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Criminal Justice and Constitutional Guarantees of Consensus of the Penal System in Brazil and the U.S.

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Abstract

This article is a comparative study between the criminal systems of Brazil and the US. Initially, examines the US system, which is founded on popular participation in the administration of justice and the consensual truth. The authors analyze the principles of due process and substantive due process of law from judicial interpretations of the US Supreme Court. This system has allowed the US 95% of criminal trails are resolved through negotiation between prosecution and defense, which makes the system faster, efficient and democratic, for allowing the accused to participate in the decision on the criminal sanction that will be reckoned. Finally, the author criticizes the Brazilian legislation, which from the 9099/95 Act introduced the consensual truth in the Brazilian criminal system to crimes punishable by up to two years in prison.

Keywords: Criminal justice; Constitution; Penal system; Brazil; U.S

Introduction

Nothing weakens more a government than it disrespects its own rules [1].

Although there are similarities between social structures and policies of Brazil and the U.S. immigration capitalist countries located in the New World, when we analyze their respective law models of social control we can notice significant differences.

Initially, the reason they adopt different law groups is the fact that in Brazil, it's connected to the Roman-Germanic system, which was founded in a tradition that follows the Enlightenment Age thinkers and operates with legal codes legitimated by the Legislature, with emphasis on inquisitive prosecution that measures the real truth or the material one, and America, except Louisiana that follows the Common Law, whose focuses on the popular participation on the administration of justice and concentrates your legitimation on consensual negotiation processes of truth.

As we know the American Constitution is quite synthetic and contains more principles than rules. However, until December 15th, 1791 ten constitutional amendments about fundamental rights were approved, they were known as the Bill of Rights and many people consider those amendments an actual criminal prosecution code.

This essay intends to expose brief remarks about the legal groups from Common Law and Civil Law, also called Roman-Germanic, followed by a brief comparison between the constitutional warranty from the legal prosecution in the Brazilian and the U.S., identifying singularities and peculiarities between the criminal transaction institute introduced in our system by the law number 9099/98 and the plea bargain from the American System.

Common Law and Civil Law

The history of the North American freedom is the history of the prosecution [2].

In fact the expression. "Common Law" is applied to designate a legal tradition born in England in the XI century, from the sentence of the Westminster Courts, as they were called the courts made by the king and subordinate it directly.

The expression, however, should not be confused either with the English law, as is also adopted by Wales, nor with UK law, rather than Scotland, although it is an integral Kingdom of Great Britain adopts the Roman-Germanic system, nor with the Anglo-Saxon law, which refers to the customary rights of individuals and tribes of primitive peoples of England before the Norman Conquest in 1066, and were initially applied by the Courts County, but were supplanted with just creation of the Common Law.

Nor can it be confused with Equity, initially applied by the courts of King's Chancellor, in order to temper the rigor of the Common Law, addressing the issues of equity, when there was no legal writ for the resolution of certain exceptional circumstances [3].

Indeed, the historical origin of the common law, similar to the process of formulating and Judex Roman praetor, the distribution of justice was the prerogative which the kings granted to judges (Judge) who roamed the kingdom, granting writ for the authorities to respect a beneficiary's legal situation, which could have further questions of the facts of their claims heard by a jury.

Today, both in England and the United States, the enforcement agencies of the Common Law and Equity are unified, and although the principle is still valid that only allows the use of equity when there was no remedy in common law, in practice this division is more a function the classification of the legal institution of law, whichever robin trials by judge and jury in equity in Common Law [4].

In another sense, common law means a right created by the court (judge-made-law) through the judicial precedent (cases law), which is opposed to the Statute Law, which is the right

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created by the legislature through the enactments of the legislature, embodied in international treaties, federal constitution, state constitutions, federal and state statutes, administrative regulations, federal, state and local as well as the statutes drawn up by the Judiciary.

Initially one must keep in mind that in the U.S., the Federal Government and most Member States have adopted a mixed system between Common Law and Civil Law, with a written Federal Constitution and rigid, with supremacy over any other rule of law, be she instituted by judges or legislators infra, since although the case law is the main source of law, written law is superior to it and may at any time to modify them.

The Roman-Germanic legal family or the Civil Law, in turn, was born in continental Europe from the combination of various traditions that have emerged in different periods of history such as the Roman Civil Law, Canon Law, Legal Science, the School exegesis of the encoding process and Commercial Law.

Its main features are the supra-legal constitutional text and the consequent control of constitutionality, the division between public and private, the predominance of written law and judicial power restricted the interpretation and application of the Constitution and laws.

Is that while in England, the evolution of the law was given towards the development of rules on procedural actions, so that the absence of a writ for a given situation could result in the inability to say the right, continental Europe was more concerned with the right equipment.

In fact, the distinctive character of the Romano-Germanic family, compared with the common law is that the first law is the main source of law, in second place occupied by custom and judicial precedent, so that the laws are used exceptionally only in cases governed by it, not being allowed to analogical interpretation.

The Appropriate Legal Prosecution in the U.S. Criminal Justice System

A legislative act (I cannot call the law) contrary to the first principles of the social contract, cannot be considered a legitimate exercise of legislative authority. The obligation of a law in governments established on express contract, and republican principles, must be determined by the nature of power in which it is founded. Some examples are sufficient to explain what it mean. A law that punished a citizen for an innocent act, or, in other words, an act which, when performed, did not violate any existing law, a law that destroys, or impairs the lawful private contracts of citizens of character, a law what makes a man the judge of its own cause, or a law to withdraw the property from A and give to B: it is against all reason and justice the people providing a legislature with such powers, and therefore cannot be assumed that it did [5].

The most important protection to personal liberty consists in the trial guaranteed to every person accused of committing a crime. The party enjoys the whole process of the presumption of innocence until proven that he is guilty [6].

In the U.S. every positive or negative act of criminal violation is also considered a transgression to the State. When it's a felony, is charged a sentence of imprisonment to be served in a penitentiary or state prison, and in some cases it can be applied capital penalty. But when it's a misdemeanor, is charged a penalty of imprisonment in reformatories or public jails.

The prosecution in the U.S. is regulated by constitutional rules and Federal Statutes that are edited by the Legislature with help of the Executive (*Acts)* and by the Supreme Court with the Federal Rules of Criminal Procedures.

In the member States, with their centrifugal feature, the main source of the criminal procedure is the State Constitutions, followed by the statutes laws, Superior Courts regulations and the state case laws.

Indeed, the rules of criminal law and criminal procedure in the U.S. are not uniform, and saved in matters concerning the Federal Court, vary substantially in each Member State, so that we can say that the only rule in criminal proceedings in the national States of the American Federation is the unqualified respect and sacred to the basic principle of democracy in that country: the due process of law, while a compilation of rules that impose the real subjective law fundamentals of life, freedom, free will, locomotion, trial by jury in serious crimes and respect for individual property [3].

The matrix of the due process has origins in the "law of land" clause, inscribed on the *Magna Charta* from 1215, this document is considered one of the most important precedents of the modern constitutionalism, that became one of the main instruments of comprehension of the Supreme Court in the U.S [7].

This principle was first established by the IV, V and VI Amendments, which were ratified on December 15, 1791 together with the amendments I, II, III, VII, VIII, IX and X, forming the so-called Bill of Rights.

The first statements of U.S. law occurred in 1776, resulting from the struggle of some colonies against the mother country, and many authors will influence the Declaration of the Rights of Man and Citizen, adopted by the French National Assembly on August 26, 1789 [8].

The first amendment deals with rights related to religion, freedom of speech and press, rights of assembly and petition, and a prime example was the biology teacher J. Scopes, who eventually acquitted in 1925 by the Supreme Court of Tennessee, after being convicted at first instance by teaching the theory of evolution in high school [9].

The Amendment II takes care of the right to bear arms, the III's right to privacy, while the IV Amendment deals with the inviolability of residence in the face of search and seizure [10].

The Amendment V was the first to refer to the due process clause, embodied in the trial by jury in more serious crimes, the impossibility of anyone being prosecuted twice for the same fact, guaranteed not to be compelled to testify against him and right fair compensation in cases of expropriation [11].

The Amendment VI [12] includes the principles of fair trail because every accused has the right to a speedy trial by a jury of people living in the crime scene, to be informed of the content of the charge and assisted by a lawyer and call witnesses [12].

The VIII Amendment prohibits the imposition of bail or fine amount excessive, cruel and unusual, while the nineteenth Amendment states that constitutional rights are merely illustrative [13].

In its origin such constitutional principles could only be invoked against the federal authorities, but after the Civil War and the freeing of slaves Fourteenth Amendment was enacted on June 16, 1866, subsequently ratified by all Member States, on July 23 1868, began to

admit that the invocation of the guarantees of Due Process of Law also against state officials [14].

Importantly, even after this amendment the Supreme Court has been reluctant to apply the Bill of Rights was not a right of defendants, but a duty of the federal authorities, so that did not apply in the private sphere or in the state, which thrashing occur in 1961, when judging the case Mapp v.Ohio.

From then, the US Court wasn't allowed to consider the due process of law when is at stake the life, freedom or property of the people. Thus, the U.S. Due Process of Law means a principle of interpretation of law and self-administered, both federal and state levels, to guard the fundamental human rights such as protection against unreasonable searches and seizures invasive of privacy, requiring a warrant with dispatch subject to confirmation of the occurrence of cause (Amendment IV), the right to a trial by jury in serious crimes, protection against double jeopardy and the right to silence (Amendment V), the right to a speedy trial by jury made of where the event occurred, the right to be informed of the contents of the indictment, the right to be assisted or refuse a lawyer, right to adversarial witnesses and have witnesses on his behalf necessarily conducted (Amendment VI). Indeed, in the U.S. criminal justice system, after the arrest of any person, it must be presented to a Justice official with decision-making powers but without the constitutional guarantees of judges for preliminary examinations, hear witnesses and gather evidence circumstantial, with powers to enact the atypical behavior or the lack of proof of authorship or establish a bond to save it loose as they start their investigations, these decisions be appealed to a judge, article III judge named in reference to the third article Constitution.

In the interview for collecting evidence by the police, the suspect has the right to refuse a lawyer or a lawyer, not being accepted or undue delay attempts at self-incrimination.

In addition, under penalty of exclusion of evidence of the procedure or later void *ab initio* the process is closed the use of evidence obtained from invasive acts of personal liberty, such as the seizure of abusive things, burglary, or invasive of personal rights magazine of the human person, and the confession obtained by coercive means.

Police investigations are completed, the information is forwarded to the prosecutor, but as in the U.S. criminal justice system prevails the principle of opportunity, the prosecutor may choose not to promote the prosecution in view the convenience of the public interest, cherished by topical that the state should not take care of small things (minimum healing non praetor), and may fail to promote *jus puniendi* when verifying that the criminal action may cause inconvenience to the public interest, determining then the filing of the inquiry.

If you decide, however, by criminal prosecution, the defense may take three paths:

a) treating the right to trial by Grand Jury of a right available, the suspect may prefer to be charged directly by the developer, which will be able to negotiate the admission of guilt by a penalty lower or the disqualification of the crime to a crime punishable with less severe in an agreement to take effect only in that process, not serving as a test for other criminal or civil, against the guarantee against double jeopardy.

The plea bargaining is essentially a negotiation between the prosecution and defense, as defined after the practice of criminal offense, and surpassed the preliminary stage of the screen (our opinio delicti), opens an opportunity for the suspect pleading where you are given their opinions on his guilt: if you plead guilty and confesses to the crime after a process of negotiating with prosecutors to charge for the exchange of a less serious crime, or a more limited number of crimes, operates the plea that is the defense response, and then the judge may fix the date of the sentence, without due process or a verdict.

b) refusal of the dispute, claiming the "plea nolo contendere", which authorizes a sentence as if guilty, but that does not represent an admission of guilt nor serves as proof to other civil or criminal proceedings, protection against double jeopardy.

c) pleads innocent for lack of prosecution or legal silences, initiating the second phase of criminal proceedings, with the installation of public trial and its procedures, which depending on the Member State deems the judge with or without the participation of the jury.

Since then the process is established by a criminal indictment against the suspect, who depending on the Member State may be made) before a Grand Jury, made up of 25 lay judges with powers to hear witnesses and to order investigative measures, b) or directly to a judge, always bearing in mind that among the fundamental human rights that could lead to the annulment of the criminal appellate procedures, is what is referred to an impartial Grand Jury and the Jury, both judge when the lay jurors.

If the prosecutor presents his case before the Grand Jury, it may accept them or present a new charge without considering the arguments of the prosecutor.

Set the procedure, with the acceptance of the indictment by grand jury, or to submit a new indictment by grand jury indictment with or directly before the judge, the judge shall appoint a trial date that begins with the formation of the petty jury, usually consists of 12 lay jurors and his spokesman, whose competence to judge questions of fact and rendering a verdict in favor of innocence or guilt of the defendant.

At this stage dominated by orality and informality of the procedures, combined with sophisticated rules on the administration of the tests, where the initial application only requires the reporting of facts, a statement of authorship and the application of the remedy.

After choosing the jury, the trial begins with opening statements by the prosecution and defense, which is the formal reading of the indictment, followed by a relatively barren of facts and terse statement of the evidence to be presented by the state and defense, without any argument or inference from the evidence.

The records of the police investigation and evidence obtained in the previous phase are not taken into account, such as the defendant is not obliged to give evidence because of the guarantee against self-incrimination, this may not be construed against its defense.

The evolution of American criminal law occurred in two phases: the due process procedure of a strictly procedural and substantive due process embodied in the constitutional court in order to control the constitutional law of agency, also called the principle of proportionality.

To achieve this substantive dimension, especially after the stock market crash of 1929 with the implementation of the New Deal, the U.S. Supreme Court went on to admit the intervention of courts to secure rights and economic freedoms, opening a wide berth for the substantive examination of the acts public authorities in redefining the concept of discretion, the struggle for racial equality (Brown v. Board

of Education), privacy (Griswold v. Conn.), abortion (Roe v. Wade), for political rights (Reynolds v. Sims) [8].

The Appropriate Legal Prosecution in the Brazilian Criminal System

But justice delayed is not justice, but qualified and manifest injustice. Because the illegal delay in the hands of the judge against the right of the parties, and thus the damages in equity, honor and freedom. Rui Barbosa [15].

In Brazil the principle of due process is provided in Art. 5, LVI of the Federal Constitution:

Article 5.

LIV. no one shall be deprived of liberty or property, without due process.

In fact, in Brazil as well the principle of due process is almost identical with the rule of law, and in a narrow sense is the guarantee that there will be no punishment without trial (nulla poena sine iudicio) in the broad sense is a kind of guiding principle of the whole system of judicial processes, as all his others are derived, such as the principles of publicity of procedural acts (inc. LX), the prohibition of evidence obtained by illegal means (inc. LVI), the prosecutor and the judge's natural (inc. LII),the contradictory and full defense (inc. LV), the presumption of innocence (inc. LVII),the right to silence and to be assisted by family and lawyer (inc. LXIII), not to be forced to confess under duress physical or moral (inc. XLIX) and a trial by jury in crimes against life (inc. XXXVIII).

Notwithstanding, although the authors usually claim the origin of the American Institute, the principle of due process in Brazil is different in many aspects of that country, because there the same due process is an option of the accused, who is due state, a certain legal proceedings, including the speedy trial, which is a speedy trial, while in our system is mandatory and the trial of temporality predetermined [16].

Indeed, while in the U.S. criminal justice system due process is a right available in Brazil dominates the principle of mandatory or compulsory, based on topical delictamaneant impunity (crimes must not go unpunished), so that the police authority and the prosecutor are obliged, under penalty of the crime of dereliction of duty, and determination to promote the outbreak of the prosecution of any crime, can only fail so in cases of atypical impunity agent, procedural illegitimacy, immateriality of fact for lack of material proof of authorship or ignored, even so through the application filing or acquittal should be submitted to the judge.

In addition, proposed public criminal action, the prevailing principle of unavailability of the process, and the prosecution cannot have it, transacting, giving up or agreeing with the defendant.

Nevertheless, from the force of Federal Law No. 9099/95, these principles have been mitigated cause the law called the special criminal courts allowed the transaction between criminal prosecution and defense in the offensive potential of minor crimes (those whose maximum penalty does not exceed two years imprisonment) for the application of alternative measures of deprivation of rights that eventually extinguish the punishability of the crime, that means no admission of guilt, and it does not determine any impact on the civil sphere, which makes the institute similar to plea nolo contendere.

In fact, this institute will open decriminalization exception, not only to the constitutional principle of due process, but also to the principles of obligation and the unavailability of prosecution, and even the real truth, which for many is the main scope of criminal proceedings, seeking, in the case of the prosecution, the evidence of authorship and materiality of the offense with the absolute certainty of truth, by tracing simulated fact.

Indeed, the principles of obligation and the unavailability of prosecution will be hampered by the principle of discretionary regulations or rules, which allows in cases envisaged by law to make room for the autonomy of the will of the parties under the control of the judiciary.

Important to note that although some authors speak of the law unconstitutional on the special criminal courts, we cannot overlook the fact that the Constitution itself was that in his art. 98, Creation of special criminal courts where possible criminal transaction, which is why one, cannot speak in their own constitutional provision unconstitutional.

In Brazil, after receiving the criminal action by the court, the guarantee of due process grants the defendant the right to adversarial (art. 5, LV FC), so that procedural stage in the prosecution and defense must be in a position to equal, with no difference between them means, time or opportunities, being closed to the judge to perform any procedural act without the knowledge of the opposing party.

At this stage the prevailing procedural principle of publicity, so that all judicial proceedings should be public, except in cases provided in art. 5, LX FC when it becomes necessary to preserve the intimacy of the litigants or when the social interest requires, as in cases where, at the discretion of the Judge, there is a possibility of scandal, danger of civil disturbance or any other major inconvenience (art. 792, § 1 of the CPP.

In Brazil, however, although it is guaranteed the right to silence as a fundamental right of the accused, the judges for many this could mean an admission of guilt (silence is consent), since even before the 1988 Constitution, the judge was obliged to warn the defendant that his silence could be used against him.

Is that while the U.S. adopt the system of moral certainty of the truth of the legislature and legal or formal, with disgust inquisitorial aspects, where the judge is a kind of referee, official without impulses in relation to society, represented by the prosecutor and the accused with the law requiring that the principles and establishing the value of each event in Brazil dominates the system of free conviction and the real truth, so jus puniendi no limits on shape or on the initiative of the parties, so that Once the criminal proposal, public or private, the procedure depends on the judge's official momentum, which can promote all services deemed necessary to order the process, including modifying qualifying, privileges or the proper classification of the crime.

Moreover, the judge has broad powers to give or not credibility to these tests, whichever is free and relativity convincing evidence, since there is no evidence prevalent, and even if the prosecutor proposes the acquittal of the accused, the judge may convict it.

Is that while the U.S. control not only the efficient cause and material evidence, but also its final cause and their modus faciendi, and the violation of certain evidentiary procedures may give rise to invalidity of the entire process [3] in Brazil follows the principle of the freedom of procedure, the defendant may present any evidence and choose the lawyer that he pleases, so that the accused can and must use all possible resources for their defense, from silence tolie - this is the paradox of our criminal justice system - as the interrogation is not made under oath, why the inquisitorial stage of the suspect and the

defendant's procedural step is allowed to present the version that it thinks fit for the facts, it represents any legal risk, while in the U.S. criminal justice system can silence the accused, but resolves to speak as a witness testifies and may not lie under penalty of committing the crime of perjury, that among us is best known for perjury.

In Brazil, has not been settled the question of fruits of the poisonous tree, the communicability of the original illegal evidence against the other evidence thereon, although the most recent decision of the Supreme Court has been in to reaffirm this principle. However, the existence of illegal evidence alone does not determine the invalidity of the process, since there is other evidence that lead and autonomous legal culpability of the defendant.

Conclusions

The life of law hasn't been logic: it has been about experience. Oliver Wendell Holmes Jr. [17].

In order to understand Law in a complex society like ours, Habermas highlights the need of a communicative reason that differs from the classic practical reason while instrumental linguistic where the interactions become balanced in seeking to an understand, this would support to a massive background consensus, from the idea of autonomy, where men can act as free subjects, in that conform to standards they themselves have participated in the development, in a process between subjects [18].

The U.S. criminal justice system, typical of the Anglo-Saxon pragmatic spirit, gives full independence to

to the Attorney General to negotiate an absolute majority of cases the guilt of the crimes and typiocality, then managing to resolve 95% of criminal cases out of court, without the need for an expensive and lengthy criminal proceeding.

The democratic base in the U.S. requires popular participation in the administration of justice, where a large part of prosecutors and state judges are elected, which gives a very strong political dimension to Justice.

On the other hand - despite the distortions inherent in the political and economic system the U.S., such as racism and hedonism - are not included as the process of jury in criminal cases the accused refuses to criminal transaction (bargaing) and requires a speedy trial, it is actually possible to the police, prosecutors and experts an effective dedication to the case.

This certainly gives a high degree of social efficiency in the U.S. criminal Law, not to mention the huge savings in public expenditure and time spent on the trial of the accused, with significant gains for the state, society and also for the accused.

Nevertheless, this system suffers severe criticism, especially by Brazilian authors, trained in the liberal legal tradition, where the principles of culpability and the real truth occupy a prominent place in the theory of criminal law on the grounds of a system like this can occur favor of the more affluent segments of the population, where the poor have less bargaining power, as they lack good and well-paid lawyers, which certainly would cause many miscarriages of justice.

Moreover, many claim that the U.S. criminal justice system in mind the destruction of basic constitutional principles, including the principle of due process, and most notably the presumption of innocence and the real truth or material, as well as the separation of powers , to mean an invasion of prosecutors in the field of responsibilities of the judiciary.

One way or another, however, know that the criminal system in Brazil still rooted to the principles of obligation and the unavailability of prosecution, is in collapse, and perhaps for this reason, from the law No. 9099/95 has been influence of U.S. criminal justice system, notably plea nolo contendere, while admitting the offenses of lower offensive potential criminal transaction without due process of conventional criminal. In fact, the Brazilian law is closer to Italian models (articles 439 and 556 CPP) and Portuguese (articles 392 et seq CPP), that derogations from the principles and requirement of unavailability of prosecution only in cases envisaged by law , where prosecutors must observe certain conditions, including the prohibition of proposing custodial sentences.

This influence can also be seen at the Institute of conditional suspension of the process, very similar to probation in the U.S. criminal justice system, as if the crime has a minimum sentence abstract not exceeding one year, repair any damage and there is the possibility of granting for future probation (suspension of the sentence already imposed) the accused is allowed to suspend the process, without discussing the guilt and upon fulfillment of certain conditions you may see the extinction of the punishment of the crime committed. These institutes mark the introduction of consensus in our criminal justice system, allowing a rapid response to crimes of small and medium offensive potential, and the actual suspect the possibility of getting rid of time consuming and unpredictable conclusion in exchange for extinguishment of punishment subject to compliance with alternative measures and compensation for damage caused to the fact. Strictly speaking, this law, which may promote a revolution in the criminal system in Brazil, came to oppose the current trend, which inspired the movement called "law and order" proposes a symbolic criminal law, excessively interventionist and preventive measures through repressive extreme severity, such as the Law on Heinous Crimes and Organized crime Act, which ended by not producing the expected effect of decreasing crime.

The Law of Special Criminal Courts, by contrast, follows the progress described in several countries including the U.S. criminal justice system and the most advanced doctrinal proposals, because from Beccaria to know it really does reduce crime is not the severity of the sentence, but the certainty of its application.

Indeed, through the institutes of the transaction of criminal probation and the process will certainly provide a major contribution to the Brazilian criminal justice system, even though they have been introduced very tentatively.

These institutes should be expanded by increasing up to five years the maximum penalty for crimes that allow criminal transaction, so that a greater number of crimes should be subject to special criminal courts.

Besides, we should introduce our criminal system the Possibility of the defendant to plead guilty and negotiate his penalty with the sentence justice, getting rid of the slow and uncertain process criminal.

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