Contract law in Spain and the United States. A study on legal interpretation, culture and thought:

ABSTRACT

The purpose of the present article is to deal with the cultural differences rooted in the drafting and interpretation of mercantile legislation, mainly contracts, in both Spain and the United States. To illustrate both legal approaches to legal hermeneutics –the Spanish and the American– further and in more depth**,** I will start considering the different traditions of thought to which these legal cultures belong. I will argue that Spain is part of the Franco-rationalistic approach based on abstract idealism, deductivism and spiritualism , while America is part of the Anglo-Empiristic approach from naturalistic pragmatism , inductivism and materialism. In doing so, the aim will ultimately be to discuss how the different cultural approaches of these two countries have very much to do with the way in which their legal traditions articulate contract law and its interpretation.

Introduction: Spanish and American law as cultural, anthropological products.

The aim of this paper is to describe the differences between the Spanish system of law as a civil system, and the American system of law as common law one, specifically in the area of contractual texts. Nevertheless, these two systems of law will be contemplated as cultural products, and therefore their sources and hermeneutics, or interpretive mechanisms, will be deemed as influenced by the patterns of thinking of each civilization, their perception of the external and conceptual world.

Geertz declares that (1983: 4): "the shapes of knowledge are always ineluctably local, indivisible from their instruments and their encasement". There are not one, but many models of cultural knowledge; a range of culturally-shared schematised systems that exist side by side with other cultural systems, encasing other subsystems in their turn, as encountered in the different scopes of human experience. These schematizations are reinforced and perpetuated through language, as the tool that orders the way in which we arrange our experience of the world. In Šarčević's words (1997: 13): "despite fundamental similarities among its constituent legal systems, a legal family does not correspond to a biological reality"

Indeed, legal models also change from culture to culture, as culturally-bound sets of tacit constructs. Accordingly, legal systems are not uniform and constant for each and every civilization, but different from one another and in tune with a whole array of conditions whereupon they evolve and that frame them as unique and peculiar to each legal tradition. Just as there is not one but numerous languages, legal models also change from culture to culture, through history, through political and economic changes; they are likely to be more static in some cultures, more pliable in others,

depending on a whole array of conditions whereupon they evolve and that frame them as unique and peculiar to each legal tradition

Tönnies (1957 in Steward and Bennet, 1991) distinguishes between and G*emeinschaft* and *Gesellschaft* societies. In what he terms as a more primeval G*emeinschaft* society, social ties are based on emotion and sentiment, and identity is bound up with belonging to the community. Its members belong to a world of relationships, more sensitive to social context as a whole, where functions in the groups are shared widely among members than in groups composed of analytical persons. *Gesellschaft* societies are a later, more sophisticated development, where formal, contractual ties, which are based on rational agreement and self-interest, and regulated by law, support impersonal social relations.

For Steward and Bennet (1991: 11) , the American thinking is typical of a *Gesellschaft society.* Epistemology is analytical, procedural, and its inductive style is represented by the generation of models and hypotheses based upon empirical observation that disregards information by word of mouth or gossip. It is an operational, pragmatical style of thinking, leading to stress on consequences and results and concentrating in decision-making and problem-solving techniques. The individual has the power to affect her environment.

In contrast, these researchers (1991: 9) talk of the European Continent as favouring "declarative" knowledge, describing the world rather than acting on it. The pragmatic approach of the Americans is very different from the European style, which emphasises theory and organic concepts. Scientific work is considered as the elaboration and confirmation of previous theories, rather than on innovations, and concepts are living

realities (Martinedale, 1960:91 in Steward and Bennet, 1991). Within this European context, Spain shares many of the characteristics of a declarative epistemology. In addition, it also belongs to a more developed kind of G*emeinschaft* society, that Steward and Bennet define as a "relational", "interpersonal" one (1991: 7), with a high degree of sensitivity to context, relationships and status.

Law and the search for knowledge: epistemological differences in legal traditions.

The Spanish and the American legal traditions come from very different epistemological attitudes towards thought and science. From the beginning of the Modern Age, Bacon's *Novum Organum* (1620) -an heir to Aristotle's *Organon*- as well as Newton's work (1642-1727), constitute landmarks for the inception of English Empiricism, subsequently developed by Locke (1632-1704) and Hume (1711-1776) and preceded, in turn, by the nominalist William of Ockham (1290-1350). "Ockam's Razor", a common principle in Medieval philosophy, denies the existence of universals, defining them as *termini concepti*, or final terms that signify individual things. In the empirical search for knowledge, raw data are primordial to the existence of a thing, and the validity of inferring the existence of universals from individuals is out of the question. Empiricism as a whole displaces the search for logic, adopting inductive, operational patterns of thinking instead, with little attention paid to the overall framework in which people's actions take place. The hunt for truth is based on objective realities, from which measurable results can be attained.

A blatantly opposed attitude to sciences was developed in the European tradition. Descartes's *Discourse on Method* and *Geometry* (1637) endeavour to go beyond

universal mathematics, in the attempt to discover the nature of intelligence. The Cartesian tradition of thought, taken up by Spinoza (1632-1677) and Leibniz (1646-1716), asserts that, in principle, all knowledge, including scientific knowledge, can be gained with reason alone. In fact, the Continental European deductive and more abstract style of thinking gives priority to the conceptual world and symbolic thinking, attaching primacy and reality to ideas and theories. Deductive thinkers are likely to have more confidence in their theories than in the raw data of empirical observation, so it suffices for their purposes to show one or two connections between their concepts and the empirical world.

Epistemological postures have also had an influence in legal traditions. Radbruch (1958 in Ghirardi, 2003) points out that Oxford and Cambridge, embracing British Empiricism, endeavoured to study the *quadrivium* (arithmetic, geometry, music, astronomy), whereas the Sorbonne tacked the trivium (grammar, rhetoric, dialectic); Common law was influenced by Roman law in its most classic methodology and spirit, and Continental law pursued the Justinian code, the *Corpus Juris*, and its subsequent modifications. In the context of Continental law, it is easy to see how, in the light of these statements and of our reasoning above, European Formalism developed into legal dogmatism in the second half of the 18th century. During this period, jurists started to develop ideal models of perfect, complete, universal legal systems. During the 19th century, the codification of civil law took off, with the paradigm of the 1804 French Civil Code, or Napoleon Code, which is the basis of Continental law today.

Nevertheless, to fully understand civil law one must realize that Continental Europe received civil law from ancient Rome, but did not retain it in the same way everywhere

(Tetley, 1999). Scotland, for example, retained it without codification, and, outside Europe, other places of the world like Quebec or Louisiana developed their own codifications. In Europe, codes like those of unified Italy (1865), Portugal (1867) and Spain (1889) were directly influenced by the French Civil Code, which was called the *Code Napoléon* because of the personal interest of the Emperor to reflect the achievements of the French Revolution. The philosophy underlying civil law during the drafting of the Code was to provide stable societies with comprehensive sets of codes adopted by legislature, set forth in a logical scheme, addressing all issues. Hence, Formalism, as an extreme end of civil-law philosophy views law as a coherent , economic and precise system of norms, from which all solutions can be drawn. The only valid source of law is legislation, by virtue of springing from a competent legal authority, being jurists, not judges, the sole drafters and interpreters of law. The only hermeneutical method is deduction, and the judge's only function is discerning between the inclusion or exclusion of the case under the norm.

The Common law is the legal tradition that developed in England from the 11th century onwards. It is the basis of law, not only for England, Ireland and Wales, but also for forty-nine U.S, States, Canada and the Commonwealth. This legal system corresponds to the reality of a dynamic world, where social changes take place continuously and where an unwritten, flowing, flexible system is preferable. In connection with British Empiricism, it gave rise to legal realism, a trend that denies general norms the character of a paradigm pre-existent to judicial decision (Gómez and Bruera, 1995). The legal Realism of Ross, Pound and Cardozo reveals a sceptical attitude towards the value of norms. It is a behavioural trend that defends the legal system as being made up of a

group of specific court decisions, the only source of law being precedent. Judges are the creators of law and have the widest freedom to interpret the case.

Juridical consequences. Different philosophies, different systems, different hermeneutics.

As Gomez and Bruera state (íbid), the extreme positions described above – Formalism and Realism- have a very strong ideological flavour and constitute opposed overstatements of the juridical reality. On the one hand, the civil law tradition arises from the articulation of rules by an absolute monarch. In the countries Formalism develops, juridical dogmatism has been originated and developed in the context of a strong legislative power, opposed to a weaker judiciary. According to Tetley (1999), civil law judges follow Rousseau's theories that the State is the source of all rights under the social contract. The Common Law tradition itself, evolves from the sheer constraint of the monarch's powers, in opposition to which the people takes initiative and elects a strong judiciary power. Tetley (íbid) points out that English judges favour Hobbes' theory that the individual agrees to convey the State a certain amount of limited rights. Realism, as an extreme version of these postulates, defends the position of judges as the creators of law and recognises precedents as the only valid legal source.

The epistemology of each culture is, indeed, the origin of different attitudes about the nature of law, the role of law in society, the organization of the legal system in each legal tradition (Merryman, 1985). In principle, the Continental, and Common Law both belong to the ample family of Western law, as opposed to Moslem law, Hindu law, Jewish law, the laws of the Far East, the African tradition and the Scandinavian one

(Merryman, íbid). As Tetley himself points out (2000), mixed legal systems exist where the law in force is derived from more than one legal tradition, with different legal jurisdictions, different court systems, and different languages. Quebec or the Egyptian legal systems would be examples of this phenomenon, and the European Union –a central system with a polyphony of singular States- is becoming a peculiar one as well, where Common and Continental law are forced to coexist (Tetley, 2000).

Even if functionally they are relatively similar, the Common and Continental law traditions are very different in nature. In tune with the epistemological context in which they evolve, the Common law tradition is based upon fact, the Continental one on legal principles. Accordingly, Common law judgements extensively expose the facts, the judge and jury actively participating in seeking evidence and examining witnesses. In the inquisitorial arrangement of the Continental process, the proceeding culminates in a trial dominated by lawyers with the judge as a referee, and decisions first identify the legal principles that might be relevant, verifying their application if prominent. Similarly, in the descriptive nature of Continental law, the judge uses her deductive reasoning to determine the applicable sections of the Code, and remedies not contemplated within the written text are inadmissible. In the empirical context of the Common law, though, the judge uses her inductive reasoning about facts, applicable prior cases and the relevant law to reach a decision, with the freedom to decide an equitable, fair remedy, even if not contemplated before.

Different features in the interpretation of contract in America and Spain.

Traditionally, legal language has always been considered difficult, prolix and far-fetched, being sometimes rejected by users and institutions alike as an unreadable and even decadent register. These complaints are widespread and could be applied to the language of any legal system in the EU, both in the Continental and Common law areas. However, and even if law is a profession of words in any system, the truth is that the Common law one possesses some features that make it easy for language *per se* to be a real issue of discussion. Regarding interpretation, as opposed to the Continental systems, where law is based on legislation and codes –scrutinised in a very general way and wide scope – when applying law to life, the Common law system is one based upon empirical postulates: cases are applied, rather than legislation. This implies that the judicature is awarded a very special position in the scheme of things, as the figure of the judge is supposed, not only to interpret law, but to make law when adjudicating. In doing so, such a judge has to separate the *ratio decidendi*, or main arguments of the previous case at hand –which are legally binding to him– from the *obiter dicta*, or additional comments made by the previous judge, which are not to be followed compulsorily by him/her when deciding the case. This way of ruling brings along a very complex hermeneutic process which is very often one of *construction* (Alcaraz, 1994), that is, a process of granting legal meaning where there was previously none. This process very often amounts to be a veritable linguistic analysis (Solan, 1993), since lexical, syntactic as well as pragmatic exercises are required on the judicial part in order to extract that meaning and its right implementation to real life. In this kind of interpretive process of adjudication every word counts, and it is precisely the tension between precision –to be as accurate as possible– and flexibility –to be able to capture every possible contingency in life affairs– which, ironically, makes legal language so difficult to understand.

Under Continental codified legal system, and in tune with the organic, theoretical tradition of knowledge, legislation constitutes the primary source of law. Civil law codes and statutes are concise, stating principles in wide, general phrases. These principles need not be explained, as they are supposed to be succinct declarations of the spirit of the law and not to be read restrictively. Hence, as Solan (2005) establishes, legal systems based upon Roman law are more laid back when having to apply contextual interpretation to legal texts, and language, even if it plays a relevant role, is less central in the hermeneutical process. This allows courts to resort to the purpose of the text without the same suspicious attitude that prevails in the hardest Anglosaxon Textualism.

Such reasoning about the interpretive processes of these systems and their epistemological origins would provide an explanation to the fact that no pure, extreme positions exist within a legal tradition, and untangle the paradox that in an empiricist, realist context like that of Common Law, formalist streaks also exist that prevent the interpretation according to context. On the other hand, it is also somewhat contradictory that in an organic, theoretical, indeed formalist Continental Law context, some empiricism is also allowed when the application of the law is susceptible to be completed by extralinguistic matters when the text is not sufficiently clear.

Specifically, Spain has a compact body of rules for contract, but legislators and drafters try to make their assertions as general as possible, and the attempt to cover every contingence and detail of reality and its multiple complexities is out of the question. In contrast, in the ontological interpretive technique of the Common Law of GB and USA

every word counts, and it is the aim of the contract to be able to capture every possible eventuality that may arise in the course of the deal.

Due to the tradition that features it, the Spanish contract is, like its Continental fellows, intentionally open-ended and generalist. As Bender (2003) points out, legal texts in the Spanish scope have to be interpreted in their ordinary meaning, "but also in relation to the context, the historical and legislative background, and the social reality of the time at which they are to be applied, with particular attention to their spirit and aim" (2003:2). This heavy intentional, indeed contextual, accent implies that texts in this high-context legal culture are construed as a whole, analysed in the light of the bulk of their overall meaning and drafted so as to adapt flexibly to the desired results in each case. In this panorama, overgeneralisation is a bonus, not a liability, of the system. To achieve the elasticity required, texts have to be composed in a way that allow for some vagueness to occur. This is not to say that hermeneutics are loose as far as the Spanish legal text is concerned. In fact, vagueness and ambiguity problems provoke the concern of some scholars (Iturralde, 1989). In this sense, the directives to interpret statute law within the Continental system (Wroblewski, 1988) , it is admitted that every word is potentially vague and, even when it is not, it may become a source of doubt in its future applications. Thus, a system of legal definition has been developed to gauge meaning in those cases where clarity is at stake, even if the formalist tradition of civil law imposes that legal texts have to be clear enough, that definitions have to be provided by legislators, and that the extralinguistic context will play a helping role in case of natural fuzziness.

Contrarily, in the inductive legal tradition within which Common Law exists, legal interpretation is mainly literal and based upon a word-by-word construction, as the literal and golden rules of interpretation command. In this legal tradition every word has its own specific weight, and, consequently, to construe law and subsequently apply it, words have to be dismembered, pulled apart, so as to disambiguate the text. Then and only then, is the relationship between context and cotext to be regarded. As it happens, unless the elucidation of terms of art with a univocal nature is involved, meaning in the Anglo-Saxon legal text is often uncertain, as paronyms and legal homonyms are usual features in the lexical level of the legal discourse. English legal texts have to resort, ideally, to autonomy of interpretation. This fact implies that the text itself is supposed to supply all the data for its own clarification and subsequent application. Literal, or textual interpretation does not have to pose problems of interpretation necessarily. Nevertheless, things seldom take place ideally in this world and meaning in the Anglo-Saxon legal text is, more often than not, uncertain, as paronyms and legal homonyms are usual characteristics of the lexicon within these systems. Ambiguity can also be seen as a resource of the system in order to achieve pliability, and such is the case with famous and recurrent adjectives like reasonable, due, actual or fair, which act as wild cards to grant latitude of judgment to judges. According to Tiersma (1999:80) this kind of terms permit legislation not to "articulate in advance exactly what is included within it (…) . It permits the law to adapt to differing circumstances and communities within a jurisdiction (…) to deal with novel situations which are likely to arise in the future".

Conclusion: perspectives in the present panorama of mercantile transactions

The rules that regulate contractual relationships in the legal framework in the United States on the one hand, and those in Spain, on the other, are very different in nature. Indeed, the Civil Code of Spain allows for a contract to be construed according to the intent of the parties entering the agreement, whereas, according to Solan (2005:78) in the United States the *parol rule* forbids courts to make use of evidence other than the language of the contract itself when the terms are unclear. Solan himself advocates for contextualizing hermeneutics to be implemented in order to avoid vagueness, stating that some states in the country are more lenient than others in this matter. Still, and with the blessings of New Textualists like Justice Antonin Scalia (Solan, 2005: 85), who regard the language in the text sufficient to reach fair decisions, the *parol evidence rule* still applies in most cases.

The prominence of this analysis lies in the recent debate and interest that has arisen with the upcoming of "mixed jurisdictions" as a result, firstly, of the European Union bringing together many legal systems under the same single legislature (Tetley, 2000). But most importantly, "mixed jurisdictions" also occur because of what has been termed as the "Americanization of law" (Audit, 2001:1). The Western Bloc promotes and supports globalization and a restrictive theory of sovereignty, being the US itself the proponent of the development of multilateral institutions like the United Nations, the World Bank, or the International Monetary Fund. In addition, what is labelled as the Anglo-internationalisation of business has had a strong impact over the last two decades and "it is unlikely to change in the near future" (Vogt, 2004:11). Consequently, international transactions are carried out in English as the main communication tool, thus, litigation and legal practice worldwide are being conducted in English.

In the context of legal matter that involve mercantile transactions between individuals, it is important to note that civil law divides the areas of private and public law, focusing on rights and obligations of individuals in each area. In contrast, Common law has no wholly unitary system for prerogatives and obligations, but depends on courts (of Common law, the law itself, or Equity, fairness as applied by courts) to grant the necessary remedy, and it is only through previous cases that rights and obligations can be found. Despite these differences, never wholly understood in the multinational application of law, it is also fair to remark that when focusing on the area of contract, the universality of Merchant law has to be considered. "The phenomenon of commercial exchange spreads worldwide and goes beyond cultures and frontiers, being shaped by progress and evolution" (Duro, 1997:13, my translation). This international leaning makes commercial law different from any other aspect of juridical systems at large, and brings corporate culture and law closer, as globalization advances. The presence of businesses in Spain and the countries with an Anglo-Saxon legal culture, specifically Great Britain and America, is a fact, as globalization has opened up these markets to international business opportunities. Accordingly, "in the light of their unique characteristics, each country must develop their cross-cultural communication skills to define their expectations and ensure that their goals are met" (Del Pozo, 2003: 117). It is a fact that these markets -which share sets of cultural and educational values- must understand each other in order to work together. In this context, the need to understand the unique quality of each legal tradition −indeed, that of Spain, in the scope of this article− and its value in the context of new transnational agreements would become more imperative than ever in order to achieve harmony, understanding and respect towards national hermeneutical tools.

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