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Comparison Between The Commercialization Of Civil Law And Civilization Of Commercial Law

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Abstract

Civil law is defined as the set of regulations that safeguard the individual rights of the people while commercial law is a set of regulations that deal with business firms and contracts. The main aim of the study is to establish a comparison between the commercialization of civil law and the civilization of commercial law along with focusing on the transaction to civil or commercial law. The facts related to the restructuring of asset and business group affiliation in French civil law countries and privatization of civil law and civilization of private law with reflective transactional law study are also discussed in the study. It was found that restructuring of assets is regarded as an important strategy by the business groups to avail market opportunities and respond to the turbulences of the competitive market conditions. The study concluded that the transnational private law helped in developing an alternate dispute resolution mechanism by introducing the concept of reflexive law.

Keywords: Civil Law, Commercial Law, Transaction, Civilization, Law

1 INTRODUCTION

Law is important enforcement by the governing bodies of the countries to ensure law and order in their respective nations. It includes implementing several laws such as civil, commercial, criminal, arbitral, and others to maintain harmony and just practices within the community and economic realms. While focusing on civil law, it is defined as the set of regulations that safeguard the individual rights of the people. It provides resolutions so that disputes that are present in the form of agreements, family law, property, and torts are resolved. On the other hand, commercial law is a set of regulations that deal with disputes that occur in business, firms, and contracts. It provides rulings through which the disputes between the company, employees, customers, and stakeholders in the business regime are resolved. In France, the Civil Code was organized in the form of short articles to ensure there were no contradictions between logic, rationality, and experience. It is applied in marriage and family cases, divorce, succession & gifts, property, contract, and torts.¹ The cause or the reason for the validity of contractual obligations includes morality of cause in which personal property is considered to be valid if it meets required formalities provided by the lawful organization. The conditions such as obligation void are forbidden by the law and in place of it, public order and good morals are enforced. However, while establishing a comparison between the civil and commercial law based on cause, lesion, and just price, it was found that in civil law, the lesion is based on protection objective, while in a criminal case; the lesion is based on subjective doctrine. In a civil case, the difference between the contract and market price is considered while determining the market price of the property, while in the commercial case; it is ensured that the price of the property is not less than the seven-twelfths of its market price as it is considered as a just price. Therefore, the determination

¹ Legrand, Pierre. "Against a European civil code." *Mod. L. Rev.* 60 (1997): 44.

of different factors such as lesion and price is essential to validate the contract basis.² The study also establishes a comparison between the commercialization of civil law and the civilization of commercial law. The research also provides valuable information about the restructuring of asset and business group affiliation in French civil law countries and analyses the privatization of civil law and civilization of private law with reflective transactional law study.

2 AIM AND OBJECTIVES

2.1 Aim

To make a comparison between the commercialization of civil law and civilization of commercial law.

2.2 Objectives

- To restructuring asset and business group affiliation in French civil law countries.
- To examine the analysis of the privatization of civil law and civilization of private law with reflective transactional law study.
- To examine the OHADA and harmonization process with special respect to business law in Africa.

3 LITERATURE REVIEW

3.1 Restructuring of asset and business group affiliation in French civil law countries

The restructuring is the process in which a company performs a series of divestitures and possessions to develop new business opportunities. It is an important strategy that is used by an organization to avail market openings and respond to competitive threats.³ Business firms in countries like the United Kingdom (UK) and the United States (US) are using asset restructuring to respond to environmental alterations that belong to other institutional surroundings. For instance, due to the implementation of privatization policies, there was an increase in the restructuring activities by Asian and Latin American enterprises.⁴

The business groups are autonomous enterprises that perform commercial activities legally by making effective use of labor, resources, and capital. The business groups provide benefits to the independent firms to avail certain resources which cannot be availed by them as autonomous firms.⁵ French Law was adopted by many Latin American enterprises as many industrialists were either former European colonizers or settlers. However, the businesses that were operating in French civil law countries experienced weak law enforcement because of which there was a low investment by the investors. Under French civil law, creditor protection was practiced that led to high ownership concentration in the business groups.⁶ The business group culture existed in several countries irrespective of the level of economic development experienced by them.⁷

The firms mainly adopted asset restructuring activities to support environmental changes in the French civil law countries. The firms also focused on the other economic considerations such as Gross Domestic Product, inflation, employment, human capital, and life expectancy factors while

² Thomas, Sean. "English Commercial Law in the Longue Durée: Chasing Continental Shadows." In *Modernisation, National Identity and Legal Instrumentalism (Vol. I: Private Law)*, pp. 73-110. Brill Nijhoff, 2019.

³ Hoskisson, Robert E., Albert A. Cannella Jr, Laszlo Tihanyi, and Rosario Faraci. "Asset restructuring and business group affiliation in French civil law countries." *Strategic Management Journal* 25, no. 6 (2004): 525-539.

⁴ Filatotchev, Igor, Trevor Buck, and Vladimir Zhukov. "Downsizing in privatized firms in Russia, Ukraine, and Belarus." *Academy of Management Journal* 43, no. 3 (2000): 286-304.

⁵ Khanna, Tarun, and Jan W. Rivkin. "Estimating the performance effects of business groups in emerging markets." *Strategic management journal* 22, no. 1 (2001): 45-74.

⁶ David, R., and J. Brierly. "Major legal systems in the world today (Stevens and Sons, London)." (1985).

⁷ Ghemawat, Pankaj, and Tarun Khanna. "The nature of diversified business groups: A research design and two case studies." *The Journal of Industrial Economics* 46, no. 1 (1998): 35-61.

implementing restructuring activities.⁸ It also includes social and political factors as political reforms bring modification in the private ownership trends and social reforms change the perception of the customers towards the business resulting increase/decrease of business opportunities. The country development governance practices influence market forces. It resulted in improved resource distribution that brought more business opportunities to the firm. The major reason behind it is that the firms were in a better position to exploit the resources by restructuring their assets.⁹

The competitive changes give rise to aspiration-induced predicaments. Under such conditions, the businesses in the French civil law countries respond to such a crisis by restructuring their assets in which the related businesses are acquired and unrelated businesses are divested. As a result, when there is a change in the competitive environment, the resources are allocated and synergies are established to enhance performance. Thus, the restructuring is considered to be highly beneficial to the French civil law countries as they have limited options to acquire resources from external resources such as capital markets.¹⁰ When there is a lack of asymmetry in investment and overseas trade, it becomes difficult for the firm to execute their commercial activities. For instance, due to the integration of Spanish and European firms, the authority of Spanish firms was reduced. The major reason behind it is that the role of the Spanish firm got restricted in development market institutions and filling the economic voids.¹¹ The financial distress creates negative implications by reducing flexibility and responses to competitive environment changes. Under such conditions, the enterprises that are associated with group affiliations face increased competition as compared to independent enterprises that are not associated with any group affiliations as they have more flexibility to make changes as per the level of competition. On the other hand, the flexibility aspect to change gets restricted under group affiliations. Therefore, it can be said that organizations respond differently to environmental opportunities and threats depending on the institutional setting.¹²

3.2 Analysis of the privatization of civil law and civilization of private law with reflective transactional law study

Transnational law is defined as a third category law that is related to a mix of international law, traditional law, and municipal law. It provides directives and specifications that are related to 'common core' rulings in the domestic legal systems and UNIDROIT Principles of International Commercial Contracts. It provides specifications related to standard agreement forms business conditions in the overseas business communities. Thus, the New Law Merchant formulated under transnational law promotes the privatization of civil law as it is based on transnational legal commandments.¹³

Transnational law is increasingly used in international trade as it is based on a quasi-legal trend of soft law. It includes two main aspects which are 'Lex Mercatoria' and 'Uniform Domain Name Dispute Resolution' that led to the formation of reflective transactional law. The Ancient Law Merchant was introduced by the European commercial courts as a general rule to resolve the disputes between the markets. Later on, under the New Institutional Economics, it also helped

⁸ Megginson, William L., and Jeffrey M. Netter. "From state to market: A survey of empirical studies on privatization." *Journal of economic literature* 39, no. 2 (2001): 321-389.

⁹ Wan, William P., and Robert E. Hoskisson. "Home country environments, corporate diversification strategies, and firm performance." *Academy of Management journal* 46, no. 1 (2003): 27-45.

¹⁰ Lubatkin, Michael H., Momar Ndiaye, and Richard Vengroff. "The nature of managerial work in developing countries: A limited test of the universalist hypothesis." *Journal of International Business Studies* 28, no. 4 (1997): 711-733.

¹¹ Guillen, Mauro F. "Business groups in emerging economies: A resource-based view." *Academy of Management Journal* 43, no. 3 (2000): 362-380.

¹² Khanna, Tarun, and Krishna Palepu. "Is group affiliation profitable in emerging markets? An analysis of diversified Indian business groups." *The journal of finance* 55, no. 2 (2000): 867-891.

¹³ Scott, Craig. "Transnational Law" as Proto-Concept: Three Conceptions." *German Law Journal* 10, no. 6-7 (2009): 859-876.

in reducing the transaction costs associated with the resolution of the cases. It specified the development of a legal system so that there is a formalization of the justice system transparently. It led to the introduction of German law in which judgments were passed through the Federal Court of Justice in Germany (BGH). The International Court of Arbitration of the ICC and the London Court of International Arbitration was established so that disputes related to international arbitration are resolved. It further led to the institutionalization of the UNIDROIT- and Lando-Principles so that there is 'codification' and compilation of cases. As a result, the Reflexive Transnational Law was introduced to determine the process of the leading cases and provide confirmatory of norms. It includes two parts such as privatization of civil law and civilization of private law so that a general framework of globalized trade is established.¹⁴

The Privatisation of Civil Law includes transnational regimes that are based on legal autopoiesis along with Uniform Dispute Resolution Policy (UDRP) guidelines related to New Law Merchant. However, the Privatisation of Civil Law resulted in complexity within the system as UDRP rulings were mainly related to the internet and its usages which acted in a self-reference form. On the other hand, the transnational law was based on the quasi-legislative Policy and Rule that provided directives related to online proceedings. The transaction cost that was charged for virtual adjudication was low and therefore, easily accessible for resolution purposes. Additionally, UDRP was formulated in an organized manner so that it could be implemented unilaterally as an obligatory process under Internet Corporation for Assigned Names and Numbers (ICANN's) discourse. On the other hand, 'lex mercatoria' is considered as a legal parasite that came into force because of piggybacking in the global commerce arena. It must be regulated by the World Commercial Court (WCC) and international public (UN) institutions to provide arbitral rewards. Thus, it can be said that transnational law acts as a legal autopsy that promotes legal certainty in the competitive environment.¹⁵

The Civilisation of Private Law asserts that the reflexive law includes several elements such as medieval customary law, transnational commerce, societal usage, and model. It is based on the traditional customary law known as 'Sachsenspiegel' that promotes community self-regulation by introducing a legal framework for public and private monitoring.¹⁶ The Civilisation of Private Law is also responsible for institutionalizing the constitution of freedom so that there is the modulation of the regulated discourse of the third party to promote the public good. Reflexive law is considered as a framework of the constitution procedure that promotes alternative dispute resolution during the arbitration. It led to the development of WCC that promoted global commercial activities and ensures that 'lex mercatoria' does not interfere with a ratio of arbitration. As a result, after the formulation of WCC, there was the development of model choice of law in the international business scenario.¹⁷ The workings of WCC can be compared with WIPO Arbitration Centre as it provides autonomy and expertise in trust development during global trade. Thus, it can be said that Civilisation of Private Law focused on protective state's policies that helped in eliminating issues related to multi-jurisdictional litigation.¹⁸

3.3 Comparison between the commercialization of civil law and civilization of commercial law

A civil litigation is related to people while commercial litigation is related to business. In certain terms such as an attorney, conduction of investigation, and researching, they are similar but differ in proceeding and jurisdiction context. In civil litigation, issues between two individuals such as landlords and tenants are resolved, while in commercial litigation, the issue between

¹⁴ Thornburg, Elizabeth G. "Fast, cheap, and out of control: Lessons from the ICANN dispute resolution process." *J. Small & Emerging Bus. L.* 6 (2002): 191.

¹⁵ Levy, J. "Precedent and Other Problems with ICANN's UDRP Procedure." *Cyberspace Lawyer* 6 (2001).

¹⁶ Teubner, Gunther. "Contracting worlds: the many autonomies of private law." *Social & legal studies* 9, no. 3 (2000): 399-417.

¹⁷ Calliess, Galf-Peter. "Reflexive transnational law: The privatisation of civil law and the civilisation of private law." *Zeitschrift für Rechtssoziologie* 23 (2002): 185-216.

¹⁸ Calliess, Galf-Peter. "Reflexive transnational law: The privatisation of civil law and the civilisation of private law." *Zeitschrift für Rechtssoziologie* 23 (2002): 185-216.

business and consumers, partners, employees, investors, and other stakeholders are resolved.¹⁹

Under the French Codifiers, the commercial code includes directives that deal with commercial business aspects so that businesses thrive and grow. On the other hand, the civil code is related to an individual legal status related to its birth, death, and the entire discourse. While focusing on the commercialization of civil law, it includes 'Formality and Parole Evidence' which states that the sale of real property must include printed standard forms of deeds of sales specifying deeds of sale warranty, and security.²⁰ For example, in the case of *Columbia Nitrogen Corp. v. Royster Co.*, the United States Uniform Commercial Code (UCC) did not take the old rule into account and emphasized the procurement of evidence to ensure that the contract was not ambiguous. On the other hand, in the case of the civilization of commercial law, it includes 'Formality and Exclusion of Parole Evidence' which states that the first law of regulation is formality executed before the notary public. It does not include any other evidence that is not mentioned in the formal document. For example, in Central America, notarial deeds are common when love and support are extended by a married man to his mistress. The notarial deed becomes an act of reassurance in terms of the nagging trust.

In the case of the civilization of commercial law and commercialization of civil law there is 'Application to Face-to-Face Transactions and Immediate Parties'. While focusing on the case of the civilization of commercial law, it includes code regulation to elucidate problems. It also includes reasons for the validity of contractual obligations so that there is no prohibition of the law and conduction of good morals and public order. On the other hand, in the case of commercialization of civil law, there is encouragement for conducting transactions between the parties even at distance. For example, UCC highly focused on establishing transactions between parties at a distance even when the interchanged correspondence was not clear.²¹

In the civilization of commercial law, cause, lesion, and just price are ascertained. The objective of the lesion is to provide protection against misappropriate exchange and receive between promises in the family property. For example, under articles 1118 and 1313 under the French Civil Code, the availability of rescission is based on legal association. On the other hand, in the case of commercialization of civil law, the cause of commercial contract is to be taken into account. It included abstract promise in which the third party is bound to the act irrespective of the underlying cause. Moreover, in the case of the civilization of commercial law, there is a lack of concern for Third Party Rights.²² For example, the French Civil Code focuses on the integrity of the family and does not lay much concern on the third party rights even the property included in the case is valuable. On the contrary, in the case of commercialization of civil, the concern of the Third-Party rights is taken into account. For example, under UCC, third party rights are protected under the bona fide agreement of trade of goods. It also includes negotiable terminologies that have been exchanged between the parties. Thus, it can be said that there is a major difference between civil and commercial as civil litigation focuses on resolving issues between individuals and commercial litigation focuses on resolving issues between businesses.

4 FINDINGS AND DISCUSSIONS

As per the above-discussed facts, it can be said that civil law and commercial law are important elements of the legal system that ensure that resolution is provided to people and businesses. Civil law provides rulings through which the disputes between individuals are resolved. It includes resolving conflicts that are related to family cases, divorce, succession & gifts, property, contract, and torts. On the other hand, the commercial is related to the resolving of issues that are faced by the business while carrying out business activities. It includes resolving conflicts that occur

¹⁹ Born, Gary B., and Peter B. Rutledge. *International civil litigation in United States courts*. Wolters Kluwer Law & Business, 2018.

²⁰ Cowan, Robin, Paul A. David, and Dominique Foray. "The explicit economics of knowledge codification and tacitness." *Industrial and corporate change* 9, no. 2 (2000): 211-253.

²¹ Komissarova, E. G., and O. A. Kuznetsova. "On the Internal Structure of Modern Private Law." *Perm U. Herald Jurid. Sci.* 42 (2018): 644.

²² Graziadei, Michele. "The structure of property ownership and the common law/civil law divide." In *Comparative Property Law*. Edward Elgar Publishing, 2017.

between business and employees, customers, suppliers, dealers, retailers, and other stakeholders. The study also examined facts related to the restructuring of asset and business group affiliation in French civil law countries and found that restructuring of asset is regarded as an important strategy by the business groups to avail market opportunities and respond to the turbulences of the competitive market conditions. By making use of the restructuring approach, the business groups make investments in other firms and sell out non-performing assets of their firms. As a result, when the market is stabilized, the businesses consolidate all their resources and enhance their performance significantly. The study also examined facts related to the privatization of civil law and civilization of private law with reflective transactional law study and found that the transnational private law helped in providing alternate dispute resolution by introducing the concept of reflexive law. It included the active involvement of dispute resolution bodies and private norms formulating agencies so that there is an introduction of an organized reflexive law perception. It helps in creating transparency in the international commercial arbitration by developing legal certainty in 'lex mercatoria' as an independent lawful system. The study established a comparison between the commercialization of civil law and the civilization of commercial law and found that both civil and commercial law have different perspectives and applications in terms of maintaining law and order within the community and economic realms.

5 CONCLUSION AND RECOMMENDATIONS

The maintenance of law and order within the country is essential to provide a peaceful and harmonious living environment to live and conduct business activities. To ensure a lawful and just economic and societal atmosphere, it is essential to implement commercial and civil law within the jurisdiction. Civil law is responsible for protecting the interests of the common people and commercial law is vital to protect the interests of the business firms. It was examined that the emergence of transnational private law has led to the privatization of civil law and civilization of private law which led to the provision of an alternative method of dispute resolution. It led to the introduction of reflexive law which helped in developing a concise between the New Law Merchant and global commerce activities. As a result, due to the implementation of the reflexive transactional law, there will be a development of transparency in the workings of international commercial arbitration which will reduce self-reference and promote legal certainty in lex mercatoria.

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