

民法第 166 條之 1 之立法政策評析*

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民法第 166 條之 1 自民國八十八年公布至今已近兩年，但仍尚未實施，而此間此一立法之當否卻引起了甚多學者之討論，並無定論。本文擬從法律之邏輯分析及立法目的之實質妥當性兩部分來檢驗民法第 166 條之 1 立法政策之當否。

在邏輯分析部分，本文分別從該條文本本身法律概念邏輯有效性以及在整體法律體系中是否符合上位概念（尤其是憲法原理原則）之要求，來探討其形式之有效性。其次在立法目的妥當性部分，本文首先本於相關經驗事實來驗證立法者或反對者就相關立法所假設之前提事實是否為真實，此一部分本文大量引用了司法院與內政部所公布之相關數據為分析基礎。其次，本文再依據目前之公證法制來探討立法者所用之強制不動產債權契約公證之立法方式，是否真能達到所欲求之減少相關契約虛偽、詐欺及推行拉丁公證制度之立法目的。最末本文再以經濟學上之供需法則 (law of demand) 與新制度經濟 (new institutional economics) 所持之理論基礎，分別來分析民法第 166 條之 1 施行後對於相關制度所可能產生之影響與成本效益之分析。

最後本文分析之結論為，為推行公證制度立法之重點應置於如何賦予經過公證之法律行為更高之法律效果，以提高當事人辦理公證之誘因，而非由國家公權力強制介入私人訂約之領域中。從而建議將現有民法第 166 條之 1 現有內容確實不當，或可委由司法機關將本條文解釋為訓示規定，或由立法者將該法條更改為「契約經公證者，推定其契約已成立」或「契約公證者，其契約視為已成立」。

關鍵詞：無效、拉丁公證制度、法律經濟分析、供需法則、新古典經濟學、新制度經濟理論、完全競爭力市場、不完全競爭市場、完全理性、受限制理性、交易成本、實質審查、形式審查

The Legislative Policy Analysis of Civil Law Article 166-1

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ABSTRACT

It has been nearly two years since the enactment of Article 166-1 of the Civil Code in 1999. However, the article has not been implemented since then, and yet it has aroused extensive academic discussions among researchers and scholars on the rightfulness of the legislation. This thesis tries to comment on the legislation policy concerning Article 166-1 of the Civil Code from the standpoints basing on both logical analysis of the concept of law and economic analysis of law.

First from the stand point of logical analysis, this thesis comments whether the legislation policy is consistent either with the logical validity of the concept of law itself, or with the constitutional principles. Furthermore, this thesis quotes abundant judicial statistics as the basis to empirically verify the hypothesis proposed by the legislators.

Second, this thesis challenges the belief that there are certain connections between enforcing mandatory notarization on real estate contracts and the decreasing of deceit and fraud within such contracts.

Finally, the writer expounds on the economic analysis of legislation policy of Article 166-1 of the Civil Code basing on the theory of new institutional economics and the law of demands.

In conclusion, this thesis explicates that in order to popularize the notarization system, the legislation should stress how to increase the vested utilities produced by the notarization to add inducement to people, rather than merely having government authorities interfering in private contracts.

Key Words: economic analysis of law, law of demand,
neoclassical economics, new institutional economics,
perfect market, imperfect market, complete
rationality, bounded rationality, transaction cost