Article

Rethinking the Nature and Legal Status of Illegal Structures in Taiwan: A Commentary on Taiwan High Court Judgment Case No. 102, Shang Zi, 1188

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ABSTRACT

*From the perspective of "uniformity and consistency for legal order" and "consistency of illegality", an illegal structure is by nature illegal under both civil and administrative law. Illegal structures are unregistered constructions which are against the law, and thus shall be deemed as prohibited from being the subject of transaction. According to Taiwan High Court Judgment Case No. 102, Shang Zi, 1188 ("**Case**") and other court rulings, the courts are of the opinion that, despite the buyer's knowledge of illegal structures, he/she was not aware of the fact that such illegal structures have been reported and ordered to be demolished; seller's failure to inform buyer of the foregoing constituted breach of guarantee of the subject of sale. Notwithstanding the foregoing, the courts' opinion is not accepted in this article.*

Furthermore, the court has afforded the owner of an illegal structure "de facto right of disposal". Such right is by nature incomplete, thus we should not even consider affording illegal structures a complete and entire right in rem. The existence of illegal structures lacks "consensus" required under customary law, and is in breach of public order and morality; as such, "de facto right of disposal" in illegal structures does not constitute customary law, meaning Article 767 of Civil

DOI：10.3966/181263242018031301003

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Code does not apply to illegal structures mutatis mutandis.

Keywords: *Illegal Structures, de Factor Right of Disposal, Untradeable Goods (Prohibited Goods), Customary Right in Rem, Right to Request for Return*

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I. COMMENTING TAIWAN HIGH COURT JUDGMENT CASE NO. 102, SHANG ZI, 1188

A. *Facts*

Plaintiff A claimed that an agreement regarding sale of a real property (the agreement is hereinafter referred to as "Agreement", and the real property is hereinafter referred to as "Property") was executed between A and defendant B on 30 September 2011, in which A agreed to pay NT$6,500,000 for sale of the Property (such purchase price is hereinafter referred to as "Purchase Price"), and B agreed to transfer the ownership of the Property. A has paid the price. B has completed the handover and transfer registration. After moving into the Property, A discovered that water leaked out from the balcony, resulting in water leaking out and paint peeling from the wall. After inspection, the Property was found to be a fixer-upper (a house containing chloride), and fee for repairing would be NT$748,200. In addition to the foregoing, A claimed that B, at the time of sale of the Property, purposely concealed the fact that the competent authority has declared the rooftop addition to the Property ("Rooftop Addition") illegal, and ordered it to be demolished. According to Article 2 of the Agreement,[1] the price of Rooftop Addition NT$1,481,331 should be reduced. The total amount to be reduced from the Purchase Price is the repair fee for the Property and the value of Rooftop Addition ordered to be demolished, which is NT$2,229,531. Plaintiff A requested that NT$2,229,531 of the Purchase Price to be repaid by defendant B in accordance with Article 179 of Taiwan Civil Code.

B. *Holdings*

In terms of "whether the buyer could claim warranty from the seller if he/she is unaware of the demolition order", which is the issue to be

1. "In terms of the additional or the occupied parts: If the subject of sale includes any additional or occupied part, which cannot be registered under the current laws and regulations, rights and obligations regarding such parts are set forth as follows: 1. Additional or occupied part: rooftop. 2. If the subject of sale includes any additional part built without application or illegal, seller shall inform the buyer of the illegality of the additional part which has been recorded by the competent authority. If the additional part is demolished or is ordered to be demolished between the period of the execution of this agreement and handover of the house, both seller and buyer agree to engage an appraiser to determine the value of the part to be demolished, and reduce the value of the same from the purchase price; if the demolition order is made or the additional part is demolished after handing over the house, buyer shall assume such risk. If the seller receives the report for demolition from competent authority before handing over the house, but fails to inform the buyer of the same, in addition to the reduction of purchase price as specified above, seller shall be liable for the damages rising there from and the appraisal fee."

discussed in this article, court of the first instance (New Taipei District Court Case No. 101, Su Zi, 1405) ruled in favor of the plaintiff based on the following reasons:

1. "According to Article 2 of the Agreement, it is clear that Rooftop Addition is part of the subject purchased by the plaintiff. If defendant has been informed of the demolition order of the Rooftop Addition before handing over the Property but does not notify plaintiff of the demolition order, the defendant should engage an appraiser to determine the value of Rooftop Addition, and deduct the value of Rooftop Addition from Purchase Price."

2. It is not disputed that defendant knew about the demolition order before handing over the Property, but defendant argued that, at the time when the Agreement was entered into, the plaintiff knew about the Rooftop Addition being "reported for demolition". In the court of first instance's view, the defendant should bear the burden of proof in evidencing plaintiff's knowledge of the "report for demolition", which the defendant failed to do so. Given defendant's failure to prove plaintiff's knowledge of "report for demolition" of the Rooftop Addition, the defendant should be held liable under Article 2 of the Agreement.

However, Taiwan High Court does not agree with court of first instance's fact finding. Taiwan High Court believes that the buyer has been informed by the seller of the fact that Rooftop Addition has been "reported for demolition". Also, Taiwan High Court believes that the buyer was aware of the "report for demolition" already at the latest at the time when the Agreement was entered into. Given the above, the plaintiff should not be entitled to, under Article 2 of the Agreement, request for price reduction for the Rooftop Addition from the Purchase Price. The judgment by the court of first instance regarding the part of Rooftop Addition was reversed, in which the Taiwan High Court ruled against the plaintiff. This part of the judgment became final and confirmed, as an appeal to the court of third instance was not permissible. Taiwan High Court specifically emphasized that:

1. The buyer was not aware of the fact that the Property is considered an illegal structure, and has been reported for demolition, which should be regarded as "defect in a thing". The texts of the judgment are as follows: "In the early days, it was common for a resident of the rooftop in a condominium to build an additional structure on the rooftop without the consent of other residents, or without an agreement among the residents stipulating that the rooftop is an individual area which the resident of the foregoing owns and uses independently. In common practice of purchase and sale of real property, the rooftop addition and the house right below the rooftop are sold together (the rooftop addition is commonly called "rooftop addition house", and no initial registration has been made for such house, so

buyer of such house can obtain de facto right of disposal only) . . . such rooftop addition house bears the risk of being demolished, therefore, it is essential for the buyer to know whether the rooftop has been agreed to be an individual area where the seller owns and can use independently, whether owners of other units dispute the ownership of rooftop, and whether the competent authority has declared the rooftop addition illegal and demand it to be demolished, as these facts affect the buyer's willingness to buy the house. Therefore, seller is responsible for disclosing such facts in detail to the buyer. If seller does not perform the foregoing obligation, which leads to the buyer mistakenly buying the rooftop addition house, and such house is demolished due to other owners' request or competent authority's order, we believe that the house contains defect in quality that destroys or diminishes the value and fitness for ordinary efficacy, or efficacy of the contract of sale".

2. The defendant did not intentionally conceal the fact that Rooftop Addition is an illegal structure from the plaintiff, and the defendant's non-disclosure of the foregoing fact was not intentional either. Furthermore, the plaintiff was aware that the Rooftop Addition was illegal by the time the Agreement was executed. Even if the plaintiff was not aware of such fact, the plaintiff can still be blamed, as gross negligence existed in plaintiff's not-knowing.

3. Accordingly, the plaintiff shall not be entitled to claim for reduction from Purchase Price, as the defendant had disclosed the fact that the Rooftop Addition was an illegal structure, and that the Rooftop Addition had been reported for demolition, which does not meet the requirements set forth in Article 2 Section 2 of the Agreement. In addition, the plaintiff, at the latest at the time when the Agreement was entered into, was aware of the fact that Rooftop Addition was an illegal structure that was reported for demolition. Knowing that the Rooftop Addition was an illegal structure and was reported for demolition, plaintiff decided to purchase the Property nevertheless. Pursuant to Article 355 Section 1 of Taiwan Civil Code, "A seller is not responsible for such defect of quality in the thing sold as specified in the first paragraph of the preceding article, if the buyer knew of the defect at the time when the contract was made.". Even if the Rooftop Addition is ordered by the competent authority to be demolished, the defendant does not bear the warranty liability under Article 355 Section 1 of Taiwan Civil Code.[2] To

2. According to the reasoning in the judgment, apart from applying Minfa (民法) [Civil Code] § 355, para. 1 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended June 10, 2015) (Taiwan) to waive the seller's warranty liability, the court also mentioned that: the buyer would at least be held reckless under Civil Code § 355 para. 2 (Taiwan) in failing to know that the house in question has been ordered to be demolished. Accordingly, the seller shall have no warranty liability. The court however did not quote Civil Code § 355, para. 2 (Taiwan) in the holding of its judgment.

conclude, the plaintiff shall not be entitled to claim the reduction at the amount of NT$1,481,331 from Purchase Price.

C. *Issues*

With regard to the key issue "whether the plaintiff was aware of the fact that the Rooftop Addition was an illegal structure and has been reported for demolition", the district court (i.e. the court of first instance) and high court have different fact-findings: the district court believed that the buyer knew that Rooftop Addition was an illegal structure, but did not know that it has been reported for demolition as the seller failed to notify the buyer of the same. Given the above, the court ruled that Article 2 of the Agreement regarding the price reduction should apply. However, the high court was convinced that the buyer knew that the Rooftop Addition was an illegal structure, and knew that it has been reported for demolition (or at least such facts were accessible to the buyer, whether by means of confirming with the seller before executing the Agreement or asking the broker to find out). Accordingly, the seller was not liable for warranty under Article 355 of Taiwan Civil Code.

Notwithstanding the foregoing, the holdings of both district court and high court seem to suggest the following legal issue: If the buyer knew that the subject of sale was an illegal structure, but did not know that such illegal structure has been reported for demolition, can seller's warranty liability, price reduction and claim for damages be stipulated in the agreement? If there is no such agreement between the seller and the buyer, does the current laws regarding seller's warranty liability apply? The answers seemed to be positive, which can be demonstrated from point 1 of the reasoning in high court's judgment as above.[3] Subject to the foregoing conclusion, the high court denied plaintiff's claim for seller's warranty liability based on its fact-finding. However starting from the issue above, this article aims to re-think the nature of illegal structures so as to re-examine whether courts' opinion that warranty liability applies to sale of illegal structures is appropriate or not.

In fact, the issue of illegal structures and warranty liability raised in the

3. It is not uncommon in purchase agreement to see disputes over the obligation of notification on demolition order for illegal structure and relevant risk assumption by agreement in court practice. As of 26 March 2017, the number of results from Taiwan High Court in Judicial Yuan's legal research system amounted to around 70. After reading those judgments, I discovered that there are quite a few disputes similar to the Case. It was reiterated in Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Minshi (民事) [Civil Division], 104 Zhong Shang Zi No. 667 (104重上字第667號民事判決) (2017) (Taiwan) that: ". . . the scope of warranty defect includes the house of sale not being ordered for demolition by the competent authorities so as to ensure the purpose of agreement has been met", otherwise, the seller bears the warranty liability.

foregoing judgment is only a small part of the illegal structure problems which have troubled courts in Taiwan for the past decades. There has been a lot of controversies arising from application of law in illegal structures, which has also been discussed by scholars in various articles.[4] However, it is only by probing into the nature of illegal structures can we ultimately solve the problem. For the past half century, in terms of the development of civil law in Taiwan, if asked to pick the most challenging dilemma from law of obligations and property law respectively, it is the "nominee registration"[5] for law of obligations; and "illegal structure"[6] for property law. Points from different perspective worthy of discussion have been conjured up in numerous articles in Taiwan. Such points will not be repeated in this article. The goal of this article is to re-think and demonstrate the nature and legal

4. Please refer to the following two articles and the literature cited in them: Xie Zai-Quan (謝在全), *Weizhang Jianzhuwu Maishouren zhi Minshifa Diwei* (*違章建築物買受人之民事法地位*) [*The Legal Status of Illegal Structure Purchaser*], *in* WUQUANFA ZHI XIN SI YU XIN WEI—CHEN RONG LONG JIAO SHOU LIU ZHI HUA DAN ZHU SHOU LUN WEN JI (物權法之新思與新爲－陳榮隆教授六秩華誕祝壽論文集) [NEW INSIGHTS ON PROPERTY LAW: ESSAYS CONTRIBUTED FOR PROFESSOR CHEN RONG-LONG'S SIXTIETH BIRTHDAY] 75 (Chen Rong-Long Jiaoshou Liuzhi Huadan Zhushou Lunwenji Bianji Weiyuan Hui (陳榮隆教授六秩華誕祝壽論文集編輯委員會) [Editorial Committee of Essays Contributed for Professor Chen Rong-Long's Sixtieth Birthday] ed., 2016); Chen Zhong-Jian (陳重見), *Weizhang Jianzhu Shishishang Chufenquan Zhi Fazhan yu Dingwei* (*違章建築事實上處分權之發展與定位*) [*The Development and Status of De Facto Right of Disposal of Illegal Structure*], *in* NEW INSIGHTS ON PROPERTY LAW: ESSAYS CONTRIBUTED FOR PROFESSOR CHEN RONG-LONG'S SIXTIETH BIRTHDAY, *id*. at 99, 99.

5. The Supreme Court has made a resolution on 14 February 2017 in civil department's third meeting on the external effect of nominee agreement: the owner A and nominee B entered into a nominee agreement over a certain real property. B, without the consent from A, transfers the ownership of the real property to a third party, C. What is the effect of such transfer? The unanimous opinion is that such transfer shall be effective. The particulars of the resolution pointed out: "nominee agreement over real property is an agreement between the owner and nominee. According to the terms of the nominee agreement, the nominee shall have no right to manage, use, dispose of, or collect proceed from the real property. However, such agreement is merely an agreement between the owner and nominee, and such agreement does not bind any third party. As the nominee is registered as the owner of the real property, the nominee shall have the right to transfer the real property to a third party." The resolution has, for the moment, put an end to the debate over the dilemma of nominee agreement.

6. There is massive amount of illegal structure in Taiwan. In Taipei, for the past 20 years or so (from 1991 to 2012), almost 180,000 buildings have been considered illegal structure. As of 2012, around 40,000 illegal structures have not yet been demolished. According to Economy Daily News dated 11 December 2016: the growth of newly built illegal structure is way faster than the speed of demolition. This results in the continuous increase in the amount of illegal structure yet to be demolished. As of the third quarter this year, the total amount of illegal structure in six major cities in Taiwan is 560,8000, among which New Taipei City has 207,000 illegal structures, which is the largest; and Kaohsiung City has 122,000, which is the second largest. Therefore, issues over illegal structure have great significance in court practice, and it is also an issue bearing local characteristics. From amount of court judgments, for cases involving illegal structure disputes, the statistics from legal research of Judicial Yuan showed that, by the key word "illegal structure", there are 411 judgments made by the Supreme Court (since 1996), 2,229 judgments from by High Court (since 2000), and 4,657 judgments made by the district courts (since 2000). Among district courts, Taiwan Taipei District Court rendered 968 judgments. By seeing the amount of judgments, the importance of issues over illegal structure in court practice can be conceived.

status of illegal structures.

II. DEMOLITION ORDER AND WARRANTY AGAINST DEFECT?

It is not doubt that the buyer may claim warranty against the defect if the buyer does not know that the subject of sale is an illegal structure. The scenario we are trying to discuss here is slightly different. Imagine a scenario: both parties know that the subject of sale is an illegal structure, but the buyer has no knowledge about the illegal structure being reported for demolition. After execution of the sale agreement, the illegal structure is demolished. What remains controversial among court practice is, can the buyer claim warranty against defect in the foregoing scenario?

A. *Positive Answer*

The majority of the court judgment takes the same position as the Taiwan High Court in the Case. For example, it was enunciated in the Supreme Court Judgment Case No. 104, Tai Shang Zi, 2062 that "at the time of execution of the agreement, the appellant was aware of the fact that the rooftop addition was an illegal structure which was not registered. *Shu-Hua Hsieh did not receive any notification about the demolition from the public construction sector, and the rooftop addition was considered an illegal structure and thus arranged for demolition by Illegal Construction Demolition Corp, New Taipei City Government after appellant's application.* According to Article 355 Section 1of Civil Code, appellant (i.e. the buyer) cannot rescind the agreement based on seller's warranty liability against defect (emphasis added)." It can thus be inferred that, the Supreme Court holds the opinion that: despite both parties' knowledge of the rooftop addition being an illegal structure, if the seller was notified of the demolition arrangement but failed to inform the buyer of the same, then such failure shall constitute warranty liability against defect.

It was also stated in the lower court's judgment (which was later brought to the Supreme Court for appeal, Case No. 89, Tai Shang Zi, 1109) that: "The swimming pool, children's play area, and the guard rooms were not included in the building layout approved by Taichung City Government Construction Office (later renamed as Taichung City Government Construction Bureau) . . . which was in violation of the construction laws and regulations, the swimming pool built in the six-meter-wide alley is an illegal structure, which was subject to demolition at any time. The public utilities built by the appellant were defective, therefore the appellant's performance was not made in conformity with the tenor of the obligations . . . *the indoor swimming pool, children's play area and the guard*

rooms built by the appellant were subject to demolition any time, so we cannot conclude that it is free of defect (emphasis added)."

B. *Negative Answer*

Despite the major opinions mentioned above, some are convinced that whether an illegal structure has been reported for demolition does not concern warranty liability against defect. For instance, in Taiwan High Court Judgment Case No. 104, Shang Yi Zi, 385, it stated that, "*If the house is an illegal structure, then it bears, by nature, the risk of being demolished, which can be imagined by common sense and experience; and it does not make any difference whether the A (i.e. the seller) has notified the buyer about the demolition or has checked the box in section 14 of the property description, in which it specified 'has the additional part been demolished or notified or announced to be demolished'* . . . and as the buyers B and C knew or were reasonably believed to have access to know of the additional part built in firebreak alley and outside of the balcony, buyer B shall not be entitled to claim damage for defect which results in the deficit of value and quality of the house (emphasis added)."

C. *Sub-Conclusion*

It is concluded in this article that, the key element to the above issue is whether there is an agreement between the seller and the buyer regarding the notification obligation in the scenario that the buyer has the knowledge about the illegal structure but no knowledge of the report for demolition. If there is no such an agreement, then as articulated in Taiwan High Court Judgment Case No. 104, Shang Yi Zi, 385, "If the house is an illegal structure, then it bears, by nature, the risk of being demolished, which can be imagined by common sense and experience; and it does not make any difference whether the A (i.e. the seller) has notified the buyer about the demolition or has checked the box in section 14 of the property description, in which it specified "has the additional part been demolished or notified or announced to be demolished". As long as both parties are aware of the fact that the house is an illegal structure, the subject of sale is then sold on an "as is" basis; which means there is no issues as to (subjective or objective) defect in a thing,[7] and the buyer therefore shall bear the risk of the house being

7. Defect of goods refers to the difference between the actual quality (quality in reality) and the agreed/ordinary quality (quality supposed to have) of the goods, which is not insignificant for the buyer. Hence, most of the scholars and court practice in Germany tend to support the subjective approach in determining whether there is a defect; or they support the standard of mixing subjective and objective approach (for Mandarin literature on this topic, please *see* MINFA ZHAIPIAN GELUN

demolished at any time. In such case, Article 354 and other stipulations regarding warranty liability against defect shall not apply.

The question is: if it is agreed between the parties that seller should notify the buyer about whether the house has been demolished or been reported for demolition, how do we assess the effect of such an agreement?[8] This article shall refer to the point raised in Taiwan High Court Judgment Case No. 105, Zhong Shang Zi, 336 to further elaborate on the aleatory nature in the transaction and both parties' intentions in taking chance. It was stated in the above judgment that: "whether the additional part of an illegal structure has been demolished is essential to the appellant. The reason of buying the house with additional part is that, the existing illegal structures built before 1 January 1995 were held back from demolition, and according to common sense in transaction, such illegal structures will not be demolished and can therefore be used by the buyer . . . *Apparently, the buyer bought the house containing illegal mezzanine as it provided more space, which was an added value. The buyer took the chance and was willing to take the risk. Both parties were aware that the additional part was subject to report for demolition, but after assessing the interest and risk, agreed on the allocation of risk* (emphasis added)." The above statement was absolutely to the point.

As reasoned in the "Case", the buyer had the chance to confirm with the seller, or to ask the broker to check whether the Rooftop Addition (i.e. the illegal structure) has been reported for demolition. If the buyer fails to complete such due diligence process and shifts such obligation to the seller, it seems that the buyer has shifted its obligation of duty of care in a transaction to the seller as the obligation of notification. Such shift in obligation is substantially equivalent to releasing buyer's gross negligent liability, which violates Article 222 of Taiwan Civil Code in which liability of intentional or gross negligent act cannot be released in advance. Given the above, the court may consider to declare such an agreement [regarding seller's notification obligation about the illegal structure's demolition status] void in order to limit the legal protection in the sale of illegal structures (the basis of such thinking is connected with what this article is about to discuss later, in which it is convinced that sale of illegal structures should be prohibited, please refer to the later paragraphs for details), and to step back to the idea of having the buyer assume the risk of purchasing an illegal

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SHANG (民法債編各論上) [PARTICULAR KINDS OF OBLIGATIONS, VOLUME 1] 63-65 (Huang Li (黃立) ed., 2002) (mainly the part contributed by Yang Fang-Hsien (楊芳賢)). Since both the seller and buyer of the illegal structure are aware of such defect, it should be deemed as, pursuant to the above academic theory, no defect at all.

8. *See supra* note 3. In practice, there are quite a few cases with such an agreement, which also raises controversy.

structure.

III. ILLEGAL STRUCTURES AS "3/4 PROHIBITED GOODS"

Let us forget about the issue of whether illegal structures being reported for demolition is a "statutory" or "contractual" warranty against defect raised in the "Case". This article contends that the fundamental issue regarding illegal structures is the nature of the same. The question is: why illegal structures, prohibited from being built and exist *under the administrative laws* in Taiwan (i.e. Building Act), are acknowledged as property lawfully protected *under Taiwan Civil Code*, and are afforded the status of so-called "de facto right of disposal" by the Supreme Court, under which illegal structures can be traded? In other words, if we agree that illegal structures should never be the subject of trade, then there is no need to discuss about the issues of the warranty against defect raised in the "Case".

Hence, this article attempts to demonstrate, under "principle of uniformity and consistency for legal order" within methodology of jurisprudence, that illegal structures should be by nature deemed as "partially prohibited".

A. *Principle of Uniformity and Consistency for Legal Order*

1. *Principle of Uniformity and Consistency for Legal Order—Constitutional Status*

Principle of uniformity and consistency for legal order (*Die Einheit der Rechtsordnung*) contained in the methodology of jurisprudence is rarely discussed or applied in the academic debate or practice in Taiwan. It is a pity. Nevertheless, the title "principle of uniformity and consistency for legal order" has become popular and has been quoted a lot by German literatures since the expert of criminal law and methodology of jurisprudence in Germany, Karl English, used it as the title of his additional booklet publication after he delivered the talk in his inauguration in Heidelberg University. Despite being applied in academic literature or court practice, such principle has become the topic of research for German academic literatures in symposiums, doctoral thesis, or academic promotion thesis since only the past few decades. Only then people started to mold such principle as juris formula (*juristische Formel*) or juris argumentation figure (*juristische Argumentationsfigur*) for jurisprudence methodology or civil jurisprudence in the 20th century; it was also only then people started to investigate and discuss the essence of such principle in order to deal with

specific questions raised regarding doctrinal study of law.[9]

Undoubtfully, "principle of uniformity and consistency for legal order" is a requirement under constitutional law level. As the German scholar Canaris indicated, "the principle of uniformity and consistency for legal order goes back the requirement under justice. Consistency is the representation of principal of equality, which guarantees the non-conflicted nature of legal order, and fulfills the tendency of justice prevalence.[10] Legal order is required to convey clear and consistent rules to the ones who are regulated. Therefore, the principle of uniformity and consistency for legal order should be afforded the significance at the constitutional level.[11]"

2. *Comprehension from Three Perspectives*

When referring to academic discussion in Germany, the principle of uniformity and consistency for legal order can be understood from three perspectives: the perspective of normative theory, legal principle theory, and legal policy theory.

In terms of normative theory, all laws should be consistent. This is because all laws originated from the effective orders of constitutional law or basic norms.[12] Although in the theory of different hierarchies of legal order (*Lehre vom Stufenbau der Rechtsordnung*),[13] novelty is certainly added in each hierarchy of the law, and within the legal order system itself, different norms are inevitably in conflict with others; however, legal order system as a whole does not allow conflicts. The idea of uniformity and consistency for legal order is to avoid the conflicts within the legal order system itself.[14]

9. MANFRED BALDUS, DIE EINHEIT DER RECHTSORDNUNG: BEDEUTUNGEN EINER JURISTISCHEN FORMEL IN RECHTSTHEORIE, ZIVIL- UND STAATSRECHTSWISSENSCHAFT DES 19. UND 20. JAHRHUNDERTS (1st ed. 1995).

10. CLAUS-WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ: ENTWICKELT AM BEISPIEL DES DEUTSCHEN PRIVATRECHTS 16 (2d ed. 1983).

11. DAGMAR FELIX, EINHEIT DER RECHTSORDNUNG 10 n.109 (1988) (citing Sebastian Müller-Franken, *Das Verbot des Abzugs der „Zuwendung von Vorteilen" nach dem Jahressteuergesetz 1996 - Verfassungsprobleme einer Durchbrechung des objektiven Nettoprinzips*, 1997 STEUER UND WIRTSCHAFT 3, 18 (1997) (Ger.)).

12. With regard to the basic norms' supremacy in terms of effect, please refer to Sifa Yuan Dafaguan Jieshi No. 499 (司法院大法官解釋第499號解釋) [Judicial Yuan Interpretation No. 499] (Mar. 24, 1999) (Taiwan), in which the Constitutional Court continuously refers to basic norms as the norms that effect the constitutional law.

13. The theory of different hierarchies of legal order is established, as well-know, by the famous scholar in public law, Hans Kelsen. According to the theory, not all the norms are placed on the same hierarchy. Rather, they are placed in different hierarchies. When the effect or judgment of values of norms in different hierarchy conflict with each other, the norms in higher hierarchy should prevail. This theory has been developed to now scrutiny on constitutionality of laws where the constitutional law prevails over the laws or regulations, and laws and regulations prevail over the administrative orders. BERND RÜTHERS, CHRISTIAN FISCHER & AXEL BIRK, RECHTSTHEORIE MIT JURISTISCHER METHODENLEHRE, Rn. 272 (9th ed. 2016).

14. *See id*. at 271.

Therefore, some scholars refer to it as "principle of being free from conflicts within legal order" (*das Prinzip der Widerspruchsfreiheit der Rechtsordnung*).[15] Naturally, given the complexity and diversity of empirical laws, the effect of adopting principle of uniformity and consistency for legal order might be practically limited.

From the perspective of legal principle theory, "uniformity and consistency for legal order" refers to the consistency required in the judgment of values, legal principle, or consistency in evaluation (*Wertungseinheit*). This is to avoid conflicts in legal order so that the purpose of various laws can be implemented in uniformity;[16] and this is as clear and understandable in terms of avoiding logical conflict. "When two different regulations represent values against each other, this is the contradiction in evaluation" and "If the evaluation of lawmakers is clear, then such conflict is not merely the conflict in values; rather, it is the conflict in regulations themselves[17]", this is to some extent against the constitutional order! Therefore, "uniformity and consistency for legal order" is considered an important methodology for explaining and demonstrating laws (*Einheit der Rechtsordnung als Auslegungsargument*), or a subsidiary concept in methodology for application of law, which mitigates the conflict existing within the regulations.[18] "If following a certain regulation results in interference or impairment to the purpose the other regulation, this is conflict in teleology. This is the other side of the evaluation contradiction, as evaluation is taken into account as part of the purpose for making certain regulations.[19]"

"Uniformity and consistency for legal order" is not just an academic theory in Germany. The Federal Constitutional Court has, in 1998 in two of its judgments, based on "violation against the principle of uniformity and consistency for legal order", declared that the container packaging tax regulations (*Verpackungssteuer-Satzung*) in Kassel City and the garbage disposal regulations (*Landesabfallgesetz*) in many other states invalid. The reason being, "the rule of law requires the law-making institutions at the state level and federal level to adjust their regulations. This is to avoid having regulations resulting in the ones who are regulated facing the conflict

15. Helge Sodan, *Das Prinzip der Widerspruchsfreiheit der Rechtsordnung*, 54 JURISTEN ZEITUNG 862-70, 864 (1999). The "principle of being free from conflicts within legal order" has been used by scholars and in practice in Germany interchangeably as "consistency of law" (*Einheit des Rechts*). REINHOLD ZIPPELIUS, JURISTISCHE METHODENLEHRE 201 (10th ed. 2012), "consistency of norms" (*Einheit des Gesetzes*) or "consistency of constitutional law" (*Einheit der Verfassung*). *See* RÜTHERS, FISCHER & BIRK, *id*. at 277.

16. *See* RÜTHERS, FISCHER & BIRK, *id*. at 145.

17. *Cf.* KLAUS F. RÖHL, ALLGEMEINE RECHTSLEHRE 429 (2d ed. 2001).

18. *See* RÜTHERS, FISCHER & BIRK, *supra* note 13, at 276-78.

19. *See* RÖHL, *supra* note 17, at 430.

in legal order[20]". It is clear that although the Federal Constitutional Court did not consider "uniformity and consistency for legal order" a requirement for legal rationale (*Rationalitätsanforderung*), instead, the Federal Constitutional Court considered "uniformity and consistency for legal order" the reflection of rule of law, which sufficiently demonstrated its significance.

More importantly, in terms of requirement or default (*Postulat*) for legal policy, it should be required that legal order contains consistency although legal order is not as unambiguous as regulations. In this way, although law materials are diverse, a final and better version of law should be reached.

3. *Difficulty in Principle of Uniformity and Consistency for Legal Order*

The German scholar Klaus F. Röhl has warned that "uniformity and consistency for legal order" is practically in danger in four facets, in which he raised essential point of view worthy of contemplating:[21]

(a) Massive amount of empirical law has made uniformity and consistency for legal order a dilemma. Empirical law comes from different areas, comprehensive and complex, it is thus hard to maintain consistency. "Uniformity and consistency for legal order" does not come from nature, it is man-made.

(b) Legislators and judges need to solve specific problems, which made consistency difficult to achieve. We can only expect them to maintain the consistency when making or applying the law. Unfortunately, this is not their main task.

(c) Ever since judicial power has been divided into different areas of adjudicative powers (e.g. civil, criminal and administrative adjudicative power), the judges no longer switch among different areas of adjudicative power. In addition, scholars and lawyers, even periodic and journals all gradually become more specialized. Specialized areas of adjudicative power are the consequence of arrangement among different departments related to legal order. However, such specialization has also made the areas strange to each other. There is no coordination among different areas either. All of those have increased the difficulty in reaching consistency in law.

(d) Based on the reasons above, uniformity and consistency for legal order is supposed to be the major task for legal study. Only by legislators receiving proper education for their legal tasks, and judges receiving decent legal education, can uniformity and consistency for legal order be reached.

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20. BVerfG, 2 BvR 1876/91, May. 7, 1998, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1998/05/rs19980507_2bvr187691.html.

21. *See* RÖHL, *supra* note 17, at 430.

Despite the foregoing, the current situation is, most of the scholars have abandoned the theory of "uniformity and consistency for legal order", and submarined in different areas of the law, each emphasizing how important the specialism is behind the walls. The importance of cross-area connection has been overly neglected.

B. *Application in Practice*

1. *Uniformity and Consistency in Civil and Criminal Law*

In Taiwan, numerous constitutional judges have cited the principle of uniformity and consistency for legal order in the dissenting opinions as their legal rationale.[22] What is worth mentioning is that, apart from the foregoing, the Supreme Court has cited such principle in many of its criminal judgments, referring to such principle as an essential legal principle in the interpretation and application of law. The classic case is, by applying the principle of uniformity and consistency for legal order, the Supreme Court held freedom of press as one of the non-statutory justifications in order to determine whether Taiwan Criminal Code Article 315-2 (offence against privacy) applies in scenario of news report.

In Supreme Court Criminal Judgment Case No. 104, Tai Shang Zi, 555 (6th Criminal Department), the Supreme Court clearly indicated that, "Taiwan Criminal Code Article 315-2 Section 3 does not provide freedom of press as one of the non-statutory justification. However, *given the supremacy and uniformity and consistency for legal order*, the application of law should comply with the purpose of constitutional law. This is to avoid the scenario where, on one hand, freedom of press is protected under constitutional law; and on the other hand, criminal law penalizes acts [of freedom of press] protected under constitutional law. As freedom of press is protected under constitutional law, it should also be regarded as one of the non-statutory justification in criminal law (alteration in original) (emphasis added).[23]"

22. As explained in the consenting opinion by Justice Chen Chun-Sheng in Explanation. Sifa Yuan Dafaguan Jieshi No. 726 (司法院大法官解釋第726號解釋) [Judicial Yuan Interpretation No. 726] (Nov. 21, 2014) (Taiwan) (Chen, J., consenting).

23. The Supreme Court 10th Criminal Department has drawn attention to the same legal rationale in its judgment (Zuigao Fayuan (最高法院) [Supreme Court], Minshi (民事) [Civil Division], 104 Tai Shang Zi No. 1227 (104台上字第1227號民事判決) (2015) (Taiwan)). Accordingly, the lower instances have one by one, apply such thinking and methodology. For example, in the Taiwan High Court judgment (Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Minshi (民事) [Civil Division], 105 Shang Yi Zi No. 509 (105上易字第509號民事判決) (2016) (Taiwan)), it restated, "Based on the supremacy of constitutional law and the principle of uniformity and consistency of legal order, the application of law shall be compatible with the purpose of the constitutional law. This is for the avoidance of having constitutional protection of freedom of speech on one hand, but having criminal law penalizing the conduct protected under constitutional law. As a

Furthermore, in a case concerning breach of Securities and Exchange Act, the consistency for application of civil and criminal law within the same legal system has also been contemplated in Supreme Court Criminal Judgment Case No. 105, Tai Shang Zi, 2206 (7th Criminal Department). It is of the opinion that, ". . . if one does not bear civil liability for damages, *under the supplementary principle of criminal law and uniformity and consistency for legal order*, one's act does not constitute *actus reus* either (emphasis added)."; and vice versa, "*according to the supplementary principle of criminal law and uniformity and consistency for legal order* (text quoted from the judgment)", the court should first consider whether the business manager breaches his/her duty of care in terms of transactions for the company to determine whether civil liability is incurred, and then consider whether one's act constitutes *actus reus* under criminal offence for breach of fiduciary duty "*to determine one's criminal liability* (text quoted from the judgment)". The legal rationale behind the judgment is addressed as follows: ". . . (3) the business manager is fully informed of company matters that fall within the scope of business judgment, and he/she will act with duty of care in good faith. Therefore, provided that such discretion is not abused, all business decisions should be respected. This is also known as 'business judgment rule', and the purpose of such rule is to prevent the business managers from unreasonable civil liability incurred by loss of profit in commercial transactions. In a given criminal case, the defendant often cite such business judgment rule as defense, arguing that if business manager has acted with duty of care in terms of commercial transactions, which complies with business judgment rule, it does not constitute 'breach of fiduciary duty' under criminal law *based on the supplementary principle of criminal law and uniformity and consistency for legal order*; nonetheless, if the business manager breaches duty of care and does not act in conformity of business judgment rule, then he/she shall bear criminal liability if the act of breach against fiduciary duty constitutes *actus reus* (emphasis added)."

2. *Uniformity and Consistency in Private and Administrative Law*

The requirement of "uniformity and consistency for legal order" also exits in the event of inconsistency between private and administrative laws, and such requirement has been adopted by Supreme Administrative Court. It was specified in Supreme Administrative Court Case No. 102, Pan Zi, 351

consequent, since constitutional law protects freedom of speech, it should be acknowledged as one of the non-statutory justification; in other words, the substantive illegality theory should be adopted. Even though the justification is non-statutory, as long as the supreme interest is equipped, the conduct should be justified in order to protect the high-value interest and sacrifice the low-value interest. To conclude, in addition to statutory justification, non-statutory justification should be acknowledged".

that, ". . . when the taxpayer contends that in the private law spectrum, when encountering inconsistency between legal form and substantive content in the economical aspect, the substantive content in the economical aspect shall prevail for the purpose of application of taxation law so as to obtain a beneficial tax, *pursuant to the requirement of uniformity and consistency for legal order*, such contention cannot be in conflict with other legal order (emphasis added).[24]"

Different Criminal Departments in the Supreme Court have all cited "uniformity and consistency for legal order" so as to establish non-statutory justification in favor of the defendant; and to connect such principle with "supplementary principle of criminal law", under which, when both elements in civil and criminal liability are met, the values of legislators for and legal consequences of civil laws should primarily be contemplated before determining criminal liability; and to insist on the requirement of **"uniformity and consistency for legal order"** when inconsistency is found between private and administrative laws so as to avoid contradictions in the values of the laws. From the above-mentioned judgment, we have discovered that **principle of "uniformity and consistency for legal order" has become prominent for Supreme Court when applying the laws.** The Supreme Court's scientific approach in applying methodology for application of law and accuracy in demonstration is a huge progress in terms of combination of both academic theory and legal practice, which should be praised!

C. *Uniformity and Consistency in Illegality*

1. *Uniformity and Consistency in Illegality under Private and Public Law*

If we make the principle of "uniformity and consistency for legal order" more specific, it then becomes the dilemma of "consistency between public and private laws" which originated from the separation of public law from private law. Therefore, the separation and correlation between public and private law has remained the most discussed topic in German legal literature in this century, especially the impact of public law to private law, and the necessity of harmony between the same. The discussion on defining the scope of, and overlapping between public and private law remains: within what sort of content and scope, should the private law be ascertained in

24. The identical legal rationale is recapitulated in Zuigao Xinzheng Fayuan (最高行政法院) [Supreme Administrative Court], Pan Li (判例) [Precedent], 101 Pan Zi No. 689 (101判字第689號判決) (2012) (Taiwan); Zuigao Xinzheng Fayuan (最高行政法院) [Supreme Administrative Court], Pan Li (判例) [Precedent], 99 Pan Zi No. 685 (99判字第685號判決) (2010) (Taiwan).

accordance with the standard of public law? And *vice versa*, in what scope should private law be respected when it overlaps with public law?[25]

According to German legal theory, there are at least a few incision points (*Einbruchstellen*) where public law enters the field of private law, which are as follows:[26] first, German Civil Code Section 134 regarding the statutory prohibition (which is equivalent to Article 71 of Taiwan Civil Code); second, German Civil Code Section 823 Subsection 2 regarding breach of a statute intended to protect another person;[27] third, the effectiveness of fundamental rights to fight against any third person, especially the application of law regarding public order and morality (German Civil Code Section 138, which is equivalent to Taiwan Civil Code Article 72); fourth, approval under public law;[28] fifth, Indefinite legal concept under German Civil Code Sections 906 and 1004 regarding exercise of the landowners' rights[29] (*Nachbarrecht*) (equivalent to Taiwan Civil Code

25. *See* RÖHL, *supra* note 17, at 436.

26. *Id*.

27. In Zuigao Fayuan (最高法院) [Supreme Court], Mnshi (民事) [Civil Division], 86 Tai Shang Zi No. 3076 (86台上字第3076號民事判決) (1997) (Taiwan), the Supreme Court rejects the idea that prohibition of illegal structure stated in Building Act Article 25 should be considered "statutory provision enacted for the protection of others and therefore prejudice to others" under Taiwan Civil Code Article 184 Section 2. I am afraid I cannot agree with such view, as the majority opinion of scholars and among court practice is of the view that Taiwan Civil Code Article 184 Section 2 only excludes statutory provisions that protect the national public interest and social order; however, it does not exclude the statutory provisions that protect individual rights and general rights. *See* WANG ZE-JIAN (王澤鑑), QINQUAN XINGWEI FA (侵權行爲法) [TORT LAW] 391 (2015); Zuigao Fayuan (最高法院) [Supreme Court], Minshi (民事) [Civil Division], 84 Tai Shang Zi No. 1142 (84台上字第1142號民事判決) (1995) (Taiwan). It is stipulated in Jianzhu Fa (建築法) [Building Act] § 1 (promulgated Dec. 26, 1938, effective Dec. 26, 1938, as amended Feb. 14, 2018) (Taiwan) that: "This Act is enacted to implement building management to maintain the public security, traffic and health, and to improve the appearance of cities." The management of illegal structure, apart from the administrative management of buildings, is to ensure the construction can only be initiated by the authority's approval (this is particularly important because of Building Act § 73's requirement for water, electricity, firefighting space arrangement, firefighting and fire escape equipment) so that the life and property of the general public can be protected. The purpose of such legislation indeed includes the protection of individuals within or affected by the building. Zuigao Fayuan (最高法院) [Supreme Court], Minshi (民事) [Civil Division], 86 Tai Shang Zi No. 2151 (86台上字第2151號民事判決) (1997) (Taiwan), on the contrary, affirms the above view, which is rather appropriate. *See also* Chen Cong-Fu (陳聰富), *Lun Weifan Baohu Taren Falu chi Qinquan Zeren* (*論違反保護他人法律之侵權責任*) [*Discussion on the Tortious Liability in Violation of Statutory Provisions Protecting Others*], *in* YINGUO GUANXI YU SUNHAI PEICHANG (因果關係與損害賠償) [ATTRIBUTION AND DAMAGE IN TORT LAW] 86 (Cong-Fu Chen ed., 2004).

28. *See also* Judicial Yuan Interpretation No. 726 regarding the following issue: if working hours arrangement between the employer and employee has not been approved and recorded by the authorities, is such arrangement still subject to the relevant labor laws? This is a proper example of how administrative law can get involved in the civil contractual relations.

29. In German academic discussion, the most representative issue on the topic of coinciding involvement of public and private law is: exercise of landowner's rights. The exercise of landowner's right is originally stipulated in property law which falls under the realm of civil law. Following the relevant vast norms such as construction laws, and the acknowledgement of litigation over exercise of landowner's rights in public law, the exercise of landowner's rights has become part of the

Articles 793 and 767) ascertained by administrative orders.[30] Overall, public law enters the field of private law with different extent of strength.

It is without doubt that the statutory prohibition stipulated in German Civil Code Section 134 and Taiwan Civil Code Article 72 is bound by administrative laws and regulations[31] since by using general terms, public law (administrative law) has been referred to as the supplement to civil law. Therefore, breach of administrative law is breach of law. In other words, a significant question when discussing the uniformity and consistency for legal order is: when an act has borne the illegality as the result of violation against certain regulations, does it automatically mean such act is a violation under the evaluation of all fields of law? It is unanimously agreed by the German scholars that the answer is positive. We can infer from the requirement of uniformity and consistency for legal order that it is impossible for regulations that contradict each other to exist. We can further infer that: **whichever is prohibited in a certain field of law, it should be prohibited in the entire legal order as a whole** (*Was in einem Rechtsgebiet verboten ist, ist schlechthin rechtlich verboten*). The foregoing is referred to as

administrative law. Given the exercise of landowner's right is separately stipulated in civil and administrative law, the result of application of laws can be quite different for the same sets of fact. Such double stipulation for exercise of landowner's right which results in inharmonious conflict has become the center of discussion in the relations between public and private laws in the past few decades. In such discussion, it is not surprising to see the principle of "uniformity and consistency for legal order" playing the key role, and to see the co-relations and the debate between the two areas of law (i.e. public and private law). For more detailed discussion, *see* RÖHL, *supra* note 17, at 436; FELIX, *supra* note 11, at 84 ff (fn. 11).

30. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 906 (Ger.) stipulates: "(1) The owner of a plot of land may not prohibit the introduction of gases, steam, smells, smoke, soot, warmth, noise, vibrations and similar influences emanating from another plot of land to the extent that the influence does not interfere with the use of his plot of land, or interferes with it only to an insignificant extent. An insignificant interference is normally present if the limits or targets laid down in statutes or by statutory orders are not exceeded by the influences established and assessed under these provisions. The same applies to values in general administrative provisions that have been issued under section 48 of the Federal Environmental Impact Protection Act [Bundes-Immissionsschutzgesetz] and represent the state of the art. (2) The same applies to the extent that a material interference is caused by a use of the other plot of land that is customary in the location and cannot be prevented by measures that are financially reasonable for users of this kind. Where the owner is obliged to tolerate an influence under these provisions, he may require from the user of the other plot of land reasonable compensation in money if the influence impairs a use of the owner's plot of land that is customary in the location or its income beyond the degree that the owner can be expected to tolerate. (3) Introduction through a special pipe or line is impermissible." According to such stipulation, whether it is a "material interference" (*eine wesentliche Beeintraechtigung*) is an uncertain legal concept which is subject to the administrative orders.

31. "Imperative provision" stated in Civil Code § 71 (Taiwan) refers to law, "legal order" specified in the Administrative Procedure Act, and local laws (including local acts and rules) enacted by the local government in accordance with the Local Government Act. *See also* Zhan Sen-Lin (詹森林), *Xiaoli Guiding yu Qudi Guiding zhi Qubie Biaozhun* (*效力規定與取締規定之區別標準*) [*The Standard of Distinguishing Imperative and Prohibitive Provision*], *in* MINSHI FALI YU PANJUE YANJIU (LIU) (民事法理與判決研究(六)) [LEGAL THEORY AND CASE STUDY IN CIVIL LAW: VOLUME 6] 40 (Sen-Lin Zhan ed., 2012).

"consistency of illegality" (*einheitliche Rechtswidrigkeit*),[32] which is in line with "uniformity and consistency for legal order" or "legal order as free from contradiction".[33]

As for its effectiveness, we need to first distinguish whether the regulations are of "prohibitive" nature (*Verbotsgesetz*) that protects individual's rights or purely of "imperative" nature (*blosse Ordnungsvorschriften*);[34] how to distinguish prohibitive regulations from imperative regulations remains difficult among German academia.[35]

In order to distinguish prohibitive regulations from imperative regulations, we need to refer to Professor Reinhard Bork, a notorious civil law scholar in Germany. According to Professor Bork, we need to look into the regulations and see if they imply any "prohibition", which can be identified by interpreting the language of the regulations. We can probe into the meaning of the text first, despite the limited effect of doing so, as it is rare for the regulations to expressly prohibit a certain act in law; we can only sense such prohibition from the language such as "shall not", "cannot" or "not allowed".

What is crucial is, in accordance with the meaning and purpose of a regulation, to inspect whether such regulation prohibits a certain effect intended by an act in law from happening. At this point, what should be further inspected is: what is prohibited under such regulation? Is it the **content (*Inhalt*) of the act in law?** Namely, is the effect of such act in law prohibited because of the content therein, which is also referred to as "prohibition of content"? Is it the **performance (*Vornahme*)** of an act in law? Namely, it is not the content of act in law that is prohibited; instead, it is the performance of an act in law that is prohibited, which is referred to as "prohibition of performance"; the effect of an act in law is prohibited from occurring as performance of the same is prohibited. Or is it the "external circumstances" (*die äussere Umstände*) under which an act in law is performed? Certainly, the distinction between the foregoing is not straightforward.[36]

Both "prohibition of content" and "prohibition of performance" are prohibitive regulations. "Prohibition of content" prohibits the agreed effect,

32. *See* RÖHL, *supra* note 17, at 432 (text in bold is highlighted by the author of this article).

33. Zhan, *supra* note 31, at 39.

34. For example, if the sale is done within the statutory business hours specified in German Shop Closing Law (*Ladenschlussgesetz*), such sale is deemed valid. This is considered the administrative prohibitive provision. However, if working hours specified in the contract violates the statutory business hour, then such agreement should be deemed as invalid due to violation of the prohibitive provision.

35. *See* Zhan, *supra* note 31, at 35 for more detailed study on distinguishing imperative and prohibitive provision.

36. This is rarely discussed even in the German scholars and court practice. *See* REINHARD BORK, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHS 1092 (4th ed. 2016).

and the effect resulted from an agreement as well. Prohibitive regulations mostly exist in public law and criminal law[37] rather than civil law. For example, request for assisted suicide is punishable under criminal law (such offence can be sentenced to life imprisonment under Section 216 of German Criminal Code). The language of the law does not expressly stipulate the content prohibited, but it is a typical type of "prohibition of content", as it implies two propositions: murder is prohibited, and the murderer can be sentenced to life imprisonment. Accordingly, if anyone is under the agreement (i.e. the service agreement under the civil law) to kill someone, then such service agreement will be void under Section 134 of German Civil Code, as the agreed objective of such agreement is prohibited under Section 216 of German Criminal Code.[38] In addition to the foregoing, there are regulations regarding "prohibition of performance" in criminal law. In other words, we can tell from the law that the legal effect resulted from the prohibited accompanying circumstances (*Begleitumstände*) is not desired. For instance, in terms of sale of stolen goods (German Criminal Code Section 259), it is not the stolen goods itself that is prohibited; it is the certain accompanying circumstances that is prohibited, which is meant to protect the victim of the theft. In other words, the handling of stolen goods is blamed because the subject of sale is stolen goods, not because of the parties' obligations of payment and delivery of goods entailed under sale of goods.[39]

If the regulation itself does not prohibit the content or performance of an act of law, but prohibits the external circumstances formed by an act of law, such regulation is considered purely an administrative imperative regulation (*bloße Ordnungsvorschriften*) rather than a prohibitive regulation. The legislators of administrative imperative regulations are not trying to prevent the performance of an act in law from happening. Instead, the legislators are trying to establish the order. Moreover, administrative imperative regulations focus on the interest of general public (*Allgemeininteressen*), while "prohibition of performance" attempts to protect the parties in form or in substance of an act in law (e.g. victims of fraud or theft) or the substantially interested persons related to such act (e.g. the victim of handling of stolen goods). Accordingly, in order to protect the interest of general public, breach of imperative regulations does not lead to invalidity of an act in law.

37. *Id*. at 1103.

38. *See id*. at 1093.

39. *See id*. at 1094. In addition, with regard to fraud, force or threat stipulated in German Civil Code § 253 and 263, the purpose of the above is to protect the victims of fraud or force or threat. Accordingly, act in law done in the above circumstances is not acceptable. However, it is particularly stipulated in German Civil Code § 123 that the legal consequence of act in law done under fraud or force or duress may be voided (similar to Taiwan Civil Code Article 92 under which the act in law can be revoked), which is the special stipulation for legal consequence on violation of prohibitive provisions as compared with German Civil Code § 134.

Imperative regulations merely impose sanctions outside of an act in law (could be, among other things, penalty, fine, or other administrative measures)[40].

Notwithstanding the foregoing, it is to be emphasized that not all regulations imposing administrative penalty to ban a certain act in law should be considered imperative regulations rather than prohibitive regulations — the legislative purpose of such regulations should be further probed into.[41]

2. *Rules on Prohibition for Sale in Illegal Structures*

According to Taiwan Building Act Article 25, "(Section 1) Without review made by and the building permit issued by the municipal or county (city) (bureau) competent authority of construction, anyone may not construct, use or demolish any building, unless otherwise enacted in Articles 78 and 98. (Section 2) To dispose a building constructed, used or demolition without permission, the municipal or county (city) (bureau) competent authority of construction may designate persons to enter the public or private-owned land or building with certificates for inspection." Also, according Article 86 of the Building Act, it states that "Infringement of Article 25 will be punished according to the following provisions:

(a) Construction without permission will be fined a sum of up to 50‰ of the construction cost of the building, and shall be stopped to supplement the necessary procedure; coercive demolishing may be executed where necessary.

(b) Usage without permission will be fined a sum of up to 50‰ of the construction cost of the building, and shall be stopped to supplement the necessary procedure; in case of any of the occasions as described in Article 58, the building may be shutdown, and modified within specified time limit or coercively demolished.

(c) Dismantling without permission will be fined a sum of up to NT$10,000, and dismantling shall be stopped to supplement the necessary procedure."

Accordingly, it is clear that the above are prohibitive regulations that void the act in law. If a building is constructed without building permit, the construction can be stopped by administrative authority during the process of constructing; the building can be ordered to be demolished if construction is completed. It is clear that the legislators have no intention to protect the illegal structure itself, the original constructor or the assignee of the illegal

40. For more details, *see* BORK, *supra* note 36, at 1091-101a; *see also* HANNS PRÜTTING, GERHARD WEGEN & GERD WEINREICH, BGB: KOMMENTAR § 134 at 16-18, 21 (11th ed. 2016).

41. *See* Zhan, *supra* note 31, at 58-59.

structure, regardless of whether there is an act in law performed to deliver the illegal structure, or what the content of act in law is. The illegal structure can be demolished anytime.

Conclusively, the legislators have declared the illegality of illegal structures in their judgment of values. Not only the illegal structure itself as the subject of sale (the content of an act in law) is prohibited, the performance of the foregoing transaction is prohibited as well. Hopefully, by imposing administrative penalty, the prohibition is achieved (it is inappropriate to consider such the above regulation as imperative simply because of administrative penalty). The legislators of administrative law have made their judgment of values that should be respected in civil law. This is to achieve "consistency of illegality" requirement set out in principle of "uniformity and consistency for legal order". Pursuant to the above, any transaction including illegal structure as the subject will be considered void given the breach of prohibitive regulations.[42] As a result, illegal structure by nature is considered "untradeable goods"[43] (*res extra commercium; verkehrsunfähige Sache*) which is "prohibited goods"[44] prohibited from

42. For similar situation, it is conceived by German scholars that for construction contractor agreement in breach of construction laws (especially the ones that do not obtain the construction permission), if an obligation of erecting the building regardless of the lack of construction permission or breach of construction law is included in the agreement, then such construction contractor agreement should be considered void. *See* WALTER ERMAN & HARM P. WESTERMANN, ERMAN BGB § 134 at 46 (11th ed. 2008). Although this is slightly different from the situation where the transaction of building occurs after the erection, the above insight can still be taken as reference.

43. With regard to the meaning of prohibited goods, *see* HUANG LI (黃立), MINFA ZONGZE (民法總則) [GENERAL PRINCIPLE OF CIVIL LAW] 168 (4th ed. 2005) ("Prohibited goods shall mean the goods not eligible for subject of rights or transaction. In other words, it shall mean the goods that cannot be traded in private laws."). Such inference may seem natural, but for the first scholar to point out and relate prohibited goods with Taiwan Civil Code Article 71 prohibitive provisions and Article 72 public order and morality, *see* QIU CONG-ZHI (邱聰智), MINFA ZONGZE (SHANG) (民法總則(上)) [GENERAL PRINCIPLE OF CIVIL LAW (PART 1)] 413 (2015) ("Prohibited goods are untradeable. If such goods are to be the subject of transaction, for example, as a gift or to be sold, then such transaction should be deemed void. For instance, sale of opium or ammunition is void because it is against the law (Taiwan Civil Code Articles 71 and 72)."); *see also* CHENG KUAN-YU (鄭冠宇), MINFA ZONGZE (民法總則) [GENERAL PRINCIPLE OF CIVIL LAW] 204 (3d ed. 2015) ("Untradeable goods as the subject voids the transaction, as such transaction is in breach of Civil Code Article 71."); *see also* LIN CHENG-ER (林誠二), MINFA ZONGZE XINJIE: TIXIHUA JIESHUO (SHANG) (民法總則新解：體系化解說(上)) [NEW INSIGHT ON GENERAL PRINCIPLE OF CIVIL LAW: EXPLANATION IN STRUCTURE] 323-24 (3d ed. 2012) (which further points out the relation between Taiwan Civil Code Articles 71 and 246); *see also* YAO RUI-GUANG (姚瑞光), MINFA ZONGZE LUN (民法總則論) [GENERAL PRINCIPLE OF CIVIL LAW] 223 (2002) (which shares the same perspective).

44. The common definition: Goods that are prohibited to be traded under the laws. *See* SHI QI-YANG (施啓揚), MINFA ZONGZE (民法總則) [GENERAL PRINCIPLE OF CIVIL LAW] 237 (7th ed. 2007); CHENG YU-PO (鄭玉波) & HUANG ZONG-LE (黃宗樂), MINFA ZONGZE (民法總則) [GENERAL PRINCIPLE OF CIVIL LAW] 209 (9th ed. 2004); WANG ZE-JIAN (王澤鑑), MINFA ZONGZE (民法總則) [GENERAL PRINCIPLE OF CIVIL LAW] 238 n.20 (2014); HONG XUN-XIN (洪遜欣), ZHONG GUO MINFA ZONGZE (中國民法總則) [GENERAL PRINCIPLE OF CIVIL LAW OF CHINA] 209 (1987); SHI SHANG-KUAN (史尚寬), MINFA ZONGLUN (民法總論) [GENERAL PRINCIPLE OF CIVIL LAW] 250

being the subject of transaction under the law; or it is at least "3/4 prohibited goods"[45].

Strictly speaking, illegal structure is not only prohibited from being the subject of transaction, but it should also be prohibited from acquisition since it can be ordered to be demolished at any time. Illegal structure is therefore supposed to be prohibited goods. However, given the administrative authority's indolence or lack of human resource to demolish [the illegal structure], illegal structure has become "legally prohibited from ownership, but practically permitted to obtain ownership". Accordingly, I shall address illegal structure as "3/4 prohibited goods" in this article.

If we agree that illegal structure is in breach of the above administrative laws and thus is considered untradeable goods, then whether illegal structure is considered "things affixed to the land" under Taiwan Civil Code Article 66, which the definition of "things affixed to the land" has been given by Constitution Court in Explanation (Case No. Shi Zi 93), has nothing to do with the illegal structure being untradeable goods. Illegal structure's prohibitive nature cannot be waived simply because it is considered "things affixed to the land". If it is the consensus that illegal structure is "3/4 prohibited goods" by nature and cannot be owned or traded, then how can those who considered illegal structure should be afforded constitutional right in rem protection under civil law justify themselves? We reserve our comments on that.

To summarize, on the basis that illegal structure is considered "3/4 prohibited goods" demonstrated previously, the sales contract of illegal structure is void as it violates Taiwan Civil Code Article 71. It does not matter whether the seller has informed the buyer of the fact that the illegal structure has been reported for demolition. Therefore, the issue presented in the above Taiwan High Court judgment is then resolved.

3. *Unconsciously Agreed . . .*

It is controversial within court practice whether illegal structure can be considered untradeable goods/prohibited goods. Certainly, the majority opinion given by judgments followed the resolution made in 1978 by

(1990).

45. Prohibited goods is categorized, in academic discussion, into two types. For the first type, only the transfer is prohibited, but not the possession. Such type of prohibited goods is untradeable, but contain ownership rights, and the owners of such goods may demand for return under Taiwan Civil Code Articles 765 or 767, or claim damage under Taiwan Civil Code Articles 184 and 196 if stolen and destroyed, for example, the ownership of pornographic magazines. This is also called "relatively prohibited goods". On the other hand, if both possession and transfer of goods are entirely prohibited, such goods are considered "absolutely prohibited goods", for example, opium, heroine, or other drugs or guns and ammunition prohibited under criminal laws. *See* QIU, *supra* note 43, at 412.

Supreme Court the 2nd Civil Department, in which de facto rights of disposal is afforded. Supreme Court emphasized in its precedent (Case No. 50, Tai Shang Zi, 1236) that "while illegal structure cannot be registered by the property registration authority, that does not mean illegal structure cannot be the subject of a transaction", and therefore denied illegal structure as untradeable goods/prohibited goods.

For example, it was stated in the lower court's judgment (which was later brought to the Supreme Court for appeal, Case No. 87, Tai Shang Zi, 2541) that: ". . . furthermore, houses built against the Building Act are illegal structures, despite administrative authority's power to demand for demolition, such illegal structures are not prohibited goods thus can be the subject of sale." A more detailed rationale can be seen in the Taiwan High Court Judgment (Case No. 92, Shang Guo Zi, 28) that: ". . . we conclude that: (1) *the rooftop addition of the building in question is not in compliance with the construction regulations thus initial registration cannot be completed. Moreover, the rooftop addition was built without consent from other co-owners of the condominium. However, it is tradeable, which is different from gun, drug or other prohibited goods. If such rooftop addition belongs to the debtor, then it is subject to enforcement in accordance with the laws* . . . . The (enforcement) authority was not in breach of any law sealing up the rooftop addition . . . . (3) Also, it was announced in the auction notice that the rooftop addition had no initial registration of ownership, which offered the potential buyers the knowledge that they could only acquire the de facto right of disposal instead of a complete ownership. Given the breach of construction regulations or lack of consent from other co-owners, the illegal structure is exposed to the risk of being demolished at any time, which derives from the nature of illegal structure's de facto right of disposal. The common sense of our society is that, buyers of such illegal structure are aware of the above risk, yet decided to purchase the illegal structure anyway after assessing the possibility of demolition and the value of the illegal structure before demolition. The appellant thus cannot argue about having no knowledge of the foregoing as the appellant is considered to possess certain level of knowledge (emphasis added)."

Nonetheless, there are court opinions that seem to consider illegal structure untradeable goods, such as Taiwan High Court, Taichung Branch Judgment (Case No. 97, Zai Yi Zi, 22) conceived that: "An act *in rem* is different from an act *in personam*. An act *in rem* does not have any moral concern. *Even if the subject of an act in rem is prohibited goods or is prevented from transfer*, it does not affect the ownership of the subject. The illegal structure built as a basement cannot be registered given the administrative management reasons, yet it does not prevent the constructor from acquiring the ownership protected under the law (emphasis added)."

Although the court did not further elaborate on the reasoning, it is likely that, in the above judgment, the court unconsciously agreed with the view of this article!

D. *Dilemma of Illegal Structures' Status: Customary Right in Rem?*

The original constructor can acquire the ownership of the illegal structure despite the fact that initial registration of ownership cannot be completed. According to the Taiwan Civil Code, the transfer of real property can only be effected by registration, under which arises the problem of whether and how the ownership of illegal structure can and is transferred, as transfer registration of illegal structure cannot be done and thus the ownership cannot be transferred under Taiwan Civil Code Article 758. Despite illegal structure's inability to be registered, it is still the subject of trade in real life. How the legal relations between the parties of illegal structure sale are formed, especially whether and how the rights of the buyers can and is protected becomes the core issue of illegal structure in terms of civil law.

It is well-known that, to solve this problem, the court practice has developed a concept known as "de facto right of disposal". "De facto right of disposal" is first established in resolution (1) made in 1978 by Supreme Court the 2nd Civil Department, in which is further elaborated that "although the ownership transfer of illegal structure cannot be effected because registration cannot be done, it should be conceived that *the de facto right of disposal has been transferred to the buyer* unless the transferor and transferee agree the otherwise (emphasis added)." The court practice has been following this opinion ever since, but the dilemma arising which has been unsolved for past few decades remains: what is the difference between "de facto right of disposal" and "ownership"?

1. *Opinions of Scholars*

Given the development of "de facto right of disposal", the scholars have been attempting to construct the illegal structure's legal status in property law in the past few decades. It seems that more and more scholars are of the opinion that illegal structure's legal status should be elevated to customary right in rem.

To summarize, the following are theories of Taiwanese scholars regarding illegal structure's legal status:[46]

46. As mentioned before, the literature contributed to this topic is countless. For a summary of current academic discussion and status, please *see* Liang Yu-Fu (梁鈺府), Wei Zhang Jian Zhu Shi Shi

(a) Equivalent of Ownership Right

Transfer registration cannot be completed for illegal structure under the current laws and regulations. Nonetheless, given the society's acknowledgment for sale of illegal structure and consensus from both parties of the sale was to transfer the rights attached to such illegal structure, including the ownership rights, the transfer of rights should become effective the moment when the illegal structure is handed over or when both parties reach the consensus to hand over.

(b) Not Right in Rem

According to this theory, the reason why the Supreme Court developed "de facto right of disposal" is to avoid the sale of illegal structure being void under Taiwan Civil Code Article 246; it is not the Supreme Court's intention to create a new type of right in rem which is not regulated under the law of right in rem. Initial ownership registration cannot be completed, thus legal status as right in rem cannot be acquired for illegal structure. Illegal structure can only be traded as property right which is neither right in rem nor quasi-right in rem.

(c) Customary Right in Rem

The amendment of Taiwan Civil Code Article 757 has afforded the chance to create different types of right in rem by means of customary law. It has long been acknowledged by the court that illegal structure can be the subject of trade and enforcement, which amounts to societal practice and *opinio juris*, the two elements to establish customary law. De facto right of disposal fulfills the elements required in establishing customary right in rem under amended Taiwan Civil Code Article 757. As for registration for publication, it can be replaced by tax registration or other type of registration. The majority of scholars are of the same opinion as this theory, and suspects that we should accommodate to the current status of illegal structure, and regulate illegal structure under the current laws regarding rights in rem in order to recognize illegal structure as a right in rem.

Shang Chu Fen Quan Zhi Yan Jiu (違章建築「事實上處分權」之研究) [A Study on Right of De Facto Disposal of Unlawful Buildings] 90 (2015) (unpublished LL.M. thesis, National Taiwan University) (on file with the National Taiwan University Library), under the section of "Summary of Recent Development"; for more details, *see also* Chen, *supra* note 4, at 99, 117 in particular. As the literature on this topic has been summarized, I shall not list out all the resources in this article.

2. *Opinions of Courts*

In terms of court practice, only de facto right of disposal has been created by far, none of the judgment has attempted to clarify the legal status of illegal structure. The Supreme Court Precedent (Case No. 62, Tai Shang Zi, 2414) pointed out: "**It is clear under Taiwan Civil Code Article 758 that any real property obtained via act in law must be registered in order to effectuate the acquisition of ownership, and illegal structure is no exception. Otherwise, the sale of illegal structure would in effect become more convenient than regular real property, which would as a result encourage the sale of illegal structure.**" It can be conceived that at least the Supreme Court did not regard illegal structure as possessing the legal status of ownership or customary right in rem which is similar to ownership.

In addition, if the illegal structure is possessed without authorization or seized by others, can the holder of de facto right of disposal demand for return under Taiwan Civil Code Article 767 whether applying such rule directly or analogously? The Supreme Court has made it clear in its judgments (Case No. 95, Tai Shang Zi, 94; 100, Tai Shang Zi, 1275; 103, Tai Shang Zi, 2241) that: "**We acknowledge de facto right of disposal for the convenience of transaction, yet de facto right of disposal does not equate to right of ownership**"; "As required under Taiwan Civil Code Article 758 Section 1, the acquisition, creation, loss and alternation of rights in rem of real property through act in law will not become valid until the registration has been completed. *Buyer of the illegal structure which the initial registration is not completed acquires de facto right of disposal. However, according to the above rule, right of ownership and de facto right of disposal are different by nature, Taiwan Civil Code Article 767 regarding owner's right to demand for return does not apply no matter directly or analogously* (emphasis added)." It seems that the Supreme Court has not yet agreed with the major opinion of affording de facto right of disposal the legal status of customary right in rem.

Nonetheless, in some of the Supreme Court judgments, for example, Case No. 106, Tai Shang Zi, 187, there seems to be the tendency of acknowledging de facto right of disposal as having customary right in rem. It stated that: "The 'right' stipulated in Taiwan Civil Code Article 184 Section 1 former paragraph refers to the right recognized in the legal system. The legal system includes the codes (including regulations delegated by the legislative authorities to the administrative authorities for enactment), customary law, custom, legal principles/theories, and precedents. Since the initial registration of the illegal structure cannot be done, the acquirer of the illegal structure cannot complete transfer registration and can only obtain de

facto right of disposal. However, such de facto right of disposal enables the right holder to possess, use, collect proceeds from, dispose of, and trade such illegal structure, which has long been recognized by the court practice and by the society. Accordingly, such de facto right of disposal shall be regarded as the 'right' specified in Taiwan Civil Code Article 184 Section 1 former paragraph. The judgment of the lower court did not err in granting the holder the entitlement to claim damage for infringement against de facto right of disposal."

Despite the foregoing debate in court practice and among scholars, I think it is necessary to first clarify two issues: first, should we afford "de facto right of disposal" the legal status of customary right in rem under Taiwan Civil Code Article 757? Second, should we afford "de facto right of disposal" the entitlement to demand for return in case of unauthorized possession or seizure?

3. *Views of this Article*

(a) Nature: "De facto Right of Disposal" is Not "Customary Right in Rem"

The point that this article is attempting to make is: under the principle of "uniformity and consistency of illegality", illegal structure is illegal under both civil and administrative law. Illegal structure is an unregistered building, which is "a building bearing illegality", and is by nature untradeable "3/4 prohibited goods". Such untradeable prohibited goods, in non-legal and plain language, is like "mistress in construction field", which should be left to wait for administrative orders for demolish. There should be no rooms for illegal structure to raise its legal status in civil law. **De facto right of disposal should simply be "de facto right of disposal", and should remain as established by the court practice fifty years ago the same legal status which should not be elevated.** Accordingly, there is no room for demonstrating that illegal structure's legal status can be elevated to be a full legal right.

To sum up, "de facto right of disposal" tailored for illegal structure can only be a convenient measure to create "deficient right" or "incomplete right" which should not be afforded the complete right in rem; and therefore, de facto right of disposal should not be elevated to customary right in rem.

The *ratio legis* of Taiwan Civil Code Article 757 has emphasized that: "The 'custom' specified in this article refers to the legally binding customary law consisting of societal practice and *opinio juris*.", which indicates the "customary law" in Taiwan Civil Code Article 1. Scholars have also emphasized that the key to customary law stated in Taiwan Civil Code

Article 1 is *opinio juris*. In both the theory of *opinio juris* (people's belief in the binding force of the custom) or common consensus (consensus expressed by the public), public's belief in the custom as having binding effect must be sought. However, following the development of modern society and formation of big cities, it becomes more difficult to seek the common consensus. As a result, we gradually come to adopt the theory of 'judge-made decision and declaration of customary law (also known as the theory of judge-made law)'[47]. Even so, the judges are simply the media, and they must refer to literatures, court judgments, relevant groups' conduct or opinion, comments of local authorities, and professional opinions etc, to conclude whether the customary law exists and to further declare its existence. Besides, the judges need to be convinced that by acknowledging the customary law, they do not violate the public order and morality under Taiwan Civil Code Article 2 required for the customary law in addition to societal practice and *opinio juris*. In terms of adherence to public order and morality, I am afraid I have to disagree.

(b) Status: "De facto Right to Disposal" Cannot Be Afforded "Right to Request for Return"

The remaining question is: before the illegal structure is demolished, should the holder of de facto right of disposal who possesses, uses, and has the right to collect the proceeds from the illegal structure for the time being, be afforded the right to demand for return as a remedy under the law? This concerns whether illegal structure is furnished with ownership, which has been a huge debate among court practice. This is particularly influential for the rights of the litigating parties when the high courts and the Supreme Court hold different opinions.

With respect to this issue, it has been made clear in judgments (Case No. 95, Tai Shang Zi, 94; 100, Tai Shang Zi, 1275; 103, Tai Shang Zi, 2241) that: "We acknowledge de facto right of disposal for the convenience of transaction, yet de facto right of disposal does not equate to right of ownership. Taiwan Civil Code Article 767 regarding owner's right to demand for return does not apply no matter directly or analogously." Thus, the answer to the above question is negative.

To echo the point made previously in this article, it is conceived that illegal structure's nature of untradeable "3/4 prohibited goods" is merely a measure taken for convenience before the demolition, and that such nature is

47. Wu Cong-Zhou (吳從周), *Lun Xiguanfa Zuowei Minfa de Fayuan* (*論習慣法作爲民法的法源*) [*Customary Law as Source of Civil Law*], *in* FAYUAN LILUN YU SUSONG JINGJI (法源理論與訴訟經濟) [SOURCE OF LAW AND ECONOMIC LITIGATION] 27 (Cong-Zhou Wu ed., 2013).

described as "incomplete right" or "deficient right" which should not be afforded the complete right in rem, let along the full effect of the right in rem which only exists in a complete ownership right. I therefore agree with the opinion of the Supreme Court enunciated in the above judgments. As for the illegal structure's status of possession before demolition, the minimum protection offered by the law would be right to demand for return of the thing possessed under Taiwan Civil Code Article 962, which is in effect weaker.

IV. CONCLUSION

To sum up, I conclude in two points made as follows:

First, in terms of illegal structure's nature, it bears illegality under civil and administrative law from the perspective of both principles of "uniformity and consistency of legal order" and "consistency of illegality". illegal structure is illegal under both civil and administrative law. Illegal structure is an unregistered building, which is "a building bearing illegality", and is by nature untradeable "3/4 prohibited goods". Illegal structure should no longer be the subject of trade. Regardless of Taiwan High Court Judgment (Case No. 102, Shang Zi, 1188)'s view that ". . . despite the buyer's knowledge of illegal structures, he/she was not aware of the fact that such illegal structure has been reported and ordered to be demolished; seller's failure to inform buyer of the foregoing constituted breach of guarantee of the subject of sale", such opinion is not accepted in this article as the basis of explanation. Accordingly, the sales contract of illegal structure is void because of violation of Taiwan Civil Code Article 71. It no longer matters whether the seller has informed the buyer of the fact that the illegal structure has been reported for demolition.

Second, in terms of illegal structure's legal status, the establishment of "de facto right of disposal" by court practice is merely a measure for convenience; it is by nature a "incomplete right" or "deficient right" which should not be afforded full right in rem. The construction of illegal structure not only lacks common consensus (consensus expressed by the public) required under customary law, but also violates the public order and morality, which is unlikely to be decided and declared by the judges as customary law. In this article, I hold the opinion that before demolition, the minimum protection offered by the law would be right to demand for return of the thing possessed under Taiwan Civil Code Article 962, and ownership right to demand for return Taiwan Civil Code Article 767 cannot be applied directly or analogously.

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再思臺灣違章建築之法律性質與地位：兼評臺灣高等法院102年度上字第1188號判決

吳 從 周

摘 要

就違章建築之法律性質而言。從「法秩序一致性」原則及「違法性一致性」觀點論證，違章建築不論在行政法上或者民法上都具有違法性，違章建築是未經登記的違法建築，它是「具有違法性的工作物」，是一種性質上為「四分之三禁制物」之不應融通物。根本不應該再成為交易之客體。臺灣高等法院102年度上字第1188號判決等實務上向來認為「買受人雖知悉買賣標的物是違章建築，但並不知悉其已經被查報將命拆除，而出賣人未告知者，仍構成買賣標的物之瑕疵擔保」之見解，在本文論證基點上，不應再採用。

就違章建築之法律地位而言。實務上創設違章建築具備之「事實上處分權」，性質上只是一種權宜的「殘缺所有權」或「不完整權利」，不應再考慮賦予具有完整物權地位之權利。違章建築之興建，不僅欠缺習慣法所應該具備之「共同體意思說」（被闡明的共同體普遍意思），也違反強行規定及公序良俗，更不符合法官認定與宣示其為習慣法之可能，亦無許其得適用或類推適用民法第767條規定行使物上請求權之餘地。

關鍵詞：違章建築、事實上處分權、不融通物（違禁物）、習慣法物權、物上請求權