The Evolution of Property Law in Taiwan: An Unconventional Interest Group Story

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Keywords

Interest group, efficiency, scholar, information costs, registration, boundary encroachment, use rights, security rights, ownership

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I. Introduction

This book chapter studies the evolution of statutory property law in Taiwan. That is, what drives the large-scale overhauls of the Book of Things—Book III of the Taiwan Civil Code—during 2007–2010 and whether the amendment produces more efficient legal rules. Unlike Demsetz (1967), Krier (2009), Levmore (2002), and others who study the evolution of property rights, this chapter focuses not on why resources change from being held in commons to being held exclusively by one or a few private parties, but on why statutory property laws are amended, which may or may not involve privatization.

Levmore (2002)'s analytical framework is the starting book for this chapter. Levmore (2002: S451) points out that “[t]he content of private property is itself a function of government, and virtually all legal moves need to be analyzed in terms of both transaction costs and interest groups.” This chapter will examine whether the statutory amendment was driven by interest groups, and to what extent the new law has increased economic efficiency. “Normative judgments about the role of government in maintaining and transforming property arrangements must depend on local evidence about given pieces of property, industries, and so forth” (Levmore 2002: S451). In order to unveil the driving force behind the amendment of property law in Taiwan, this chapter presents descriptive statistics and interviews, and digs into archives of legislative hearings and meeting minutes of the task force in charge of proposing bills to the legislature.

The transaction cost versus interest group stories can be aligned in another dimension: formal versus informal property rights. The transaction cost story more easily explains the emergence of informal property rights in “relatively close-knit, egalitarian communities” (Merrill 2002: S338), such as fur rights in Indian tribes (Demsetz 1967) and rights of parking space during storm in secondary streets in Chicago (Epstein 2002). Social norm theory could well complement the transaction cost story (for example adding in a norm entrepreneur) in explaining the emergence of property customs (Ellickson 1991). By contrast, interest group theory can more easily explain contemporary changes in formal property rights (particularly those through amendments of property-related statutes, such as land use regulations and civil codes). Since

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2 For the disconnection between the economics of property rights and the economics of property laws, see Lueck and Miceli (2007: 187).
3 Compare Wyman (2005)'s approach that emphasizes the role of political institution in establishing property rights (individual transferable quota in fishery) in order to increase
interest groups are more likely to benefit from privatization or reallocation of entitlements than devolution into commons (Levmore 2002: S429), and given that elected legislators generally do not amend law to improve efficiency (Levmore 2002: S428), we can expect that changes in property statutes tend to benefit the politically powerful at the expense of the politically weak.

Yet the Book of Things in the Taiwan Civil Code is no ordinary statutes. The Book contains many general and abstract doctrines such as the doctrine of first possession that is unlikely to greatly affect the wealth of many people. The costs of overcoming the collective action problem (Olson 2009) are likely to outweigh the tiny benefit each participant receives. Even for big landowners, statutes regarding property taxes, land use regulation, urban renewal, eminent domain, etc. involve higher stakes than the mostly “technical” stipulations in the Taiwan Civil Code. Thus, even though the politically powerful may be able to bully the politically weak, it might not worth the former’s time and resource to do that in amending the Taiwan Civil Code.

Against this backdrop, this chapter deals with the issue of who else then drives the legislative amendments in 2007–2010. After all, elected representatives, as part of the interest group politics, are unlikely to initiate by themselves the unsexy amendment of the Taiwan Civil Code, as that will not result in much campaign contributions or votes in the next election. My story is that the jurists drive the legal change. To be more exact, the scholarly judges and property law scholars dominate the amendment process.

One of the oldest and longest debate in law and economics is whether and why the judge-made common law tends to become more efficient over time, while the legislator-made statutes do not (e.g. Posner 1973; Priest 1977; Rubin 1977, 1982; Parisi 2004; Fon, Parisi, and Depoorter 2005; Ponsetto and Fernandez 2008; Niblett, Posner, and Shleifer 2010; Posner 2010; Zywicki and Stringham 2010; Garoupa and Ligüerre 2011). In the U.S., an alternative expression of this dichotomy is that private laws tend to be efficient while statutory regulations tend to be inefficient (Posner 2010: 714–16). When applying this framework to civil law countries, where statutes are sources of private law, the first-order inquiry is whether private laws (civil codes) will be efficient because it deals with civil matters or whether they will be inefficient because they are enacted by legislatures. Another dimension would be to ask in economic efficiency.

4 I use the term scholarly judges to describe judges who either serve as adjunct law professors or publish legal textbooks.
5 Compare Rubin (1982: 207) which contends that the statute-common law distinction is one in time. That is, “in the early period most law was efficient and most law was common law. In the later period, most law was inefficient and most law was statute law.”
private laws, regarding the same legal problem, whether the doctrine in American common law or that in civil law tends to be more efficient. Chang (2013a), for example, finds that a code-stipulated property doctrine, access to landlocked land, in several European and Asian civil-law countries are more efficient that its counterpart doctrine in the U.S. common law. Garoupa and Ligüerre (2011: 308–21) contend the superiority of French law in terms of efficiency over the American law. Arruñada and Andonova (2008: 83) point out that both common law and civil law at their inceptions in the nineteenth century were both efficient adaptation to the local circumstances, and the civil law countries in the nineteenth century reserved more rule-making powers to the legislature, instead of the court, to preserve the market.

My study here on the evolution of property law in Taiwan further complicates this debate. I find that the legislature rubber-stamped the proposed bill sent from the executive branch, and this highly technical and sophisticated bill is the brainchild of an official task force consisting of property scholars and judges. In other words, the depressing story usually told by public choice theorists, such as legislative changes reflecting the narrow interests of lobbying groups and donors of campaign funds, is not applicable here. If the prima facie case against statutes in terms of efficiency is lifted, can we make a general prediction as to whether statutes like this will be welfare enhancing? I am not ready to offer a grand theory. Yet my case study on the evolution of property law in Taiwan sings a positive note, as my observation is that the amendments of Book of Things are generally Kaldor-Hicks-improving. Of course, civil codes are special cases, so my findings may not be readily generalizable. But civil codes are important laws, so any theory on the general inefficiency of statutes should be able to explain them.

The structure of this chapter is as follows: Part II summarizes the current property law in Taiwan. Part III describes the changes of property law in 2007–2010. Part IV discusses whether the new the Taiwan Civil Code is more efficient than its predecessor. Part IV concludes.

II. OVERVIEW OF CURRENT PROPERTY LAW IN TAIWAN

The original Taiwan Civil Code was enacted in 1929 and went into force in 1930 when the Nationalist Government still reigned China. In 1949, the defeated Nationalist government brought gold, treasures from the Forbidden City, millions of soldiers and officials, and enacted codes to Taiwan. The Taiwan Civil Code, in

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Rubin (1982) has pointed out that there is no a priori reason for the inefficiency of statutes, but does not propose a general theory to predict the (in)efficiency of statutes.
particular, continued to be the private law of the land without interruption. The Taiwan Civil Code was drafted with the assistance of Japanese consultants, and is heavily influenced by German and Swiss civil codes (see, e.g., Tsai 2000:54–55). The drafters also incorporated in the Taiwan Civil Code the “dian right,” a traditional Chinese property right, and did not import usufruct and security interests that were adopted in the German Civil Code but distant from property practice in China.

The Taiwan Civil Code went through a major overhaul in 2007–2010 (see Part III). The pre-2009 Article 757 of the Taiwan Civil Code adopted a strict version of the *numerus clausus* principle (Merrill and Smith 2000; Hansmann and Kraakman 2002), but the 2009 amendment switched to a looser version under which property customs can create property forms. Nevertheless, so far courts in Taiwan have not yet formally recognized customary property forms, though they have done so implicitly (Chang 2014b). This part briefly overviews the property forms formally recognized in the Taiwan Civil Code as of 2014.

A. *Ownership and Registration*

Like other civil codes influenced by the German Civil Code, the Taiwan Civil Code contrasts ownership and possession (Chang 2014a). Ownership is a full title to real or personal properties, while possession, defined as actual control, is a fact. Like under the Japan Civil Code (Article 86) and China’s Property Law of 2007, land and fixtures (such as buildings) are separate things and thus can be (and not infrequently) owned by different persons. There are three types of co-ownership, tenancy-in-common (Chang 2012), owners-in-common (similar to but not exactly the same as joint tenancy), and condominium. As a snapshot, on Feb. 11, 2011, 20.5% of land parcels were co-owned, whereas 5.4% of apartments or houses were co-owned (see Figure 1 for the distribution of the number of co-owners).  

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7 I acquired a dataset from the Ministry of the Interior and calculate these statistics myself.
Figure 1: The number of co-tenants in co-owned land and apartment/house

Note: The unit for calculating co-owners in land is a land parcel with its own unique “land number.” The unit for calculating co-owners in non-land real properties is one ownership right. That is, if the whole building is subject to one ownership right, such as a house, the statistics here describe how many people share that right of ownership. If the building is a condominium, and divided into multiple apartments, because each apartment is subject to one ownership right, the statistics here describe how many people share that right of ownership in one apartment, not the ownership of the whole building.

Titles to, and lesser property interests of, real properties can be de jure transferred only after registration in the land registry. Taiwan, like Germany, adopts the Torrens registration system (Arruñada 2012: 72–73). Land registration is mandatory and the Department of Land Administration, Ministry of the Interior, has actively mapped land in Taiwan and put land in the registry. At the end of 2012, the total area of Taiwan is 36,192.82 square kilometers, of which 3,493,7.12 square kilometers are registered. That is, only 3.47% of land is unregistered (Figure 2), of which much is state land that is exempted by the

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8 For a cliometric study that shows that introducing land registration in Taiwan under Japanese rule in the early twentieth century had increased legal certainty to title and thus increasing farmers’ long-term investment, see Koo (2011).
Land Act for registration purposes. On the other hand, registration of fixtures is optional. Builders of their own houses, for example, can choose to leave their constructions off the registry, at the expense of not being able to transfer titles or establish lesser property interests de jure. Many developers do not register buildings, however, because they have failed to comply with the building code. That is, they cannot register even if they want to. (The tax authorities seek out these fixtures and put them in the “tax registry” to levy property taxes.) These kinds of fixtures, called “illegal buildings” in Taiwan (Chang 2014g) and “small properties” in China (Qiao 2014)(see also Qiao chapter in this book), cause courts in Taiwan a lot of trouble: numerous illegal buildings exist and were transacted, and yet legally speaking no formal property rights can change hand. Since late 1950s, Taiwan Supreme Court was forced to create a new type of property rights, called “de facto disposal right.” I will discuss this informal property rights in more detail in Chang (2014b).

Figure 2 Changes in percentage of registered land in Taiwan, 2005–2012

Data Source: Ministry of the Interior Statistical Yearbook. Percentage is calculated based on the assumption that throughout the years the total size of Taiwan is always 36,192.82 square kilometers.
B. Use Rights

The Taiwan Civil Code as of June 2014 acknowledges three types of *usufruct*, or use rights: *superficies*, easement, and agricultural right. *Emphyteusis*, or permanent tenancy rights, a traditional form that dates all the way to Roman law but rarely utilized nowadays (Hsieh 2007:26; Figure 3), was abolished in 2010 and replaced by the new agricultural right. As noted above, land and fixtures are separate real estates, which make *superficies*, or above-ground rights, a crucial right in land use planning (lease is a type of contract under the Taiwan Civil Code). A fixture owner will need a *superficies* to legally use the land underneath her building. *Superficies* is legally effective upon registration. When contracting over temporary immovable property uses, many property owners still use leases, which have only *in personam* effect, resulting in many lawsuits and disputes regarding tearing down of buildings, owners of which do not have the right to use the underlying land. Despite the ease of creating *superficies* and its in-rem effect, in recent years, perplexingly, there is a downward trend in using *superficies* until 2012 (Figure 4 and Figure 5). Implemented less than five years, agricultural rights have yet to prove their usefulness (Figure 6). Before 2010, easements (or servitudes) can be set between two land parcels. Now they can be set between any real property, such as between a house and a land parcel. Only easements appurtenant, but not easements in gross, are allowed (Su 2011:495–97). No-competition easement never takes off in Taiwan; even passage easements are not prevalent. As Figure 7 shows, easements are stunningly infrequently used, though a big jump in registration in 2013 is worth noting.

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11 Wang (2010:347–48) points out that the demise of *emphyteusis* should be attributed to the large-scale land reform in the 1950s, during which the land-use laws stipulated that tenants received ownership—through eminent domain and “givings” (Bell and Parchomovsky 2001)—after twenty years of leasing. Permanent tenants, as a result, essentially disappeared.

12 Above-ground rights are a literal translation. *Superficies* can in fact be established for developments below land surface. See Article 832 of the Taiwan Civil Code.

13 Article 425-1: “The land and the house on such land belong to one person, he transfers only the ownership of land of the house to the other, or transfers the ownership of land and house simultaneously or in sequence to the different persons, the lease is presumed to be constituted between the transferee of the land or of the house and the person of transferor, or between the transferee of the house and of the land in the duration of the use of the house. The limitation of the period in the first paragraph of Article 449 shall not be applied.”

Article 838-1: “Where the land and a building on such land are owned by the same person, a superficies is deemed to have been created and to exist at the time when the land and the building are thereafter sold by auction of compulsory execution to different bidder; and the rental, term, and scope of the superficies shall be determined by agreement between the parties. If such an agreement cannot be reached, the parties can apply to a court for a judgment determining these. The same rule shall apply when either the land or the building is auctioned.”

14 In 1999–2004, easements were established less than 300 times each year (Wang 2010:346).
The amended Taiwan Civil Code (Articles 799-1 and 859-4) and Condominium Administration Act enable developers and residents to use covenants running with real properties in planning and managing condominium or large-scale neighborhoods. Doctrinally, this is a break-through, but the market has not picked up this tool.¹⁵

Figure 3 Number of *emphyteusis* registration, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook

¹⁵ My conjecture is that developers use in-rem "condominium regulations" (allowed by Condominium Administration Act for two decades) instead of the new type of easement. In many scenarios, both function similarly.
Yun-chien Chang

Figure 4 Number of superfcies registration, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook
Figure 5 Number of land parcels affected by new *superficies* registrations, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook
Figure 6 Number of agricultural right registration, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook
Figure 7 Number of easement registration, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook

C. Securities Rights

The current Taiwan Civil Code specifies three types of securities rights: mortgage, pledge, and retention. Mortgage (called hypothec in European civil-law countries) is by far the most popular lesser property interests in Taiwan, with hundreds of thousands of registration filing to create new mortgages each year. There was a decreasing trend of using mortgage, again puzzling (Figure 8; Figure 9; Figure 10). The 2009 amendment, however, may have halted the slide. The number of registration filing for creating new mortgages and the number of land parcels or buildings newly subject to mortgage remain stable since 2009.

The 2009 amendment formally introduce a sub-type of mortgage into the code, maximum-amount mortgage. Despite the strict numerus clausus principle in the original the Taiwan Civil Code, courts and banks since the 1960s have recognized this form of mortgage rights (Chang 2014b), which softens the

16 Unlike many other civil law countries, the Taiwan Civil Code explicitly treats security rights as types of property forms, rather than contractual forms or intermediate forms (Chang and Smith 2013).
accessory principle to allow both parties to stipulate the maximum amount of credits in the loan contract, and the lender does not have to borrow out the full amount at the outset. Business lending often takes this form. By contrast, home mortgage is always in the form of the traditional mortgage. Home mortgage loans are heavily regulated even before the 2008 U.S. Financial Crisis. Home mortgage payments are generally amortized.

Figure 8 Number of mortgage registration, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook. Statistics include the number of ordinary mortgage and maximum-amount mortgage.
Figure 9 Number of land parcels affected by new mortgage registrations, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook. Statistics include the number of ordinary mortgage and maximum-amount mortgage.
Figure 10 Number of Apartment/House affected by new mortgage registrations, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook. For the definition of apartment/house, see the note accompanying Figure 1.

Both pledges of things and pledges of rights are allowed in the Taiwan Civil Code, and thus the objects of property rights do not have to be corporeal things. Pledge of rights is often used to borrow cash by pledging stocks. Pawn, the commercial pledge of things, is officially recognized by the Taiwan Civil Code in 2007 to be a special type of pledge, and is regulated separately. Pawn shops can be seen everywhere in Taipei City, the capital of Taiwan, with advertisements that claim “everything can be pawned.” Pawn shops are also in the business of chattel mortgage, which is recognized as a property form by Personal Property Secured Transactions Act. Right of retention is strictly speaking a statutory pledge given to creditors who happen to be in possession of the lenders’ movables when the latter

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defaults.

D. Dian, a Hybrid Form

A hybrid form, dian right, was rarely used in the past several decades. As Figure 11 demonstrates, dian rights are even more unpopular than the permanent tenancy right, and yet the legislature preserves this form and greatly amends the relevant stipulations in the Taiwan Civil Code, hoping to rekindle interests in dian right (Hsieh 2007:27). Dian right can be traced back to the Sung Dynasty in China (about 1000 years from now) (Huang 2001; Zhang 2011; Ellickson 2012), and was quite popular in Taiwan until 1923 (the later stage of the Japan colonization), when the Japanese government mandates abolishment of customary property forms and conformation with Japan Civil Code (Tsai 2000:51–52; Wang 1997:371; Wang 2010:348), which does not recognize dian right. Unreported statistics (from the Ministry of the Interior Statistical Yearbook) would show that a majority of dian registrations in 2005–2012 took place in Kinmen County, an offshore island that is very close to Mainland China and has never been ruled by Japan. This partly explains why dian rights are still used there.
Figure 11  Number of dian registration, by registration type and by year

Data Source: Ministry of the Interior Statistical Yearbook

III. THE REFORM IN 2007–2010

The Ministry of Justice, Taiwan (MOJ), is in charge of the enactment and revision of many laws in Taiwan, including the Taiwan Civil Code. In 1988, the MOJ organized a task force composed of judges and legal scholars to draft the proposed revisions of the Book of Things in the Taiwan Civil Code. After 300 meetings over 8 years, the bill was sent to the legislature, but was not passed. In 2003, the MOJ organized another task force to improve the bill. The revised bill was divided into three parts and sent out to the legislature separately. In 2007, 2009, and 2010, the legislature passed the part on securities, the parts on general principle and ownership, and the parts on usufruct and possession, respectively. Before 2007, there were 210 articles in the Book of Things and only one of them had been revised since its enactment in 1929 in China. After the 2010 revision, there were 277 articles in total—82 new articles were added and 15 articles

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18 Article 942 was revised in 1995 to correct a typo.
were deleted, and 135 articles were revised for 137 times. This part first describes the revision and then examines the driving force of it.

**A. Source of (New) Law**

Many laws in Taiwan were revised upon suggestions by the Executive Yuan (the cabinet) or the Judicial Yuan (responsible for supervising judges, etc.). Either Yuan generally sends to the legislature a document that starts with an executive summary that is followed by a table that contains three columns: the current statutes, the proposed revisions, and the “underlying reasons” for amendment, article by article. That is, each amended article is accompanied by its own underlying reason. These reasons are not official (i.e., the legislature does not pass these reasons), but they are good sources for probing into the driving forces of legal changes.

Table 1 shows the typology of changes in the Book of Things. Among the 179 articles that were substantively amended, the underlying reasons for 102 of them (57%) indicate the influence of domestic scholarly theories, domestic court precedents, and foreign civil codes. According to my interview with Hon. Tsay-Chuan Hsieh, the 77 articles that were substantively changed without a clear legal source might in fact have an implicit source or two, but the task force considered such sources as incomprehensive, so rather leaving out the source references. Note that although quite a few judges have served in the task force, and citing the precedents as the reason to amend statutory laws is quite reasonable, court precedents are only cited in 18 underlying reasons. By contrast, foreign laws are cited 59 times. Theories by law professors also feature in 45 underlying reasons.

Figure 12 breaks down the sources of the foreign civil codes. Japan Civil Code is the citation champion, but the citation number overstates its influence, as 12 references concern the new property form, maximum-amount mortgage,

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19 Two articles regarding finder-keeper rules were amended twice each during this time frame. The second revisions were initiated by legislators themselves, not the MOJ task force.

20 Hon. Hsieh is a former Grand Justice of the Constitutional Court and a member of the task force since 1988 (also chairing the 2003 task force).

21 I count the number of times using an article as one unit.
that the Taiwan Civil Code imported from the Japan Civil Code almost wholesale. The original Taiwan Civil Code was heavily influenced by German and Swiss Civil Codes, so their continued influence is not surprising—references to German Civil Code concentrate in stipulations regarding ownership and general principle. The Quebec and Dutch Civil Codes inspire the task force partly because they are relatively new.22 The underlying reasons accompanying stipulations regarding tenancy in common refer to multiple jurisdictions. In one interesting case (Article 943), the task force amends an article to defect from the Japan Civil Code and turn to the German and Swiss Civil Code.

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22 Interview with Hon. Hsieh.
Table 1 Type of and Reason for Amendment in the Book of Things in Taiwan Civil Code

<table>
<thead>
<tr>
<th>Type of and Reason for Amendment</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deletion</td>
<td>15</td>
<td>5.0</td>
</tr>
<tr>
<td>Textual amendment</td>
<td>40</td>
<td>13.3</td>
</tr>
<tr>
<td>Not amended</td>
<td>67</td>
<td>22.3</td>
</tr>
<tr>
<td><strong>Substantive changes</strong></td>
<td><strong>179</strong></td>
<td><strong>59.4</strong></td>
</tr>
<tr>
<td>Change without clear sources</td>
<td>77</td>
<td>25.6</td>
</tr>
<tr>
<td>Following scholarly theories</td>
<td>23</td>
<td>7.6</td>
</tr>
<tr>
<td>Following foreign laws</td>
<td>38</td>
<td>12.6</td>
</tr>
<tr>
<td>Following court precedents</td>
<td>6</td>
<td>2.0</td>
</tr>
<tr>
<td>Consistent with the civil code or other laws</td>
<td>8</td>
<td>2.7</td>
</tr>
<tr>
<td>Following scholarly theories and foreign laws</td>
<td>13</td>
<td>4.3</td>
</tr>
<tr>
<td>Following other combinations of scholarly theories, foreign laws, and court precedents</td>
<td>13</td>
<td>4.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>301</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

Source: author.

Figure 12 Number of references to foreign civil codes

Source: author.
B. Legislature as Rubber Stamp

The two MOJ-convened task forces worked in a similar fashion (Hsieh 2007:18–19): They met regularly to discuss the contents of the Book of Things, finished a first draft and circulated it widely to call for comments from other government agencies, professional guides and associations, and the civil society. Based on the comments received, they worked on a second draft. MOJ would send the second draft to the Executive Yuan and the Judicial Yuan, which in only very few circumstances made minor changes of their own, and then sent the legislative proposal to the legislature. That is, the legislature was basically reviewing a bill that scholarly judges and scholars shape.

Did the legislature reject the proposal as too ivory-tower? As Table 2 shows, it did not. 226 of the 232 articles (97%) that the task force proposed to amend were quickly or eventually passed as proposed. The legislature made all five substantive revisions in 2009 regarding mortgage. One explanation for the isolated activism is that a group of legislators proposed its own bill based on concrete proposals by an independent group of property researchers, so deviating from the task-force version is also low-cost. Another possible explanation is that mortgage stipulations may greatly affect the business models and/or revenues for banks and real estate developers; thus, they may have lobbied under the table for or against certain revisions. Nonetheless, the big picture is that the legislature is only rubber-stamping the proposal by the task force.
Table 2 Legislative (re)action to the proposed amendment by the task force

<table>
<thead>
<tr>
<th>Legislative action</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pass as proposed</td>
<td>226</td>
<td>75.1</td>
</tr>
<tr>
<td>Textual revision</td>
<td>1</td>
<td>0.3</td>
</tr>
<tr>
<td>Substantive revision</td>
<td>5</td>
<td>1.7</td>
</tr>
<tr>
<td>Amendment after own initiation*</td>
<td>2</td>
<td>0.7</td>
</tr>
<tr>
<td>Not amended</td>
<td>67</td>
<td>22.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>301</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

Source: author.

* Strictly speaking, the two self-initiating amendments are independent of the efforts by the MOJ to revise the Book of Things, as these two amendments are quick reaction to the popular outrage over a law student who found a lost object and requested a 10% payment allowed by the original law.

C. Legal Scholars as the Dominant Force

By now, it should be clear that scholarly judges and property professors (particularly the latter23) are the dominant force behind the evolution of property laws in Taiwan in 2007–2010. Scant, if any, evidence exists to support the conjecture that interest groups from the business sector exerted significant influence over the amendment. Seemingly neutral and highly technical, the amendment of the civil code in Taiwan appears to constitute an atypical phenomenon in the eyes of public choice theorists.

From the get-go, amending the Book of Things is the pet project of the legal elites, for doctrinal and other practical needs, rather than driven by the demand from the civil society or the business world.24 The Taiwan Civil Code was enacted in 1930 to govern resources in China. In the late 1980s it became clear that property transactions in the modern Taiwan society utterly square with the implicit assumptions of small-farmer, isolated economy in the original Book of Things in the Taiwan Civil Code. For one prominent example, when the second task force was formed, land registration was stored in electronic databases, and almost all land parcels were registered. The capacity of land registry has sky-rocketed as compared to that in 1930. Negligible expenses and the huge accompanying benefits of lowering information costs make it sensible to open

23 In the 2003 task force, a majority of the members are full-time property law professors.
24 Compare Posner (2010: 719) which discusses criminal codes are products of “broad” interest group.
the door for more information to be registered, and to make the registered information binding to third parties who are ignorant of the information.

A typical transaction cost story would by definition suggest that the new Book of Tings is more efficient, whereas a typical interest group story would cast doubt on whether the revised civil code increases social welfare. My story is at most an atypical interest group story. Law professors and scholarly judges could of course lobby for their own personal interests. But other than being known as the new framer of the revised Book of Things, the personal stakes involved in shaping the new civil code are rather low. As a result, these “framers’” worldviews might play a more important role. Their experience of pursuing a doctorate or master degree in law in foreign countries (most of them did) and the fact that the Taiwan Civil Code is modelled after European civil codes partly explain why foreign laws are frequently cited as authorities in the underlying reasons. Given that there are much more law professors than judges in the second task force, the worldview story may also explain why “the conventional wisdom among legal scholars” is cited more often than Supreme Court precedents, which are legally more authoritative and practically more influential—albeit often criticized as flawed by scholars.

The worldview story is agnostic about whether the new code is more efficient than the old code. As at least two members in the task force (Yeong-Chin Su and Jer-sheng Shieh) frequently draw on property law and economics in their own writings, it is not entirely crazy to hypothesize that changes in civil codes could be Kaldor-Hicks-improving. In the next part, I discuss whether the Taiwan Civil Code evolves toward a more efficient system.

IV. TOWARD A MORE EFFICIENT PROPERTY LAW

To render conclusive evaluation of whether Taiwan moves toward a more efficient property system is apparently beyond the scope of this book chapter. But I shall offer a general observation and discuss in more detail two examples in the following sections.

Generally speaking, the reform of the Book of Things increases efficiency. Most amendments “address local problems under local restrictions and specific determinants” (Garoupa and Ligüerre 2011: 291) and can be considered

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25 In her study on Constitutional Court Justices in Taiwan, W. Chang (2013) found that the experience of studying law abroad in a particular country statistically significantly affects which country’s laws or cases a Justice cites in her concurring or dissenting opinions.
successful. Regarding security rights, in particular the widely used mortgage
eights, the new law clarifies many doctrines and officially incorporates
maximum-amount mortgage and maximum-amount pledge of things. Legal
certainty generally increases asset values. In addition, while the numerus clausus
principle keeps information costs in check (Merrill and Smith 2000; Smith 2011),
the number of property forms in Taiwan is so few that “frustration costs” are
very high and desired transactions are hard to structure (Chang 2010). To matter
matters worse, without property-form trust and future interests, property law in
Taiwan is hardly recursive (Smith 2011). Arguably, the number of property forms
in Taiwan before 2007 is sub-optimal. The 2010 amendment expanded the scope
of easement (from between land parcels only to between all real estates26);
created a new form of superﬁcies, divided superﬁcies27 which can be established
on, above, and below surface; and got rid of the antiquated permanent tenancy
right, replaced by a new agricultural right that arguably ﬁts the current and
future needs of residents in Taiwan. Moreover, the new legal servitude of passage
document excludes the applicability to land that becomes locked due to voluntary
act, greatly reducing the possibility of opportunistic behaviors (Chang 2013a).
Sections A and B of this part will discuss two examples of efﬁcient amendment in
more detail.

One might bring the task force to task for not going far enough. Easements in
gross, reverse mortgages, real residential rights, etc. are not incorporated in the
Book of Things. Trust and lease remain partway between contract and property.
Despite the overly complicated stipulations regarding possession (Chang 2014a),
the possession chapter in the Book of Things underwent no fundamental change.
But considering the unprecedentedly large scale of reform and the many decades
the task force took to ﬁnish the project, their credits should not be taken away for
these omissions.

Certain changes, however, are inefﬁcient, and these changes appear to be
correlated with ill-adviced judicial precedents. Regarding prescriptive acquisition
of lesser property interests on registered immovable properties, the original
Taiwan Civil Code implicitly disallowed it, and yet a 1971 Supreme Court
precedent recognized it. While it might make sense more than 40 years ago to
twist the meaning of the law to allow such practice, given the comprehensive
digitization of land records in Taiwan and the rise of Google Map and Google

26 Note, however, that, according to my interview with an ofﬁcial responsible for real property
statistics in the Ministry of the Interior; no local government since 2011 has reported any
registration of easements between buildings.
27 See Articles 841-1–841-6 of the Taiwan Civil Code.
Earth along with land-record apps developed by Taiwan government, it arguably makes much less sense to deviate from the property rule as far as registered real estates are concerned (Chang 2014b). Yet the new Article 772 of the Taiwan Civil Code explicitly recognizes prescriptive acquisition of lesser property interests on registered real properties.

Co-ownership partition lawsuits are very numerous in Taiwan (more than 1000 lawsuits per year at the district court level; see Chang 2013). The original Taiwan Civil Code gave judges discretion to choose between partition in kind or partition by sale, and partial partition such as partition in kind with owelty is explicitly allowed, too. In the pre-amendment era, district courts have developed more than a dozen ways of partial partition methods and used them quite frequently (Chang 2012: 536). The Supreme Court, however, has long preferred partition in kind. The 2009 amendment obeyed the wish of the Supreme Court, ignoring that partition in kind is not always the most efficient way to dissolve joint interests (Chang and Fennell 2014).

Finally, Section 2 of the newly enacted Article 826-1 allows covenants to use co-owned movable properties between the co-owners to run to transferees, as long as the transferees know or could have known the existence of such covenants. This stipulation codifies the doctrine invented by Judicial Interpretation No. 349 by the Constitutional Court of Taiwan.28 The doctrine suffers from two problems (Chang 2011: 1278–80). First, for the co-owners who plan to contract for a covenant, the value of it is uncertain, as the covenant may not bind a good-faith transferee who could pop up anytime. Second, for many transacting parties who want no part of a restricting covenant, they will have to spend investigation costs to figure out whether any covenant exists (those who do not verify could be considered as the “could-have-known”). As far as movables are concerned, most of these investigations might be futile and investigation costs are thus wasted.

A. Reducing Information Costs and Inducing Cost-justified Information Gathering

The task force does not explicitly put reducing information costs in the center stage (reducing transaction costs does have a few cameo appearances in the underlying reasons), but quite a few new stipulations serve to reduce

information costs. In particular, the new Taiwan Civil Code allows several types of transactional terms (such as rent and limitations on the type of uses allowed) in superficies, servitude, agricultural rights, and mortgage to be registered, and these covenants, once registered, have in rem effect and bind transferees. This can in a sense be viewed as “contractization of property rights” that gives flesh to the bone provided by the numeros clausus principle. Although these stipulations cannot be used to create new property forms, they better empower transacting parties to tailor their needs in an in-rem fashion, and at the same time not over-loading informational burdens on potential transacting third parties. This shall enhance efficiency.

Traditionally, good-faith party is protected in property law, but the law and economic literature has started to distinguish between good-faith (without fault) and innocence (or negligently good-faith) (Landes and Posner 1996; Mackaay 2012; Sterk 2012; Chang 2013b). Innocent, or negligently good-faith, parties are those who could have known certain facts had they expended some costs in verification, and the expected benefit of verification is higher than the cost. The amendment of the Taiwan Civil Code is consistent with this line of research. In six new stipulations regarding both real properties and personal properties, parties who are bad-faith or “good-faith out of gross negligence” are treated equally—not protected. These stipulations shall induce relevant parties to verify titles and other information in a cost-justified way.

B. Boundary Encroachment

The old Taiwan Civil Code contained one simple article on boundary encroachment. The 2009 amendment expanded it to three sophisticated articles (Articles 796, 796-1, and 796-2). In the optional law terminology (Calabresi and Melamed 1972; Ayres 2005; Chang 2013c), the old Taiwan Civil Code gives the encroached party the choice between Rule 1 (with a minor prerequisite) and

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29 A law professor who served in the task force has emphasized the import of the expansion of register-able information (Su 2012: 477, 493).
30 See Articles 836-1, 836-2, 838, 850-3, 859-2, and 873-1 of the Taiwan Civil Code.
31 Article 826-1 of the Taiwan Civil Code allows registered covenants between co-tenants to run with the real properties (Chang 2012; Chang and Smith 2012). This can be used to create new property forms (Su 2012: 475–480). For example, John who wants to rent Mary’s apartment for residential use in property form can buy a small share of Mary’s apartment and use the co-tenant’s covenant to arrange the residential rights.
32 See Articles 799-1IV, 826-1I, 881III, 899III, 928II, and 948I of the Taiwan Civil Code.
33 Some articles use the phrase “could have known.”
34 As noted above, Article 826-1II suffers from other problems, not shared by other stipulations listed in footnote 32.
Rule 2, and the new Taiwan Civil Code tinkers with the prerequisite and adds a “safety valve” (Smith 2009a: 2128–29; 2013)—courts can remove the option of Rule 1 after considering public and private interests.

Specifically, the new boundary encroachment doctrine is as follows: the entitlement of the neighbor (whose land is trespassed) is generally protected by the property rule when the encroachment is intentional or grossly negligent, if the neighbor immediately objects to the trespass upon being aware of it. The entitlement, however, is only protected by the liability rule if the neighbor fails to promptly notify the negligent trespasser of her disapproval. And under the liability rule, the neighbor can either request the encroacher to purchase “the part of the trespassed land” and “the odd lot caused by the trespass” at a “reasonable price,” or request payment for her losses. As a “safety valve,” if the trespass is unintentional, the court, after taking into account public interests and both parties’ interests, may switch from the property rule to the liability rule. The boundary encroachment doctrines apply to residential buildings and apply mutatis mutandis to other types of buildings that are “similarly valuable.”

In Chang (2013d), I argued that the new boundary encroachment doctrine can better increase social welfare if the aforementioned stipulations can be interpreted in the following ways: First, no matter the construction is completed or not, the prompt protest rule applies. Second, under the liability rule, the encroacher should pay rent, rather than torts damages, to the neighbor. Third, the reasonable price should be fair market value, not the underassessed official land value currently used by the court. Fourth, the precondition for the court to use the safety valve is that the encroaching part of the building is more valuable than the part of the trespassed land. The “public interest” that the court should take into account is the social benefits external to both parties’ interests. Fifth, property owners usually attach subjective value to their residence. The “similarly-valuable buildings” that can be protected by Article 796 should have positive subjective value, too, whereas the “similarly-valuable buildings” that can be protected by Article 796-1 need to be valuable (with or without a positive subjective value).

It is worth noting that under the new doctrine, the prompt protest rule does not apply when the trespasser is bad-faith. This is an application of the ex ante viewpoint (Bebchuk 2001; Brooks and Schwartz 2005; Smith 2009b), which is emphasized by law and economics to increase long-term efficiency. One can reasonably agree or disagree as to whether the exception should also apply to negligently good-faith trespassers, given the fact that nowadays checking out real
estate information (including boundaries) in the registry becomes extremely easy in Taiwan (Chang 2013c), and official survey, which is generally required before a builder applies for a building permit, is inexpensive (less than $150 for most landowners) and definitive in setting land boundaries. A similar concern emerges as to whether the safety valve (a judicial taking of the neighbor’s right to exclude) is desirable when the trespasser is innocent but not good-faith.

Although ex post analysis usually takes the back seat in law and economics, in a world of positive transaction costs, ill-advised entitlement allocation by courts can still decrease efficiency. With the broad and general language of Article 796-1 of the Civil Code of Taiwan, courts in Taiwan essentially hold a blank check in determining whether to tear down the encroaching fixture. Did courts exert this power so as to increase social welfare? Chang (2014c) observed that they did. That empirical study uses a unique dataset that include the population of all cases rendered pursuant to Article 796-1 since it became effective in 2009 (until 2012); there are 157 observations. Using descriptive statistics and logistic regression model, Chang (2014c) finds that when the area of encroachment and the encroachment ratio is low, and the encroacher is not grossly negligent, courts tend to preserve the buildings.\(^{35}\)

V. Conclusion

The Taiwan story, particularly the part on amendments of the Taiwan Civil Code in 2007–2010, contributes to the law and economics literature in the following ways: legal scholars and judges can be effective in changing statutory laws. They can be considered as an atypical interest group. As members of the task force, scholars and judges have semi-official capacity. On the other hand, their proposal in no way binds the legislature. Indeed, when another group of

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\(^{35}\) In a sister article, Chang (2014f) finds that in 2002–2011, the encroaching constructions are mostly residential and non-residential buildings, rather than fixtures like fences or extensions like garages. During that time frame, courts in Taiwan determined boundary encroachment cases in the following pattern: If part of the buildings encroaches the land boundary, but tearing it down would not affect “the economic value of the whole building,” courts would order the encroaching part removed. Courts rarely explicitly consider whether the trespasser is intentional, (grossly) negligent, or no-fault. It is difficult for the encroachers to persuade the court that the neighboring landowners fail to protest promptly. Courts consistently use the product of official land value and an ad hoc yield rate as compensation to the landowners. The official value, however, is much lower than market value, and the yield rates (from 1% to 10%, with 5% and 8% as the modes) do not appear to correlate with any legitimate index or standard (Chang et al. (2014) finds that courts suffered from the anchoring effect in determining yield rates, the anchor being plaintiffs’ requests). Landowners seldom ask the trespassers to purchase the encroached land.
scholars proposed a bill of their own, the legislature made its only amendments to the task-force version of the bill. Hence, scholars and judges, particularly the former, could be considered as an interest group. One could also take the frequent references to academic writings as evidence that the task force behaves like an interest group.

To most, the term interest group connotes negative meaning, but interest groups do not always pursue narrow self-interests. With little personal stakes in the substantive contents of the Book of Things, the task force clears away anomalous doctrines, updates an oft-difficult-to-use code, and modernizes various stipulations. As a result of their efforts, the statutory amendment generally increases efficiency (yes, statutes can be efficient!). Ironically, in the few instances where the new law probably decreases social welfare, the task force drew on Supreme Court precedents as the rationales, and court precedents are the source of common law in the Anglo-American system. This book chapter does not argue that an exception in comparative law refutes the rule. Yet this study should at least be counted as a cautionary tale and add new fuels to the debate on the relative efficiency of court-made law and legislature-made law.
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