

LEGAL CERTAINTY AND PROTECTION OF THE INVESTMENTS: A COMPARATIVE PERSPECTIVE (COMMON LAW & CIVIL LAW)

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The purpose of this article is to discuss the issue of legal certainty. It reviews the legal certainty in the ambit of Brazilian Law, a civil law jurisdiction. The concept of legal certainty is delimited and its importance for economy and commercial relations is discussed. The most important aspect of legal certainty is “ideology”. The judicial legitimacy of the same-sex family union in Brazil is a highly notable case in which we can see that a norm is interpreted differently when the ideology changes. As “ideology matters”, if a country wants to provide more legal certainty, it has to develop actions aiming at changing the ideology. The conclusion suggests the thesis that ideology would be the most important aspect in the matter of legal certainty also in common law jurisdictions.

§ 1 – THE CONCEPT AND IMPORTANCE OF LEGAL CERTAINTY

“Legal certainty” is an extremely complex subject. As a simplification, I will reduce the concept of “legal certainty” to the idea of “predictability of judicial decisions”. I will adopt the equation “the greater the predictability of judicial decisions, the greater the legal certainty; the greater the unpredictability, the lesser the legal certainty ».

It is worth pointing out that we do not intend to have an absolute predictability of judicial decisions. There are no reliable means to know in advance the judicial decision in 100% of the cases. We may reasonably anticipate the most likely decision in most of the cases, but not in the totality. In some cases, the judicial decision shall be unavoidably a surprise. It will be unpredictable. There is a “predictable unpredictability”: a tiny margin of cases where the courts will not apply the law which most specialists would reasonably expect to be applied. While the rate of unpredictable decisions is within the predictable unpredictability margin, it does not affect legal certainty. A scenario of legal uncertainty arises, therefore, when the number of unpredictable decisions exceeds the predictable unpredictability margin.

Global entrepreneurs interested in expanding their businesses do not make only economic calculations. They make legal calculations, as well, based on the laws in force in each

jurisdiction. They also pay attention to the manner in which the law has been applied by the courts.

The legal certainty degree frames the kind of global investment to be attracted. Countries with a high legal uncertainty degree tend to hold back more conservative entrepreneurs and attract the boldest ones. We know a basic equation of investments, adopted millenniums ago: the higher the risk, the higher the return must be. This is a derivation of the law of supply and demand. The number of persons interested in investing in less risky businesses is higher than that of persons interested in investing in more uncertain businesses. In the first case (lower-risk businesses), many investors dispute few alternatives, and the return will be necessarily tiny. In the second case (higher-risk businesses), fewer investors dispute the alternatives, assuring a perspective of a higher return. In countries with a lower legal certainty degree, the risk is higher. As a consequence, bold investors, which seek significant gains, feel more attracted to invest in these jurisdictions.

Any entrepreneur wishing to invest in a low legal certainty degree jurisdiction will be required to behave as bold investors, however conservative such entrepreneur's profile may be in other jurisdictions. The entrepreneur will not be satisfied with tiny returns and will seek more substantial gains for its investment. The consequence will be higher prices for low-quality products or services. After all, all capitalists, even those with a conservative profile, when they invest in countries with a low legal certainty degree, are forced to adopt the logics of the "search for higher returns".

Moreover, because legal uncertainty increases the risk of the investment, there will be fewer agents interested in investing. In other words, there will be less competition. The country with a low legal certainty degree tends to have a economy with low competitiveness. And, in such economy, prices tend to be higher. The "search for higher returns" and the low competitiveness jeopardize the consumers of the country with a low legal certainty. Entrepreneurs defend themselves, either by transferring their investments to other countries or adjusting themselves to the economic environment of low predictability of judicial decisions. Consumers have no defence.

In a globalised economy, entrepreneurs have the whole world to make investments. So, countries compete for investments. Legal certainty is one of the most important tools in this competition. Therefore, countries interested in improving their position in the global economy must be concerned with strategies to increase their legal certainty. These strategies will be even more efficient if they are consistent with the correct diagnosis of the legal certainty matter. This diagnosis requires the previous definition of its most important aspect.

As ideology is this most important aspect, when we discuss legal certainty, "ideology matters".

§ 2 – DEFINITION OF “ IDEOLOGY ”

What is ideology? “Ideology” is an ambiguous concept¹. I employ its functional concept, proposed by Tércio Sampaio Ferraz Jr., one of the most important Brazilian legal scholars.

Tércio defines ideology as the “valuation of values”. Society not only cultivates its values. It also values them. Some values are more important than others. There is a hierarchy of values. And it is precisely this hierarchy that represents ideology in its functional meaning². So as to understand the concept, let us consider two values: the value related to free initiative and the value related to protection of consumers.

Two hundred years ago, the value related to free initiative was above the value related to protection of consumers. For Adam Smith, if the full freedom of initiative and competition were assured, consumers would be naturally satisfied in their interests and rights. In his famous image, the “invisible hand” of the market would naturally cause consumers to have their rights satisfied. It would not be required any special legal protection to the consumers. If the consumer were not satisfied with the product purchased from a certain businessperson, he/she should simply cease purchasing from such businessperson and look for a competitor. And there would always be a competitor to attend this unsatisfied consumer, as the entrepreneurs are attentive to the needs of consumers. They would not fail in identifying a good opportunity to make money by selling the same product with more quality and satisfying, therefore, the unsatisfied consumer. “Free initiative” was valued as most important at that time.

Since the 1960s, the spreading out of the consumer protection movement has changed this hierarchy. The inversion has already taken place, and “consumer protection” is hierarchically superior to “free initiative”, today in Brazil.

The ideology of society has changed. The hierarchy of values adopted by society is the most important aspect to take into account when we discuss the “legal certainty”. Judicial decisions are more or less predictable not only based on changes in rules, but mainly on changes in values cultivated by society, in the valuation of such values, in ideology.

¹ Ideology has, on the one hand, a more diffused meaning – which Norberto Bobbio named “strong meaning” – and, on the other hand, several meanings not so well known. The “strong meaning” of ideology is the Marxist one. For Marx, ideology is the ensemble of ideas corresponding to the interests of the bourgeoisie and that serve to hide the relation of capitalist domination. According to the Marxists, the idea that labour laws would be instruments of justice for the worker is ideological because the laws, as a matter of fact, would only assure the reproduction of the capitalist relations of production and the “exploitation of man by man”. When I refer to ideology as the main aspect of the matter of legal certainty, I am not using the concept in this Marxist meaning.

² T. FERRAZ JR., *Teoria da norma jurídica*, 2nd ed., *Forense*, 1986, p. 155; “Direito, retórica e comunicação”, *Sarainha*, 1973, p. 150); “Função social da dogmática jurídica”, *Revista dos Tribunais*, 1980, ps. 187/188.

§ 3 – IDEOLOGY MATTERS

In civil law jurisdictions, “legal certainty” is usually associated to the enhancement of law, statutes and general rules. This is not quite so, however. Of course. Well-drafted general rules help increase legal certainty, by reducing interpretation doubts. But improving the quality of rules is not a sufficient measure to increase legal certainty.

A highly notable case of Brazilian courts shows that legal certainty does not depend only on the law in force. It depends much more on the ideology of the society. I make reference here to same-sex marriage. In Brazil, there is no law permitting same-sex marriage. The Brazilian Constitution itself sets forth a provision on marriage, which has been the same since 1988³. The drafters of the Constitution were certainly not worried about defining marriage as the family union of man and woman. In 1988, for Brazilians, there would not have been same-sex marriage. By the way, law professors and books for law students had always referred to the idea of same-sex marriage as an example of a “nonexistent legal act”.

In 2011, the Brazilian highest court of justice (Federal Supreme Court – STF) recognized that the Constitution protects family unions regardless of the partners’ sex; both the different-sex and same-sex family unions deserve the same protection under the Brazilian Constitution⁴. Since this historical decision, same-sex marriages have started being formalized in several parts of the country.

This case shows that the importance of general rules is somewhat relative – even in the civil law jurisdictions. If a family lawyer were consulted in the 1990s on the feasibility of filing a lawsuit for the recognition of the right of two persons of the same sex to get married, that lawyer would certainly advise the client on the absolute impossibility of being successful. Today, after a quarter-century, that lawyer would make a diametrically different evaluation. He would have had to tell the client that that judicial lawsuit is completely feasible.

What has changed in the meantime? I have already mentioned that it was not the general rule. The Brazilian Constitution has not changed itself in connection with the matter. But the values cultivated by the Brazilian society have changed. Today, most Brazilians do not repudiate relations between same-sex persons as they did five or six years ago.

This case shows that foretelling the possibility of success or failure in any judicial lawsuit cannot be based on an analysis restricted exclusively to the rules and precedents – even in a civil law jurisdiction. It is necessary to pay attention to the changes in

³ Article 226 of Brazilian Constitution has had the same wording since the beginning of its effectiveness. It suffered one amendment only, in 2010, which suppressed one of the forms of dissolution of marriage (separation) and kept the other one (divorce). This change, therefore, has no relevance for the issue of admissibility or not of same-sex marriage.

⁴ Brazil, STF, ADI 4277-DF, 05-05-2011,

<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635>

socially spread values. When such values change, it modifies the predictability of judicial decisions.

§ 4 – STRATEGY TO INCREASE LEGAL CERTAINTY

As “ideology matters”, if a country is interested in improving its position in the globalized economy, it must definitively contemplate strategic actions aimed at bringing about a change in the valuation of the values. As ideology matters to increase legal certainty, the fundamental question is how to make the values related to commercial law *rise* in the hierarchy of values of society. The values related to commercial law are expressed themselves by means of certain legal principles, such as: autonomy of will, binding of the contracting parties to the contract, limitation of the partners’ responsibility for the company’s obligations etc.

We may summarize these principles in the general idea of “legal protection of the investment”.

If the valuation of the values remains unchanged, the rule in divergence with the ideology will tend not to be applied by the courts. An example may help in clarifying this idea. In Brazilian Law, companies are considered legal entities. Their partners or shareholders are not responsible for the debts of the company⁵. But, though the law clearly recognizes companies as legal entities, some courts have decided in the opposite direction. Indeed, the values related to commercial law are today hierarchically lower when confronted with the values related to labour law, consumer protection law and even the tax law.

This is a clear example of unpredictable judicial decisions, which increase the legal uncertainty in Brazil. As “ideology matters”, if Brazil wants to offer to global investors a higher legal certainty, it has to develop a strategy involving actions aiming at inverting this hierarchy of values. Brazil has to develop actions where the values related to the “legal protection of the investment” become valued by society, in particular by the members of the legal community (judges, lawyers etc.).

These actions may be grouped in two large categories: academic actions and institutional actions.

The *academic* actions encompass the production of legal articles, thesis, studies, seminars, conferences and events focused on the rules of legal protection of the investment. Those academic actions must imply reflections on the importance of the protection of the investment *for the whole Brazilian society*. The

⁵ When the limited liability or the joint-stock company has no assets for payment of its creditors, the partners may be held liable. In the limited liability company (inspired on the *Gesellschaft mit beschränkter Haftung* of the German Law), the partners are responsible for the unpaid quota capital. In other words, after the full payment of the quota capital, they are no longer responsible for any debt of the company (Civil Code, article 1052). And in the joint-stock company (inspired on the U.S. *corporation*), the shareholder is liable for the price of the shares. Once the price of the shares is paid to the company, no obligation of the company may be required from the shareholder (Corporations Law, article 1).

academic actions must reflect this economic effect of the legal uncertainty.

I emphasise this idea. Judicial rulings that deny legal protection of the investment eventually cause increase in the *costs* of the economic activity. This *cost increase* brings impacts on the prices. For this reason, the Brazilian consumers pay the bill when the courts make unpredictable rulings, reduce protection of investment and create a legal uncertainty environment. Recalling the grounding developed, in the past, by academic reflection is not sufficient. It is necessary to review the whole of such grounding with the purpose of showing that the ultimate interests protected by the general rules of commercial law are not the entrepreneurs' interests. The Brazilian society itself (the Brazilian consumers, after all) are benefited by the legal protection of the investment. In the application of the rules of legal protection of the investment, the conflict at issue involves the interest of a single consumer or employee against that of the collectiveness of consumers.

On the other hand, the institutional actions consist of a reform of the general rules. Institutional actions tend to have a more immediate efficacy. They may have a much more impactful efficacy if the reform of the laws takes place by means of a new *Commercial Code*.

A new codification is usually regarded as a highly important event in a civil law jurisdiction. This institutional event draws the attention of Brazilian society as a whole and of the legal community in particular. It fosters conditions for a broad national debate. In short, new Codes are important tools of ideological changes in the civil law jurisdictions. Consequently, a new Commercial Code is a very strong instrument in the process of changing the hierarchy of values. It will contribute to the inversion of the evaluation of values. It will help to heighten the values related to legal protection of the investment.

In the context of the institutional actions, the National Congress has been reviewing a bill of law since 2011, with the purpose of enacting the new Brazilian Commercial Code.

Only the mere existence of the bill has already produced interesting fruits. Commercial law professionals have already begun to notice significant changes in the judicial decisions. The bill has probably already at least stopped the increase of the rate of unpredictability. The conversion of the bill of Commercial Code into law will reduce this rate.

CONCLUSION

I conclude this article with a suggestion of a thesis. Globalisation is the process of neutralisation of national frontiers in economy. One of the purposes of globalisation is to encourage the development of trade, so that borders among countries no longer represent an obstacle at all. The purpose of neutralizing national frontiers in economy presupposes the application of the same commercial law in all jurisdictions involved in globalization. So,

one of the features of globalisation is the gradual disappearance of the differences in Commercial Law worldwide. The differences between common law and civil law are one of those the globalization has progressively eliminated among the national laws. In countries affiliated to the common law system, globalisation requires the formalisation in laws, statutes or other general rules of the harmonised content of commercial law. This formalisation may result directly from international commitments undertaken by these countries or merely in order to satisfy the expectations of foreign investors. On the other hand, in countries affiliated to the civil law system, the importance of precedents is increasing more and more. Quite often, the precedents modify the general rules and, for this reason, need to be taken into account by lawyers and law scholars. In short, with globalisation, the tendency is the total disappearance of the differences that characterise both systems.

If the premise adopted in this article is correct, that is, if “ideology matters”, then this fundamental aspect of “legal certainty” does not present features exclusively related to the civil law system. The values and their valuations enable a higher predictability of judicial decisions, also in the context of legal system of common law. I close this article with the suggestion of the thesis that the fundamental aspect of legal protection of investment (ideology) is the same in both legal systems.

