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Qi Shaoming
Sichuan Chaoyue Law Firm

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A Study on the Contemporary Value of the *De Facto* Contract Theory: From the Perspective of Article 471 of the *Civil Code of the People's Republic of China*

Qi Shaoming*

Sichuan Chaoyue Law Firm

Abstract: Article 471 of the *Civil Code of the People's Republic of China* (hereinafter referred to as "the *Civil Code*") stipulates that contracts may be formed not only through offer and acceptance but also through "other means." However, the *Civil Code* does not provide further clarification on what "other means" entail. This statutory provision represents a departure from the traditional theory of contract formation, which requires a "meeting of the minds." This study seeks to identify the jurisprudential basis of the *Civil Code* as a positive law and finds that the theory of *de facto* contracts, proposed by German scholar Günter Haupt in his lecture titled "On Factual Contractual Relationships" provides a theoretical foundation for the *Civil Code*'s inclusion of alternative methods of contract conclusion. The theory of *de facto* contracts argues that for certain types of conduct, the formalities of offer and acceptance are not essential. Instead, contracts can be established through factual processes. This view introduces flexibility to the otherwise rigid doctrine of contractual freedom, allowing for more streamlined and logical judicial analysis. It also balances economic efficiency with principles of fairness and justice, serving the normative values underlying contract law. In this paper, the author proposes that the term "*de facto* contract" be precisely defined within the context of legislative and judicial practice. This article also recommends limiting the original concept described by Haupt to contracts formed based on legally prescribed factual processes or behaviors. Such contracts can be tentatively termed as "statutory *de facto* contracts," which could be examined as a distinct category of contracts in legal theory.

Keywords: *de facto* contract, offer and acceptance, declaration of intention, mutual assent

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* Qi Shaoming, Sichuan Chaoyue Law Firm.

Correspondence concerning this article should be addressed to Qi Shaoming, Sichuan Chaoyue Law Firm, Chengdu, 610031, China. Email: 527193801@qq.com

Historically, in Chinese legal theory, there was a distinction between civil legal relationships wherein parties have conflicting intentions, known as a "contract," like in a sales agreement, and those wherein parties have aligned intentions, referred to as an "agreement," such as in partnership agreements. This differentiation ceased to exist after the implementation of the *Contract Law of the People's Republic of China* (Xie et al., 2000, p. 2). The English word "contract," the French word "*contrat*" or "*pacte*," and the German word "*vertrag*" are all derived from the concept of "*contractus*" in Roman law (Wang, 2020, p. 97). This study addresses issues relating to the concept of contracts.

A strict formalistic approach was once adopted in the history of Chinese contract law, but a revision was made in the Contract Law. Article 469 of the *Civil Code* also extends the form of contract to electronic data interchange and e-mails. In judicial practice, when there is no written agreement between parties, but some contractual relationship has been actually performed, it is commonly understood as the establishment of a *de facto* contractual relationship. However, the term "*de facto* contract" discussed in this paper does not refer to relationships recognized by the actual performance of obligations without a written agreement. Instead, it relates not to the "form of contract" but to the "method of contract conclusion."

Article 471 of the *Civil Code* states that the parties may conclude a contract by making an offer and acceptance or by other means. The innovative approach to contract formation in this positive law provision can find its theoretical basis in the *de facto* contract theory proposed by Haupt. This article examines the controversies surrounding the *de facto* contract theory, explores the establishment of contractual relationships between parties without traditional "offer and acceptance" or "mutual assent," elucidates the rationale and practical significance of the *de facto* contract theory, and introduces the concept of "statutory *de facto* contract" to refine the *de facto* contract theory as part of the contractual system.

The Debate on the *De Facto* Contract Theory

Concept and Types of *De Facto* Contractual Relationships

The concept of "*de facto* contractual relationship" and its associated theory are commonly traced back to January 29, 1941, when German scholar Günter Haupt gave an inaugural lecture titled "On *De Facto* Contractual Relationships" (*Über faktische Vertragsverhältnisse*) at Leipzig University, igniting a widespread debate among German legal scholars. Haupt discussed the contractual phenomena in real-world economic activities, such as mandatory contracts and the prevalent use of standardized terms. In such situations, contracts are formed without adhering to the traditional offer and acceptance method. When traditional contract theory cannot accommodate certain real-life behaviors, it is appropriate to recognize

a new theory: Under specific conditions, there is no need to scrutinize the intent or consensus of contracting parties through the traditional offer-and-acceptance method. Instead, contracts are established based on specific factual processes. Haupt termed such contracts "*de facto* contractual relationships." Instead of being analyzed according to the traditional "offer and acceptance," this form of contracting does not adhere to the general legal components. Based on real-world examples, if it is determined that the factual acts between parties embody the essence of a contract (and not merely a quasi-contract or another legal relationship), such typical scenarios should be governed by contract law (Haupt, 1941, p. 8). Under these conditions, a "*de facto* contractual relationship" can be formed solely based on factual processes.

Haupt identified three types of "*de facto* contractual relationships" in his discussion.

First, *de facto* contracts arising from social contact.

A contractual relationship is established when the mere act of social contact replaces a formal declaration of intention, leading to obligations such as care, notification, and protection. If this scenario falls under contract law, a party who suffers a loss can claim rights based on contractual provisions.

Second, *de facto* contracts arising from organizational relationships.

The main examples of this type are *de facto* partnerships and employment relations. The crux of the matter lies in determining how to address the rights and obligations that have arisen when, during their performance, partnership agreements or employment contracts are found to be void or rescinded. According to Haupt, if a partnership has been established, or if labor has been partially or fully performed, the factual performance should not be disregarded without reason. The corresponding rights and obligations should be managed based on the contractual relationship.

Third, *de facto* contracts arising from the social obligation of payment that is indispensable to economic life in modern societies.

Services such as electricity, gas, communications, tap water, and public transportation have become essential to modern daily life, predominantly supplied by monopolistic entities. This leaves consumers with limited choices and makes altering contractual terms challenging. According to Haupt, for these essential services, providers should not refuse to provide without a legitimate reason. Consumers usually lack the power to negotiate. Thus, it is unnecessary to rely on the internal intentions of the parties or to assume that the consumer's behaviors represent a "tacit agreement" to the service provider's terms. Instead, contracts can be established based on factual acts or processes without delving into parties' intentions.

Haupt's view was supported by the famous German jurist Karl Larenz's theory of "typical social behavior" (*Die Lehre vom sozialtypischen Verhalten*). The theory posits that modern transactions produce numerous unique situations where a contract can be formed not

based on a genuine declaration of intention but merely on transactional concepts and actual behaviors. For instance, when passengers board a bus without purchasing a ticket beforehand, this behavior is not an expression of mutual agreement aiming at a specific legal outcome. Instead, it is a socially typical behavior, resulting in rights and obligations consistent with a civil legal act (Wang, 2015, p. 403).

Controversies Surrounding the *De Facto* Contract Theory

After Haupt introduced the theory of "factual contractual relationships," it immediately ignited intense discussions within the German legal academic community, with scholars offering diverse perspectives. In this paper, the terms "factual contractual relationship" and "*de facto* contract" are used interchangeably, and various debates concerning the *de facto* contract theory are revisited and dissected.

Debates on the Notion of De Facto Contract

Civil law scholar Wang Zejian, argued in his writings that this concept is difficult to delineate due to its varied types and characteristics. He believes that the consistency in defining essential elements is only present negatively. Contracts are fundamentally based on the foundation of mutual intent, embodying the principles of autonomy and freedom. If parties to a legal relationship have no intent to establish mutual rights and obligations, then it lacks the intrinsic characteristics of a contract. Mere factual behavior stands in stark contrast to the conventional understanding of a contract. Hence, the term "factual contractual relationship" is inherently contradictory. Prof. Wang also emphasizes that the traditional contract theory, which champions the spirit of equality and freedom, should not be easily disrupted. He cautions against introducing novel concepts that might muddy the waters of the established legal framework (Wang, 2015, pp. 405–409).

Other scholars suggest that the term "*de facto* contract" fails to accurately encapsulate the essence and scope of the concept, asserting that it is merely a way to articulate, borrowing the appearance of existing contract notions, to address specific real-world situations. Dismissing the concept of a *de facto* contract solely on the grounds of perceived incompatibility with traditional contract theory, without evaluating the merits of the *de facto* contract theory, lacks compelling arguments. The nomenclature of a theory is less significant than its fundamental essence (Huang, 2005, pp. 1–56). The author shares the same viewpoint.

The principles of Roman law exerted a profound influence on the development of civil law in continental Europe from the Middle Ages to the 19th century. According to British jurist Sir Henry Maine, the Consensual Contracts in Roman law "constituted the stage in the history of Contract-law from which all modern conceptions of contract took their start" (Dong, 2002, p. 9). A review of consensual contracts in Roman law reveals the emergence of the possibility for free will in contracting. In the modern era, with the inherent demands of capitalist trade relations, the revival movement of Roman law in Europe emerged. The

French Revolution, classical natural law theory, and the rise of humanistic legal thought significantly contributed to the evolution of the freedom of contract principle. The *French Civil Code* explicitly defines a contract as an agreement. This definition was further elucidated by the glossators, leading to the mutual assent doctrine in contract theory. From this emerged the principles of "autonomy of will and freedom of contract," forming the legal framework for contractual acts. In the 19th century, when the Enlightenment in Europe led to the generation of such ideas as absolute reason and free will, freedom of contract was even regarded as the embodiment of individuals' free will on the highest level. The concept of mutual assent was also annotated as consensus premised on abstract free will. The juristic act system of civil law, grounded in the mutual assent doctrine, has influenced the rationale for concluding contracts in modern contract law, emphasizing mutual agreement through offer and acceptance. As a result, the doctrine of mutual assent in contract theory, grounded in positive law, is interpreted as a consensus that is mandated under the principle of free will. Some scholars' denial of *de facto* contract builds on the doctrine of mutual assent under the principle of freedom of contract, which is essential to the definition of contract. As the 20th century progressed, with increasingly complex and dynamic transactional relationships emerging, the realization dawned that purely formalistic freedom of contract often led to substantive injustices. The consensual doctrine rooted in absolute free will started to seem outdated, prompting scholars to re-evaluate traditional interpretations and seek alternative approaches. Indeed, as per Roman jurist Domitius Ulpian's interpretation in Book IV of *On the Edict*, mutual assent, central to the concept of contract, is merely a general term, denoting matters agreed upon between contracting parties to achieve consensus or compromise. In legal assessment, mutual assent manifests only to a certain degree. Roman jurist Gaius stated in Book II of *The Institutes*, "for an obligation by contract arises either re (by delivery of a res: real contract), by words (verbal contract), by writing (literal contract), or by consent (consensual contract)." Regarding what constitutes consent, Gaius elaborated that obligations formed in these manners are based on mutual agreement since no specific form or written element is mandated, but merely the unanimous agreement of the contracting parties. Thus, in Roman law, mutual consent is not a mystical outcome of free will but simply signifies mutual agreement in its most common sense (Fu, 1997, pp. 172–175).

Under certain circumstances, the *de facto* contract theory disregards personal intentions and contends that the law directly establishes contractual relations, which impose legal obligations on the parties. The principle of mutual assent under the autonomy of will is sidelined, causing inevitable unease (Wang, 2006, pp. 27–31). However, with the advent of the 21st century, dramatic advances in technology brought about radical changes in social and economic activities. Examples include scenarios where one party offers a standard contract for the other to sign, the parties agree to use a version recommended by an industry association, or contracts are mandatorily formed for the sake of public interest.

If legislation continues to uphold the formation of mutual assent solely through "offer and acceptance" as the exclusive method for contract conclusion, it clearly becomes detached from the contemporary world, failing to realize the order-promoting value of the law. As P. S. Atiyah noted, in most cases, the consensus-based contract theory is correct only in a very strict sense. The inequality of bargaining power, socioeconomic pressures (primarily due to poverty), and the utilization of standard formats have now become indicators that, in many contexts, there is a lack of genuine freedom of choice, irrespective of the underlying market theory. Beyond the economic constraints of the freedom of contract regime, the undesirable and inequitable outcomes produced by such a system are increasingly evident. Consequently, the law has established various measures to intervene in contracts, prohibiting certain contract types or clauses, or mandating that some contracts bestow rights not expressly included within them (Atiyah, 2002, pp. 15–19). Roscoe Pound, an American jurist, critiqued Friedrich Karl von Savigny's voluntaristic theory. By contrasting the emphasis on subjective elements in the construction of legal relations, there was a shift towards a more objective emphasis. Legal scholars of the previous century, notably in Britain, endeavored to integrate Savigny's abstract notion of the "dominion of will" with common law. It is now widely believed that it is imperative to depart from Savigny's abstract idea of placing will at the jurisprudential core (Pound, 1984, pp. 65–66). A review of Anglo-American Contract Law's theoretical development shows that two important doctrines emerged on the basis of Pound's theory, namely the decline of freedom of contract and unilateral contract. Practically speaking, these two trajectories are aligned: discarding the dominion of will theory and challenging the theory of contractual intent synchronization. With societal diversification, evolving value systems, and shifts in economic policies, legal studies are increasingly more focused on efficiency and equity, giving more importance to remedies and liabilities. This requires the abandonment of some archaic notions from traditional contract theory and a redefinition of the concept of contracts. Evaluating contractual relations in terms of their inherent value is both logically and historically justified (Zhang, 2003, pp. 39–42).

China's current *Civil Code*, specifically Article 464 (1), provides a definition of a contract, but it does not explicitly mention intention or mutual assent. Traditional contract theory asserts that the essence of a contract is mutual assent or an agreement, considering the terms "agreement" and "mutual assent" as synonymous (Wang, 2020, p. 99). However, based on Article 464 (2) of the Civil Code, the term "agreement" should be considered as a broader concept than "contract," implying that a "contract" falls under the category of an "agreement." If we interpret the law as stating that a "contract is formed through mutual assent" solely based on the inclusion of the word "agreement" in the definition of contract, it would be an oversimplified interpretation, rather than a comprehensive understanding of the provision. The term "agreement" in Article 464 should be understood as an abstract, static concept, not as a tangible, dynamic idea representing the negotiation process. It should be construed as a

legally binding document created by the contracting parties pursuant to law or agreement. The legislator does not emphasize the mutual assent element of the traditional contract theory. Conversely, as stipulated in Article 471, mutual assent is not the exclusive method for contract formation. This implies that the Civil Code has moved away from the sole reliance on mutual assent as posited in traditional contract theory, reflecting modern jurisprudential values. It would be challenging to gain support from Chinese positive law if we use the notion of contract formed through mutual assent to reject the concept of *de facto* contract.

The Divergence Between the Three Basic Types of "De Facto Contracts" and Traditional Contract Theory

Scholars rejecting the *de facto* contract theory argue that the problems the theory aims to address can all be solved under the existing civil law system. The issues related to *de facto* contracts due to social interactions fall within the ambit of culpa in contrahendo. In the case of *de facto* partnerships and labor relationships, considering the flawed expression of intention and principles of trust and good faith (Lehmann, 1958, pp. 1–5), contracts for enterprises that have been practically performed, with established legal relationships both internally and externally, can be characterized as ongoing contracts. Retroactively limiting the "invalidation or revocation" of such contracts can resolve affiliated rights and duties and further the goal of labor protection. *De facto* contracts stemming from societal payment obligations can be rationally addressed by interpreting the process of consensus using traditional contract theory, considering both its conceptual and technical aspects (Nipperdey, 1957, p. 129). In transactions concerning "essential goods," while the freedom of contract might be constrained, if one party explicitly expresses a desire to contract, it signifies mutual agreement. For certain behaviors or scenarios, like boarding a bus or parking in public spaces, such behaviors are taken as implied expressions of intention, resulting in contract formation. Furthermore, based on trade customs, the nature of transactions, or statements from the offeror, if a declaration is deemed unnecessary, then the conduct is seen as an acceptance, leading to the formation of a contract. Critics of the *de facto* contract theory also argue that if "factual behaviors" do not apply to current laws regarding flawed intention expressions, contract invalidity, or revocation, they would conflict with the system of civil capacity, potentially undermining the rights of minors (Wang, 2015, p. 409).

Another perspective holds that the *de facto* contract theory departs from the traditional offer-and-acceptance model. For certain typical behaviors, contracts can be formed based on the factual process, providing a sound explanation for the legal relations between parties in specific scenarios. Without scrutinizing the declaration of intent, it serves as a more straightforward reference for guiding and standardizing corresponding behaviors, resolving disagreements over contract formation, and diminishing the unpredictability of legal outcomes. It is better aligned with reality and reflects the theory's rationality and value (Zhang, 2003, pp. 39–42). This view is supported in this study, and below is a response to the

arguments rejecting the *de facto* contract theory.

De facto contracts resulting from social interactions aim to address obligations such as care, notification, and protection stemming from these interactions. Early German case law introduced a "preliminary contract," "maintenance contract," or "liability guarantee contract" based on implied intentions (Wang, 2015, p. 400). Haupt believed such a declaration of intention to be purely contrived and, if applied, lacks persuasiveness and should be discarded. When there is no intent to contract between the parties, it may serve as a basis for the liable party to evade contractual responsibilities. Hence, alternative objective criteria should be incorporated into contract law, allowing injured parties to assert rights based on contractual provisions. The author posits that *culpa in contrahendo* cannot address the concerns related to these *de facto* contracts. The concept of culpa in contrahendo traces back to an article by Rudolf von Jhering in 1861 titled "Culpa in contravention or damage from invalid or incorrect contract." Jhering's theory of culpa in contrahendo does not stem from agreements between parties but from explicit stipulations in contract law, challenging the positivist stance that liability arises from contracts and paving the way for broadening contract relations (Fu, 1997, pp. 24–25). Its legal effects mirror those of the *de facto* contract theory, but they differ in the prerequisites for bearing liability in certain situations. Both the reliance interest, which is rooted in the principle of good faith under the culpa in contrahendo theory, and obligations like care, notification, and protection as proposed by the *de facto* contract theory stem from interactions between parties. However, in the former, such interactions must explicitly demonstrate a "contractual intent." When a contract is not finalized or becomes null or void, the assessment of damages must evaluate the parties' intention during the contract formation. In contrast, the *de facto* contract theory argues that contracts may be unfinalized due to one party's lack of intent from the outset, making it difficult for the injured party to seek redress under *culpa in contrahendo* provisions, thus denying them just protection. For instance, a shopper might just be window shopping and then get randomly chosen by a retailer for a product or service trial as part of a promotion. If injured, the shopper would find it challenging to prove a contractual intent, making it tough to seek damages based on *culpa in contrahendo*. Of course, in such practical examples, the victim's right to claim might also arise from tort liability. However, there are some defects in the protection provided by tort law for such victims. For example, the subject of liability and fault, the causation of loss, and the scope of compensation are all controversial. The *culpa in contrahendo* theory emerged in the mid to late 19th century, a period when Western societies underwent massive transformations due to rapid industrialization. The prevailing positive contract theory could no longer explain these evolving societal conditions, necessitating a new theoretical foundation. Both the *de facto* contract theory and the negligent contracting are developments or extensions of the traditional contract theory within contract law. They do not establish entirely separate contractual systems but rather build upon the existing

framework. The intrinsic merits of the traditional contract theory remain intact. By detaching certain behaviors from the constructed interpretations of intent, real-world issues can be more aptly addressed (Nikisch, 1963, p. 83), fostering the evolution and development of contract systems.

De facto contracts arising from organizational relationships are intended to address the legal consequences of a complicated situation in which a partnership or labor contract is found to be invalid or revoked due to defects after they have been performed. In such cases, unjust enrichment principles under the general principle of German civil law dictate that restitution should be made. However, this study argues that relying solely on the principles of trust and good faith, as well as legislation clarifying retroactivity, cannot effectively resolve the practical challenges associated with these circumstances. First, there are problems regarding the parties of a partnership when a dispute arises, despite the provision that the partnership has no retroactivity after it is revoked or becomes invalid. How can these problems be solved? Second, if provisions are made only for the reliance interest and defective declaration of intention without addressing the original partnership agreement, can it solve the problems regarding the validity of partnership agency during the period of partnership? Third, there are problems regarding how to deal with the external transactions that occurred during the partnership period but have not been settled, and the internal property payment or profit and loss distribution according to the original agreement. According to the *de facto* contract theory, it should be recognized as a *de facto* partnership, since this would be a "fast-track" approach to resolving the disputes arising after the partnership contract becomes invalid or is revoked. Such regulation based on *de facto* contract is better in line with the reality and the pursuit of efficiency and fairness based on the rule of law in modern societies. According to Article 28 of the *Labor Contract Law of the People's Republic of China*, if a labor contract is determined to be invalid but the worker has performed it, the employing unit shall pay the worker remuneration. There is no substantial difference between such a legal consequence and the approach based on the *de facto* labor relationship according to the *de facto* contract theory.

The value of the *de facto* contract theory is best exemplified in the obligations to pay stemming from typical social behaviors. The author contends that scholars who oppose the *de facto* contract theory fail to realistically address the pervasive standard contracts and the contractual relationships concerning transactions of essential goods for daily life. Indeed, many real-life situations bypass the mutual assent process of offer and acceptance. Consumers, in their individual capacities, lack a genuine choice, and they often find themselves bound by boilerplate or unilaterally drafted contracts—a scenario distinct from mutual assent achieved through offer and acceptance grounded in the autonomy of intention principle. The act of offer and acceptance is a manifestation of the parties' deliberation over the specific terms of the contract. Yet, concepts like implied declarations of intention,

customary trade practices, and offers not necessitating acceptance, all postulated from a contractual technicality standpoint, bypass negotiations over the contract's detailed terms. They are merely detached, rational constructs. Without legal standards that recognize contractual ties based on factual behaviors or processes, conventional contract theories struggle to offer coherent explanations. If the *de facto* contract theory is perceived as undermining the traditional legal order, it may be necessary to amend the law to accommodate and address these concerns.

The Value of the *De Facto* Contract Theory

The Rationality of the *De Facto* Contract Theory

The *De Facto* Contract Theory posits that for certain real-life transactions, it is unnecessary to scrutinize the methods of contract formation or the "declaration of intention" and "mutual assent" processes during its inception. By addressing real-life transactions that bypass traditional offer-and-acceptance mechanisms or lack mutual assent, contracts can be established between parties based on factual behaviors or processes. These *de facto* contracts give rise to contractual rights and duties, allowing the right holders to make claims under contract law. By exclusively focusing on factual behaviors or processes, this theory recognizes that not all transactions are genuinely founded on mutual assent. Moreover, it resolves issues of contract formation when the declaration of intention is not truly voluntary. Hence, for certain types of contracts, the traditional offer-and-acceptance paradigm is no longer the sole method of formation. This perspective eliminates contentious debates regarding the formation or validity of contracts based on the parties' declaration of intention and mutual assent. Instead, it efficiently ascertains the actual circumstances under which contracts are formed, promoting substantive fairness in adjudication.

In contemporary society, certain unique transactions pose jurisprudential challenges when trying to establish contractual relationships via the conventional offer-and-acceptance method. Examples include mandatory contracts (such as those for disaster relief, epidemic prevention and control, or state directives), competitive (auction) contracts, intentions that require no formal acceptance, and non-modifiable standard form contracts. The *de facto* contract theory, which does not assess the intention to contract through the traditional lens of offer and acceptance, aptly elucidates the formation of these typical contractual relations. Although mandatory contracts may involve elements of offer and acceptance, they are not based on the voluntary negotiation of the parties. Instead, it restricts the parties' contractual freedom, going against the principle of autonomy of will. Competitive (auction) contracts differ from the standard one-to-one offer and acceptance relationships. The process is dynamic and showcases both competitiveness and a statutory nature. When assessing such

contracts, the constantly changing nature of bidders complicates the traditional understanding of an offer. It is primarily the final bid's hammering action that is pivotal; if the action complies with bidding laws, auction laws, and auction rules, a contract is formed, deviating from the conventional offer-and-acceptance mode. The realization of intention pertains to situations where, based on trade practices or an offeror's prior declaration, a contract is formed without the offeree needing to express acceptance (Leading Group of the Supreme People's Court for Implementation of the *Civil Code of the People's Republic of China*, 2020, pp. 61–62). Without explicit legal provisions, it becomes challenging to evaluate through the traditional offer-and-acceptance paradigm. This becomes particularly problematic in transactions involving standard contractual terms in everyday life, as consumers are often in a disadvantageous position. Therefore, evaluating these using the traditional offer-and-acceptance criteria does not effectively protect consumer rights.

In judicial practice, when parties have not executed a written agreement but have established a contractual relationship based on the actual fulfillment of obligations, this falls under the domain of which "form of contract" is used to establish the contractual relationship. Scholars have sought to unravel the "implied intent" behind forming contracts due to actual performances, aiming to elucidate the declaration of intention regarding standard-form contracts or routine transactions as proposed by the *de facto* contract theory. However, using this approach to interpret the mode of contract formation, and subsequently upholding the position of mutual assent during the contracting phase, struggles to reconcile subjective intent with objective behaviors in practical scenarios. Regarding the mutual assent of contracts, Anglo-American law accentuates the contract's external manifestation, German civil law finds a balance between *intentionalism* and *expressivism*, and recent trends in French civil law indicate a transition from pure *intentionalism* towards *expressivism*. When it comes to specific instances outlined by the *de facto* contract theory, such as routine transactions, standardized professional contracts, and public service contracts, inferring a declaration of intent from implied, external actions and interpreting the mutual assent principle from a technical standpoint introduces new logical challenges. How can parties implicitly stipulate unforeseeable terms without undergoing a conventional offer and acceptance negotiation? Conversely, when employing the *de facto* contract theory to determine the existence of a contract, it does not rely on the parties' declared intention or their expertise concerning the subject matter. Otherwise, in such scenarios, "the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."[①] Atiyah remarked that the court's final recourse is not anchored in the parties' intention but rather a legal statute akin to any other (Atiyah, 2002, pp. 20–21). For litigations concerning the previously discussed typical transactions,

courts ultimately base their judgments on factual behaviors, departing from the consensus principle of classical contract theory.

Although the *De Facto* Contract Theory challenges foundational elements of traditional contract theory, such as the concepts of "declaration of intention," "mutual assent," "freedom of contract," and "autonomy of private law," it does not completely overthrow the overarching contract theory that is based on the notion of meeting of minds. It merely extends beyond the conventional ways of contract formation, offering a new theoretical foundation for occurrences already evident in real life and judicial practices. As acknowledged by Wang Zejian, the *De Facto* Contract Theory demonstrates undeniable effectiveness, especially in addressing unique scenarios, compared to traditional doctrines (Wang, 2015, p. 409). He highlighted three areas worth research by virtue of such theory: (a) Given the pervasive use of standardized contract terms in modern society, which substantially curtails individual freedom, how should traditional civil law's principles of party autonomy and contractual freedom be interpreted and applied to ensure contractual justice? (b) Should there be revisions to the stipulations on civil legal behaviors in traditional civil law? (c) With the emergence of numerous unconventional transactions today, how should traditional contract theory adapt to address the objective, external, and factual nature of typical transaction behaviors proposed by the *De Facto* Contract Theory? Additionally, to what extent should considerations be given to flaws in the declaration of intention, discrepancies between internal reservations, and verbal objections (Wang, 2015, pp. 409–410)? If we shift away from the constraints of the traditional offer-and-acceptance model, abstain from scrutinizing parties' intentions and agreements, and assert that the law directly establishes contractual relationships based on factual behaviors or processes, it can mitigate divergent interpretations of the "declaration of intention" in legal proceedings. This would facilitate a more efficient resolution of disputes, reflecting a genuine commitment to equitable and just outcomes.

The Practical Value of the *De Facto* Contract Theory

Since its inception, the *de facto* contract theory has sparked varied responses among scholars. This discourse, to some extent, showcases the interplay and reassessment between foundational contractual principles like freedom of contract and mutual assent and the evolving innovative transactions in societal progression. With our transition into an information-driven era, there have been notable shifts in market transactions, lifestyles, and value systems since Haupt introduced the theory. Traditional contract theories fall short in explicating transactions in public services, public safety, and those conducted through the internet. Thus, revisiting the value of the *de facto* contract theory holds tangible relevance.

① Lord Radcliffe's analysis in a case transitioning between theories.

The *De Facto* Contract Theory, from its inception, was devised to address prevailing practical issues. Some German Federal Court of Justice's adjudications rooted in the doctrine of "typical social behaviors" underscore the significance of such theory. To illustrate, consider a representative case: The Hamburg City Council designated public land flanking both sides of a roadway as a public parking area. This area was then entrusted to a private enterprise to manage and levy parking charges, indicated by erected signage. The defendant, having parked there multiple times, consistently asserted to the employed attendants that public spaces are free for all to use, negating the need for attendant supervision of vehicles, henceforth declining to pay the parking fees. The plaintiff subsequently sought legal redress, demanding payment for the parking. The rationale was twofold: even if no formal contract was in place regarding vehicle oversight, the defendant's act of parking amounted to unjust enrichment. Moreover, the defendant's parking behaviors inhibited the plaintiff from reallocating the parking space, thus inflicting tangible losses. Intriguingly, the court's judgment did not pivot on the plaintiff's plea centered on the defendant's unjust enrichment or illicit actions. Instead, the court propounded that the circumstances echoed the tenets of a *de facto* contract based on "typical behavior." The court observed that if the judgment rested on unjust enrichment, the onus on the plaintiff to substantiate the defendant's gains would be burdensome. Similarly, absent recognition of a *de facto* contract, alternative resolutions would be elusive. Consequently, independent of the defendant's manifest intention to contract, the very act of parking substantiated a contractual relationship, thereby entitling the plaintiff to demand parking fee payment (BGHZ, 1956, p. 319). This precedent, underpinned by the *De Facto* Contract Theory, fortifies lawful interests in public service domains, exemplifying the theory's inherent worth.

Article 793 of the *Civil Code* dictates that if a construction project contract is rendered invalid, yet the construction project has been accepted upon successful inspection, compensation to the contractor may be determined with reference to the project's contractually agreed price. A parallel provision exists in the judicial interpretation [F.S. (2020) No. 25] by the Supreme People's Court of China. To ensure public safety and maintain quality standards, the legislators, when reconciling the interests of the contract-offering party and the contractor, choose to regard an invalid contract as if it were valid. The author posits that such an approach finds its theoretical foundation in the *de facto* contract theory. Some scholars contend that the foundation for the right to claim in this context is not rooted in the legal relationship of a *de facto* contract but rather in unjust enrichment. They argue that referencing the agreed price merely offers a currently reasonable calculation method for unjust enrichment (Dang, 2015, pp. 95–102). However, since the law permits the invocation of the substantive rights and obligations outlined within the invalid contract, it cannot be asserted that there is a lack of legal basis, thereby negating any claim of unjust enrichment. If, based on the *de facto* contract theory, a contract emanating from an organizational

relationship is found to be void or rescinded post-implementation, the resultant rights and obligations cannot be arbitrarily negated. Thus, the parties should establish a *de facto* contractual relationship founded on this reality and address the ensuing rights and obligations accordingly. Similarly, as described in the aforementioned judicial interpretation [F.S. (2020) No. 25], when a construction contract is deemed void, the "actual builder," acting as an independent legal entity, can demand payment from the contract-offering party based on the stipulated project price. This scenario can be aptly regulated using the *de facto* contract theory rooted in organizational relationships, thereby obviating the need to incorporate policy considerations related to remunerating migrant workers as a so-called exception to the established privity of contract doctrine. Employing the *de facto* contract theory to dissect specific real-world dilemmas provides greater clarity to the underlying legal rationale, enhancing predictability and reducing ambiguities in judicial deliberations.

The traditional principle of freedom of contract posits that a contract is established based on mutual assent of the parties under the doctrine of intention autonomy. This sets objective facts or actions as external evidence of subjective declarations of intention. This perspective has been steadfastly maintained in traditional contract law's legislative and judicial approaches. In response to contemporary transactional phenomena, there have been attempts to introduce concepts like "implied declaration of intention," "expressed intention," and "acts of intention declaration." These endeavors aim to harmonize subjective intention with objective behaviors, resulting in a doctrine of consistent mutual assent interpretation. However, these efforts have complicated legislative and judicial practices, giving rise to new contentions.

In contemporary society, "standardized transactions in public service sectors that cannot fully engage in market competition" and "routine transactions in sectors characterized by high specialization, even under market conditions," do not typically employ the traditional "bargain and negotiate" process. Yet, such practices have gained widespread acceptance. This compels reflection on scenarios where the purchaser (or the recipient of a service) merely consents or dissents to terms posited by the other party. Other scenarios may involve the contracting parties collectively opting for an industry-recommended contract format, adhering to specific rules in international commercial treaties for standardized transactions, or relying on customary trade and commercial practices. In these situations, parties do not deliberate over contractual terms. Evaluating parties' declaration of intention and mutual assent based on the offer-and-acceptance paradigm, and interpreting contract initiation or validity through the mutual assent doctrine, is inconsistent with the objective realities. Disputes between parties can become convoluted when discerning the facts. Divergent judicial interpretations may arise, attributable to varying perceptions of the declaration of intention. However, employing the *de facto* contract theory to scrutinize these transactional behaviors sidesteps interpretative discrepancies regarding the declaration of intention.

It simplifies the resolution of disputes pertaining to the inception, timing, or validation of contractual relationships, thereby directing such transactions to be regulated in an anticipatory manner.

The *de facto* contract theory arises from the interplay between novel societal occurrences and established contract regulations. In the contemporary realm, myriad transactions not predicated on bargaining are evident. Such observations prompt a reevaluation of fairness and justice conceptions within classical contract theory. Traditional contract theory posits that procedural fairness (i.e., offer-and-acceptance under the banner of intent autonomy) ensures "justice and fairness," sidestepping the tangible outcomes or consequences of the contract. The differentiation between procedural and substantive fairness holds ramifications for the application of contract law in individual cases. Nevertheless, emphasizing procedural justice to the exclusion of substantive justice proves challenging in application (Atiyah, 2002, p. 303). Critics of the *de facto* contract theory often suggest that breaching the "meeting of minds" principle intrinsic to contract freedom jeopardizes the presumed procedural fairness system. Yet, the classical contract theory's contract procedure system neglects various nuances: the intrinsic disparities in contracting capability, asymmetry in obtaining transaction information, challenges in deciphering intricate standardized terms, and the non-neutrality of market regulations. In such contexts, insisting on procedural fairness without contemplating substantive equity in contract outcomes is misguided. When tackling specific cases, inconsistencies emerge when leveraging traditional contract theory to elucidate contemporary phenomena. Likewise, when the existing positive law struggles to render equitable and efficient backing for claim rights, and when applying such law is jurisprudentially contentious, necessitating further elucidation, the ultimate outcomes may diverge from the foundational legal tenets of "order and justice." This can blur the legal rule parameters of "clarity, uniformity, and anticipatory nature," casting doubts upon the legal ethos of "safety, equality, freedom, and efficiency." The characteristic transactions of *de facto* contract theory highlight that the factual contract relations, which bind the parties' duties and rights, release them from the formal fairness limitations of conventional contract theory. This approach moves closer towards realizing substantive fairness.

A Preliminary Proposal for Refining the *De Facto* Contract Theory

Article 471 of the *Civil Code* stipulates that contracts can be formed either by an offer and acceptance or by other methods, breaking away from the traditional doctrine of mutual assent. The classical freedom of contract, foundational to traditional contract theory, undergoes limitations and modifications in this positive law, embodying the principle that "law ultimately reflects the socioeconomic conditions of society" (Zhou, 2000, p. 1). Yet, the *Civil Code* does not elaborate on these "other methods." The modes of contracting outlined

in the mandatory contract clause of Article 494 and the clause for realizing intention without acceptance in Article 480 adopt the "offer and acceptance" format. While the legislature acknowledges methods beyond the traditional offer and acceptance, it leaves the definition of these "other methods" ambiguous. This ambiguity underscores the ongoing debates surrounding the *de facto* contract theory, despite acknowledging its inherent merit and importance. Born against the backdrop of what scholars deem the decline of contractual freedom, the *de facto* contract theory suggests that certain contemporary transactions demand the intervention of state authority for standardization, favoring the protection of the rights of vulnerable contracting parties over encroachments on private rights.

Haupt originally proposed the *de facto* contract theory to address specific situations. The term "*de facto* contract" was merely a descriptive term, and its intrinsic and extrinsic definitions were not fully fleshed-out. This theory was merely an insightful viewpoint. Larenz's "typical social behaviors" theory once endorsed the *de facto* contract theory, gaining significant attention from scholars and being utilized by German courts as a foundational theoretical reference for judgments. However, Larenz later withdrew his support. Some detractors then posited that the *de facto* contract theory had become defunct. These criticisms, rooted solely in the retreat of a key proponent rather than evaluating the substance of the theory itself, were academically and practically unconvincing. Other academics suggested that certain dilemmas, easily addressed within traditional theoretical constructs, become more complex under the *de facto* contract theory. For instance, a shoplifter might assert a *de facto* contract with a store, paralleling regular customers, contending that his only obligation was the payment for goods (Medicus, 2000, p. 194). This debate stems from the absence of clear definitions around the concept, scope, and relevant scenarios for *de facto* contracts. To infer that all contractual relationships can be construed based solely on factual behaviors or processes is a departure from the original intentions behind the *de facto* contract theory. The theory should be reserved for specific circumstances that either currently exist or are bound to arise, sidestepping the need to probe the mutual assent typically integral to contract formation.

In his work *Allgemeiner Teil des Bürgerlichen Rechts: Ein Lehrbuch*, Larenz abandoned the notion of "typical social behavior," positing that *de facto* contracts "lack a legal foundation, and the mere presence of such a need in modern commercial interactions hardly lends credence to this perspective" (Larenz, 2013, p. 746). He contends that analogous behaviors "ought to possess both an intent and the corresponding act to manifest that intent," a stance hardly distinguishable from the conventional contract law theory. In light of this, Larenz proposed assessing the actor's capacity to act, asserting they must bear consequences like restitution for unjust enrichment or other unfavorable outcomes. In all these scenarios, Article 151 of the *German Civil Code* (BGB) should be invoked, as long as these provisions are pertinent to the situation (Larenz, 2013, p. 746).

The author gathered insights from Larenz's rationale for relinquishing his endorsement of the *de facto* contract theory, suggesting that the quintessential transactions encompassed by this theory necessitate explicit legal stipulations. Beyond articulating the methods of contracting, there is a pressing need for the legal codification of these stereotypical transactions, ensuring their recognition within positive law. Pursuant to Article 468 of the *Civil Code*, whether a creditor-debtor relationship emanates from a contract can be addressed under the pertinent provisions of contract law. Hence, there exists no impediment in positive law when subjecting the typical factual behaviors posited by the *de facto* contract theory to contractual regulation.

On the foundation of Haupt's "factual contractual relationship" theory, the author introduces a refined concept termed "statutory *de facto* contract." Instead of assessing contract formation through the traditional offer-and-acceptance lens, this approach recognizes contractual relationships grounded in specific factual behaviors, as defined by law. The resultant rights and duties of the involved parties are then governed by contract law. This notion of the statutory *de facto* contract is distinct from factual contractual relationships in the judiciary where written agreements are absent. Furthermore, it diverges from contracts formed based solely on objective factual behaviors. The author posits that statutory *de facto* contracts can be examined as a distinct category of contracts. The essential criteria for their establishment are: first, the presence of specific factual behaviors between parties; second, legal consequences of these behaviors are expressly stipulated by law; and third, the emergence of rights, duties, or damages stemming from these behaviors. A succinct overview of various forms of statutory *de facto* contracts is provided below.

A statutory *de facto* contract arising from social contact behavior can be delineated as: When the provider of goods (or services) manages a venue relatively isolated from the outside world and does not deny entry to those with good intentions, a statutory *de facto* contractual relationship forms between the manager and the well-intentioned party, encompassing duties of notification, care, and protection. Pursuant to Article 18(2) of the Consumer Rights and Interests Protection Law of China, operators of public establishments have an obligation to ensure consumer safety. Failure to fulfill this duty may result in tort liability. However, it is important to note that the burden of proof and the scope of compensable losses differ from those in cases of breach of contract liability. Under Article 187 of the *Civil Code*, a party can opt to pursue either breach of contract or tort liability. Such statutory *de facto* contractual relationships do not consider the parties' mutual assent and are distinct from culpa in contrahendo.

A statutory *de facto* contract rooted in organization is articulated as: when a contract becomes null or is rescinded, and the legal stipulations permit the rights and duties of the involved parties to be managed according to the contract's provisions, it gives rise to a statutory *de facto* contractual relationship. As referenced earlier, when a construction project

contract is rendered null, the ability to seek remuneration based on the terms of the voided contract falls under this category of statutory *de facto* contractual relationship.

A statutory *de facto* contract, stemming from the indispensable societal payment obligations inherent to contemporary economic conditions, can be expanded in scope to encompass contracts formed within economic domains lacking comprehensive market competition or, even if within free-competition sectors, where parties operate under standardized contracts due to transactional information asymmetry. Such contracts should no longer be assessed through the lens of offer and acceptance for their establishment. First, sectors without comprehensive market competition include areas related to essential public utilities like electricity, gas, telecommunications, tap water, public transportation, and the internet, and those involving state-mandated tasks, such as disaster rescue, epidemic control, or other national imperatives. Second, in free-market sectors where parties experience transactional information disparities, this involves non-alterable standardized contracts provided by one side or those shaped by customary trading practices and international commercial treaty stipulations. Articles 494(2) and (3) of the *Civil Code*, introduced based on the foundational Article 38 of China's original Contract Law, delineate the offer-and-acceptance mechanism for mandatory contracts. However, their "compulsory" nature diverges from the traditional mutual assent framework underlined by contractual freedom and intent autonomy principles. This seemingly adaptive shift by legislators to conventional contract theory gives rise to conceptual inconsistencies. Objectively, contracts mandated by reality that sidestep free and mutual assent starkly contrast with the conventional offer-and-acceptance contract theory. Such contracts more aptly fit the mold of statutory *de facto* contracts. Legislations, including Contract Law and Consumer Rights Protection Law, have specified the effectiveness, rationality, and essentiality of standardized and implicit terms within such contracts, aiming to curtail substantial contractual inequities. For these contracts, it becomes unnecessary to inspect their formation via the offer and acceptance pathway. Recognizing them as statutory *de facto* contracts and defining their formation time through legislation or judiciary would be appropriate. For instance, Articles 496, 497, and 498 of the *Civil Code* elucidate the conditions under which non-negotiated standardized clauses can form part of a contract and their effective applicability. The mutual assent phase among contract parties is not examined. Such immutable standardized contracts belong to the statutory *de facto* contract classification as advocated in this paper. Pursuant to Article 49(2) of the E-Commerce Law, an e-commerce business may not stipulate by standard form clauses, or any other means, that a contract is not established after the consumer pays the price; and if standard form clauses, among others, contain such a stipulation, the stipulation shall be invalid. In e-commerce transactions, this provision, as *lex specialis*, should prevail. Even if e-commerce operators have satisfied their obligation to notify and clarify to consumers as per Article 496 of the *Civil Code*, the stipulation remains ineffective. Thus,

once a consumer completes payment as indicated by the e-commerce operator, the contract is ratified without scrutinizing mutual assent among the parties. These contracts align with the concept of statutory *de facto* contracts.

In addition to the previously mentioned types of statutory *de facto* contracts, the author posits that contracts formed on the basis of "realization of intention" should be classified as statutory *de facto* contracts. Article 484(2) of the *Civil Code* delineates a specific act as a distinctive mode of acceptance. A similar provision exists in Article 151 of the *German Civil Code* (BGB). This scenario, theoretically referred to as the realization of intention, solely inspects the particular behavior of the counterparty to infer the objective manifestation of acceptance without scrutinizing its subjective declaration. When such behavior aligns with legal prerequisites, a contract materializes. Forming a contractual relationship based on such factual behaviors aligns with the essence of the statutory *de facto* contract presented in this paper. Categorizing these as statutory *de facto* contracts offers an efficient solution to challenges surrounding contract inception. For instance, vending machine transactions exemplify the realization of intention. Traditional contract theory offers varying interpretations of whether a customer's coin insertion signifies an offer or acceptance. Larenz posits that the vending machine, stocked with sellable items, extends an offer, while the act of depositing coins signals acceptance (Larenz, 1989, p. 519), subsequently culminating in a contract. Conversely, Medicus contends that the vending machine presents an invitation to offer to undesignated customers, with coin deposition constituting the offer. The machine's operation implies acceptance; its malfunction denotes contract non-establishment (Medicus, 1987, p. 362). In reality, this contention arises from constraining typical real-world transactions within the confines of traditional contract theory. When viewed through the lens of contemporary positive law, the pivotal inquiry is whether the customer has successfully completed the act of inserting the coin. Once this act is completed, a contractual relationship is established. Another illustration can be found in Article 638(2) of the *Civil Code* regarding trial sales. Here, a buyer's payment or disposal actions are construed as buying consent, negating the need for further examination of any acceptance declaration or to affirm prior behaviors as constituting acceptance. Legal stipulations directly authenticate contract formation. Traditional contract theories conceptualize the "realization of intention" as a form of implicit acceptance, delineated by tacit acts, presumptive behaviors, performance actions, receipt behaviors, possessive actions, and usage behaviors. These markers attempt to navigate back to the declaration-based contract framework, juxtaposing objective actions and subjective intentions, and complicating real-world applications. In legal practice, if we sidestep analyses centered around declarations of intention by means of offer and acceptance(including acceptance by conducts), we can clearly judge whether the contract is established by making objective analyses on statutorily mandated behaviors instead. This approach helps to mitigate interpretative disparities among jurists who are entrenched in

traditional paradigms. By addressing contractual formations rooted in customary actions, the process becomes more transparent, facilitating transactional predictability, efficiency, and fairness.

The existing typical contracts have been enumerated and categorized as statutory *de facto* contracts. Differing from traditional methods of contract formation based on offer and acceptance, these contracts have specific legal provisions that outline the rights and obligations of the contracting parties. Their typified conceptualization offers a framework for judicial interpretation, aiming to strike a balance between economic efficiency and principles of equity and justice when resolving disputes concerning such contracts. The trajectory of value-driven thought in legal dogmatics suggests that numerous doctrinal constructs are not necessarily deduced from established conceptual systems. Examples include anticipatory rights, legal relations in contract negotiations (serving as the foundation for *culpa in contrahendo* liability), and contracts designed to protect third parties. More often than not, these constructs have evolved in response to transactional needs or specific principles of justice, gradually shaped over time through judicial interpretations, and are poised for further development (Larenz, 1991, p. 229). Thus, the potential for the *de facto* contract theory to be embraced as a subsidiary theory within the predominant contractual framework is intertwined with the ability of typified statutory *de facto* contracts to be recognized and critically analyzed in judicial decisions. This interrelationship and its real-world applicability in jurisprudential practice necessitate continuous observation and research.

Conclusion

Socioeconomic development and policy ideas inevitably bring about changes in legislation and judicature. Contemporary contract law, amidst these changes, seeks to balance various values and interests. The rise of innovative transactions due to rapid economic growth demands an evolution of traditional contract systems. Article 471 of the *Civil Code* states that contracts can be established through means beyond the traditional offer and acceptance, directly addressing prevalent factual behaviors. This shatters the confines of classical contract theory, prompting reconsideration of the methods of contract conclusion and the inception of contractual relationships. The *de facto* contract theory provides a foundational legal rationale. Yet, this theory encompasses other modes beyond the standard offer and acceptance, like mandatory contracting and the realization of intention. Correspondingly, the *Civil Code*'s phrasing has not entirely departed from the traditional model. The predominance of systematic thought in contemporary jurisprudence stems from the fact that legal norms operate within specific frameworks, necessitating internal consistency and coherence to avoid contradictory rulings (Larenz, 1991, p. 125). The *de facto* contract theory does not repudiate elements of the classical contract theory, such as contract forms, nullification,

capacity rules, and more. The author posits that modern contract law should prioritize efficiency and substantive fairness over adhering rigidly to established theoretical constructs. Introducing the concept of the statutory *de facto* contract to categorize specific typical contracts, the author strongly encourages the refining and advancing of the *de facto* contract theory. In judicial practice, when judges assess issues related to the formation of such typical contracts, they should no longer be confined to the traditional offer-and-acceptance process. In legislation, the logic behind the phrasing of how these contracts are established should be reconsidered.

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