).

B. The Law of Corporate Reorganization—Parmalat Case

Other recent relevant judicial decision that made rule in the Commercial Law of Brazil was the decision hold by the Justice of São Paulo State, dated February 11, 2004, in the case of Parmalat Brasil S/A.

Parmalat Brasil S/A is a corporation held in Brazil in accordance with the Brazilian Commercial Law. Parmalat Brasil has been for many years a well branded dairy company in Brazil. The main and controller stockholder of Parmalat Brasil was Parmalat Finanziaria S.p.A, a corporation held in Italy under the Commercial Law of Italy.⁴⁰

In December of 2003, Parmalat Finanziaria S.p.A initiated legal proceedings requiring reorganization of the company, and the President and Financial Director of the company were arrested in Italy due to fraud against the international and national financial system. All the news about Parmalat Finanziaria published in newspapers and magazines all over the world brought economical instability to the business of Parmalat in Brazil. Before this fact, the company in Brazil had been doing well and all security internal business procedures had been done for the warranty of investors. As result of the fraud in Italy, the share price of Parmalat Brasil plummeted and the creditors of Parmalat Brasil started to call for guarantees that Parmalat Brasil would not enter into bankruptcy.⁴¹

In that time, the main problem was the former national bankruptcy. This law was totally disbelieved by attorneys and scholars, and did not provide legal support for a multinational company that might have difficulty due to a temporary economic problem. It did not help the company either to continue its business or keep the workers employed in their activities.

For this reason, the judge of the legal process Banco Sumitomo v. Parmalat Brasil S/A, in February of 2004, decided to apply a new bankruptcy law that had not been already enacted by the legislature and approved by the President of Brazil. In his reasoning, the judge held a

judge is not a employer who must live closed, out of the world, and out of current reality, merely watching facts happening around him, as a shadow of principal actors of the social life [. . .] Following the French Government opinion about the company crises, it is not sufficient to be jurist, it is important to be realist, with the purpose of thinking about life condition in the modern world where has developed very important economical activities.

40. See AFONSO CHAMPI JR & DJALMA GONÇALVES BARBOSA, DIÁRIO DE UMA CRISE—LIÇÕES DO CASO PARMALAT. [CRISES DIARY—LESSONS OF PARMALAT CASE] (Qualitymark eds., 2004).

41. *Id.* at 98-99.

In this way, the judge of São Paulo jurisdiction ordered to application of the draft of law 4376/93 in order to give Parmalat Brasil the right of reorganization under the new worldwide concept of bankruptcy law.⁴² And because of this judicial order, Parmalat was able to reorganize itself and remain active in world business.

This controversial decision created a large discussion in the Court of Appeal, and is a good example of the new function of justice in Brazil. In fact, this decision provides reasons for enactment of the new bankruptcy law in February 9, 2005, and a good case to be discussed by professors.

IV. LEGAL METHODS OF ARGUMENTATION

Working with judicial precedents in a law school has still been a challenge for a law professor in Brazil. Even though the Courts of Justice have been using precedents in the reasoning of their decisions, law schools in Brazil are used to working with objective and empirical methods of study. In law schools, Brazilian professors traditionally lecture their fields and their theories under an empirical philosophy.

However, the practice of law in the judiciary and the legislature has demonstrated a deep and quick transformation of practical law that legal theories in the classroom might not be able to keep up with. Law professors have an obligation to teach this transformation and change the method of their teaching in order to have much better results to their lectures.

Some European scholars have defended the legal reasoning applied in the common law legal system. According to Atienza, “[w]orking with cases is a necessary legal method to the law, even though it is considered unperfected in other circumstances. The jurist uses the law with open rules that might change case to case. The law shall be opened to permit further legal opinions that might be different to the previous one.”⁴³

Thinking this way, the objective and empirical method of studying law is not as effective since students do not learn to critique whether a legal rule is correct and can be applied in further cases. They do not have the legal reasoning skills to truly practice law because they have been trained to answer tests according to the opinions of the lecturers, not according to what they

42. *Id.* at 99-100.

43. MANUEL ATIENZA, AS RAZÕES DO DIREITO. TEORIAS DA ARGUMENTAÇÃO JURÍDICA [REASONING OF LAW. THEORY OF JUDICIAL ARGUMENTATION] 78 (Landy eds., 2d, 202).

think is actually fair. In this method, they spend hours memorizing theories but not learning both sides of an argument.

In American law schools, the students spend hours reading cases that, unlike textbooks, have neither instructions nor explanations that will serve to answer the question posed. Then, they engage in a Socratic discussion with their teacher and classmates and ultimately discover on their own that a proposition is self-evident only if it must be true because its opposite is unthinkable.⁴⁴

V. CONCLUSION

This paper stressed the similarities between the common law and the civil law system. Special emphasis could be given to the important function assumed by the judicial precedents in both systems. The civil law is no longer based only on the statutory rules enacted by the legislature. Judges dealing with commercial issues have handed down more flexible decisions. The purpose of such flexible decisions has been only to provide a judicial support more adequate for the current reality of the world than simple statutes alone can provide. It has also been demonstrated that the common law is also not a pure case-based law. Some statutes, acts, and codes have been organized in order to provide more objectivity to some circumstances of life in society.

These considerations call for the introduction of more flexibility and less dogmatism in Brazilian law schools. Even in a civil law system, the Socratic method of teaching could be useful for the student to understand the meaning of the law. Working with precedent can be difficult in the beginning for a professor not prepared to provide legal support for an unthinkable discussion. But, it will be much more useful for the student to learn how to analyze and think in the relative safety of a classroom under the watchful eye of a professor, even if the only goal is to awaken their understanding. Using a judge's methodology from the start of law school seems more effective than trying to learn the skill later.

Notwithstanding, working with statutory law, professors cannot abandon the empirical logic adopted by the legislature to rule the law. The lecturer should follow the more relevant legal theories in order to stimulate student understanding of the meaning of the law or the interest of the legislature in a specific area of law.

44. THOMAS R. ORR, EDUCATIONAL METHOD ON TRIAL: THE CASE OF *SOCRATES V. DEWEY*, http://www.angelicum.net/html/educational_method_on_trial.html (visited on Nov. 29, 2006).

Since there are two sources to develop the law in both systems, a professor of law should have the sensibility to apply a mixture of both reasoning methods in their lectures. According to Atienza, the law should be on one hand a system of rules, and on the other hand a system of procedures that allow for different analysis and reasoning. However, to create an authentic general theory of law that reaches both systems and that arrives at a “theory of society,” it is necessary to develop the dynamism of legal reasoning as demonstrated in this paper.⁴⁵ It is important to open the limit of national law to allow comparative law, which has shown to be very constructive to the development of the “science of law,” in accordance with the current life of a worldwide society.

45. ATIENZA, *supra* note 43, at 232.