Introduction

YUN-CHIEN CHANG

This book explores the evolution of property, contract, tort, and business organization laws in China and Taiwan. Given the drastic changes in the two jurisdictions in recent decades, the book covers not only the current laws, but also how these laws evolved into their current forms. Moreover, this book does not merely restate black letter laws – it also offers economic analysis of the driving force behind the legal evolution and examines whether the legal changes are economically efficient.

Given China's dazzling economic development during the past three decades, few would question the importance of studying China, particularly the four basic legal fields that will shape the future of the Chinese regime and greatly affect the interests of foreign investors. But why Taiwan? To put China's legal changes in context, one has to find a proper benchmark. Hong Kong and Singapore are ruled by Chinese people, but their laws are fundamentally shaped by English common law, and they are both much smaller than Taiwan. Macao is in a similar situation, except that it has imported Portuguese law, which has hardly any influence on laws in China. By contrast, in the property, contract, and tort laws of China and Taiwan, the doctrinal structures are both civil law, whereas in business organization law, the US law is the main inspiration. Moreover, in many ways, private laws in China and Taiwan are heavily influenced by German jurisprudence, making the comparison even more meaningful. There is also strong evidence that Chinese scholars and legislature, in formulating these four areas of laws, widely consult laws and legal scholarship in Taiwan. Therefore, putting Taiwanese laws and Chinese laws in the same volume helps readers have a better understanding of the uniqueness (or the lack thereof) of Chinese laws. To put it boldly, the future transformation of Chinese law might resemble the evolution of Taiwanese law. Furthermore, Taiwan and China are culturally similar, so proponents of the "Chinese characteristics" theory (laid on the foundation of the Chinese, or Confucian,

culture) would need to find support in Taiwanese law.[1] The Taiwan laws in this volume thus provide valuable information.

One goal of this volume is to offer a concise summary of black-letter private law in China and Taiwan. Chinese laws change fast. At the time of writing, the Property Law of 2007, the Labor Contract Law of 2007, and the Tortious Liability Law of 2009 are less than ten years old. The Contract Law of 1999 has not reached "adulthood" either. The Company Law of 1999 was recently amended in 2013. In addition, this volume covers new Judicial Interpretations in the fields that constantly reshape the legal landscape.[2] Private law in Taiwan has undergone a tumultuous fifteen-year span as well. The Taiwanese Civil Code, originally enacted in China in 1929, was infrequently amended during the first few decades of its implementation in Taiwan. The early revisions focus almost entirely on family law and succession law. Then, in 1999, the Book of Obligation in the Taiwanese Civil Code, which contains contract law and tort law, among others, underwent a major overhaul, as if to prepare the Civil Code for the new millennium. Between 2007 and 2010, the Book of Things in the Taiwanese Civil Code, which contains property law, was updated.[3] As one major vehicle for the capitalistic market in Taiwan, the Company Act has been revised on multiple occasions since its inception, most recently in 2015. This book, which gives an up-to-date overview of the relevant laws and judicial decisions, enables English readers to get a better grasp of the laws in China and Taiwan.

Another aim of this book is to unite a powerful and dominant legal analytical approach with important legal issues in China and Taiwan. Very few comparative law scholars or China experts see laws in China and Taiwan through the lens of law and economics. In his final book, *Why China Goes Capitalist*, which he co-authored with Ning Wang, Ronald Coase made a rare attempt to analyze the legal institution in China from an economic viewpoint. But Coase and Wang (2012)'s book does not explore the details of the law. In line with the law-and-economics paradigm, this book will offer insights into the general evolution of law, particularly the evolution of private law in China and Taiwan. Contributors use economic theories either to explain why a certain field evolved toward its current form or to evaluate whether a specific statutory stipulation or a judicial decision is economically efficient.

This book contains ten chapters, in addition to an Introduction and a Conclusion. The first two chapters are more theoretical in tone. Authored by Saul Levmore and Bruno Deffains respectively, they provide theoretical groundwork for the economic analysis offered in the eight following chapters. Levmore's chapter draws on the eight chapters as evidence both for and against his thesis. Deffains' theoretical framework for legal harmonization and transplantation offers insights into understanding the evolution of private and company laws in China and Taiwan. The eight application chapters will discuss one by one property, contract, tort, and company laws in China and Taiwan.

More specifically, in Chapter 1, Saul Levmore argues that legal evolution, and variety within and among legal systems, can sometimes be explained as the product of disparate strategies for solving social problems. A *concentration* strategy is one that focuses rights, responsibilities, or both on a single party in order to encourage that party to take precautions or otherwise solve a problem. In contrast, a *distribution* strategy is one that scatters incentives in order to encourage multiple parties to behave as a team. Within this framework comparative negligence gives an example of the latter and strict liability for defective products an example of the former. The concentration–distribution tension, or choice, is developed through examples from tort, contract, property, and corporate law in the United States, China, and Taiwan. With respect to complex social problems, contemporary law and politics often look to the government to be the problem solver, and government control can then be understood as an emerging concentration approach. In turn, in a kind of second step of problem solving, the government might assign tasks, through its lawmaking power, in either distributed or concentrated fashion. Emerging reactions to climate change and other large-scale problems can be expected to follow this pattern.

In Chapter 2, Bruno Deffains addresses the economics of harmonization and legal convergence. Harmonization obliges different national legislations not to be contradictory with regard to common aim. It seeks to coordinate legal systems by eliminating major differences and creating minimum requirements or standards. Unification, by contrast, refers to the substitution of multiple rules by a new legislation at a supranational level. Unlike unification, which contemplates the substitution of two or more legal systems with one single system, the harmonization of law seeks to promote coordination of different legal

provisions or systems. From an economic perspective, convergence imposes a debate about two different questions: Should legal systems converge? And, if the answer is positive, how can convergence be obtained? This chapter begins with an economic evaluation of the benefits and limits of convergence (costs of legal fragmentation, natural and functional convergence, and institutional isomorphism). The chapter then goes on to analyze different ways to achieve convergence (imitation and herding behaviors, legal competition, legal transplant and coordination). The third part of the chapter considers the question of legal convergence when preferences are endogenous. When legal problems have solutions that can be ranked according to their efficiency and when the optimal solution is unique, unification occurs in the long run because all countries tend to choose the optimal rule. Legal preferences change in the same way that this optimal rule is the preferred rule in the long run.

Chapter 3, co-authored by Jing Leng and Wei Shen, describes international conventions (such as the "United Nations Convention on Contracts of International Sales of Goods," known as CISG) and local characteristics that shape the contours of Chinese contract law. Important topics, such as the distinction between default rules and mandatory rules, contract interpretation, and three types of remedies, are also included. Among other interesting dimensions of Chinese contract law, two features stand out. First, in contrast to other civil law countries, China prioritizes damages over specific performances. Second, administrative agencies have always been present in shaping (sometimes directly censoring) the contents of various contracts.

Chapter 4, penned by Wen-yeu Wang, reviews the inadequacy of the way in which the Taiwan Supreme Court and contract law scholars interpreted contract laws and contracts. In addition to several other matters, this chapter points out that several features of the system have persisted throughout the past decades and showed no signs of moving toward increased efficiency. First, while Taiwanese contract law covers both private and business contracts, the development of Taiwanese contract law, in terms of both its statute and case law, is heavily skewed in the direction of consumer contracts, while the legal development to accommodate the complexity of business contracts has been largely ignored. There is an overarching driving force of consumer protection that indiscriminately applies not only in consumer contracts but also in cases of business-to-business (B-to-B) transactions. The

principal driving forces behind business transactions (B-to-B contracts), such as common industry practice and the nature of transactions, are seldom explored or considered in legal scholarship or in courts. Second, in the absence of any substantial modernization of Taiwanese contract law, the courts tend simply to resort to the mechanical application, by way of analogy, of the default rules contained in the Taiwan Civil Code without taking into consideration the true intentions of the parties and basic principles of contracts such as party autonomy. Such stoic interpretations and applications of the already outdated Civil Code make it impossible for Taiwanese contract law to be efficient in the face of the ever-evolving business landscape. This chapter critiques three important Taiwan Supreme Court cases to demonstrate the aforementioned points.

Chapter 5, contributed by Wei Zhang, delineates the enormous changes in Chinese tort law since the formal legal rules came into being in 1986. The most salient feature of the evolution of torts in China in the past three decades is the growth of a liability system moving predominantly in favor of tort victims. This feature, however, has eluded previous introductory works on Chinese tort law written in English. In addition to using the major civil statutes to demonstrate this point, this chapter also surveys the administrative laws and regulations as well as the judicial interpretations that also shape the contours of the Chinese tort law. An equal emphasis on the latter is another unique contribution of this chapter. After an overview of several aspects of tort law that shows an expansion of injurers' liabilities, this chapter assesses the efficiency implications of the evolution of tort law in China. Given the exceptionally low point at which the increment of victim protection in tort law started, the change of rules in China is, by and large, moving in the direction of cost internalization as required by efficiency. However, the potential improvement in efficiency is perhaps a by-product of the development of tort law in China. The motivation behind the rule change is more likely to be loss redistribution rather than efficiency upgrade.

Chapter 6, written by Tze-Shiou Chien, begins with a description of tort law in Taiwan, an integral part of the Civil Code of 1930. Liability for damages has been based on the fault principle. There are three basic categories of tort: infringement of rights, *contra bonos mores*, and violations of protective laws. Types of strict liabilities were added to the Civil Code in 1999. The Consumer Protection Law ushered in

products liability in 1994. Insurance and other nontortious compensation institutions that affect tort law have also found their places in Taiwan. Courts, as the interpreter of the law, have played a significant role in the development of tort law in Taiwan, although not to the extent they have played in common law systems.

Chapter 6 offers a critical examination of this evolution of tort law in Taiwan, as articulated by the Taiwan Supreme Court, from an economic perspective – specifically the Coasean view, rather than the Pigovian or Posnerian views. Standard law and economics would characterize tort law as legal measures to deter injuring persons from engaging in activities that cannot be justified on the grounds of cost. The criterion for the liability for damages is the level of physical capacity to prevent accidents. This, however, is an *ex ante* regulatory measure. It does not fit with the idea of tort law as an *ex post* compensation mechanism. Chapter 6 sees tort law as a set of default rules which are *ex ante* agreed upon by the injuring persons and the injured persons to be applied *ex post* in the concrete cases of accidents. The injuring persons and the injured persons would make a deal agreeing on a set of fault-based liability rules to allocate the loss because the rules are beneficial to both the injuring persons and the injured persons. Whether the damage is foreseeable to the injuring persons is the key. The law as a norm must be recognized by the ruled. Liability for damages must be foreseeable to the injuring persons, otherwise tort law would lose its normativity and thus also its legitimacy. Based on the human nature of cognition, the foreseeability of damage depends upon the riskiness of activities in which the injuring persons engage. The more risky the activities are, the more likely the injuring persons will be liable for damage. The riskiness of activities, then, would depend upon the physical capacity to prevent accidents of the injuring persons. The less capable the injuring persons are, the more risky the activities in which they engage. As a result, the less capable the injuring persons are, the more likely they would be at fault and then liable for the damage. In the fault principle, there exists a built-in incentive to improve the physical capacity to prevent accidents because this would increase the scope of activities that the injuring persons may engage in without being held liable for damage.

Chapter 7, authored by Shitong Qiao, engages the debate on the nature of property rights through the lens of Chinese property law, real estate law in particular. Qiao engages the important debate on whether property rights are better characterized as a bundle of rights

or *in rem* rights. Traditionally, the *in rem* nature of property was widely recognized, at least since Blackstone. Later, however, legal realists succeeded in promoting a rival conception – property as a bundle of rights. Coase (1960) reinforces the realist picture by conceiving of property as a list of particularized use rights. Merrill and Smith (2001; 2012) push back the realist conception and contend that property rights are *in rem*. Qiao's chapter moves the ball forward by engaging this debate in the context of a huge developing country – China.

Set against the backdrop of Chinese land reform, Chapter 7 argues that the path of Chinese land reform reflects the "bundle of rights" picture rather than the *in rem*ness picture of property rights. The two main achievements of Chinese land reform, i.e., the establishment of transferrable land use rights in the urban area and the establishment of the household responsibility system in the rural area, this chapter argues, are examples of the "stick by stick" approach (in property jargon, a bundle of rights and a bundle of sticks are interchangeable). This chapter develops its argument by reviewing the main property laws and policies introduced over the past three decades. The basic contours of the Chinese property system are thus revealed.

In Chapter 8, I first give an overview of the several types of limited property rights allowed by the Taiwan Civil Code and provide statistics as to how often property owners in Taiwan utilize these forms. The Book of Things in the Taiwan Civil Code was overhauled between 2007 and 2010. Chang coded the amendments and found: (1) 97 percent of the proposals by the taskforce (composed of property scholars and judges) were accepted verbatim by the legislature and (2) property laws in Japan, Germany, and Switzerland heavily influenced this round of amendments. The unconventional story behind the legal changes is that scholars and judges are the "interest group" that drives these amendments. The business world is generally uninterested in changing the abstract Taiwan Civil Code. Generally speaking, the new law, as proposed by this interest group, is more efficient than the old law. For instance, the new law decreases information costs for third parties in several respects. The findings also have implications for the debate regarding the evolution of property rights and the long-term efficiency of the common law versus statutes.

Chapter 9, written by Ruoying Chen, provides an overview of a few of the major issues in business organization laws in China, consisting of four principal topics: (1) the broad economic and political

background of the legislative history of the core body of business organization laws, i.e. company law, which has closely tracked the steps of, and been largely driven by, the reform of state-owned enterprises; (2) issues relating to the limited liability company, such as piercing the corporate veil and the recent abolition of the statutory minimal registered capital; (3) corporate governance issues, especially those unique to China, such as shareholder supremacy driven by protection of state-owned assets; and (4) duties of corporate officers, such as the judicial and regulatory implementation of the duty of care and shareholders' derivative lawsuits. Each section provides a critical introduction to the legal framework and current legal issues, and also aims to highlight recent research development. With respect to rules and the legal framework, special attention is paid to judicial practice as well as regulatory activities. Meanwhile, the broader economic, political, and social background is taken into account in an attempt to shed light on the institutional origins of legal rules and the potential driving force for the implementation of law, which is indispensable to understanding both law in action and its future development. Unlike the existing literature on corporate law in China, this chapter incorporates recent statistical studies of judicial practice in this field, in addition to theoretical inquiries in the traditional fashion. These social science studies demonstrate that the corporate law in action in China leaves many questions that are not yet well addressed by traditional theoretical inquiries.

Chapter 10, contributed by Ching-Ping Shao, argues that the Taiwan Company Law adopts a blockholder-centric model. This approach is evident in both the board hegemony rule incorporated in 2001 and the shareholders' right of proposal transplanted in 2005. This chapter focuses on the underlying reasons for the evolution of the juridical-person shareholder rule and the mandatory cumulative voting rule, both rarely seen in comparative corporate governance nowadays. As concentrated ownership structures are ubiquitous in most jurisdictions, the Taiwanese experience imparts valuable lessons for scholars and policy makers alike. More specifically, Chapter 10 first observes that in the corporate governance world, Taiwan is an outlier when it comes to the selection method for the board of directors. According to the Taiwan Company Law of 1946, a juridical-person shareholder of a company could skip elections in shareholder meetings and designate its representatives to serve as directors. The number of directors that the juridical-person shareholder can single-handedly appoint

is proportionate with its shareholding with respect to the total outstanding shares of the company. The Taiwan Company Law of 1966 abolished the designation power of juridical-person shareholders and adopted mandatory cumulative voting. Furthermore, juridical-person shareholders can send natural-person representatives to participate in elections and replace their representative directors at will. These new rules maintain the overwhelming influence of juridical-person shareholders. While the cumulative voting rule was changed from a mandatory rule to a default rule in 2001, it remained in practice a sticky default. This permissive form of rule did not last long. The Taiwan Company Law of 2011 revived mandatory cumulative voting.

In the concluding chapter, Wei Shen and Wen-yeu Wang identify the commonalities and differences in Chinese and Taiwanese laws and flush out the meaning and implication of the Chinese characteristic theories. The comparative setting is a very interesting tool in understanding why two jurisdictions that share the same origins and cultural backgrounds are moving into two diverging directions.

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Notes

1 Scholars are fond of using "Chinese characteristics" in the titles of their works, though not always endorsing the theory that social phenomena or laws in China are unique and have to be so. See, for instance, Chang (2012), Chen (2010), and Huang (2008). Another recent book, *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century*, edited by David Kennedy and Nobel laureate Joseph E. Stiglitz (2013), contains critical reflection on the general theory of law and development as applied to China

2 For books written in English on Chinese private laws, see, e.g., Ling (2002), Stein (2012), Sommers and Phillips (2012), and Li and Jin (2014). For books written in English on Chinese company laws, see, e.g., Liu (2008), Shi (2012), and Wang (2014).

3 For writings in English on Taiwanese private laws, see, e.g., Chang, Chen, and Wu (2016).