

PART IV

Legal transplants and the influence of Japanese law in Asia

4.1 The influence of Japanese law on Taiwan law

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I. THE SHAPING OF TAIWAN LAW

Taiwan law means, in this chapter, the law existing in Taiwan since 1895, when Taiwan became a colony in the prewar Japanese Empire. The periods of Dutch and Spanish rule (1624–1662) and Koxinga regime’s rule (1661–1683) were so short in Taiwan’s history that the ruled had not yet shaped their own political identity. For the next 212 years (1683–1895), Taiwan was ruled by a local government of imperial China and there was almost no Taiwanese political or cultural identity during that time.¹ However, since 1895 a modern-style legal system was brought to Taiwan by the Japanese colonialists. More importantly, Taiwan became a specific jurisdiction within the whole Japanese empire, having its own laws and court system different from that of metropolitan Japan.² The term, and concept of, “Taiwan law” thus emerged. Although Taiwan was regarded as a province of Republican China between 1945 and 1949, Taiwan has been constituted a *de facto* independent state since 1949, as mentioned below. Therefore, the law in Taiwan, officially named the Republic of China (“ROC”) law, can be called “Taiwan law” in the international community.³

¹ Taiwan did not acquire provincial status under the rule of Qing Dynasty until 1885. See Robert Gardella, *From Treaty Ports to Provincial Status, 1860–1894*, in Murray A. Rubinstein ed., *TAIWAN: A NEW HISTORY* (Armonk, N.Y.: M.E. Sharpe, 1999), 187. On briefly discussing the history of Taiwan before 1895, see TAY-SHENG WANG, *LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895–1945): THE RECEPTION OF WESTERN LAW 14–26* (Seattle, WA: University of Washington Press, 2000).

² See TAY-SHENG WANG, *supra* note 1, at 36–56, 63–89.

³ “Taiwan” is more well known in the international community than “the Republic of China” or “ROC.” See also CHANG-FA LO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN 1–4* (The Netherlands: Kluwer International, 2006).

Taiwan law is a member of the civil law family, of which the sources of positive law are statutes. The provisions in statutes are in essence the products of legislature, in which various political forces make their compromise; however, they are written by legal terminology and often need to be interpreted for general application to individual cases in accordance with legal theories. Scholars who are familiar with legal theories thus play important roles in shaping positive law. The authoritative legal interpretations are ultimately made by the court by applying statutes to regulate related parties in a society. Accordingly, in order to answer to what extent Japanese law influences Taiwan law, we have to examine not only legal provisions in the law books but also political circumstances for legislation and the characteristics of legal scholars and the legal profession in Taiwan. In addition, this chapter will further discuss legal practices in Taiwanese society in order to explore Japanese law elements in the daily lives of people.⁴

II. JAPANESE INFLUENCE ON TAIWAN'S LEGISLATION

“Taiwan” is the name used by the majority of Taiwanese people to identify their country in today's Taiwan, but it is not the official name of the country in the positive law of Taiwan. The main reason for this is that current positive law in Taiwan was put into effect by the government of Republican China, which was overthrown by the present Chinese government, the People's Republic of China (“PRC”), in 1949. However, the PRC did not take over Taiwan in 1949. The sovereignty of Taiwan is still a controversial issue in international law. In any event, since 1949, the Taiwan authorities have referred to their country, whose territory comprises Taiwan only, by China's former name, the Republic of China (ROC).

Nevertheless, Japanese laws have a close tie with Taiwan in history because the majority of people in Taiwan experienced a modern-style legal system for the first time during the fifty-year period of Japanese

⁴ Generally discussing the relationship between provisions in statutes, legal theories, legal interpretations in administrative and judicial cases, and application of law in daily lives of people, see TAY-SHENG WANG, JUYOU LISHI SIWEI DE FAXUE: JIEHUO TAIWAN FALU SHEHUI SHI YU FALU LUNZHENG [Jurisprudence with Historical Thinking: Combination of Taiwanese Social History of Law and Legal Reasoning] 3–30 (Taipei: the author, 2010).

colonial rule (1895–1945). Japanese law was no more the positive law in Taiwan after 1945 when Republican China took over Taiwan on behalf of the Allies after World War II. The influence of Japanese laws, however, continued to grow in postwar Taiwan because the newly implemented ROC laws were deeply impacted by Japanese laws. At the beginning of the 20th century, Qing China employed Japanese legal scholars to compile Chinese modern-style codes, promote Chinese legal education, and allowed a large number of Chinese students to study law in Meiji Japan. Republican China promulgated its civil code, criminal code, the code for civil procedure, and the code for criminal procedure from 1929 to 1935. Those basic codes of the ROC law were in appearance modeled on civil law countries, especially Germany, but in fact directed by Japanese law and legal theories, which were dominated by German jurisprudence.⁵ Unfortunately, those ROC codes had poor levels of enforcement in Republican China and were rejected by the Chinese people in 1949, after they had been effective in China for 20 years at most. In contrast, ROC law has been well implemented in Taiwan partly because Taiwanese society was relatively familiar with modern-style laws during Japanese colonial rule,⁶ and has been effective in Taiwan since 1945, so for the past 69 years.

Since 1950, both Taiwan and Japan have had a close political relationship with the USA.⁷ It is therefore convenient for Taiwan law to imitate Japanese laws because the two countries share the same legal values. Occasionally, it appears that Taiwan law attempts to adopt American institutions, but it is actually modeled on Japanese law. The 1995 trust law of Taiwan is an example. When Taiwan law tried to adopt the principles of US trust law, the case law in the US legal system, it was actually modeled on Japanese trust law, because Taiwan

⁵ See Dan F. Henderson, *Japanese Influences on Communist Chinese Legal Language*, in Jerome A. Cohen ed., *CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES* (Cambridge, MA: Harvard University Press, 1970), 158–87.

⁶ See generally TAY-SHENG WANG, *supra* note 1, at 174–83.

⁷ The outbreak of the Korean War caused a reversal of US policy toward Taiwan, from abandoning the island, to Communist China's takeover, to guaranteeing Taiwan's Protection through US military deployment in 1950. By the end of 1951, a US embassy replaced the American Consulate General in Taipei, Congress passed a bill providing \$300 million in aid to Taiwan, and a US general headed a Military Assistance Group on the island. See DENNY ROY, *TAIWAN: A POLITICAL HISTORY* 112, 116 (Ithaca, NY: Cornell University Press, 2003).

law like Japanese law is rooted in civil law traditions.⁸ Since 2003, Taiwan law has, to a large extent, followed US-style procedure for criminal justice. The incentive for this legislation, however, is to imitate Japanese criminal procedural law that was reformed to adopt American institutions during the American occupation period.⁹

Another example is to refer to Japanese laws for codifying Taiwan's legal practice, which originated from Japan under colonial rule. Japanese *ne-teito* (fixed mortgage), by which the debtor furnished security for an undetermined number of debts within a fixed amount, was a traditional practice in Japan and became prevalent in Taiwan due to Japanese rule. The ROC Civil Code made in China did not include such practice, but it was regarded as customary law and held valid by postwar Taiwanese courts.¹⁰ The 2007 revision of the ROC Civil Code has expressly added this practice, called "maximum-amount mortgage," by referring to Japanese law.

III. JAPANESE INFLUENCE ON TAIWAN'S LEGAL THEORIES

Legal scholars in colonial Taiwan were almost all Japanese and they left Taiwan after 1945. Only a very small number of native Taiwanese jurists, who were trained by Japanese laws in the colonial days, became members of the first generation of Taiwan's legal scholars that emerged in the postwar era. Most of Taiwan's first-generation legal scholars were those people who received their legal education in Republican China. However, Japanese legal books were often translated into Chinese and welcomed by law students in China under the administration of the

⁸ See TZU-CHIANG CHEN, *TAIWAN MINFA YU RIBEN ZHAIQUAN FA ZHI XIANDAI HUA* [Taiwanese Civil Law and the Modernization of Japanese Law on Obligations] 180 (Taipei: Angle Publishing Co., 2011).

⁹ The former head of Taiwan's Supreme Court said that Taiwan courts suggested the adoption of postwar Japanese criminal procedural law, in which prosecutors had a heavy burden to prove defendants guilty in the trial, to urge Taiwan's prosecutors to be more prudent in deciding whether to charge the suspected or not, so that the number of lawsuits in the court could decrease. See DIVISION ON JUDICIAL ADMINISTRATION, JUDICIAL YUAN ed., *TAIWAN FAJIE QIXIU KOUSHU LISHI, DIER Ji* [The Oral History of the Elder in Taiwan's Legal Community, Vol. II] 202, 205–06 (Taipei: Judicial Yuan, 2006).

¹⁰ See generally Tay-sheng Wang, *Chapter 4: Taiwan*, in Poh-Ling Tan ed., *EAST ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA* 156 (Sydney: Butterworths, 1997).

Peking government (1912–1928). The legal terminology and theories influenced by prewar Japan were frequently used to interpret the provisions of newly enacted ROC codes under the administration of the Nationalist government (1928–1948). It is not surprising that legal scholars from Republican China often cited Japanese laws or decisions to interpret the meaning of provisions in ROC law. As a consequence, the legal theories of Taiwan's first-generation legal scholars basically follow the direction of Japan's legal community.¹¹

Many of Taiwan's second-generation legal scholars, emerging after the mid-1960s, went to European countries, especially Germany, for advanced studies in law. They directly learned European legal theories and criticized the traditional ones borrowed from Japan's legal scholars. Although some of the second-generation scholars went to Japan for advanced studies, what they learned were postwar, not prewar, Japanese law and legal theories. Generally speaking, Japanese laws and legal theories had dominance over Taiwan's legal community from the 1950s to the 1970s. In the 1980s, the influence of Japanese laws and legal theories on Taiwan law remained as strong as German or American laws. Japan's influence gradually decreased in the 1990s because most of Taiwan's third-generation legal scholars, emerging after the mid-1980s, studied law in Germany or the USA and the number of those scholars who studied law in Japan decreased. Taking into consideration Taiwan's fourth-generation legal scholars, emerging after 2000, the majority are those legal scholars who went to Germany (and other European countries) or the USA (and the UK) for advanced studies, and the minority are those legal scholars who received their Ph.D. education in Japan or Taiwan.¹² Nevertheless, in comparative law studies in today's Taiwan, Japanese laws are always referred to.

In sum, partly because the number of Taiwanese law students studying in Japan has decreased, Japanese laws have lost their original influence upon Taiwan law. If a Taiwanese law student who wants to pursue a Ph.D. degree in Japan is required to study German law or US law, he or she may think it would be better to go to Germany or the United States for advanced studies. On the other hand, Japanese laws are still attractive to Taiwanese law students. As mentioned above,

¹¹ See Tay-sheng Wang, *Sige Shidai Xingsu Ercheng De Zhanhou Taiwan Faxue* [Jurisprudence of Postwar Taiwan Shaped by Four Generations], *TAIDA FAXUE LUNCONG* [NTU LAW JOURNAL], 40: special issue (Oct. 2011), 1372–82, 1396–1400. On the legal theories of civil law, see TZU-CHIANG CHEN *supra* note 8, at 343, 346.

¹² See Tay-sheng Wang, *supra* note 11, at 1400–03, 1405–07.

Japanese laws remain the main source of Taiwanese legislation. If a Japanese law becomes the model for Taiwan law, the provisions of this Taiwan law are ordinarily interpreted with reference to Japanese law and decisions. Training in Japanese law is thereby needed for the enforcement of Taiwan law. Moreover, the situation of Japanese society often repeats itself in Taiwanese society about a decade later. Japanese law, which was enacted to resolve these social problems, is very useful for Taiwan law in order to deal with similar social problems.

IV. JAPANESE INFLUENCE ON TAIWAN'S JUDICIAL DECISIONS

Anyone familiar with the decisions of Japanese courts will notice the similarity in the form of writing between the decisions of Japanese courts and their counterparts in Taiwan courts. This similarity, however, did not result from Japanese colonial rule in Taiwan, but from the Japanese influence on the writing style of decisions in the courts of Republican China. In fact, all of the Japanese judicial officials left Taiwan after 1945. There were few Taiwanese judges in colonial days, although they continued to be judicial officials in postwar Taiwan. Therefore, the judicial culture in postwar Taiwan, including the notorious corruption in the past, was derived from Republican China rather than prewar Japan.¹³

The legal interpretation of ROC law in postwar Taiwan, on the other hand, was indeed to a large extent influenced by Japanese law and legal theories. Most importantly, those decisions of the courts in Republican China, which present Taiwanese courts must follow, were made under the strength of the influence of Japanese laws and legal theories, as discussed above. In addition, many elite judicial officials familiar with the Japanese language in colonial days were educated by ROC law in postwar Taiwan. They frequently read Japanese materials when they had difficulty resolving legal issues under ROC law.

A retired judge of Taiwan's Administrative Supreme Court said that the education she had received in colonial days had been Japanese, and thus she had absorbed a large number of Japanese legal theories on administrative law by the time of her appointment as judge in the administrative court, largely because only a few of the materials written in Chinese discussed administrative law. She further pointed

¹³ See TAY-SHENG WANG, *supra* note 1, at 179–81.

out that there were at least six judges in the Administrative Supreme Court who often read Japanese theories and decisions. According to her observation, the administrative court of Taiwan became gradually inclined to adopt German law and theories after several Taiwanese legal scholars had studied in Germany and had written many articles introducing those theories, moreover, the Grand Justices had also adopted many of the German legal theories as well.¹⁴ It is obvious that the attitude of Taiwanese courts depends on the mainstream proposition in academic circles. Therefore, the influence of Japanese laws on Taiwanese courts did prevail in the past but has decreased recently.

V. JAPANESE INFLUENCE ON THE LEGAL LIVES OF TAIWAN'S PEOPLE

Having fought against the Japanese in World War II, the KMT (Kuomintang, Chinese Nationalist Party) regime, who took over Taiwan in 1945, wanted to eliminate the Japanese legacy in Taiwanese society in the postwar era. The KMT regime, however, massacred thousands of native Taiwanese in the 228 Incident in 1947 and enforced martial law in Taiwan from 1949 to 1987.¹⁵ Consequently, many native Taiwanese, unlike most Koreans who also experienced Japanese colonial rule before 1945, became friendly to the Japanese on the grounds that Japanese colonialists were not so “bad” in contrast to the Chinese KMT regime.¹⁶ In addition, many of the legal practices were actually introduced by Japanese colonialists into the daily lives of the native Taiwanese, and they had already become accustomed to them. If no external force existed to prohibit them from adopting those legal practices, people were inclined to continue them.

The continuity of legal practices brought by the Japanese could be found in Taiwanese society. For example, a contract relating to

¹⁴ See DIVISION ON JUDICIAL ADMINISTRATION, JUDICIAL YUAN ed., TAIWAN FAJIE QIXIU KOUSHU LISHI DISI Ji [The Oral History of the Elder in Taiwan's Legal Community, *Vol. IV*] 190–91 (Taipei: Judicial Yuan, 2008).

¹⁵ See generally Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward A Liberal and Democratic Country*, 11(3) PAC. RIM L. & POL'Y J. 531, 536–38 (2002).

¹⁶ It should also be noted, however, that most Mainlanders, who migrated from the Chinese mainland to Taiwan during the 1945–1950 period and dominated Taiwan's politics before the 1990s, were usually unfriendly to the Japanese. Moreover, many native Taiwanese who supported the KMT regime had the same attitude as most Mainlanders.

prostitution in colonial Taiwan was included in the public notary documents of a Taiwanese district court in 1912.¹⁷ According to this agreement, a Japanese person “borrowed” 320 dollars from another Japanese person who ran the prostitution industry in Taiwan, and the daughter of this borrower in return for the money had to become a prostitute for a period of four years. It is astonishing that such an agreement involving the sale of a human body was considered legal so that it was included in the public notary documents in the colonial court. It is also very shocking to find that, according to a newspaper report, a similar contract was entered into in Taiwan in 1958, when ROC law would have been in effect in Taiwan for over ten years. In fact, the colonial government did promulgate a regulation allowing this kind of prostitution contract during the period between 1910 and 1918.¹⁸ It seemed, however, that the abolition of this regulation did not impede the spread of such a prostitution contract in Taiwan. Surprisingly, this legacy of Japanese law further survived in postwar Taiwanese society.

The legal transaction for real estate further illustrates the Japanese legacy in Taiwan. The colonial authorities introduced the Japanese scrivener (*shiho daisho nin*, *shiho shoshi* after 1935) system to the Taiwanese when they enacted a new law that required registration in certain legal transactions relating to land in 1905. Most Taiwanese were unfamiliar with not only the Japanese language but also the modern private law, but were still willing to employ a scrivener to deal with such a registration in the colonial, namely Japanese, government. A scrivener had to present an employee’s “officially recognized seal” (*in kan*) to prove that he made the registration on behalf of a specific employer. Accordingly, the Japanese system of “officially recognized seal” appeared in colonial Taiwan as well.¹⁹ Furthermore, the Taiwanese

¹⁷ The decisions of civil and criminal cases and the public notary documents of four district courts in colonial Taiwan during the period from 1895 to 1945 can be found in “Taiwan Colonial Court Records Archives.” The pictures of these archives are stored in the National Taiwan University Library and open to academic researchers after acquiring approval. See http://tcra.lib.ntu.edu.tw/tccra_develop/

¹⁸ See Shih-fang Lin, *Jiuzi Mailuo Yanhua Jie: Rizhi Shiqi Taiwan sheqing Hangye Zhong De Funu Renshen Maimai* [Selling Daughter to Be a Prostitute: the Sale of Body of a Female in the Prostitute Industry in Colonial Taiwan], 23 J. WOMEN’S & GENDER STUD. (NATIONAL TAIWAN UNIVERSITY), 93, 119–23, 128–29 (2007).

¹⁹ See TAY-SHENG WANG, TAIWAN FU DE SHIJI BIANGE [Transformation of Taiwanese Law in the Twentieth Century] 353–54, 357–58 (Taipei: Angle Publishing Co., 2005).

frequently wanted to borrow money from modern-style banks, which emerged in Taiwan for the first time and were always managed by the Japanese at that time, for buying real estate. It was common for him or her to provide the aforementioned “maximum-amount mortgage,” a Japanese legal practice, as a security for a loan. The various transactions relating to real estate were quite common in colonial Taiwan, and the Japanese systems of scrivener, officially recognized seal, and maximum-amount mortgage naturally became prevalent and were also used in other types of business transactions among Taiwanese people.

Although no counterparts existed in ROC law, these legal practices deriving from Japanese law remained welcome in postwar Taiwanese society. The ROC legal system originally created in China did not include the Japanese-style scrivener, so the scrivener, in fact a member of the legal profession, was no longer regulated by the government. Under pressure from practicing lawyers, the Taiwan government has since 1970 forbidden the practice of scriveners. Nonetheless, the Taiwanese people have never stopped employing scriveners in legal transactions for real estate and so on. In 1981, the Taiwan government created a system of “a licensed agent for land registration” to legalize a scrivener.²⁰ However, many scriveners are still active in Taiwanese society without a license. On the other hand, the government in postwar Taiwan continued to offer the “officially recognized seal” upon popular application. In the 2000s, the Taiwan government tried to stop this service on the ground that it was not provided in ROC law. This suggestion immediately encountered popular objection and was finally abandoned. Almost at the same time the maximum-amount mortgage was included in the Civil Code, as discussed above. Nevertheless, very few people in today’s Taiwan recognize that these legal practices are influenced by Japanese law because for a long time official education in Taiwan has ignored Taiwanese social history in the Japanese colonial rule period.

VI. CONCLUSION

Taiwan was not merged into Communist China in 1949, but became a *de facto* country and implemented the law of Republican China. This allowed Japanese law to continue to influence Taiwan law after its fifty-year colonial rule in Taiwan. However, since the 1960s Taiwan law began to directly borrow legal institutions or theories from Germany

²⁰ See TAY-SHENG WANG, *TAIWAN FALU SHI GAILUN* [General Discussion on Taiwanese Legal History] 235–37 (Taipei: Angle Publishing Co., 4th edn., 2012).

and the United States. Especially after the democratization of Taiwan in the 1990s, Taiwan law has developed its own characteristics and it no longer merely learns from Japanese law and legal theories. In any event, the influence of Japanese law does exist in the legal lives of Taiwanese in an unidentified way. To make comparative studies on Taiwan law and Japanese laws is definitely significant for both countries.