Is Freedom of Property Form Principle Efficient?

—Interpretations of Article 757 of the Taiwan Civil Code and the Underlying Theory

Yun-Chien Chang

Abstract

Recently, many Taiwanese and Chinese scholars criticized the *numerus clausus* principle, and proposed freedom of property form principle instead. In 2009, the Taiwan legislature amended Article 757 of the Civil Code, loosening the *numerus clausus* principle, and allowing customs to create new property forms. Based on the optimal standardization theory first proposed by Merrill & Smith, with the revision by Hansmann & Kraakman and this article, I evaluate which institutional arrangement to create property forms is the most desirable.

This article argues that although the *numerus clausus* principle (under which the legislature monopolizes the creation of property forms) does not guarantee creation of optimal number of property forms, it is not impossible for the number of statute-created property forms to approximate the optimal number. The freedom of property form principle, by contrast, will produce an over-optimal number of property forms, because of the external costs of creating new property forms by private transactors. When interpreting the newly-amended Article 757, the court, in addition to the marginal social costs mentioned in the "amendment rationale"

(drafted by the Department of Justice before sending the bill to the legislature), should also take into consideration the marginal social benefit of creating new property forms. In addition, new property forms on personal properties are difficult to be verified by third parties. Thus, the court should adopt a strict standard of review in recognizing new personal property forms created by customs. Finally, a pre-requisite to recognize new property forms on real estate created by customs is the existence of such customs in most regions in Taiwan.