An Economic Analysis of the Article 826-1 of the Taiwan Civil Code: The Distinction between Property Rights and Quasi-Property Rights

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Abstract

Ever since J.Y. Interpretation No.349, which partially vacated a Taiwan Supreme Court precedent in force for 35 years, scholars in Taiwan have been debating whether "covenants to use co-owned property" should run with assets and bind share transferees. This issue links to a broader and even more fiercely debated issue, the distinction among contractual rights, property rights, and"propertized contractual rights" (or "quasi-property rights" in my term). In 2009, the Taiwan Civil Code added Article 826-1, which stipulates that covenants to use co-owned real property shall run with assets on the condition that they have been registered, while covenants to use personal property will bind share transferees only when they know or should have known the existence of such covenants. The design by Article 826-1 is different from both the Supreme Court precedent and J.Y. Interpretation No.349, raising questions regarding its desirability. In addition, Article 826-1 seems to make fuzzier the distinction among the three types of rights mentioned above.

Following the analytical framework laid out by Thomas Merrill and Henry Smith in a series of seminal articles, this article examines the above issue through law-and-economic perspective. I argue property right is different from a contractual right; therefore, Taiwan and other civil law countries alike should maintain the *numerus clausus* principle. Furthermore, "quasi-property rights" is not the only possible intermediate relation in the property/contract interface (as claimed by some Civil Law scholars). Merrill & Smith have found two types of

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intermediate relations (quasi-multitaland compound-paucital). One of this article's contribution is to point out that quasi-multital can further be categorized, with Article 425 of the Taiwan Civil Code, Article 826-1 II of the Taiwan Civil Code, and a recent Taiwan Supreme Court decision creating three different sub-types. I also argue that Taiwan's Supreme Court and lawmakers have neglected the importance of notice, thus creating or recognizing new forms of (quasi-) property rights that increases transaction costs between dealing parties and imposes higher information costs on third parties. Regarding the efficiency of Article 826-1 I of the Taiwan Civil Code, I argue that itsrequirement of registration as notice makes economic sense and facilitates the use of co-owned properties. It has been argued that Article 826-1 I can be utilized as a platform to create any type of new real property right. Although I agree that this is plausible, the current tax regime and Article 823's restraint on non-partition agreements shall prove to be significant hurdles to such arrangements. Therefore, new types of property forms, such as certain types of servitudes, shall be enacted into the Civil Code.

Keywords: Numerus clausus, covenant to use co-owned property, contractual rights, property rights, propertized contractual rights, quasi-property rights, in personam rights, in rem rights, registration, public notice, Article 826-1 of the Taiwan Civil Code