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Jean-Paul Decorps

French Continental Law Foundation

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The civil law notary profession, a fair balance between regulation and liberalization

By Jean-Paul DECORPS

Former President of French Notary council

Two legal systems are competing in the world:

Common law system, which is the promoter of the liberalization of economic activity, and the continental law system, which is oriented towards regulation and previous controls.

One focus on speed, in the name of efficiency. It leads to taking risks, and the subsequent litigation.

The other focuses on security, which involves prior checks and thus certain formalism.

The choice between one or the other system, besides the cultural influences that may exist (the law is to society what grammar is to language) has a decisive impact on the economic strategy of a country:

- should speed be favoured and the common law system will be selected.

- should security be focused, and the continental law system will be adopted.

Till a recent time, many people considered that widespread liberalization on a global scale was the only way to ensure the wellbeing of humanity. And for them a liberal system, as the common law one, was the only way to reach this aim.

But the recent events, I mean the economic, crisis show that such an analyses was wrong.

No society, no corporate body and no structure can operate without rules, designed to organize, control and develop them.

We will examine:

- in a first point, the damaging effects of self-regulated market economy
- in a second point, the need for balanced regulation of the market economy

I- The damaging effects of self-regulated market economy

1) The economic aspect: the excesses of globalization

A- The excesses of liberalization

It creates a double deception:

- *first one at the psychological level:*

When referring to liberalization most people understand “freedom” and equate the two.

However, there is a total antagonism between liberalization and freedom: liberalization is the absence of rules.

That means the law of the strongest or the more rich.

Freedom, by contrast, involves rules. One person freedom ends where another person’s freedom begins. So, limits are necessary.

“Between the strong and the weak, the law protects and freedom oppresses” wrote a french author.

- *second deception, at the legal level:*

Economic conquest becomes easier, at the institutional level, if no local rules exist, result being that stronger countries can impose their own rules to cooperate with those countries.

B- The excesses of free competition

Two questions arise in this regard:

1- Is free competition really the best way to ensure the well being of humanity?

We notice that this way of life has been imposed by technocrats of the global economy, without any democratic process.

2- How to find the best product or the best service in a competitive market?

- The consumer in such a self regulated market is quiet lost. His search for the cheapest cost leads him not to look after the quality of the

product. The consumer is also lost among the different proposed rates, with a great difficulty to compare and to choose the best one.

- The free competition finally leads to unlawful agreements between those who control the market.

2) The legal aspect: the down sides of common law

Two down sides must be examined:

A- Common law favours excesses of liberty:

Common law is close to the characteristics of economic liberalization: few rules to guide business activities. The contract is the main element. But it allows those who are economically stronger to impose their conditions on whoever is weaker.

B- Common law favours the excesses of the free competition:

- It is the domain of a single profession, that of the lawyer, who can have multiples roles: real estate broker, contract drafting, trial lawyer, insurer.

This situation confuses the consumer, who is lost when he has to choose the right legal professional.

- The common law favours the freedom of set up practice, leading professionals to concentrate in large cities, and create economic deserts in the countryside.

- The common law allows freedom to set professional rates. Such a rule leads those professionals to select the most profitable cases.

II- The need for balanced regulation of the market economy:

Such a regulation is specially provided by the continental law system.

1) The system of continental law is a legal instrument of economic regulation:

Every people know the main differences between the two systems, but let me remind them:

- A trial is quiet natural in common law. It is an accident in continental law

- Common law is a speed oriented law. It fits the urgency of business.

- The formalism of continental law protect the consumer and avoid many proceedings downstream. "Formalism is the twin sister of liberty" as written hiring, German law teacher of 19ème century.

2) The civil law notary is a legal expert for economic regulation:

A- What are the basic needs of a State governed by law?

They are three main needs:

1- Legal security

There is a direct link between legal security and economic development: legal security creates confidence which allow credit, thus investment, and hence economic development and social progress.

And there is also a direct link between legal security and continental law system, thus between legal security and civil law notary profession, which is the cornerstone of this system.

2- Conflict prevention is the second objective

- A trial is a concern for a citizen and a risk for a company. Nobody knows the result, the cost and the duration of it.

- The cost of Justice becomes prohibitive (2,5 % of G.D.P. in the USA, wich is equivalent to the budget of Hungary or Tchequy)

- Many civilisations dismiss the idea of a trial (as in China where taking legal action is losing face)

3- The controlled liberalization of certain activities

The State, today, for budgetary problems or policy choices, has to focus on sovereignty activities, as Justice, army or diplomacy.

Some others activities, however, must be controlled as strategic one.

For instance to know who owns what, who is funding what and how, to collect the taxes related to real estate.

For them, the government transfers its "power" to some institutions under control.

The civil law notary institution exactly fullfills this policy choice:

- It is a freeland profession

- It is a legal profession, controlled by the government.

B- What a civil law notary brings to a state government

1) The civil law notary is the law professional of legal security

This is why he has a fundamental role in the area of real estate.

- The right of ownership is a fundamental human right as per the declaration of human rights (1789) as well per in European charter of fundamental rights (2000).

- More over, ownership plays an essential economic, social and strategic role in development of a country.

- It is why systems for real estate advertisement are most often in the world regulated by professional who depend on the State. It is also why there is always a double verification by either a Judge and legal expert (civil law notary in most cases).

- The consequences of uncertainty are harmful to the economy:

* the real estate litigation in Europe is fifty times fewer than in the United States.

* The subprime crisis reveals the need for legal certainty, since it is the result of both a lack of control to the detriment of banks (titles deeds that were falsified or erroneous, undisclosed mortgages, people without capacity or power to sign deeds (more than 20% of cases) and an absence of advice to the detriment of borrowers (hurried signatures with a knife to the throat).

2) The civil law notary is a legal expert for transparency

- A notarized deed has to be registered in the fiscal district of the civil law notary's office, which avoids relocation for taxes purposes.
- A notarized deed is a mean to fight against money laundering:
 - * it allows the players and fund used to be traced
 - * the transfert of shares of real estate companies can be followed to know who owns what.

3) The civil law notary is a legal expert for amicable proceedings

- He must respect specific ethics, which require him to be neutral and impartial.
- He must be the legal expert for a contract or case, and not for a client.
- He must seek a balance for the contract.
- He must act as an arbitrator, as interface, as a conciliator or a mediator.

4) The civil law notary is a responsible legal expert

- He is subject to a very broad civil liability due to his obligation to explain the law, to apply the law, and to give advices to his customers.
- He is also subject to a special professional liability.
- He is subject to aggravated criminal liability because of his status.

To conclude, we can say that civil law notary, the legal professional of certainty, is the legal professional of the 21ème century.

Jean-Paul DECORPS

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