THE AUTONOMY OF COMMERCIAL LAW AND A NEW COMMERCIAL CODE

[1]Marina Zava de Faria
http://lattes.cnpq.br/8604979682033155
https://orcid.org/0000-0002-7818-5848

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RESUME

This article aims to discuss the autonomy of Commercial Law, in order to highlight its most relevant aspects. Sequentially, there will be a confrontation of its weakening over time, mainly due to the relative unification resulting from the advent of the 2002 Civil Code. autonomy of Commercial Law, in addition to promoting its evolution and strengthening.

Keywords: Commercial Law. Autonomy. New Commercial Code.

INTRODUCTION

The article "autonomy of commercial law and a new Commercial Code" aims to discuss the autonomy of commercial law from its origin to the present. It is intended, through the study of the origin, evolution, purpose and rules of commercial law, to analyze the discipline's autonomy over time, verifying if it satisfactorily exists today. Then, it proposes to discuss the impacts of CC / 02 regulation for commercial law. Finally, the need to create an autonomous and independent Commercial Code will be analyzed in order to ensure the discipline's autonomy and contribute to the country's economic and social development.

[1] Professor at the State University of Goiás. PhD in Commercial Law at PUC-SP.

The theme is important and fundamental at a time of weakening of commercial law in the regulation of the special relationship involving the company, - mainly due to the unification of the codification - as well as by the discussion of two bills passing on the subject, one in the Senate and another in the Chamber of Deputies. In order to justify the choice of the theme and its importance, we will discuss important elements of the work

1. COMMERCIAL LAW: ORIGIN AND EVOLUTION

The word trade has its origin in the Latin commutatio mercium, which means exchange of goods. In the words of Vidaria (1910, p.1) "commerce is the part of the economy that studies the phenomena by which goods pass from the hands of one person to another, or from one place to another". In the beginning, the exchange was a fundamental element for living in society, being necessary and comfortable to satisfy the needs of a social group.

However, as supply and demand were not coincident, several inconveniences occurred, and it was necessary to create a commodity that would serve as a standard for exchanges: currency. Thus, due to the importance of the exchange of goods, a professional activity arose around it, namely: merchant. The intermediation to facilitate the exchange, combined with the increase in the value of the goods (profit), characterized the commercial activity. This activity dates back to the early days, with trade existing since the Ancient Age, with the Phoenicians standing out in the exercise of mercantile activity.

Commercial law comes later. In the Ancient Age, despite the presence of sparse laws for the discipline of commerce, there was no systematic legal regime with its own rules and principles. In Rome, existing trade rules were part of common private law, that is, jus privatorum or jus civile. It is in the Middle Ages that, with the revival of cities and the strengthening of maritime trade, they point to the emergence of commercial direct. These rules, at that time, due to the decentralization of power, were considered “local rights”.

Due to the effervescence of the mercantile activity observed by the bourgeois class, the so-called merchants, needed to organize themselves and build their own rights, to be applied existing conflicts. Thus, the rules of commercial law are emerging, from the very need and dynamics of business activity. They arise because of the demands of the commercial phenomenon. (VALERI, 1950, p.3). The development of commercial activity brought to light, the insufficiency of civil law to discipline the new legal facts that were presented.

The first phase of commercial law is marked by commercial uses and customs, and in the absence of the State in its elaboration. Through trade corporations, rules were created by merchants and for merchants. The rules - ius mercatorum- were applied to all merchants linked

to a trade corporation, as long as one of the parties in a given relationship was a trader, to the detriment of the other applied rights and that the issue was also linked to the exercise of trade. Some commercial law institutes date back to this period, such as credit securities, companies, commercial contracts and banks (FORGIONI, 2012, p.13).

Commercial law, attentive to the aspirations of the rising class, brought about a great change in contractual doctrine crystallized in Roman law. According to Ramos (2011, p. 3) "In Rome, the ideals of security and stability of the ruling class" arrested "the contract, linking it to the property institute". So the contract was just the means by which a thing was acquired or transferred. The static conception of Roman law based on real estate and full of obstacles for circulation loses space for the principle of freedom in the form of contracting. Then a specific right emerges, peculiar to a certain social class and disciplining the new economic reality that was emerging.

In Brazil, such a system prevailed during the 18th century and the first half of the 19th century, as the rules issued in such periods referred to businessmen, their privileges and their bankruptcy. (TOMAZETTE, 2014, p.8).

In a second moment, with the formation of the National States, the professional corporations are losing the monopoly of the mercantile jurisdiction, as the States claim and call for themselves the monopoly of the jurisdiction, consecrating the freedom and equality in the exercise of the arts and crafts. Thus, in 1804 and 1808, respectively, the Civil Code and the Commercial Code are published in France. Commercial law becomes a state legal system. The Napoleonic Codification divides private law: civil law on the one hand and commercial law on the other. According to Ramos (2011, p. 4):

> The Napoleonic Civil Code was fundamentally a body of laws that served the interests of the landed nobility, as it was centered on property law. The Commercial Code, on the other hand, embodied the spirit of the commercial and industrial bourgeoisie, valuing the wealth of securities.

As the disciplines had marked differences and needs, private law was codified into two Codes, the Civil Code and the Commercial Code. So it fell to the rightthe regulation of general private relations, and commercial law, special legal relations, that intended to regulate commercial activities. This moment is fundamental for the development of the Commercial Law. The gathering of commercial norms in a specific diploma allowed the development of the subject and its detachment from the bonds of civilist conservatism.

Thus, it became necessary to create a criterion that would delimit the incidence of each of these branches. To this end, the French doctrine created the theory of acts of commerce,

which had as one of its essential functions to attribute, to those who practiced the so-called “acts of commerce”, the quality of a trader, which was a prerequisite for the application of the Commercial Code. Thus, commercial law would regulate, therefore, legal relations that involved the practice of some acts defined by law as acts of commerce.

The definition of acts of commerce was a task attributed to the legislator, who chose to describe its basic characteristics or to enumerate, in a list of typical conducts, which acts would be considered mercantile. The doctrine criticized the French system stating that it was never possible to define the acts of commerce satisfactorily. At this time, commercial law was conceptualized by Vivante (2006, p.7) as being “the part of private law that mainly aims at regulating the legal relations that arise from the exercise of trade”.

In Brazil, the Commercial Code of 1850, adopted the French theory of acts of commerce, due to the influence of Napoleonic codification, and promulgated Regulation 727 with activities that were considered “acts of commerce”. Although Carvalho de Mendonça tried to scientifically conceptualize acts of commerce, it was not possible to establish a unitary criterion for acts of commerce. Barreto Filho (1999, p. 299), sharing the orientation of those who criticize the objective system, states that:

If it is up to the law, and, ultimately, the definition of a trader, or an act of trade, and, consequently, the matter of trade, it is irresistibly concluded that Mercantile Law is rather a legislative category, than a logical category.

It should be noted that the criticisms refer to the criterion defining the scope of incidence between the Civil and Commercial Code, with the theory of acts of commerce definitely not working. Although, there were few criticisms regarding double coding regarding private law disciplines.

With the outdated view of the theory of acts of trade and the economic need that drove commercial law, especially after the Industrial Revolution, several relevant economic activities emerged, and many of them were not included in the concept of act of trade. And then, even before the derogation from the Commercial Code, the theory of the acts of commerce was being abandoned, as for example, with the edition of the Consumer Protection Code, Urban Leasing Law and reform of the commercial registry (COELHO, 2014, p. 41).

Inauguration of the third phase of commercial law, the Civil Code of 1942 is published in Italy, bringing a new delimiting system: the theory of the company. Although the Italian Civil Code did not define a company, jurist Alberto Asquini, analyzing the companies in Italy, brought the profiles: subjective, functional, objective and corporate. Still, the Italian codex chose to promote the formal unification of private law, disciplining civil and commercial

relations in a single legislative diploma. Thus, in principle, any economic activity, as long as it is exercised in business, is subject to the rules of commercial law.

Inspired by the Italian Codice Civile, the new Brazilian Civil Code derogated a large part of the Commercial Code of 1850, maintaining only the second part related to maritime trade, in the search for unification, although formal of private law. The entrepreneur under the terms of article 966 has become one who professionally carries out organized economic activity for the production or circulation of goods or services. According to Minister João Otávio de Noronha:

> 2. The new Brazilian Civil Code, in spite of not having expressly defined the figure of the company, conceptualized in art. 966 the entrepreneur as "who professionally carries out organized economic activity for the production or circulation of goods or services" and, in doing so, has enabled the interpreter to infer the legal concept of company as "the organized or professional exercise of economic activity for the production or circulation of goods or services ". 3. By professional exercise of economic activity, an element that integrates the core of the concept of company, it is necessary to understand the exploitation of activity for profit. (...) (STJ, REsp 623.367 / RJ, 2nd Class, Rel. Min, João Otávio de Noronha, DJ 09.08.2004, p, 245)

Thus, if the material division of private law persists, contrasting different legal regimes for the discipline of civil and business relations, there is, as a consequence, the need to establish a criterion that delimits the scope of commercial law and that criterion it was precisely the theory of the company.

General theory of commercial law: the general part of commercial law, its conceptualization, its delimitation. Corporate and company law: covering the study of the individual or collective entrepreneur. Industrial law: I study the commercial establishment and industrial property. Currency or cartular law: studies credit securities. Commercial obligations law: comprises the study of commercial contracts. Bankruptcy Law: it would cover the study of bankruptcies and company recovery. Navigation Law: it would cover the study of transport by air or water.

This classification demonstrates the diversity and specificity of issues related to commercial law and its importance for the country's economic and social development. Today the subject matter is “spread” between the Commercial Code of 1850, the Civil Code and special Laws, such as the Bankruptcy Law, Check Law, Corporation Law. We cannot forget the essential principles of the discipline, such as: freedom of initiative, freedom of competition and social function of the company.

Based on the observations made, we try to establish, in summary, the historical bases of the affirmation of commercial law, its purpose, and its consecration as an independent and

autonomous legal branch. Let us now analyze the autonomy of commercial law.

2.AUTONOMY OF COMMERCIAL LAW

The autonomy of a discipline is the freedom that a certain branch of law enjoys in being able to be guided by its own principles, with a characteristic of special law. The independence and autonomy of commercial law, as a special regime, derive from the fact that the discipline has its own characteristics, institutes and principles, elements present since its birth until today. In this sense, there is no doubt that the economic activities developed in the market have very specific characteristics.

It happens that, with the formal unification of private law, the doctrine started to discuss, with a certain emphasis, the thesis of unification of private law, which started, fundamentally, from the idea that the separation between civil law and commercial law did not pass of a mere historical phenomenon already overcome, linked above all to the emergence and development of capitalism.

We definitely believe that the process of legislative unification of private law did not result in the loss of the autonomy of commercial law, also due to the autonomy guaranteed by the CF in article 22, item I. Although, it seems that it may have caused a weakening and regression of the discipline, as it is intended to analyze at work.

Well, private law is the branch of law that disciplines relationships based on legal equality. Because it is a kind of intuitive right, it is as old as life in society, because without it, coexistence between the individual would be impossible. Private law developed predominantly during the Roman Empire, in which its main institutes, which exist until today, were formed. At this stage, it cannot be said that there was a dichotomy of private law, since it was only in the Middle Ages that the so-called commercial law began to develop. Thus, private law was synonymous with civil law, which generates the statement that civil law is general or common private law (BEVILAQUA, 2015, p. 75).

It was in the Middle Ages, with immigration from the countryside, the development of maritime trade and the intensification of exchange and industrial production, that the need for special rules arose. Thus, it begins to appear in private law, special rules that form commercial law, called, therefore, special private law, in contrast to civil law, general private law. (TOMAZETTI, 2014, p. 24).

In order to define the scope of civil law, Bevilaqua (2015, p.75), states that it is the "complex of legal norms relating to people, in their general and common constitution, in their

reciprocal family relations, in the face of assets considered in their use value ". On the other hand, commercial law would have a more specific object and would turn to the discipline of legal relations resulting from the exercise of an economic activity with certain characteristics, the company. The unity of modern economic life does not allow for a single discipline, so there is the dichotomy of civil law and commercial law. There is an opposition between acts of conservation or enjoyment of goods and acts of production and circulation, that is to say, there must be a different treatment between goods treated as objects of property or consumption and goods used in a productive process. Civil law is a right for the production and consumption of goods at their value in use, while commercial law regulates the circulation of goods. As it examines whether, commercial law arose out of a historical need, the need for traders, to regulate a special activity. This right developed deeply in the way that its institutes came to be used not only by traders, but also by other citizens. According to Tomazetti (2014, p. 25), this interference of mercantile matter in people's daily lives calls into question their own autonomy in the face of civil law, which becomes more current in Brazil with the advent of the Civil Code of 2002, which in Book II of the Special Part deals with the so-called company law. This insecurity has worried scholars.

The autonomy of the branches of law can be seen in two aspects: formal or legislative autonomy and substantial or legal autonomy. Formal or legislative autonomy exists when there is a specific body of rules highlighted in common law. Thus, commercial law would have autonomy if it had its own Code. We can affirm that with the advent of the Civil Code of 2002, that formal autonomy of commercial law decreases dramatically, but not that it ceased to exist completely, as there is still a part of the Commercial Code that remains in force.

Substantial autonomy, in turn, refers to the content of the discipline, if it has specific institutes and principles. The topic is the subject of major clashes both by national and foreign doctrine. A remarkable moment in the controversy over the autonomy of commercial law was the inaugural class given by Cesare Vivante at the University of Bologna in 1892. The leading modern trader attacked the division of private law, saying that an autonomous treatment of commercial law was not justified. Vivante, however, did not insist on these criticisms of the autonomy of commercial law; in 1919, after being appointed chairman of the commission for the reform of commercial legislation in Italy, he abandoned the unification thesis and drafted a specific Commercial Code (COELHO, 2014, p. 31). In Brazil, exponents such as Teixeira de Freitas, Inglez de Souza, Orozimbo Nonato, Philomeno José da Costa also defended the unification of civil and commercial law.

Among the authors who expressed their opposition to the autonomy of commercial law, we highlight the position of Cesare Vivante and Philomeno José da Costa. Vivante maintained, at first, that in modern life there is a certain uniformity of obligations, which would not justify two different treatments. He claimed that the division of private law was detrimental to the progress of science, given the very difficulty in defining mercantile matters and finally that the existence of two codes would make it difficult to apply, when there were provisions in both about the same institute (VIVANTE, 2006, p. 18).

Fhilomeno José da Costa also denied the autonomy of commercial law. He claimed that commercial law disappeared as a result of the historical process; that customs, the progressive nature and the international character did not justify their autonomy, and finally claimed that there is a unity in economic life and that there are no grounds for a peculiar treatment of commercial law (COSTA, 1956). The same author stated that the reduction of commercial law to corporate law would not provide sufficient strength to recognize the possible autonomy of this branch of law. Gladston Mamede, in turn, asserts that with the Civil Code there was a unification of the matters (MAMEDE, 2014, p.33).

Despite the positions, the autonomy of commercial law is defended in a majority character. Vivante himself portrayed himself and recognized the autonomy of Commercial Law. He recognized, in the first place, because the method of commercial law is inductive, prevailing the empirical study of technical phenomena, affirming, still, the tendency to create a single world market, replacing local markets. He then stated that the regulation of distance business, mass business and the discipline of credit securities could only be made under commercial law, as civil law would not be sufficient to protect the interests of the game.

Rocco, affirmed that it would not have any influence, the difficulty of defining the limits between commercial law and civil law, and that the problem of limits would be a constant within the law. Nor would the question of technical deficiencies influence the autonomy of commercial law, as they would not arise from the duality of private law. He states that (2003, p.77):

> the autonomy of commercial law even in the light of modern economic life, asserting that commercial activity demands a greater simplicity of forms and greater efficiency of credit. The enlargement of commercial law thus, only that the requirements of commercial law were extended to other economic relations, without affecting the autonomy of commercial law.

In Brazil, Oscar Barreto Filho defended the autonomy of commercial law due to the specialty of the regulated economic phenomenon. Waldírio Bulgarelli also defended autonomy,

invoking the existence of institutes peculiar to commercial life, which cannot be governed by common law. According to Coelho (2014, p. 44):

The autonomy of commercial law is not compromised neither by the legislative unification of private law nor by the theory of the company, it is found in the curricula of the legal courses of Italian faculties. 60 years have passed since legislative unification and the adoption of company theory in Italy, and commercial law continues to be treated there as an autonomous discipline, with specialized teachers and literature.

Commercial law is autonomous since the characteristics peculiar to civil law do not meet the needs of such a peculiar activity. According to Renault (1910, p. 3) the reasons for the need for this distinction are:

there are public or private institutions that are typical of commerce, such as stock exchanges, banks and general stores; commercial operations are carried out en masse and often involve large amounts; and the importance of fulfilling obligations.

The autonomy of the discipline does not compromise the adoption, in Brazilian private law, of the theory of the company. As seen, the bipartition of legal regimes that discipline economic activities does not cease to exist, when the criterion of entrepreneurship is adopted to circumscribe the contours of the scope of commercial law. In fact, the theory of the company does not even matter the legislative unification of private law.

Commercial law basically rests on three pillars: speed; security and credit. As a result, the autonomy of commercial law cannot be denied, with its own characteristics and principles.

In spite of all the affirmation and justification of commercial law, we realized that mainly due to the advent of the Civil Code, a gradual loss of this autonomy and regression to the discipline, and with that a need for eminent change. And this work is justified here. According to Cordeiro apud Malcher Filho (2015, p. 79):

It has been stated that the Swiss and Italian unitary experiences did not lead to the disappearance of commercial law in their respective spaces. It is not strictly accurate. It is true that a type of problem linked to business life - therefore: nuclear business situations, much more restricted than traditional commercial law -, somewhat similar to the current Anglo Saxon Merchant Law, gets a joint treatment under the title “Commercial Law”. However, the classic commercial legal developments, evident in any German, French or Portuguese manual, have been lost. The typical Italian manual deals with the company, companies, brands and commercial contracts, ignoring the many hundreds of pages that, before 1942, were dedicated to traders and acts of commerce. Commercial law remains - even due to osmosis with

neighboring experiences and an evident weight of tradition - but it is qualitatively and quantitatively different: weaker, less cohesive and more subject to fractionation in multiple autonomous disciplines. (emphasis added)

> In Brazilian law in force today, in Brazil, there are two important consequences of the configuration of a certain economic activity as subject to commercial law: on the one hand, the judicial judicial execution of the entrepreneur's assets through its own procedure, that is, bankruptcy, and, on the other hand, the possibility of requesting the judicial recovery of the company or the approval of extrajudicial recovery. No other important distinction, as regards the regulation of their relations with other individuals, separates today the businessmen and those engaged in civil activities. Of course, there are, occasionally, some other differences in treatment, such as the so-called obligations common to businessmen (bookkeeping, balance sheet drawing), or proof of contractual bond and effective fulfillment of obligations as a requirement for protest by duplicate indications. provision of services, an existing condition for trade duplicates. But in any case, in general terms, contrary to what was verified in the past, under the aegis of the theory of the acts of commerce, it is more and more dispensable to discern the civil or entrepreneurial nature of the person exercising economic activity, to apply the law in force in Brazil. (emphasis added)

The conservatism of civil law has negatively influenced commercial law, which leads us to believe that the unification of the discipline in a single diploma represented a setback for commercial law. Even with the affirmation of the autonomy of commercial law, demonstrated throughout this project, the uncertainties and insecurity about this autonomy have been worrying jurists. We realize that the real autonomy and freedom of commercial law is in check.

Commercial law has its own principles, which axiologically base the central rules of this legal branch. But for several reasons, including the repeal, since 2002, of the first part of the Commercial Code, they are not being honored in several judicial decisions, implying serious risks to legal security. The enunciation, in the positive order, of the principles of commercial law thus presents itself as a necessary measure to increase legal certainty. The alleged lack of "due application" is partly a consequence of the need to harmonize and adjust business law to new times (WAISBERG, 2015).

The current configuration of positive law, does not give due importance to the indispensable distinction that must exist in the legal treatment of business economic activities, urgently demanding change. According to Vivante (2006, p. 75):

Before starting the work, the commission examined the opportunity to merge, in a single code, the civil and the commercial. But the state of maturity of the two branches is extremely diverse, the different speed with which the content of these two codes is prepared is likely to always pose a major obstacle to unification. (emphasis added)

The author continues saying:

> The difference in method in civil and mercantile codifications, the discipline of credit securities, the deals celebrated en masse and, above all, the cosmopolitan nature of commerce and commercial law, convinced me of the inconvenience of unification that would cause "serious damage to the progress of commercial law. (emphasis added)

In other words, the insertion of part of the commercial matter in the Civil Code remained absolutely trivial, as at the same time it did not unify private law and did not revoke the Commercial Code of 1850, leaving out other new commercial institutes, except for the weak one, general theory of credit titles and outdated corporate law (company law), nor did it remove the substantial, academic and formal or legislative autonomy of commercial law. In fact, the reform as it took place, specifically in commercial law, was not justified; on the other hand, it brought a greater didactic complication to the study of commercial law. It is concluded that legislatively speaking, it was not interesting and productive to insert commercial law in the Civil Code, even if partially, as occurred with the arrival of CC / 2002.

The supposed legislative unification of private law brought serious problems for commercial law, since civil and commercial contracts started to have the same "general theory" ignoring the enormous distinction that exists between them; general rules on credit instruments are out of step with existing laws, notably the Uniform Geneva Law that has been incorporated into our legal system for decades; the limited society previously submitted to the flexible and lean normative framework, became the bureaucratic and plastered corporate figure; legal institutes received confusing and even technical treatment, generating interpretative difficulties that promote legal insecurity, as occurs with the difficult practical distinction between simple and business societies; old legal customs enshrined in forensic practice, such as the unnecessary spousal grant for the guarantee of a married person, and the possibility of contracting a partnership between spouses regardless of the property regime, were unjustifiably changed; new figures already known by foreign law have lost the chance of being adopted, such as the sole proprietorship and the individual limited liability entrepreneur (recently, EIRELI - individual limited liability company that was just incorporated into the Civil Code of 2002 by Law 12.441 / 2011). (emphasis added)

3.CODIFICATION OF COMMERCIAL LAW

It proposes to defend the need to edit a new Commercial Code, solid, modern, efficient and in line with the best international practices. We believe that a new regulation will contribute to the consecration of the autonomy of commercial law, the development of commercial law, security for business and the economic and social development of the country. In this sense, there are two bills for a new Commercial Code in progress, one in the Senate, PL 487/2003 and in the Chamber of Deputies, PL 1572/2011 which reflects the perception of urgency in reforming the topic. The projects are attempts to remove the commercial right from the "darkness", to provide security and effectiveness and the opportunity to reaffirm the discipline's autonomy.

The discussion on such a relevant topic is undoubtedly healthy and clearly shows that this branch of law has returned to occupy the prominence and professional and academic attention that its relevance has always deserved (WAISBERG, p.1). There are several arguments that justify the need for a new instrument for commercial law, one of which is the guarantee of its autonomy and all its reflexes. According to Malcher Filho (2015, p. 73):

> It is clear that the need or not for a new Commercial Code, the importance or not of the preliminary draft, goes through the discussion regarding the problem of autonomy or unification of private law, that is, whether or not there should be a dichotomy. The autonomy of commercial law must be preserved, that is, it exists and has never ceased to exist due to the simple fact that the legislator has chosen to bring company law and related matters into the current Civil Code. However, this fact raised doubts regarding this autonomy, causing a clear confusion among law operators, making it necessary to systematize the rules of commercial law. That is why we need a new Commercial Code to keep the autonomy of private law out of the reach of any doubt. (emphasis added)

It is important to emphasize that we understand that the autonomy of commercial law exists and never ceased to exist due to the simple fact that the legislator chose to bring company law and related matters into the current Civil Code. However, it is noted that this fact has brought about doubt and weakening regarding this autonomy, causing clear confusion among law operators, requiring a new systematization of the rules of commercial law. Thus, it is essential to issue a new Commercial Code that will systematize, in a single law, all matters that are directly or indirectly related to this branch of law, - although, of course, other sparse laws must be kept outside its scope. scope given to the specificity of each business - in order to keep the autonomy of commercial law out of the reach of any doubt. Here are some reasons for such positioning.

In other words, if the assertion contained in art. 3 of the LINDB that “Nobody excuses to comply with the law, claiming that they do not know it”, the normative meeting in a single diploma is an imperative duty of a country that intends to promote economic development and

facilitate the understanding of its laws for those who decide to project themselves in the fields of commerce, so that they can have a real understanding and extension of the rules that regulate their activity.

Codification arises from the need to meet, in a single standard, albeit of a vast extent, principles and rules or forms of solution. The codes form a methodical, systematic and harmonious set of rules on a given point of law, facilitating the understanding and management of legal institutes, in addition to providing the indispensable legal certainty. Contributing to the grouping, ordering the sources and principles of the law, the codes help in the evolution and in the good application of the Law.

Commercial law uses the inductive method, and the rules are concluded based on the facts. In turn, civil law uses the deductive method. Two sciences with different methods should be allocated different codes. In addition to its own method, commercial law has its own principles. According to Barreto Filho: "commercial law is endowed with its own principles that result from economic requirements. In this sense, we can highlight the concept of ownership, circulation, and the need for uniform regulation of business characteristic of the mass economy, as well as the international standardization of business techniques. On the other hand, civil law is based on formal and rigid principles. The principles of speed, simplicity and absence of forms are incompatible with civil law. It is noteworthy that the state of maturity of the two branches is extremely diverse.

The existence of separate civil and commercial codifications is fundamental for the preservation of ontological data that, under commercial law, confer their autonomy.

Requião (2014, p. 31) recognizes its own characteristics in mercantile law, namely cosmopolitanism, individualism, informality, fragmentarism and credit protection. They are not present in civil law.

The simplicity of forms is inherent to commercial law, both in the formation and in the extinction of legal relations. Now, the speed of modern economic relations does not allow the conservatism of civil law to be present in mass relations. Faster business discipline is needed. This characteristic is perceived in the representation of goods by titles, and the consequent circulation thereof. Also, in the prevalence of the will in the formation of relationships, as in societies.

The first and last end of commercial law is profit, with essential costs. The entrepreneur acts driven by profit and the entrepreneurial activity is marked by the objectification of profit, and gratuitousness is not conceived in the entrepreneurial activity.

Requião (2015, p. 153) comments on this characteristic: “onerosity is the rule, and it is presumed. In civil law, gratuity is the constant in many contracts, starting with the mandate. The curassow, in Roman law, was a contract between a friend, becoming onerous with the development of trade ”.

Credit is an essential element for the exercise of commercial activity and serves as a machine for growth, and as such it must be protected. Every entrepreneur needs credit and works with credit operations. We can list as typically commercial mechanisms for credit protection: the unavailability of personal exceptions in credit securities, the enforcement process that aims to satisfy the obligation quickly, the possibility of bankruptcy due to unjustified untimely.

The cosmopolitanism or internationalism of commercial law is intended to regulate relations that are not linked to a nation, on the contrary, they concern the whole world, especially with globalization. Civil law, in turn, represents the conceptions of life of a specific society, being subject to the historical inflows of each nation. Thus, commercial standards must pay attention to international mechanisms. The cosmopolitanism of commercial law is reflected in the large number of treaties that regulate commercial matters, such as the Uniform Geneva Law.

Commercial law is a specialized area of legal knowledge. Its autonomy as a curricular discipline or specific professional field of practice stems from the extra-legal knowledge that teachers and lawyers must seek when they choose it as their practice. The trader is required not only to master basic concepts of economics, business administration, finance and accounting, but also to understand the entrepreneur's own needs and the nature of the cost element that the law often assumes for him (COELHO, 2014, p . 37).

The unification of private law, in the form carried out, requires unnecessary litigation for the previous discussion of the civil or commercial nature of the forum, in the definition of deadlines, procedural rites and rules of jurisdiction. It also causes insecurity due to the difficulty in defining civil subjects and business subjects, and a person who thought he could exercise civil activity may be surprised by the declaration of his bankruptcy. It generates difficulties in differentiating and applying rules of commercial law, negatively affects the evolution of the scientific process and ultimately weakens the autonomy of commercial law.

View of this profuse legal and regulatory scenario, the edition of a new Commercial Code, without going into the merits of the matters dealt with by it and also without a judgment on the need to change the rules currently in force, seems to us to be salutary. This is because the legal system must have, in essence, the predicate of showing itself coherent and cohesive to

those who submit to its rules, a quality that proves difficult to be verified with the abundance of rules that sometimes appear to be complex to be understood even by those who are trained in the legal profession.

In fact, Brazilian corporate legislation calls for immediate modernization as a measure aimed at improving the business environment, attracting investments, reducing costs, increasing competitiveness and lowering the prices of products and services. The themes must be rethought in order to adjust the legal discipline in force to the needs of today's dynamic Brazilian economy.

It is necessary to recognize the unviability of unification, with the removal of mercantile material from the Civil Code, leaving commercial law free from the bureaucratic bonds of civil law. According to Waisberg (2015):

In our opinion, the answer can only be one: the creation of the new Commercial Code is useful and will greatly assist the right to support the economy in this moment of economic development. A new code will modernize, systematize, harmonize and adjust corporate legislation

CONCLUSION

In conclusion, it appears that, the insertion of part of the commercial matter in CC / 2002, proves to be, apparently pernicious, being a true legislative mistake and absolutely harmful to commercial law, due to its characteristics and principles of formlessness, speed of business and monitoring of the economic world, in addition to its international nature, whose legal plaster certainly hinders the harmonization or unification of mercantile institutes, just at the threshold of this century - whose moment is demanding greater economic integration between nations and strengthening of international relations of trade.

Unification is still out of step with the worldwide trend of changing old generalist codes and imprecise small laws or specialized and more effective codifications.

It is reiterated that the autonomy of a determined branch of law consists of the freedom that it enjoys in being able to be guided by its own principles, with a characteristic of special law. Thus, the real autonomy of the commercial is fundamental and indispensable

for the regulation of business activity and the only way to guarantee this full autonomy is through a new specialized and efficient code.

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