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# DOCTRINAL NORMS AND POPULAR ATTITUDES CONCERNING CIVIL LAW RELATIONSHIPS IN TAIWAN

Pitman B. Potter†

## I. INTRODUCTION

The dramatic economic success of the Republic of China (“ROC”) on Taiwan presents an important opportunity to reexamine the Weberian paradigm correlating economic growth and the rationality of formal legal systems.<sup>1</sup> Law in Taiwan is heavily institutionalized; formal codes are enacted and revised through legislative process and interpreted by a variety of formal courts of law attended by a technically proficient cadre of lawyers and judges.<sup>2</sup> This emphasis on formal law has been accompanied by a

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† Faculty of Law, University of British of Columbia. Portions of this paper were presented to the 1992 and 1993 Annual Meetings of the Association for Asian Studies and draw on my previous work on notions of equality and justice in the legal cultures of the PRC and Taiwan. See Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325 (1994) [hereinafter Potter, *Riding the Tiger*]; Pitman B. Potter, *Socialist Legality and Legal Culture in Shanghai: A Survey of the Getihu*, 9 CAN. J.L. & SOC’Y 41 (1994); and Pitman B. Potter, *Law and Culture in Chinese Society*, (May 1991) (paper presented to the International Conference on Values in Chinese Society, National Central Library, Taipei, Taiwan). This project has been made possible in part through the generous support of the Social Sciences and Humanities Research Council of Canada and the Center for Chinese Studies at the ROC National Central Library, for which I am deeply grateful. I would also like to thank the Chinese Canadian Institute of Arts & Science for their generous support.

1. Weber’s thesis has been applied often to societies in East Asia that are undergoing rapid economic growth. See, e.g., Carole Jones, *The Globalization of Rule of Law? Some Questions From Asia*, (Oct. 1-2, 1993) (unpublished manuscript presented to the Workshop on Globalization and the Future of Law in China, University of Wisconsin-Madison). For critiques of the Weberian paradigm, see Francis Snyder, *Law and Development in the Light of Dependency Theory*, 14 LAW & SOC’Y REV. 722 (1980).

2. See generally TRADE AND INVESTMENT IN TAIWAN (Herbert H.P. Ma ed., 2d ed. 1985); Herbert H.P. Ma, *General Features of the Law and Legal System of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN, *supra* at 1-54; and Hehsong Wang, *The Governmental Environment of Trade and Investment*, in TRADE AND INVESTMENT IN TAIWAN, *supra* at 101-52.

record of economic growth that remains the dominant emblem of development in Asia.<sup>3</sup>

However, there is little reason to assume a causal relation between these two phenomena without a better understanding of the effect of the formal legal system on behavior in society. This requires, in turn, an examination of the extent to which members of society assimilate the formal aspects of Taiwanese law. This paper examines popular attitudes concerning the structure and consequences of civil relationships in the context of doctrinal norms regarding contract, unjust enrichment, and property. This study seeks to promote further understanding of the behavioral implications of legal doctrines that have particular relevance for economic activity.

### A. BACKGROUND TO LEGAL CULTURE IN TAIWAN

Attitudes concerning law are an important component of legal culture.<sup>4</sup> Legal culture in Taiwan depends, in part, on the historical context of the development of the ROC Civil Code. The ROC government has long adopted a positivist approach to law, using it to express and effectuate policy goals, although with limited success.<sup>5</sup> Once established on Taiwan, the ROC government created laws that implemented policies emphasizing capital accumulation and industrial development.<sup>6</sup> Creation of a local market system and private sector economic activity<sup>7</sup> required recognition and enforcement of private obligations in ways that had not been evident previously. Policy priorities regarding the creation of a nationally integrated economy required rule-making on a national scale for private transactions.<sup>8</sup> Pursuant to pol-

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3. See generally S.W.Y. KUO ET AL., *THE TAIWAN SUCCESS STORY* (1981); THOMAS GOLD, *STATE AND SOCIETY IN THE TAIWAN MIRACLE* (1986); *Taiwan: Economic Plan 1990-1993*, E. ASIAN EXECUTIVE REP., Apr. 15, 1990, at 8.

4. For a discussion of legal culture, see LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (1975), wherein legal culture is depicted as entailing "customs, opinions, ways of doing and thinking." For the application of Friedman's approach to China, see Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 333 (1991). See generally HENRY W. EHRMANN, *COMPARATIVE LEGAL CULTURES* (1976); MARY ANN GLENDON, *COMPARATIVE LEGAL SYSTEMS* (1986); *COMPARATIVE LEGAL CULTURES* (Csaba Varga ed., 1992).

5. See, for example, SUSAN MANN, *LOCAL MERCHANTS AND THE CHINESE BUREAUCRACY, 1750-1950* (1987), for a discussion of the Republican government's failure in the 1930's to effectively impose its tax policies at the local level.

6. See, e.g., CAL CLARK, *TAIWAN'S DEVELOPMENT: IMPLICATIONS FOR CONTENTING POLITICAL ECONOMY PARADIGMS* (1989).

7. GOLD, *supra* note 3, at 126-27.

8. See Shieh Song-tau, *Chung-hwa Min-kuo Hsien-fa yu San Min Chu-i [The Constitution of the Republic of China and the Three Principles of the People]*, HWA KANG FA K'O HSUEH-PAU [HWA KANG J.L. & SOC. SCI.], Mar. 1985, at 101, 110 [hereinafter *Constitution*]; see also Li Shao-shen, *Min-sheng Ching-chi Chih Li*

icy goals aimed at achieving a "planned free economy," the regulatory framework promoted expansion of private enterprise, protected private property, and encouraged pursuit of private profits.<sup>9</sup> Attention was also given to the free flow of goods and finance,<sup>10</sup> as well as to the growth of an export-oriented economy.<sup>11</sup>

This positivist approach contradicted existing customs. In particular, the regime confronted civil customs that varied significantly from the doctrinal tenets of the ROC Civil Code.<sup>12</sup> These customs posed significant obstacles to the popular assimilation of the official doctrines of civil law. Accordingly, examination of legal culture in Taiwan must address not only the formal doctrinal provisions of law, but also the extent to which they have been assimilated into popular attitudes.

#### B. EQUALITY AND JUSTICE: DOCTRINAL RESPONSES TO STRUCTURE AND CONSEQUENCE IN CIVIL LAW RELATIONS<sup>13</sup>

Of particular interest in the study of legal culture in Taiwan are questions about the structure and consequences of legal relationships and corresponding doctrines and attitudes concerning equality and justice. Although generally associated with European and North American ideals about the rule of law, notions of equality and justice can be applied as well to Chinese legal culture. Views about equality reflect presumptions concerning the structure of civil and economic relationships, which are then given doctrinal expression in the context of legal relationships.<sup>14</sup> Notions of justice involve ideals about right and wrong in the

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*hsiang Yu T'ai-wan Ti-chu Ching-chi Hsien-tai-hwa* [The Ideal of the People's Livelihood and the Economic Modernization of Taiwan], HWA KANG FA K'O HSUEH-PAU [HWA KANG J.L. & SOC. SCI.] Mar. 1985, at 189 [hereinafter *Ideal and Modernization*].

9. *Ideal and Modernization*, *supra* note 8, at 199.

10. See generally *Constitution*, *supra* note 8, at 101.

11. CLARK, *supra* note 6, at 229.

12. See, e.g., SSU-FA HSING-CHENG PU [DEPARTMENT OF JUSTICE AND ADMINISTRATION], T'AI-WAN MIN-SHIH HSI-KUAN TIAO-CH'A PAO-KAO [REPORT ON INVESTIGATION OF CIVIL CUSTOMS IN TAIWAN] (1968).

13. This section draws on my previous work presented in Potter, *Riding the Tiger*, *supra* note †, at 328-29.

14. For a general discussion distinguishing between equality as entailing autonomy of individuals from the state, and equality that embraces only the relationships between members of society, see John Keane, *Despotism and Democracy: The Origins and Development of the Distinction Between Civil Society and the State 1750-1850*, in CIVIL SOCIETY AND THE STATE: NEW EUROPEAN PERSPECTIVES 35, 35-71 (John Keane ed., 1988); SAMUEL C. COVAL & JOSEPH C. SMITH, LAW AND ITS PRESUPPOSITIONS: ACTIONS, AGENTS AND RULES (1986); and ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM (1970).

evaluation of the consequences of these relationships.<sup>15</sup> Ideas about equality and justice are closely intertwined, such that ideals of justice serve as a standard against which presumptions of equality are evaluated.<sup>16</sup>

Notions of equality and justice are particularly useful in examining doctrinal and cultural approaches to civil law relationships. The formation of civil obligations reflects the structure of the relationship between the parties. Doctrinal norms governing formation often depend on notions about the equality of the parties' relationship. The law's recognition of each party's capacity to enter into an obligatory relationship reflects conclusions about the extent of equality between actual and potential parties. Thus, doctrinal rules about legal capacity spring from presumptions concerning equality.

The enforcement of civil obligations, on the other hand, involves the consequences of these relationships. These consequences derive from structure and thus are often considered appropriate to the extent that the doctrinal norms governing formation are satisfied. Yet there may also be independent doctrinal norms governing the consequences of civil obligations. An obligation that is recognized as valid with respect to capacity and procedure may still face obstacles to enforcement if the result is considered unjust. Thus, doctrinal norms concerning justice in the consequences of civil obligations serve as a counterweight to norms about equality in structure.

In addition, doctrinal provisions on civil obligations, as well as property, family, and inheritance relationships, may address issues of equality and justice directly, thus providing a broader set of principles to compare with popular attitudes.

## II. NOTIONS OF EQUALITY AND JUSTICE IN TAIWANESE CIVIL LAW

The ROC Civil Code ("Civil Code") contains separate chapters on Obligations, Rights Over Things, Family, and Inheritance, each of which offers useful insights into the doctrines governing civil relationships.<sup>17</sup> The Civil Code section on General Princi-

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15. For further discussion of values about justice, see generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) and JOHN RAWLS, *Justice as Fairness: Political Not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223 (1985).

16. See generally Richard Wilson, *Reconciling Universalism and Relativism in Political Culture: A View Based on Economic and Psychological Perspectives*, 50 *J. ASIAN STUD.* 53 (1991), in which Wilson juxtaposes an ethic of autonomy with an ethic of care as alternative modes of social orientation. These may also be viewed as consequences of the interplay between ideas about equality and justice.

17. All citations to the Min Fa (ROC Civil Code) can be found in TSUI HSIN TSUNG HO LIU FA CH'UAN SHU; YAO-CHIH TSENG-PIEN P'AN-CHUEH CHIH-YIN FA-

ples provides overall interpretive guidance, while the substantive chapters cover rules governing the civil relationships themselves.

#### A. GENERAL PRINCIPLES

The Civil Code's general principles focus on legal actors and their behavior by reference to the centrality of natural and legal persons and the significance of the legal act (*fa-lü hsing-wei*), which is deemed to result from free will. The Civil Code refers to the notion of "purposeful action" (*you yin hsing-wei*) separately from the issue of "desire" (*yu*) in describing the kinds of acts that are considered to have legal effect.<sup>18</sup> By focusing on purpose divorced from desire, the Civil Code expresses a belief that persons are responsible for their own purposeful acts regardless of whether they actually desire to bring about the consequences of such acts. This approach may generally be viewed as emphasizing personal autonomy—people act purposefully because they have the autonomy to do so, and so they bear responsibility for their acts. From these basic principles emerge additional doctrinal ideas about the structure and consequence of civil law relationships.

#### B. CIVIL OBLIGATIONS

In addition to being subject to regulatory provisions set forth in the Administrative Law section of the so-called Six Laws, which focuses on activities within enterprises and on relations between enterprises and the government, civil obligations are also more broadly subject to the provisions of the Civil Code Chapter on Obligations.<sup>19</sup> Interpretations of the Chapter on Obligations, through case decisions and otherwise,<sup>20</sup> provide additional indicators of official doctrine.

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LING YUAN-YIN SHIH-HSIANG YIN-DE [THE LATEST COMPREHENSIVE SIX LAWS: EXPANDED COMPILATION OF IMPORTANT EDICTS, JUDGMENT PRECEDENTS, STATUTORY CITATIONS, ITEMIZED CITATIONS] (T'ao Pai-ch'uan et al. eds., 1990) [hereinafter SIX LAWS]. Additional doctrinal provisions are derived from (i) official interpretations of the Code; (ii) case decisions by the Supreme Court and other appellate tribunals; and (iii) scholarly interpretations by legal academics in Taiwan. Since the Wade-Giles romanization system is used in Taiwan, I shall use it here when referring to Taiwan source materials.

18. See MIN FA, bk. 1 General Principles, ch. 4 Legal Acts (Reasoning), reprinted in SIX LAWS, *supra* note 17, at 160-61.

19. See MIN-FA, bk. 2, Chai-pien, reprinted in SIX LAWS, *supra* note 17, at 181-291. See generally Pitman B. Potter, *Taiwan Contract and Sales Law*, in FOREIGN TRADE AND INVESTMENT LAW IN THE REPUBLIC OF CHINA 191 (Mitchell Silk ed., 1994).

20. All case citations used in this chapter are to ROC Supreme Court Cases. These decisions are reported in government publications such as *Ssu-fa pu kung-pao* [Ministry of Justice Gazette] and law journals such as *Fa ling yue-k'an* [Laws and Edicts Monthly] and *Fa-hsueh ts'ung-k'an* [literally Compendium of Jurisprudence,

The formation of obligations depends on the type of obligation at issue. While the person involved in the creation of the obligation may be either a natural or legal person, and the legal effect of the person's legal act depends on the nature of the act as well as the character of the person, the factors that affect creation of the obligation depend to a larger extent on the character of the obligation. Thus, the Book on Obligations provides for five bases for formation of obligations: (a) contract; (b) delegation; (c) management of affairs without mandate; (d) unjust enrichment; and (e) tort.<sup>21</sup> Contracts and unjust enrichment are two categories of obligations that are of particular interest in the context of notions about equality and justice because they relate to the structure and consequence of civil law relationships.

### 1. *Contract Obligations*<sup>22</sup>

The general principles governing formation of contract obligations suggest an effort to balance the conflicting imperatives of autonomy and community. On the one hand, the principles of freedom of contract are rooted in notions of free will and autonomy.<sup>23</sup> The formation of contracts is based on agreement by the

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but translated officially as *China Law Journal*]. They are also reported in compilations of precedents, such as MIN HSING SHIH FA-KUI P'AN-CHIEH YE-SHU [PROFESSIONAL VOLUME OF JUDICIAL INTERPRETATIONS OF CIVIL AND CRIMINAL LAW] (Ts'ai Tun-ming ed., 1982) [hereinafter JUDICIAL INTERPRETATIONS]; MIN SHIH FA TS'AI P'AN YAO-CHIH KUANG-PIEN [EXTENSIVE COLLECTION OF ARBITRAL AND ADJUDICATIVE PRECEDENTS IN CIVIL LAW] (Tai Sen-hsiung ed., 1982) [hereinafter ARBITRAL AND ADJUDICATIVE PRECEDENTS]; and TSUI-KAO FA-YUAN MIN HSING SHI P'AN-LI CH'UAN-WEN HUI-PIEN [COMPILATION OF THE COMPLETE TEXTS OF SUPREME COURT CIVIL AND CRIMINAL PRECEDENTS] (Sup. Ct. Editorial Comm. for Sup. Ct. Precedents ed., yearly) [hereinafter CIVIL PRECEDENTS]. Other compilations cited include TSUI-KAO FA-YUAN PAN-LI YAO-CHIH [SUPREME COURT PRECEDENTS] (Lin Yang-kang ed., 1990) [hereinafter SUP. CT. PRECEDENTS] and MIN-FA GE-AN HSUAN CHUANG SHI-WU [PRACTICUM OF SELECTED PLEADINGS IN VARIOUS CIVIL LAW CASES] (Chen Ch'in-yuan ed., 1991) [hereinafter PRACTICUM OF PLEADINGS]. Case decisions are cited by case number, year of decision, and reporting source. In addition, the Civil Affairs Chamber (*Min shih t'ing*) of the Supreme Court issues authoritative interpretations that determine the application of the Chapter on Obligations to specific cases. These decisions are found in TSUI-KAO FA-YUAN MIN HSING SHIH T'ING HUI-I CHUEH-I CHIH CH'UAN-WEN HUI-PIEN [COMPILATION OF COMPLETE TEXTS OF DECISIONS OF THE SESSIONS OF THE CIVIL AND CRIMINAL CHAMBERS OF THE SUPREME COURT] (Sup. Ct. Editorial Comm. ed., 1989) [hereinafter SESSION DECISIONS] and in ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra*.

21. See generally TSENG LUNG-YU, MIN-FA CHAI-PIEN TSUNG-LUN [GENERAL THEORY OF THE BOOK ON OBLIGATIONS OF THE CIVIL CODE] 13 (1989).

22. This discussion relies heavily on my chapter on contract and sales law. Potter, *supra* note 19.

23. Taiwanese contract law borrows from continental theories of free will and private autonomy and espouses the primacy of freedom of contract as the basis for creation and enforcement of private obligation. See generally Lee Wenyi, *Developing Contract Theory in a Changing Society: Standardization of Contracts in the Tai-*

parties, expressed either directly or implied through behavior, which must extend to all essential terms.<sup>24</sup> Thus, in the formation of contract obligations, the parties are bound to their obligations because their agreement to contract is deemed to result from the exercise of free will.

Once the contract is formed, it is considered to be a matter of private law, containing rules that the contracting parties have set for themselves.<sup>25</sup> Each party's capacity to make these private rules and their right to demand performance of them derive from presumptions about the structure of the parties' relationship. These presumptions are expressed through doctrinal indicators of equality, such as the concept of the objective equality of legal and natural persons. This presumption of equality is underscored by provisions limiting the court's authority to supply contract terms. Judicial interference in the fundamental contract provisions is generally not permitted. The court may supply nonessential terms when necessary to avoid ambiguity<sup>26</sup> and may interpret the scope of the contract based on the circumstances,<sup>27</sup> but these are "gap-filling" provisions that do not permit courts to disregard or replace the basic agreement. The court generally cannot mod-

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wan Marketplace and the Growth of Consumer Protection (1981) (unpublished Ph.D. Dissertation, University of Washington). The underlying conceptual foundations owe much to the civil law traditions of Germany and France. See generally SHIH SHANG-KUAN, CHAI-FA TSUNG-LUN [GENERAL TREATISE ON THE LAW OF OBLIGATIONS] 1, 1-7 (1972); Jen Yang, *Contract Law of the Republic of China, in TRADE AND INVESTMENT IN TAIWAN, supra* note 2, at 361.

24. See MIN FA, arts. 153-66, *reprinted in SIX LAWS, supra* note 17, at 181-83.

25. See Case No. 1672 of 1972, JUDICIAL INTERPRETATIONS, *supra* note 20, at 227. This private law character of contracts is somewhat illusory, as the state recognizes and enforces the contract rights and obligations of the parties through the mechanism of the courts and the Law of the ROC on Enforcement of Performance (*Chung-hua min-kuo ch'iang-chih chih-hsing fa*). For a discussion of modern critiques of the distinction between public and private law, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 102-09 (1987). In theory, however, the private law nature of contracts means that the rights and obligations expressed in the contract are created and enforced based on the parties' agreement, rather than on legal public rules that govern the relationship between the parties and the government. To the extent that contracts are subject to state regulation, this affects the initial validity of the contract. Once formed, however, the state no longer intervenes in the relationship, except to enforce the rights and obligations that the parties have already set for themselves. See generally KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1949).

26. See MIN FA, art. 153, art. 153 cmt, *reprinted in SIX LAWS, supra* note 17, at 181. In a case involving a shipping contract, the court imposed on the carrier implied duties that the contract did not address. See Case No. 2715 of 1982, SUP. CT. PRECEDENTS, *supra* note 20, at 84.

27. Thus, in a case involving a real estate agency contract, the court held that the agency fee set in the contract applied to all sales made through the efforts of the agent pursuant to the contract. See Case No. 3638 of 1980, ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra* note 20, vol. 1, at 373-74.



ify contract terms to avoid a hardship to the other party, even if this modification would achieve the court's goal of fairness.<sup>28</sup>

Presumptions about equality are also evident in provisions stating that the obligations of the contracting parties are mutually dependent but not mutually exchangeable.<sup>29</sup> Thus, a contract obligor bound to tender performance is also an obligee entitled to receive performance. The Civil Code permits a party to a mutual contract to refuse to tender performance until the other party also performs.<sup>30</sup> The Civil Code recognizes exceptions to the mutuality of performance rules when the contract so requires.<sup>31</sup> The contract parties are deemed equal in their relationship to each other, and so inequality in the contract terms is deemed the just consequence of their free decisions. Thus, the equality of the parties in negotiation takes precedence over their inequality in the contract terms—in effect the parties can agree to give up their respective rights to equal treatment under the contract.

Even where derogation of contracts is permitted, such derogation remains confined within the doctrinal discourse of free will and the assumptions about structural equality that it entails. For example, the object of a contract must be feasible, certain, and appropriate (*t'uo-tang*) to law and society.<sup>32</sup> While this requirement might justify judicial intervention based on subjective assessment of the obligation, it is seldom used. Rather, the basic premises of equality, free will, and responsibility, which underlie the orientation toward autonomy in contract formation, remain powerful shields against external intrusion in contract terms. In cases where the circumstances, including the contract's content, suggest a lack of free will—such as situations where impaired capacity, mistake or deception are evident—the Code will permit

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28. Thus, in a lease contract, the court cannot order the lessor to continue to lease part of the property to the lessee in order to prevent the lessee from losing the land. See Case No. 732 of 1958, JUDICIAL INTERPRETATIONS, *supra* note 20, vol. 1, at 338.

29. For an extensive discussion of the mutuality of obligations concept, see Wang Tse-chien, *Min fa ti erh liu ssu t'iao kuan-yu shuang wu ch'i-yueh t'ung shih lu-hsing k'ang-pien kui-ting chih shih-yung, chun-yung yu lei t'ui shih-yung* [The Applications, Uses, and Use by Analogy of the Provisions of Civil Code Article 264 Concerning Simultaneous Performance of Mutual Obligations Contracts] FA HSUEH TSUNG-K'AN [CHINA L.J.], Apr. 1988, at 17.

30. See MIN FA, art. 263, reprinted in SIX LAWS, *supra* note 17, at 207.

31. If the contract requires one party to perform first, then the mutuality of performance provisions will not apply. See Case No. 2351 of 1967, ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra* note 20, vol. 1, at 969. In cases where the financial condition of one of the contract parties has declined after the conclusion of the contract and made its performance problematic, the other party may refuse to perform further until receiving performance or security from the financially troubled party. See MIN FA, art. 265, reprinted in SIX LAWS, *supra* note 17, at 207-08.

32. See SHIH, *supra* note 23, at 223-24.

the premise of free will to be reexamined.<sup>33</sup> These limited exceptions and the doctrinal presumptions on which they are founded serve to entrench notions about structural equality. The qualifications on the notion of autonomy in contract formation demonstrate recognition that, despite such autonomy, there may exist impediments to the exercise of free will. Nonetheless, the basic assumption remains focused on the autonomy of legal actors (natural and legal persons) to engage in legal acts and to bear responsibility for them.

Thus, contract formation doctrine in the ROC Civil Code emerges against a backdrop of policy priorities supporting economic growth as expressed through continental civil law language. Presumptions about structural equality between the parties permit contracts to be viewed as private obligations, derived from both parties' equal capacity to determine contract terms. Once a contract is validly formed, justice requires enforcement at the obligor's cost regardless of the subjective balance of obligations under the contract. Although the mutuality provisions discussed above make performance conditional, they do not require analysis of the substantive content of the parties' respective obligations.

## 2. *Unjust Enrichment*

In contrast to contract relations, which are functions of the need for certainty in economic and commercial relations, unjust enrichment represents an attempt to lend legal force to what are essentially moral and equitable obligations. The doctrine of unjust enrichment is thus a product of the legalization of equity.<sup>34</sup> The doctrinal focus is less on the parties' equality and the concomitant primacy of their autonomy and more on the imperative of achieving fairness. The Civil Code provides that unjust enrichment occurs when, without operation of law, a party suffers loss and another is benefitted, and the court cannot properly refuse

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33. See [1 CHI-PEN LI-LUN, CHAI CHIH FA-SHENG] [1 BASIC THEORY AND THE CREATION OF OBLIGATIONS] WANG TSE-CHIEN, MIN-FA CHAI-PIEN TSUNG-LUN [GENERAL THEORY ON CIVIL LAW OBLIGATIONS] 71 (1992).

34. See generally WANG TSE-CHIEN, *Pu tang teh-li chih-tu yu heng-p'ing yuen-tze: Ting-tso jen yi min-fa ti wu yi yi 'iao kui-ting chung-chih ch'i-yueh shih, ch'eng-lan jen chiu ch'eng-lan kung-tso chih ch'uan-pu chih-ch'u fei-yung te chu-chang pu tang teh-li fan-huan ch-ing-ch'iu ch'uan?* [Unjust Enrichment and the Equity Principle: When the Client Terminates a Contract Pursuant to Article 511 of the Civil Code, Does the Contractor Have the Right Under a Claim of Unjust Enrichment to Request Reimbursement for All Expenses Paid in Connection with the Contracted Work?], in MIN-FA HSUEH-SHUO YU P'AN-LI YAN-CHIU [STUDY AND DISCUSSION OF CIVIL LAW AND RESEARCH ON CASES] 177, 198-99 (1991) [hereinafter WANG, *Unjust Enrichment Rights*].

to make restitution to the injured party.<sup>35</sup> Thus, unjust enrichment has been invoked in cases involving mistaken registration of property<sup>36</sup> and partial performance of contracts,<sup>37</sup> as well as disputes over commonly held property, debts, and product quality.<sup>38</sup> In these cases, the examination generally turns on whether the benefit to one party and the loss to the other occurred through operation of law. If so, the claim of unjust enrichment must fail, and the plaintiff's remedy must be found in those provisions of law which generated the loss and benefit. In general, this will give primacy to the notion of autonomy and free will in legal acts. If the benefit and loss are not created through operation of law, then the court may examine the basic equities of the case and possibly require restitution to the injured party. Thus, in contrast to contract formation, where the parties' free will is the source of the legal validity of the obligation, the obligation in unjust enrichment cases arises against the will of one of the parties.

Also, in contrast to contract formation doctrine, the doctrine of unjust enrichment places primary importance on the values of the community over the autonomy of the parties. Once it is found that the benefit and loss at the core of the enrichment did not arise through process of law, examination of the basic equities of the parties' transaction is permitted. In effect, the unjust enrichment doctrine allows an examination of basic fairness once legal obligations based on autonomy are not at issue. In turn, the examination of basic fairness involves a process of examining the relationships between the disputing parties and adjusting the obligations according to community-based notions of fairness. The benefitted party cannot rest on the argument that the injured party had autonomy to act, had free will to acknowledge and avoid risk, and therefore has responsibility for resulting losses. Rather, community-based notions of fairness are imposed on the transaction in order to produce what is deemed to be a "just" result.

The doctrines under the ROC Civil Code relating to the formation of contracts and the recognition of unjust enrichment involve complementary notions of equality and justice, as well as

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35. See MIN FA, bk. 2 Obligations, arts. 179-83, *reprinted in SIX LAWS*, *supra* note 17, at 186-87.

36. See WANG TSE-CHIEN, *Wu-ch'uan hsing-wei ts'o-wu yu pu-tang de li* [*Mistakes in Property Activity and Unjust Enrichment*], in MIN-FA HSUEH-SHUO YU P'AN-LI YAN-CHIU [STUDY AND DISCUSSION OF CIVIL LAW AND RESEARCH ON CASES] 149, 150-51 (1991).

37. See WANG, *Unjust Enrichment Rights*, *supra* note 34, at 179.

38. See Case No. 44 of 1983, Case No. 45 of 1984 and Case No. 46 of 1967, PRACTICUM OF PLEADINGS, *supra* note 20, at 87-92.

autonomy and community. On the one hand, contract formation assumes free will and the equality of legal actors and imposes upon them the responsibility for their legal acts. Contract doctrine is essentially forward looking, approaching the transaction from the standpoint of equal and autonomous parties as they stand prior to the agreement. On the other hand, when benefit and loss are not created through operation of law, unjust enrichment allows community standards of justice to be invoked and imposed to ensure substantive fairness.

### 3. *Enforcement Issues*

The dichotomy between doctrinal notions of equality and autonomy in the formation of contracts and communitarian notions of justice in the area of unjust enrichment is complemented by doctrinal ideals about the enforcement of obligations. The Civil Code requires that obligations be performed with honesty and in good faith, thus emphasizing the link between justice in performance and the role of equality and autonomy in the formation of contract terms.<sup>39</sup> This requirement is one of the most often cited provisions of the Chapter on Obligations and is used as a catchall provision to impose liability on nonperforming parties where other Code provisions imperfectly apply.<sup>40</sup>

The link between justice in performance and equality in formation is also evident in the provision that the obligee is entitled to receive performance (*kei-fu*) from the obligor,<sup>41</sup> and that the cost of performance lies with the obligor, unless otherwise provided by law or by contract, or where the obligee has increased such cost.<sup>42</sup> Thus, the justice in enforcement of contract obligations lies not in the qualitative relationship that might arise between the parties, but rather in the status of the parties prior to entering into the agreement. Justice in enforcement depends on an assumption of justice in the executed contract, which in turn depends on presumptions about the equality of the parties in forming the agreement.

The Civil Code provisions relieving the obligor of the duty to perform in the event of impossibility or force majeure suggest limits to the extent to which notions of substantive justice in per-

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39. See MIN FA, art. 219, reprinted in SIX LAWS, *supra* note 17, at 197.

40. One example of this is where the seller in a land sale contract is unable to perform because the seller has already transferred part of the contract property to another. See Case No. 1385 of 1981, ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra* note 20, vol. 1, at 716-17; see also ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra* note 20, vol. 1, at 690-717 (covering fully 99 cases on good faith requirements).

41. See MIN FA, art. 199, reprinted in SIX LAWS, *supra* note 17, at 193.

42. See MIN FA, art. 317, reprinted in SIX LAWS, *supra* note 17, at 218.

formance will be permitted to overturn contract terms derived from relationships of equality and autonomy. Only where circumstances arise that are external to the parties' relationship and for which they are not responsible will there be relief from the obligation. Thus, where circumstances arise to make performance of the contract or a part thereof impossible, the parties will be relieved from the duty of performance to the extent of the impossibility.<sup>43</sup> In addition, the parties are relieved of the obligation to perform in cases of force majeure.<sup>44</sup> These provisions for impossibility and force majeure reflect notions of substantive fairness that express presumptions about equality. Only circumstances external to the parties may relieve one or both of them of the duty to perform, not circumstances that affect their subjective positions vis-a-vis each other. This qualification does not undermine basic assumptions about equality and autonomy of parties to formation and the justice in holding them to their obligations, but does provide yet another perspective from which to determine the justice of enforcement of obligations.

### C. TAIWANESE LAW ON PROPERTY MATTERS

While the ROC Civil Code contains a specific chapter on property (Rights Over Things), important property matters are also addressed in the chapters on Family and on Inheritance. The Chapter on Rights Over Things sets forth the basic rules regarding movable and immovable property.<sup>45</sup> Autonomy of ownership is emphasized through rights of possession, rights to income, and rights of disposal of property.<sup>46</sup> Autonomy of ownership of movable property is entrenched through the provision that states that transfer is effective by delivery, whereas auton-

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43. See MIN FA, arts. 211, 225, reprinted in *SIX LAWS*, *supra* note 17, at 195, 198. Thus, where the law governing a contract is changed to bar certain aspects of performance, the doctrine of impossibility applies to discharge the affected obligations. See, e.g., Case No. 383 of 1955, SUP. CT. PRECEDENTS, *supra* note 20, at 141 (concerning cancellation of an international sales contract due to changes in the law). Similarly, where government organs refuse to permit a transfer of immovable property to be registered, this constitutes impossibility as to the transferor's duty to make delivery. See Judgment of July 7, 1981, SESSION DECISIONS, *supra* note 20, at 58.

44. Thus, where property subject to a lease contract is destroyed by natural disaster, the lessor is relieved of the obligation to make the property available to the lessee and the lessee is relieved of the duty to pay rent. See Case No. 1020 of 1950, JUDICIAL INTERPRETATIONS, *supra* note 20, vol. 1, at 346. Similarly, where the lessee of a fishing boat is unable to return the vessel to the lessor at the conclusion of the lease period because the boat was destroyed in an ocean storm, the lessee is relieved of the duty to return the vessel. See Case No. 1537 of 1960, JUDICIAL INTERPRETATIONS, *supra* note 20, vol. 1, at 226.

45. MIN FA, Wu-ch'uan pien, reprinted in *SIX LAWS*, *supra* note 17, at 293-332.

46. MIN FA, Wu-ch'uan pien, arts. 765-72, reprinted in *SIX LAWS*, *supra* note 17, at 296-98.

omy of immovable property (e.g. land) is more limited due to registration requirements.<sup>47</sup> Autonomy of ownership is also underscored by the provision permitting waiver of any rights over things, absent a contrary provision of law.<sup>48</sup>

In espousing the autonomy of property rights, the Chapter on Rights Over Things expresses basic views about equality of parties in property relationships. With the exception of registration requirements for immovable property, which themselves are intended primarily to prevent harm or loss to third parties, the general rules governing property are intended to free legal actors from government intrusion. This consequence suggests assumptions about equality among property owners and between parties to property transactions that militate against state intrusion. While the Chapter on Rights Over Things contains numerous specific rules for various types of property relations, such as mortgages, servitudes, pledge, *tien* (traditional form of land pledge contract), and other matters, the basic principles governing Taiwan's property regime appear to establish principles of autonomy and equality in property relations.

However, these principles are subject to significant qualification. The chapters of the ROC Civil Code on Family (*Ch'in-shu pien*) and on Inheritance (*Chi-ch'eng pien*) contain provisions that affect the equality of property rights in operation. The Chapter on Family articulates a community property scheme that attempts to protect the female spouse's separate property while ensuring her rights to property acquired by the married couple during marriage.<sup>49</sup> However, husband and wife may, by agreement, adopt an alternative arrangement, which may be tantamount to a spousal waiver.<sup>50</sup> Moreover, the husband manages the community property and has the right to the income from the wife's contribution to the community.<sup>51</sup>

The tension in the Chapter on Family between the ideal of equality (the community property regime) and the significant potential for operational inequality (the contracted alternative and

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47. MIN FA, Wu-ch'uan pien, arts. 758-61, *reprinted in SIX LAWS, supra* note 17, at 293-95.

48. MIN FA, Wu-ch'uan pien, art. 764, *reprinted in SIX LAWS, supra* note 17, at 296.

49. See MIN FA, Ch'in-shu pien, arts. 1016-20, *reprinted in SIX LAWS, supra* note 17, at 341-42. See also MIN FA CH'IN-SHU YU CHI-CH'ENG [CIVIL LAW OF FAMILY AND INHERITANCE] 79-88 (Tai Tun-hsiung & Liu Te-k'uan eds., 1992) [hereinafter FAMILY AND INHERITANCE].

50. MIN FA, Wu-ch'uan pien, art. 764, *reprinted in SIX LAWS, supra* note 17, at 293-332 (spousal waiver); MIN FA, Ch'in-shu pien, arts. 1004-08, *reprinted in Six Laws, supra* note 18, at 340-41.

51. MIN FA, Ch'in-shu pien, arts. 1018-19, *reprinted in SIX LAWS, supra* note 17, at 342.

the husband's managerial powers and rights) is complemented by a similar tension in the Chapter on Inheritance.<sup>52</sup> Although this chapter provides expressly for equality of inheritance rights between spouses,<sup>53</sup> like the Chapter on Rights Over Things and the Chapter on Family, it also permits waiver of these rights.<sup>54</sup>

While the Chapters on Family and on Inheritance endeavor to protect the interests of female spouses and heirs, they do so based on presumptions about equality in the relationship between husband and wife: equal capacity to refuse an alternative noncommunity property arrangement or to refuse to waive inheritance rights, and equal capacity of the female spouse to oversee the husband in the management of community property. However, noting the resilience of traditional Chinese patriarchal attitudes it remains questionable whether these efforts to protect women will be successful. The practices of compelling daughters to waive their inheritance rights, and wives, their community property rights, remain evident in Taiwan. Thus, the doctrinal provisions about autonomy and equality in the Chapter on Rights Over Things are subject to significant qualification in operation.

In sum, formal doctrines on contracts, unjust enrichment, and property rely heavily on formalized notions of equality of individuals and the consequent imposition of responsibility for their actions. Equity plays a very limited role in adjusting what are regarded as the unjust consequences of certain types of relationships not otherwise sanctioned through the operation of law. Property relations are also based on notions of formal equality, which represent efforts to reform traditional norms that permit unequal allocation of property rights and entitlements. These various doctrines, and the underlying norms they support, are tied closely to the government's efforts to bring about economic growth.

### III. POPULAR ATTITUDES ABOUT EQUALITY AND JUSTICE

Contrasting doctrinal provisions with popular attitudes on civil law relations may reveal the extent to which legal norms are assimilated in society. This comparison, in turn, may shed light on the relationship between the legal system and behavior and permit a more precise understanding of the relationship between

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52. MIN FA, Chi-ch'eng pien, *reprinted in SIX LAWS, supra* note 17, at 365-77.

53. MIN FA, Chi-ch'eng pien, art. 1144, *reprinted in SIX LAWS, supra* note 17, at 366.

54. MIN FA, Chi-ch'eng pien, art. 1174, *reprinted in SIX LAWS, supra* note 17, at 371; *see FAMILY AND INHERITANCE, supra* note 49, at 319.

formal legal rationality and economic growth. Popular attitudes toward law in Taiwan reflect the extent to which legal doctrine has become accepted in practice. They also represent an essential element of legal culture that stands in juxtaposition to doctrine, complementing it and perhaps contradicting it. This tension is particularly important in light of the ambivalence toward law that has been detected by numerous studies of Chinese political culture and social attitudes.<sup>55</sup>

Interviews and survey research suggest that popular views on issues related to civil law relationships have not wholly assimilated the doctrinal tenets of the ROC Civil Code. Unstructured interviews with individuals having varying degrees of business activities and experience elicited a clear consensus emphasizing informality and personal relations in the regulation of business conduct.<sup>56</sup> Mutual supervisory and enforcement powers between

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55. For example, studies of practices among business people have revealed that commercial relationships are formed and managed based on sentiments of mutual trust (*hsin-yung*), which appears to be much more influential in the creation and structuring of business relationships than legal norms grounded in freedom of contract. See, e.g., Donald DeClopper, *Doing Business in Lukang*, in *STUDIES IN CHINESE SOCIETY* (Arthur Wolf ed., 1978). The role of various types of relationships (*kuan-hsi*) and mutual empathy (*kan-ch'ing*) is seen as much more important in social discourse than the legal obligations articulated in the Civil Code. See, e.g., J. BRUCE JACOBS, *LOCAL POLITICS IN A RURAL CHINESE CULTURAL SETTING: A FIELD STUDY OF MAZU TOWNSHIP, TAIWAN* (1980). Indeed, when legal rules and formally articulated law-based obligations are called into play, it is seen as a reflection of how bad the relationship between disputants has gotten or as an indication that no mutually sustaining relationship ever existed, such as in disputes involving outsiders from the local community. See generally MICHAEL J. MOSER, *LAW AND SOCIAL CHANGE IN A CHINESE COMMUNITY: A CASE STUDY FROM RURAL TAIWAN* (1982). These attitudes are also evident among rural low-income groups whose ambivalence toward formal legal conceptualizations of rights and obligations remains a salient characteristic. See Wu Chu-yuan, *Nung-ts'un She-ch'u Chung Ying-hsiang Nung-min Kao Ti Shou-ju Te Yin-ssu He Yin-ying Chih-tao* [A Study of the Influential Factors of Low-Income Groups and High-Income Groups in Rural Communities in Taiwan], *HWA KANG FA K'O HSUEH-PAU* [HWA KANG J.L. & SOC. SCI.], Mar. 1985, at 169, 177-79. Uncertainties over the effectiveness of legal rules in the creation and enforcement of business obligations are evident in the continued prevalence of family business enterprises, even when their structure and dynamics inhibit the concentration of capital and achievement of long term efficacy and profits. See Susan Greenhalgh, *Families and Networks in Taiwan's Economic Development, in* *CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN* 224 (Edwin A. Winckler & Susan Greenhalgh eds., 1988). These and other studies have concluded that Chinese society in Taiwan is ambivalent about the role of law in ordering social and economic relationships in everyday life. See also RICHARD W. HARTZELL, *HARMONY IN CONFLICT: ACTIVE ADAPTATION IN PRESENT-DAY CHINESE SOCIETY* 527-35 (1988).

56. These unstructured interviews were conducted from 1990 to 1992 and particularly from May through August 1992 during my residency in Taipei. Informants included a cosmetics retailer, members of the construction industry, an engineer, a corporate lawyer, a university professor, several foreign bankers, a motorcycle repair shop owner, and numerous taxi cab drivers. Each was asked questions about the extent of their business activities and the role of law in regulating these activities.



and among members of particular business fields were frequently described as more powerful than law in encouraging performance of obligations and compensation for losses and damages. While several respondents recognized that this emphasis on informal community ethics over formal legal norms makes it difficult for new firms to enter the market, most concluded that the benefits of stable and predictable commercial relationships outweighed the disadvantages.

In addition, while most interview respondents indicated a willingness to use contracts, these were not regarded as the basis for business relationships. While reliance on form contracts and the habit of signing contracts without much attention to their contents was described as commonplace, the personal relationships between business partners were considered much more important. The view expressed in these interviews tended to be that the parties had agreed to the terms of the deal on the basis of their face-to-face relationship. If either party tried to back out or alter its performance, then it would be sanctioned by the local business community through denial of future business. This penalty would be imposed even if the party trying to avoid or alter its obligations was technically permitted to do so under the terms of the written agreement. Thus, in the mind of the economic actors interviewed, the written agreement remained subject to the relationship between the contracting parties.

Despite their expressed views that reliance on law in the formation and enforcement of obligations was not nearly as important as reliance on community-based relationships, the business people and other interview subjects did not necessarily disagree with the provisions of the Civil Code. For example, reliance on personal understandings as the basis for a contractual arrangement need not conflict with Civil Code provisions on formation. Formation of the contract obligation does not necessarily require a written agreement as long as the requirements for mutual assent have been satisfied.<sup>57</sup> On the other hand, while reliance on the original oral agreement, despite subsequent inconsistent terms in the signed form contract, may not contradict the provisions of the Civil Code, evidentiary issues arise if the case is taken to court. As a matter of evidence, a signed document which contradicts a previous oral agreement will generally be deemed to replace the prior agreement, absent issues of mistake and so forth that go to the question of mutual assent to the sub-

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Questions about confidence in the legal system were also asked. Additional interviews were conducted during my visits to Taipei in June, October and December 1994. Notes from these meetings are on file with the author.

57. See MIN FA, arts. 153-66, reprinted in SIX LAWS, *supra* note 17, at 181-83; see also TSENG, *supra* note 21, at 23-24.

sequent agreement.<sup>58</sup> Nonetheless, the apparent willingness to continue performing a previous oral agreement despite subsequent and contrary written contract terms suggests that business partners continue to rely on personal relationships rather than the Civil Code. Thus, communitarian norms seem to take precedence over the norms of autonomy embedded in the Civil Code doctrines on responsibility for legal acts.

The views expressed in these unstructured interviews were reinforced through the results of a survey questionnaire administered from July through December 1992 in cooperation with the Psychology Department of National Taiwan University.<sup>59</sup> Of the 207 respondents who answered the gender identification question, 105 were female and 102 male. The majority of respondents were between the ages of twenty-five and thirty-eight. Annual family income levels ranged from a low of less than NT\$250,000 (US\$10,000) to a high of over NT\$5,000,000 (US\$200,000), with the average at NT\$500,000 (US\$20,000). The education level of the respondents was relatively high; most (53.9%) had completed postsecondary technical school, while a significant minority (21.4%) had completed university. The occupational distribution involved primarily labor, business, and government activities. These figures provide a general picture of the individuals in the sample, but are not meant to suggest that the group was representative of Taipei or Taiwan as a whole. Nonetheless, by comparing the attitudes of the survey respondents with formal legal norms, preliminary conclusions can be drawn concerning popular assimilation of official doctrine.<sup>60</sup>

By and large, the respondents seemed to accept official doctrine about equality in civil relations. An overwhelming majority (84.7%) agreed that all members of society are equal (rather than enjoying special legal rights based on social or political status). Similarly, a solid majority (82.8%) of the respondents disagreed with the proposition that law operates primarily for the benefit of business, while a similar proportion (81.7%) disagreed with the notion that legal rights were linked to wealth. Linkages between ideas about equality and the expectations about institu-

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58. The process of replacement (modification) occurs through the parties who agree to mutual release from the contract obligations pursuant to Article 343 of the Civil Code.

59. The questionnaire was developed through testing in the Chinese community of Vancouver, B.C., and then was completed by 210 individuals contacted randomly in Taipei. An English language translation of the questionnaire is attached. See *infra* APPENDIX. I am grateful to Professor Huang Kwang-kuo and researcher Shen Bing-jun of the Psychology Department of Taiwan National University for their invaluable assistance in connection with the conduct of the survey.

60. For further discussion, see Melanie Manion, *Survey Research in the Study of Contemporary China: Learning from Local Samples*, 139 CHINA Q. 741 (1994).

tional behavior were evident in the proportion of responses (46.7%) indicating that a government decision was fair if it applied equally to all. Presumptions about equality were evident as well in responses related to compliance with legal rules. Thus, 61.3% of respondents indicated that laws should be obeyed without exception. A significant majority (66.3%) agreed with the proposition that law protects ordinary people's rights. A substantial majority (72.8%) agreed with the proposition that law is the best protection against corruption.

Despite these abstract notions of legal behavior and underlying presumptions about equality, however, most respondents downplayed the substantive role of law in governing their own relationships. Thus, only 20.4% of respondents indicated that they would repay a debt due to the existence of a legal duty, while more than twice as many (47.9%) indicated that they would repay the debt because of a moral duty. Protection of reputation was cited by 25.8% of respondents as the reason they would repay their debts—again, a higher proportion than that emphasizing legal duties. Protection of reputation took on greater significance when compared to other factors, as a significant majority (68.3%) of respondents indicated that they would honor their obligations generally in order to protect their reputation, rather than to avoid getting into trouble or to protect a specific relationship. Thus, abstract notions about adherence to law and underlying notions about equality were tempered by the greater importance given to communitarian relationships and the subjective differentiation that goes with reliance on morality and reputation.

The tension between acceptance of doctrinal principles in the abstract and in substantive practice extended as well to family relations. On one hand, a large majority of respondents (70.0%) agreed that men and women are equally capable, and a similar proportion (76.3%) agreed that men and women are generally equal. A significant proportion (66.3%) of respondents disagreed with the proposition that men should earn more than women, and a large majority (77.5%) disagreed with the proposition that men should work and women should care for children.

Despite these expressions of agreement with abstract principles of gender equality, however, the family unit was seen by many respondents as a distinct realm separate from the formal law regime. In addition to the large proportion (91.3%) that considered a loan obligation to be less important if made to a friend or family member, a significant majority (78.6%) concluded that dishonest acts occurring within the family were more serious than those occurring outside the family. Nearly half of the respondents agreed that family businesses are the most suc-

cessful. And while a majority (63.6%) of respondents conceded that law might intrude into family matters, a sizeable minority (36.4%) held that family matters should remain beyond the scope of law. These preferences for insulating the family from the regime of law suggest a tolerance for existing social relations within the family, with all the evident inequalities that they entail.<sup>61</sup> Thus, despite the acceptance of abstract ideals of gender equality, there remains a willingness to accept in practice the gender inequalities that continue to dominate family life in Taiwan.<sup>62</sup> These views would appear consistent with those found in close-knit family businesses, which resist involvement with outsiders and the gradual intrusion of unfamiliar norms that this entails, even though such insularity erects barriers to commercial expansion.<sup>63</sup>

The tension between abstraction and experience was also evident in ideas about equality in political and legal institutions. A high proportion (91.0%) of respondents asserted that government officials should be bound by law, while a larger majority (94.3%) dissented from the proposition that the government knows what it is doing and does not require input from ordinary people. The influence of ideals of equality and related aspirations about democracy were also evident in the responses of a large proportion of respondents (43%) who indicated that elected representatives should have primary input in lawmaking. However, a greater combined proportion (56.6%) of respondents indicated that lawmaking should receive primary input from experts (32.9%) and wise officials (23.7%). These expressed presumptions about the expertise and wisdom of officials were underscored by the responses of a majority (71.2%) who agreed

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61. See, e.g., Nancy J. Olsen, *Changing Family Attitudes of Taiwanese Youth*, in VALUE CHANGE IN CHINESE SOCIETY 171 (Richard W. Wilson et al. eds., 1979); Sheldon Appleton, *Sex, Values, and Change on Taiwan*, in VALUE CHANGE IN CHINESE SOCIETY, *supra* at 185; and HILL GATES, *CHINESE WORKING CLASS LIVES: GETTING BY IN TAIWAN*, 145-74 (1987).

62. In what may be an indication of growing resistance to the pervasive role of the traditional family, the respondents revealed surprising reluctance to involve the family in minor disputes. For example, in responses to questions about disputes over sales and loan transactions, respondents showed a clear preference for having friends rather than family involved in resolving the dispute. In loan disputes, 68.8% preferred assistance from friends and only 2.8% from family in resolving the matter. In sales disputes, 30.6% of respondents preferred assistance from friends and only 13.7% preferred family assistance in resolving the problem. For a discussion of emerging challenges to traditional social norms in Taiwan, see Thomas A. Brindley, *Socio-Psychological Values in the Republic of China II*, 15 *ASIAN THOUGHT & Soc'y* 2, 6-7 (1990).

63. See, e.g., Kwang-kuo Hwang, *Modernization of the Chinese Family Business*, 123 *INT'L J. PSYCHOL.* 593 (1990); Susan Greenhalgh, *Families and Networks in Taiwan's Economic Development*, in *CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN*, *supra* note 55, at 224.

that government officials are more capable than ordinary people, despite beliefs of 90.7% of respondents that officials were just the same as common people. Clearly, the abstract ideals of objective equality were tempered by substantive expectations regarding subjective attributes such as wisdom and expertise.

The tension between abstraction and practice was also evident in responses concerning the behavior of legal institutions. While a significant proportion (65.3%) agreed with the proposition that the outcome of lawsuits is fair, a majority (55.3%) of respondents defined fairness as adherence to legal procedure. On the other hand, a majority (57.5%) of respondents disagreed with the proposition that people who are arrested are usually guilty, and 51.6% disagreed that a defendant would be sent to jail only if guilty. Nearly half (49.6%) of respondents agreed that they would be more likely to win in court if the judge knew them or their family. Thus, formalistic attention to legal procedure notwithstanding, significant proportions of respondents evinced doubts about substantive fairness in the behavior of legal institutions.

The survey responses also suggest that the expected role for formal law may depend on the specifics of particular relationships. For example, there was broad agreement (78.0%) that sales agreements were more effective if they were in writing. These views were reiterated even when the sale was to a family member or friend, as 66.3% of respondents indicated they would still use a written agreement. These responses contrast interestingly with responses to a similar question concerning loan agreements, where only 53.7% indicated that the importance of a loan agreement was unaffected by the existence of a written agreement (45.9% indicated that a writing did make a difference).

This variation may be explained in part by reference to the different structures of the relationships. While a sale may be a one-time transaction after which the parties go their separate ways, a loan involves a longer term relationship and hence the existence of a written agreement may not be seen as crucial to either the relationship or the parties' rights. Moreover, informal loan agreements between friends and family members are common in Chinese communities, a practice that is not likely to give way to the requirements of legal formality. Thus, a large proportion (91.3%) of respondents indicated that a loan obligation was considered less important if made to a friend or family member. It would seem therefore that compliance with legal formalities depends on the conditions of the exchange in question.

Despite the evident tension between abstraction and experience with regard to formal legal ideals and institutions, some respondents displayed a nascent willingness to rely on legal

institutions in practice. Of the small number (27.0%) of respondents who admitted to seeking institutional resolution of a serious dispute over property, only a slim majority (59.3%) had settled the matter through mediation without going to court, while the remaining 40.0% had gone through court action. Despite emphasizing morality and reputation as the bases for performing their own obligations, respondents showed a surprising willingness to resort to formal legal recourse in order to enforce their rights to receive performance from others. A high proportion (30.6%) of respondents indicated a willingness to seek legal assistance if a business counterpart failed to perform under a sales obligation. Similarly, when asked how to respond if a rental obligation was not performed, 27.9% indicated a willingness to seek legal assistance. While these proportions remain lower than the proportion of respondents who would seek informal assistance from friends to resolve the dispute, they suggest that significant consideration is given to formal legal channels in resolving disputes. Indeed, in the event of nonpayment on a loan, only 10.7% of respondents indicated that they would never sue to collect the debt. In the case of sales transactions, only 27.5% contended that they would not sue to pursue the matter of nonpayment. These responses appear consistent with the steady increase in court cases in civil law matters since 1980.<sup>64</sup>

The questionnaire responses suggest several preliminary conclusions. It seems apparent that while provisions of the ROC Civil Code extolling objective equality of legal actors have begun to be accepted in the abstract, significant public attention remains directed at subjective relationships and the inequalities they bring to civil relations. Reputation, morality, and family ties all are seen to play a more important role than law in regulating civil relations. The resilience of traditional attitudes in regards to social relations and the insularity of family structures suggest continuing barriers to the transformation of abstract acceptance of the Civil Code's doctrines of equality and justice into practical experience.

Nonetheless, the respondents also showed a notable willingness to use legal avenues to ensure performance of obligations. The questionnaire responses appear to confirm evidence of growing litigiousness over contracts and sales matters.<sup>65</sup> Thus, in spite

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64. See SSU-FA T'UNG-CHI T'I-YAO [OUTLINE OF JUDICIAL STATISTICS] 28, 31 tbl. 37 (Ssu-fa Pu T'ung-chi ch'u [Statistics Department of the Ministry of Justice of the ROC] ed., 1991).

65. Disputes over formation and performance of contracts are common and involve issues such as the nature of the parties' agreement and even disputes over the existence of the contract. See Case No. 2495 of 1981, ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra* note 20, vol. 1, at 279. See also SUP. CT. PRECEDENTS,

of the evident disjunction between doctrinal and popular views on issues related to civil law relationships, the apparent increase in popular willingness to resort to legal means to enforce rights is significant. It remains to be seen whether these nascent views will develop into a significant component of legal culture in Taiwan.

#### IV. CONCLUSION

The interplay of doctrine and attitudes concerning civil relations in Taiwan casts doubt on models asserting that formal law and legal institutions play a major role in bringing about economic growth. The attitudes of the survey respondents toward the structure and consequences of civil law relationships reveal significant disparities with official doctrine and suggest barriers to popular assimilation of the basic ideals about equality and justice that inform the ROC's civil law system and its regulation of economic life. Differences over the role of formal legal institutions in the formation and enforcement of civil obligations indicate further barriers to the process by which economic actors become legal actors and use doctrinal vehicles to articulate and enforce their rights.

On the other hand, there are indications of gradual assimilation of some doctrinal norms. Incipient acceptance of abstract notions about equality and a growing willingness to rely on legal institutions in the resolution of disputes suggest the potential for gradual acceptance of the regime's civil law doctrine. Coming in the wake of Taiwan's economic "miracle" rather than preceding it, and contrasting with the traditional attitudes that were dominant not more than twenty years ago, these new indicators suggest that rather than being dependent on formal law, economic growth may instead induce greater reliance on formal legal norms. The socioeconomic complexity, dislocation, and alienation brought on by rapid economic growth may induce members of society to give greater attention to legal norms of equality that permit greater opportunities than were available under old sys-

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*supra* note 20, at 85. Litigation has frequently been pursued over nonperformance of contracts. See Case No. 299 of 1981, ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra* note 20, vol. 1, at 746; Case No. 455 of 1969, ARBITRAL AND ADJUDICATIVE PRECEDENTS, *supra* note 20, vol. 1, at 1075; and Case No. 144 of 1960, JUDICIAL INTERPRETATIONS, *supra* note 20, vol. 1, at 354. In defenses to suits seeking enforcement of contract obligations, parties have raised such issues as mutuality of performance. See Case No. 4176 of 1984, FA LING YUE-K'AN [LAWS AND EDICTS MONTHLY], Mar. 1985, at 22. They have also raised issues of force majeure. See Case No. 1020 of 1950, JUDICIAL INTERPRETATIONS, *supra* note 20, vol. 1, at 346; see also Case No. 1537 of 1960, JUDICIAL INTERPRETATIONS, *supra* note 20, vol. 1, at 226.

tems entrenched in unequal and often unjust relationships.<sup>66</sup> While the details of this dynamic remain to be explored, this study suggests that economic growth is the stimulus rather than the product of formal legal rationality.

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66. See generally SCHMUEL N. EISENSTADT AND L. RONIGER, PATRONS, CLIENTS AND FRIENDS: INTERPERSONAL RELATIONS AND THE STRUCTURE OF TRUST IN SOCIETY (1984).



## APPENDIX

## CHINESE LEGAL CULTURE PROJECT QUESTIONNAIRE: TAIWAN

## I. Experience With Disputes

## A. Property

- 1) Have you ever had a serious dispute with another person over an item of property?
- 2) If so, please explain the circumstances.
  - When did it occur?
  - What sort of property was involved?
  - What was the value of the property?
  - Who owned the property?
  - What was the nature of the dispute?
- 3) Please explain how the dispute was resolved.
  - Did family or friends help resolve the dispute?
  - Did the dispute go to court?
  - Did some other organization help resolve the dispute?

## B. Business

- 1) Have you ever had a serious dispute with another person over a business matter?
- 2) If so, please explain the circumstances.
  - When did it occur?
  - What sort of business was involved?
  - What was the nature of the dispute?
- 3) Please explain how the dispute was resolved.
  - Did family or friends help resolve the dispute?
  - Did the dispute go to court?
  - Did some other organization help resolve the dispute?

## II. General Questions.

## A. Please check the box that most closely expresses your personal viewpoint.

1. When a person owes me money,
  - the loan is more important if the person is my friend or family relation.
  - the loan is less important if the person is my friend or family relation.
2. When a person owes me money,
  - the debt is more important if the loan agreement is in writing.
  - the debt is important regardless of whether the loan agreement is in writing.
3. If a person who owes me money refuses to pay, I would
  - ask a mutual friend to remind the person to pay.
  - ask the person's family to pay.
  - ask a lawyer to arrange matters.
4. If a person who owes me money refuses to pay,
  - under no circumstances would I file suit in court.
  - I would be willing to sue in court only if the debtor's family or a mutual friend had not been able to arrange payment.
  - I would be willing to sue in court if I was not able to persuade the debtor to pay.
  - I would be willing to sue in court only if the debt was more than NT\$100; NT\$500; NT\$1,000; NT\$5,000.
5. If a person agrees to purchase a motorcycle from me,

- \_\_\_ a formal purchase agreement is not necessary if the buyer is my family relation or my friend.  
 \_\_\_ even if the buyer is my family relation or my friend, I would still use a formal purchase agreement.
6. If a person agrees to purchase a motorcycle from me,  
 \_\_\_ the agreement is more effective if it is in writing.  
 \_\_\_ the agreement is effective regardless of whether it is in writing.
7. If a person agreed to purchase a motorcycle from me and then refused to complete the deal, I would  
 \_\_\_ ask a mutual friend to persuade the person to complete the deal.  
 \_\_\_ ask the person's family to persuade the person to complete the deal.  
 \_\_\_ ask a lawyer to arrange matters.  
 \_\_\_ forget it.
8. If a person agreed to purchase a motorcycle from me and then refused to complete the deal,  
 \_\_\_ under no circumstances would I be willing to sue in court.  
 \_\_\_ I would be willing to sue in court if the buyer's family or a mutual friend had been unable to persuade the buyer to complete the sale.  
 \_\_\_ I would be willing to sue in court if I had not been able to persuade the buyer to complete the sale.  
 \_\_\_ I would be willing to sue in court only if I did not have a good relationship with the buyer.
9. If I wanted to rent an apartment  
 \_\_\_ regardless of the rental price, if the person renting to me was a family relation or a friend, I would be willing to rent.  
 \_\_\_ if the rental price was relatively low, I would be willing to rent regardless of who the person renting to me was.
10. If a person agreed to rent me an apartment and then refused to complete the deal, I would  
 \_\_\_ ask a mutual friend to persuade the person to complete the deal.  
 \_\_\_ ask the person's family to persuade the person to complete the deal.  
 \_\_\_ ask a lawyer to arrange matters.  
 \_\_\_ forget it.
11. If I owe money to someone, I will repay the debt  
 \_\_\_ because I want to protect my reputation.  
 \_\_\_ because I have a legal duty to do so.  
 \_\_\_ because I have a moral duty to do so.
12. I honor my obligations  
 \_\_\_ because I want to protect my reputation.  
 \_\_\_ because I don't want to get in trouble.  
 \_\_\_ depending on my relationship with the other person (obligee).
13. A person should obey the law  
 \_\_\_ without exception.  
 \_\_\_ except when the law is unjust.  
 \_\_\_ unless it harms a family relation or friend.

14. A person who breaks the law should be punished
  - without exception.
  - unless the law is unjust or unclear.
  - unless there was a good reason for breaking the law.
15. Government officials
  - are generally more competent than ordinary people.
  - are no different than ordinary people.
  - need to have special treatment because they have special responsibilities.
16. Dishonesty among family members
  - is more serious than dishonesty between people who don't know each other.
  - is less serious than dishonesty between people who don't know each other.
17. All members of society
  - are equal.
  - have legal rights depending on their social status.
  - have legal rights depending on their political status.
  - have legal rights depending on their family status.
18. A government decision is fair
  - if it is applied equally to everyone.
  - when it takes into account different situations among different people.
  - when it is enacted through proper procedures.
19. A court decision is fair
  - if it rewards the good and punishes the bad.
  - when it follows legal procedure.
  - when all parties are content.
20. Laws should be formulated
  - by experts who understand the government's policies.
  - by elected representatives who follow the will of the people.
  - by wise officials who know what is best for the common good.

B. Please respond to the following questions by marking a number 1, 2, 3 or 4, as follows:

- 4: If you strongly agree
  - 3: If you somewhat agree
  - 2: If you somewhat disagree
  - 1: If you strongly disagree
- 1) Lawyers are generally trustworthy.
  - 2) Courts are generally able to protect my rights.
  - 3) Laws are mainly for business people.
  - 4) I have the same rights as people wealthier than me.
  - 5) Family businesses are the most successful.
  - 6) The law protects ordinary people's rights.
  - 7) People make more of a difference than laws and rules.
  - 8) People shouldn't fight over matters of business and property.
  - 9) Laws and regulations aren't as important as personal relationships.

- 10) If I have a friend in the government, I don't need to worry about laws and regulations.
- 11) If I go to court, I am more likely to win if the judge knows me or my family.
- 12) I would never do business with someone I didn't know personally.
- 13) People generally do what is right because the law requires it.
- 14) People generally do what is right because they have strong moral principles.
- 15) People generally do what is right because their personal reputation requires it.
- 16) Personal relationships are more important than the law.
- 17) As long as I have my family, everything will be alright.
- 18) As long as I have my friends, everything will be alright.
- 19) If someone tries to take advantage of me, I know the law will protect me.
- 20) Government officials don't need to obey the law as much as ordinary people.
- 21) All people are essentially equal and should not get special protection from the law.
- 22) Although all people are essentially equal, the law should protect those who are poor or weak.
- 23) With sufficient education and training, anyone can become a judge or government leader.
- 24) The only way to succeed is through hard work.
- 25) If a person does not achieve success, this is probably due to the unwillingness to work hard.
- 26) Men and women are equally capable in business, the professions and government.
- 27) Men should work and women should care for the children.
- 28) Older people have rich knowledge because of their greater experience.
- 29) Government officials are just the same as the common people.
- 30) If a person gets a good education, this means that he or she is smarter than most normal people.
- 31) Boys should have more chances to go to school than girls.
- 32) People should obey government rules even if they disagree with them.
- 33) The outcome of court suits is usually fair.
- 34) It is unfair for government officials to have nicer cars than other people.
- 35) The government knows how to run the country, and it doesn't need to listen to me.
- 36) People who are arrested are usually guilty.
- 37) A person will not be sent to jail unless he or she is guilty.
- 38) Men should earn higher wages than women.
- 39) The law should favor virtuous people.
- 40) The law does favor virtuous people.
- 41) Leaders are generally more capable than ordinary people.

- 42) I can achieve great success if I work hard.
- 43) Success depends on who you know.
- 44) Success depends on how you perform.
- 45) People will cheat to get ahead.
- 46) People who are better educated than ordinary people are more likely to succeed.
- 47) People who have good connections are more likely to succeed.
- 48) Men and women are equal in all important respects.
- 49) Men should work and women should stay at home and take care of the family.
- 50) Men should put family before career.
- 51) Women who put their careers first don't care about their families.
- 52) Older people are wiser than younger people.
- 53) Older family members should have a strong say in family matters.
- 54) The law should not intrude into family matters.
- 55) The law is the best protection against corruption.

### III. Background Information

- a) Age: \_\_\_\_\_
- b) Sex: \_\_\_\_\_
- c) Education Level: \_\_\_\_\_
- d) Occupation: \_\_\_\_\_
- e) Annual Family Income:
  - \_\_\_ Less than NT\$250,000
  - \_\_\_ Between NT\$250,000 and 500,000
  - \_\_\_ Between NT\$500,000 and 1,000,000
  - \_\_\_ Between NT\$1,000,000 and 2,000,000
  - \_\_\_ Between NT\$2,000,000 and 5,000,000
  - \_\_\_ Over NT\$5,000,000
- f) How long have you lived in Taiwan?
- g) Where is your ancestral home?
- h) Do any members of your family live in North America?
- i) What is your native dialect?
- j) Please note your proficiency in English by checking the appropriate box for each skill:
 

<i>Reading:</i>	___ Excellent;	___ Good;	___ Fair;	___ Poor.
<i>Writing:</i>	___ Excellent;	___ Good;	___ Fair;	___ Poor.
<i>Listening:</i>	___ Excellent;	___ Good;	___ Fair;	___ Poor.
<i>Speaking:</i>	___ Excellent;	___ Good;	___ Fair;	___ Poor.