

# TRANSLATION, CODIFICATION, AND TRANSPLANTATION OF FOREIGN LAWS IN TAIWAN

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*Abstract:* Taiwan is an excellent example for rethinking the significance of translation and codification of law in the process of transplantation of modern law in East Asian countries. Regardless of its strangeness to the general public, the translation of Western laws was always codified in Meiji Japan for the purpose of “receiving” modern law. Those Westernized Japanese legal codes also took effect in Taiwan during the later period of Japanese colonial rule, although Japanese colonialists initially applied Taiwanese customary law, created by Western legal terminology, to the Taiwanese to decrease their resistance to the new regime. Using foreign Japanese language to learn Western institutions in legal codes, the Taiwanese could only transplant modern law to a certain extent. This situation continued even after the Chinese Nationalist Party brought their Westernized legal codes to Taiwan in 1945. Since the 1970s, however, those Taiwanese legal scholars who were educated in postwar Europe, Japan, and the United States have actively translated contemporary Western laws to suit the needs of Taiwanese society. Accompanying the democratization of Taiwan in the 1990s, many local legal practices were incorporated in the legal codes originally enacted for Republican China. As Taiwan’s case shows, the spirit of modern law is transplanted to an East Asian country after its legal codes have been localized.

## I. INTRODUCTION

Taiwan, sometimes called “Formosa,” was not prominent on the world stage until the seventeenth century.<sup>1</sup> The history of Taiwan’s legal development is short but complex.<sup>2</sup> With the advent of Western powers in East Asia, Taiwan encountered its first exposure to law derived from the

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<sup>1</sup> The term “Taiwan” is not restricted to Taiwan Island itself, but also refers to the Pescadore Islands and other subordinated islands. When I discuss events that occurred in Taiwan after 1949, I regard Kinmen and Matsu as part of Taiwan. On the general history of Taiwan, see TAIWAN: A NEW HISTORY (Murray A. Rubinstein ed., 2007).

<sup>2</sup> For information on the socio-economic background and legal development of Taiwan from the seventeenth century to mid-1990s, see Tay-sheng Wang, *Taiwan*, in ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA 124–34 (Poh-Ling Tan ed., 1997) [hereinafter Tay-sheng Wang, *Taiwan*]. On the development of constitutional law in Taiwan during the 2000s, see Tay-sheng Wang & I-Hsun Sandy Chou, *The Emergence of Modern Constitutional Culture in Taiwan*, 5 NAT’L TAIWAN U.L. REV. 1, 29–33 (2010).

modern West (“modern law” or “Western law”) in the latter half of the nineteenth century.<sup>3</sup> As discussed below, the first modern-style codes implemented in Taiwan were nevertheless products of the modernization of Meiji Japan, the first country to transplant Western modern law in East Asia. Furthermore, the modernized codes effective in today’s Taiwan have come, surprisingly, from Republican China (1911–1949) since 1945.

Influenced by the legal codes of prewar Japan and Republican China, Taiwan’s legal development should be understood with reference to the translation, codification, and transplantation of Western laws in these two East Asian countries. Specifically, Taiwan’s legal history should be more broadly examined in a way that includes the Japanese and Chinese traditions of “receiving” Western laws. The process of this “reception” always includes translation of foreign laws and jurisprudence, codification of foreign laws or local legal practices, and transplantation of modern law. This process will be further explored and illustrated by the Taiwan case, with reference to Japan and China, in this article.

Taiwan’s legal developments have many characteristics that distinguish them from the development seen in Japan or China. Following over forty years of authoritarian rule in the postwar era, Taiwan gradually became a liberal and democratic country in the 1990s, and the Taiwanese legal system underwent many reforms from then on.<sup>4</sup> Today’s Taiwan has shaped its own law by using multiple foreign laws and jurisprudences. The experience of legal modernization in Taiwan thus encourages us to rethink the significance of translation and codification of law in the process of transplantation of modern law in East Asian countries.

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<sup>3</sup> Since the 1860s, four treaty ports in Taiwan ruled by the Qing Dynasty were open to foreigners; accordingly, some inhabitants in Taiwan had already been exposed to Western insurance law or company law brought by British businessmen and the like. See TAY-SHENG WANG, HUA-YUAN HSUEH, & SHIH-CHIEH HUANG, ZHUIXUN TAIWAN FALŪ DE ZUJI: SHIJIAN BAIXUAN JI FALŪSHI YANJIU FANGFA [TRACING THE FOOTPRINT OF TAIWANESE LAW: 100 SELECTED INCIDENTS AND THE METHODOLOGY OF LEGAL HISTORY STUDIES] 48–49 (2006) [hereinafter TAY-SHENG WANG, TRACING THE FOOTPRINT]. Nevertheless, Taiwan’s legal institutions underwent a radical change in 1895, when Japanese colonialists brought their modernized state laws to Taiwan, and the Western modern law continually dominated the positive law of post-war Taiwan. See Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL’Y J. 531, 531–39 (2002) [hereinafter Tay-sheng Wang, *The Legal Development of Taiwan*].

<sup>4</sup> Postwar Japan has not suffered such an authoritarian rule, and China has not become a liberal and democratic country yet. See TAY-SHENG WANG, TRACING THE FOOTPRINT, *supra* note 3, at 536–39, 542–46, 548, 551–54, 556, 558–59.

## II. LEGAL TRANSPLANTATION INVOLVING JAPANESE MODERN CODES AND TAIWANESE CUSTOMARY LAW

Because of Taiwan's status as a Japanese colony, it is important to understand 1) the process of legal modernization in prewar Japan; and 2) how Japanese modern law worked alongside, and sometimes replaced, Taiwanese customary law.

### A. *Legal Experiences of Japanese Colonists*

Japanese governance of Taiwan was the first major influence on the development of modern Taiwanese laws. In 1895, Qing China ceded Taiwan to the prewar Japanese Empire under the Treaty of Shimonoseki.<sup>5</sup> Prior to succession, Qing China officials in Taiwan established a Republic in an attempt to prevent Japanese rule, but it nonetheless failed to resist the Japanese invasion.<sup>6</sup> Accordingly, Taiwan was already detached from the Chinese empire when Qing China modernized its law in 1902. Under the contemporaneous global tendency toward legal Westernization,<sup>7</sup> Taiwan thus embarked on this course, prompted by the Japanese intervention rather than organization by residents on the island. Citizen-organized government did not emerge until the 1990s, about a hundred years later. As a result, the Taiwanese—composed of Han Chinese immigrants and plains aborigines assimilated by the Han Chinese immigrants during the Japanese colonial period (1895–1945)—were exposed to a modern law introduced and implemented by the Japanese authorities. An exception to this was most of the mountain aborigines, who maintained their original culture and were not exposed to modern-style laws due to the Japanese separation policy toward them.<sup>8</sup> In any event, the extent to which Taiwanese people were exposed to modern law depended on the decisions made by Japanese rulers. Those Japanese colonialists were influenced by Japan's own experience with

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<sup>5</sup> See Harry J. Lamley, *Taiwan Under Japanese Rule, 1895–1945: The Vicissitudes of Colonialism*, in *TAIWAN: A NEW HISTORY*, *supra* note 1, at 201, 203–04.

<sup>6</sup> See *id.* at 206–07.

<sup>7</sup> In the late nineteenth century, Western powers directly imposed their law or legal conceptions on their Asian or African colonies and indirectly induced some Asian independent states to adopt Western law. On the situation in Thailand, see M. B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* 377–79 (1975).

<sup>8</sup> The Japanese authorities did not apply the principle of rule by law to the mountain aborigines, whose affairs were almost dealt with by the police in colonial Taiwan. See generally Tay-sheng Wang, *Rizhi Shiqi Gaoshanzu Yuanzhu Minzu de Xiandai Fazhi Chu Tiyan: Yi Guanyu Exing de Zhicai Wei Zhongxin* [Mountain Indigenous Peoples' Initial Encounter with Modern Law Under the Japanese Rule in Taiwan: On Criminal Sanctions], 40 *TAIDA FAXUE LUNCONG* [NAT'L TAIWAN U. L. REV.] 1, 1–98 (2011).

modern law. Therefore, to understand the development of Taiwanese law, it is necessary to understand the process of legal modernization in prewar Japan.

Prior to acquiring Taiwan in 1895, Meiji Japan was engaged in modernizing its own law for merely a quarter century. The modern law derived from the West was so peculiar to the Japanese that they had to invent a word for even such a fundamental term as “right” (*kenri*).<sup>9</sup> In 1869, the Japanese Meiji government began rapidly translating the various French legal codes;<sup>10</sup> thereafter, the Japanese also translated codes of other European civil law countries, including Germany. Western legal scholars were then invited to teach in Japan and assist the Japanese government in drafting Japan's modern codes. In addition, a system allowing Japanese students to study abroad was promoted so the students learned to translate Western law and legal terminology, and to comprehend modern jurisprudence.<sup>11</sup>

Japanese modern codes were developed based on translations of continental European laws and jurisprudence. Criminal law is always a prime legal tool of an emergent regime. The first modern codes promulgated by the new Meiji government were the 1880 Criminal Code and the 1880 Code of Criminal Instruction, which were based on drafts by Dr. Boissonade, a French advisor. Modernization of Japanese civil law, however, occurred piecemeal over a longer period of time. Through the 1880s, the entire law of family, private transactions, and civil procedure continued to be governed by unrecorded customary law. This system was largely unsuitable for modern social and commercial relations, and could be highly divergent from place to place. Nonetheless, certain Western laws, which had been translated into Japanese, still entered the Japanese civil law

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<sup>9</sup> Dan F. Henderson, *Law and Political Modernization in Japan*, in *POLITICAL DEVELOPMENT IN MODERN JAPAN* 387, 433 (Robert E. Ward ed., 1968).

<sup>10</sup> The official who was in charge of translating the French codes, Rinsho Mitsukuri, said that when he was ordered to translate the French Penal Code, he did not understand much of it. He translated successively the Civil Code, the Commercial Code, the Code of Procedure, the Code of Criminal Instruction, the Constitution, etc., but noted “[he] really did a hazy translation.” Ken Mukai & Nobuyoshi Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, 1 L. IN JAPAN 25, 49–50 (1967).

<sup>11</sup> See *id.* at 37–39. A word in Western law was often translated into several different words in Japanese by the expression of Chinese characters with Japanese pronunciation. For example, the modern concept of “constitutional law” was absent in Chinese legal traditions, but those Japanese who wanted to translate this word into Japanese employed different Chinese characters with Japanese pronunciation to express its meaning. MANZO WATANABE, *GENDAI HOURITSUGO NO SHITEKI KOUSATSU* [THE HISTORICAL SURVEY ON CURRENT LEGAL TERMINOLOGY] 258–60 (1930).

through the judicial process as an expression of reason; they were a source of law to be applied by judges.<sup>12</sup> A draft of the Civil Code based on French law was completed in 1890, but its implementation was postponed. The 1890 Code of Civil Procedure, modeled on German law, was smoothly implemented in 1891. Finally, the first three books (“general provisions,” “rights over things,” and “obligations”) of the new Civil Code were enacted in 1896 and to a large degree were influenced by German jurisprudence. The Civil Code’s last two books (“family” and “succession”) were enacted in 1898.<sup>13</sup>

The questions of whether to adopt foreign laws and which foreign country’s code was best for legal transplantation were answered in accordance with the needs of the ruling class of Meiji Japan. The Meiji government realized in the 1870s that Japan needed to compile modern codes based on Western law in order to end extraterritoriality<sup>14</sup> and to become an independent state equal to the Western powers. Legal modernization was also necessary for Japan to adopt Western capitalism, which would “enrich the country and strengthen the army.”<sup>15</sup> Meiji Japan therefore turned to the continental European codes, first the French and later the German, for their models. At this time American and English common laws, as well as Japanese customary laws, were not in a sufficiently coherent form to “enable the Japanese to adopt them as solutions to their urgent diplomatic or systematization problems.”<sup>16</sup> In contrast to the immediate abandonment of most Japanese customary laws, in two instances political incentives precluded the adoption of modern laws. First, the traditional family system of Japan was intentionally preserved in the Civil Code to maintain prewar Japan’s family state ideology of the Emperor system, under which the Emperor was the head of all Japanese families. Second, the absolutist character of the Prussian Empire was more attractive to Meiji

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<sup>12</sup> See Henderson, *supra* note 9, at 418–19, 432. Article 3 of the 1875 Rules for the Conduct of Judicial Affairs provided that judgments in civil cases should be governed by custom in the absence of written law; in the absence of custom, judgments should be based on reason. See also ĒNOSUKE YAMANAKA, SHIN NIHON KINDAIHO RON [DISCUSSION ON JAPANESE MODERN LAW, NEW EDITION] 218–19 (2005).

<sup>13</sup> See Henderson, *supra* note 9, at 430–34; ĒNOSUKE YAMANAKA, *supra* note 12, at 221–24, 259.

<sup>14</sup> At this time, a citizen of a Western power who committed an offense in Japan was to be tried by the representative of his own country in Japan.

<sup>15</sup> See TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895–1945: THE RECEPTION OF WESTERN LAW 27–28 (2000) [hereinafter TAY-SHENG WANG, LEGAL REFORM IN TAIWAN].

<sup>16</sup> See Henderson, *supra* note 9, at 432–33.

leaders than the democratic liberalism of France or England.<sup>17</sup> This political selection further influenced the later development of Japan's legal codes and jurisprudence, including the 1889 Meiji Constitution, which tended towards executive supremacy. Indeed, the establishment of Japan's modern legal system was a response to both internal and external state needs rather than to social necessity.<sup>18</sup>

It is worth considering the special case of the codification of the Japanese traditional family system. When the Civil Code began to be compiled in 1880, status law—including the law relating to family and succession—was drafted by the Japanese themselves, rather than Dr. Boissonade, on the ground that this law should be based on Japanese customs. Nonetheless, the 1890 Civil Code caused significant debate, and thus its enforcement was postponed. The books on family and succession enacted in 1898 maintained the head of household's control over its members.<sup>19</sup> In fact, incorporating some traditional Japanese practices into family law was helpful in maintaining the cultural identity of the Japanese people,<sup>20</sup> although the main concern of the Meiji government was likely that overly radical changes might result in chaos in society. In any event, despite retaining traditional Japanese attributes, prewar Japanese family law still adopted some of the individualist civil law components from Western legal jurisprudence. For example, the head as well as every member of the household was allowed to have personal rights over his or her property.<sup>21</sup> Though Japanese family law was not wholly adopted from Western codes, it was still fundamentally influenced and modified by Western laws and jurisprudence.

### *B. Formulation of the Colonial Legal System in Taiwan*

The Japanese government did not automatically apply these modern codes to Taiwan, which was not part of its territory when the codes were drafted. The extent to which the Japanese modern codes were implemented in colonial Taiwan depended entirely on the political needs of Japanese imperialists, who had their own experience in implementing such codes in

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<sup>17</sup> YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 50 (1976).

<sup>18</sup> The author described this phenomenon as “pro-government selection in reception.” TAY-SHENG WANG, LEGAL REFORM IN TAIWAN, *supra* note 15, at 31–33.

<sup>19</sup> See ĒNOSUKE YAMANAKA, *supra* note 12, at 217, 258–60.

<sup>20</sup> See MASAJI CHIBA, LEGAL PLURALISM: TOWARD A GENERAL THEORY THROUGH JAPANESE LEGAL CULTURE 154–56 (1989).

<sup>21</sup> See ĒNOSUKE YAMANAKA, *supra* note 12, at 260.

Japan. Following the practice of Western colonial powers, the Meiji government established a special legal system in colonial Taiwan.<sup>22</sup> Generally, areas of law primarily concerned with the authority of the ruling colonial power—such as the structure of state powers, the role of the judiciary, and the system of criminal sanctions—were transplanted from the “mother country’s” Japanese laws. In contrast, most areas of law that concerned the daily life of ordinary people, such as commercial transactions and matters relating to the family and succession, operated in conjunction with native legal rules so as to avoid resistance to the new regime. Thus, the Criminal Code, the Code of Criminal Procedure, and the Code of Civil Procedure of the prewar Japanese Empire were enforced in Taiwan almost from the beginning of colonial rule.<sup>23</sup>

The operation and selective transplantation of Japanese codes have led to a number of practical and theoretical criticisms of Taiwanese legal modernization. The colonized Taiwanese were forced to use foreign Japanese language to learn Western legal concepts and institutions. It is often severely criticized by today’s jurists that some modern/Western elements in these codes were given up due to the enactment of several special laws in colonial Taiwan that in practice maintained Chinese legal traditions against modernity.<sup>24</sup> At the beginning of the colonial rule, however, Taiwanese actually felt more comfortable with those special laws, which followed their local practices, than Japanese modern codes.

Under such circumstances, the Japanese colonialists employed so-called customary laws to deal with Taiwanese civil and commercial matters because customary laws appeared friendlier to the colonized population. In colonial Taiwan, the 1898 Civil, Commercial, and Criminal Laws and the 1908 Taiwan Civil Law provided that civil and commercial matters involving Japanese citizens (or foreigners other than Chinese citizens) must conform to the Japanese modernized civil and commercial codes, but those involving only Taiwanese (or Chinese) citizens or relating to the land in Taiwan were to be decided in accordance with Taiwan’s “old customs,”

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<sup>22</sup> See Edward I-te Chen, *The Attempt to Integrate the Empire: Legal Perspective*, in *THE JAPANESE COLONIAL EMPIRE 1895–1945* 240, 247 (Ramon H. Myers & Mark R. Peattie eds., 1984).

<sup>23</sup> TAY-SHENG WANG, *LEGAL REFORM IN TAIWAN*, *supra* note 15, at 46–50.

<sup>24</sup> See generally *id.* at 47–50. For example, under the 1904 Summary Judgment Law, the heads of local government, like magistrates in Qing Taiwan, had the power to immediately adjudicate a broad range of criminal offenses; this power was more extensive than under the similar system in metropolitan Japan. Didactic mediation by magistrates, a commonplace form of dispute resolution in traditional China, was also restored by the 1904 Civil Disputes Mediation Law in colonial Taiwan.

unless there were laws that provided otherwise. In other words, the laws governing Taiwanese civil and commercial matters as well as Taiwan's land were rules in the Taiwanese customary law recognized by colonial courts or the administrative branch. To help Japanese officials determine the appropriate Taiwanese customary law applicable in individual cases, the colonial government established an institute—the Commission for the Investigation of Old Laws and Customs in Formosa—to find the legal rules in Taiwan's old customs. Japan applied this research to the implementation of its legal regime so that traditional customs would be interpreted using the jurisprudence and terminology of modern European—especially German—law.<sup>25</sup> Therefore, the Taiwanese customary law shaped by Japanese jurists and officials was a product of modernization, not a pure translation of wording about customs.<sup>26</sup> Just as the prewar Japanese legal system was organized by legal terminology and theories translated from Western jurisprudence, Japan attempted to implement the law in colonial Taiwan using the same methods.

The Meiji government did not think it was necessary to implement a modern-style civil code in Taiwan in the early period of Japanese colonial rule. Though derived from the self-serving incentives of Japanese colonialists, the pattern of using customary law was probably more desirable to the general public in colonial Taiwan because Taiwanese legal practices and traditional values would then be seriously taken into consideration, rather than completely ignored. Compilations of Japanese customary laws existed in the 1880s,<sup>27</sup> but the codification of customary laws was rejected in the early Meiji era in order to immediately end extraterritoriality. Interestingly, the style of codifying customary laws was carried out in colonial Taiwan for another political reason, as mentioned below.

The Commission for the Investigation of Old Laws and Customs in Formosa was engaged in codifying Taiwanese customary law in order to enact civil and commercial codes for the people, regardless of whether they were Taiwanese or Japanese, in the territory of colonial Taiwan during the

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<sup>25</sup> For the English translation of its primary works on Taiwanese old customs, see SANTARO OKAMATSU, PROVISIONAL REPORT ON INVESTIGATIONS OF LAWS AND CUSTOMS IN THE ISLAND OF FORMOSA (1902).

<sup>26</sup> See TAY-SHENG WANG, LEGAL REFORM IN TAIWAN, *supra* note 15, at 49–50, 85, 140–44.

<sup>27</sup> See Henderson, *supra* note 9, at 432 n.81.



1909–1914 period.<sup>28</sup> Judge-made customary law was merely derived from specific controversies in front of the courts, and thus did not create comprehensive legal schema or precedents for future cases. In contrast, the early drafts of Taiwan’s civil and commercial law not only codified the rules in Taiwanese customary law, but also referred to and actively included legal provisions in the civil and commercial codes of Japan, Germany, France, and other Western countries.<sup>29</sup> The modernity of these drafts was higher than Taiwanese customary law. The whole process meant that local legal practices were interpreted by foreign legal terminology and concepts, reviewed in the name of customary law by judicial decisions, and finally reformed by “the legislation of customs” for the purpose of certainty and progress in law.

Nevertheless, a colony possessing its own civil and commercial codes within a specific jurisdiction could promote the colony’s independence. Such a consequence was contrary to the interests of the prewar Japanese Empire. As a result, the imperial government of Japan rejected adopting these drafts proposed by the colonial government. The Taiwanese would probably have welcomed the codification of those customary laws; through codification, they could not only maintain their cultural identity but also use capitalistic laws coming from metropolitan Japan or Western countries in their legal transactions.

Based on Japanese nationalism, the Japanese imperial government decided that the only way for the Taiwanese to benefit from modern civil and commercial law was to apply prewar Japan’s codes, rather than Taiwan’s own codes. Like a common language, a single, uniform system of law was regarded as a tool of nation-building in the territories of the Japanese Empire.<sup>30</sup> Beginning in 1923, under a policy of “extension of the homeland,” almost all of Japan’s modern codes took effect in colonial Taiwan, with some exceptions. One exception, the Taiwanese customary law relating to family and succession matters, continued to be applied to the Taiwanese during the later period of Japanese rule. That, however, did not significantly

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<sup>28</sup> See TAY-SHENG WANG, LEGAL REFORM IN TAIWAN, *supra* note 15, at 145.

<sup>29</sup> See Tay-sheng Wang, *Xueshuo yu Zhengce Jiaozhi Xia de Rizhi Taiwan Minshi Fazhi Bianqian: Yi Gangsong Wenshu Wei Zhongxin* [The Transformation of Civil Laws in Colonial Taiwan Under the Interaction of Theory and Policy: Reference to the Santaro Okamatsu Documents], 37 TAIDA FAXUE LUNCONG [NAT’L TAIWAN U. L. REV.] 47, 60 (2008) [hereinafter Tay-sheng Wang, *Santaro Okamatsu Documents*].

<sup>30</sup> See LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 221–22 (1975).

prevent the Taiwanese from modernizing their laws because the Japanese civil code on family and succession itself often did not reflect modern law.<sup>31</sup> Perhaps because Japanese colonialists themselves had incorporated their legal traditions in the status law (that is, the family and succession law), they were willing to treat the Taiwanese in the same way. Implementing Japanese civil codes increased Taiwan's exposure to modern laws.

In sum, modern law had been transplanted into Taiwan to the extent it was helpful to the interests of the Japanese Empire, not the Taiwanese people, by 1945. Only the modern-style codes originally designed for the Japanese were available for Taiwanese transplanting Western individualistic law. As a consequence, the Taiwanese became familiar with modern law to a certain degree through the application of Japan's modernized codes in a colony.<sup>32</sup>

### III. LEGAL TRANSPLANTATION THROUGH THE MODERN CODES OF REPUBLICAN CHINA AND FOREIGN-TRAINED LEGAL SCHOLARS

#### A. *Continuity of Legal Transplantation*

After the defeat of Japan in World War II in 1945, China, under the administration of the Chinese Nationalist Party (*Kuomintang* or KMT), took over Taiwan on behalf of the Allies. All Japanese residents were ousted from Taiwan after the war. The Chinese who migrated to Taiwan from the Chinese mainland after 1945, primarily in 1949,<sup>33</sup> were known as "Mainlanders" and became the new ruling class in postwar Taiwan. Those people who had been ruled by the Japanese authorities in Taiwan were thus called "native Taiwanese." As the Japanese colonialists did fifty years earlier, Mainlanders brought their legal codes and experiences from Republican China to Taiwan. For the purpose of reintegrating Taiwan into China, the legal codes of the Republic of China (ROC) promulgated by the KMT regime were immediately and completely implemented in Taiwan. Because both Taiwan and the Chinese mainland had changed so much (politically, socially, and economically) between 1895 and 1945, the

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<sup>31</sup> See TAY-SHENG WANG, LEGAL REFORM IN TAIWAN, *supra* note 15, at 55.

<sup>32</sup> See *id.* at 184–86.

<sup>33</sup> Due to the defeat of the KMT in the Chinese Civil War, the KMT-led government moved to Taiwan in December 1949. Over one million people living in the Chinese mainland also migrated to Taiwan in the same year. Not surprisingly, most Mainlanders had close ties with the KMT regime in postwar Taiwan.

retrocession was less a resumption of historical ties and more an attempt to forge an entirely new relationship.<sup>34</sup>

Nonetheless, the native Taiwanese had little difficulty applying the new ROC codes because these codes were substantially similar to the prewar Japanese legal codes that had already been enforced in Taiwan.<sup>35</sup> This result was indeed a historical coincidence. In order to eliminate Western extraterritoriality, late Qing China followed the example of Meiji Japan to draft modern-style codes with the assistance of Japanese jurists. Republican China was continuously engaged in the codification of modern Chinese law, and it finally promulgated civil, criminal, and other procedural codes of the ROC from the late 1920s to mid-1930s. These ROC codes were modeled on continental European (especially German) codes with legal terminology and jurisprudence strongly impacted by prewar Japan, and were more modern than the laws in Taiwan under Japanese colonial rule.<sup>36</sup> These laws, however, were poorly implemented in the Chinese mainland partly due to chaos in Republican China. It is ironic that extending Japan's modern codes to Taiwan since 1923 actually laid a firm foundation for extending Republican China's modern codes to Taiwan in 1945. As a result, native Taiwanese were continuously exposed to modern law through the Japanese-oriented ROC codes without interruption despite the change of regimes, although neither Japanese codes nor the ROC codes were originally enacted for Taiwan or its people.<sup>37</sup>

In late 1949, the ROC codes were no longer used in Communist China but still applied in Taiwan. Due to the defeat of the KMT in the Chinese Civil War, the KMT-led ROC central government relocated to Taiwan in

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<sup>34</sup> Steven Phillips, *Between Assimilation and Independence: Taiwanese Political Aspirations Under Nationalist Chinese Rule*, in TAIWAN: A NEW HISTORY, *supra* note 1, at 275–76.

<sup>35</sup> On the civil law of Taiwan, see TSE-CHIEN WANG, MINFA GAIYAO [GENERAL DISCUSSION ON THE CIVIL LAW] 26 (Mu-hua Wang ed., 2009).

<sup>36</sup> In the early era of Republican China, a large number of Japanese legal textbooks had been translated into Chinese. The ROC codes were often modeled on German codes, which Chinese jurists actually understood through the Japanese legal literature. Unlike the Japanese colonialists in Taiwan, the KMT regime applied all of the modern Chinese law to Taiwan without exceptions so the legal provisions included more modern elements in postwar Taiwan than those in the Japanese period. For example, a citizen was entitled to bring a lawsuit against administrative organs under the ROC code for Administrative Litigation. In contrast, administrative litigation was legally impermissible under the legal system of colonial Taiwan. In addition, a daughter had no right to inherit the family property of her deceased parents under Taiwanese customary law in colonial Taiwan, but did have the right to inherit the family property of her deceased parents under the ROC Civil Code.

<sup>37</sup> See generally TAY-SHENG WANG, LEGAL REFORM IN TAIWAN, *supra* note 15, at 175–76 (when Republican China drafted and later promulgated these modern codes, Taiwan was not part of its territory).

December 1949. Taiwan became a *de facto* state in late 1949 because there was an independent sovereign government on the island. On the basis of its different territory and population, the ROC in Taiwan was actually quite different from the original ROC government that had been succeeded by the People's Republic of China (PRC) government (the new Chinese government) established on October 1, 1949. The KMT regime in Taiwan continued to implement the ROC legal system established in Republican China, with the enforcement of the wartime laws until 1991, in large part for the purpose of proclaiming itself the legitimate government of China.<sup>38</sup>

*B. The Promotion of Four Generations of Legal Scholars*

A group of legal scholars in Taiwan, including both native Taiwanese and Mainlanders, emerged for the first time in postwar Taiwan. Although native Taiwanese made up about eighty-six percent of Taiwan's total population in the 1950s, legal scholars who were native Taiwanese constituted a minority of the first generation of legal scholars. In prewar Taiwan, the Japanese assumed a near monopoly over legal academic circles on the island; almost no native Taiwanese became legal scholars in colonial Taiwan, although many native Taiwanese studied law and even became legal professionals, and a few became law professors outside of Taiwan. After the end of World War II, all Japanese legal scholars left Taiwan. Furthermore, some native Taiwanese legal scholars were excluded from the postwar legal community because they had worked for the Japanese authorities.<sup>39</sup> Thus, among first-generation legal scholars, the number of native Taiwanese was small, but these scholars were considerably familiar with the prewar Japanese experiences in translating, codifying, and transplanting modern law.

The majority of first-generation Taiwanese legal scholars were Mainlanders. Accompanying the KMT regime (which fled to Taiwan in 1949) were a large number of Mainlanders, including many famous legal scholars. With the support of the KMT regime, these Mainlander legal scholars exerted overwhelming influence on the legal community in Taiwan. It should be noted, however, they had experienced the legal development of Republican China and thus their legal concepts and legal interpretations of

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<sup>38</sup> See Tay-sheng Wang, *The Legal Development of Taiwan*, *supra* note 3, at 537–38. See also DENNY ROY, *TAIWAN: A POLITICAL HISTORY* 81–86, 175, 185 (2003).

<sup>39</sup> See Tay-sheng Wang, *Sige Shidai Xingsu Ercheng de Zhanhou Taiwan Faxue* [Jurisprudence of Postwar Taiwan Shaped by Four Generations], 40 *TAIDA FAXUE LUNCONG* [NAT'L TAIWAN U.L. REV.] 1327, 1391–95 (2011) [hereinafter Tay-sheng Wang, *Jurisprudence of Postwar Japan*].

ROC law were also influenced by prewar Japanese law and jurisprudence. This was due to the fact that after the legal modernization of China in the late Qing era, prewar Japanese legal scholars and their writings played a prominent role in introducing modern law to China and helped the Chinese codify their own laws.<sup>40</sup> Generally speaking, in the prewar era, the Japanese translated German law and legal materials; meanwhile, the Chinese translated Japanese law and legal materials, codified their own laws in Chinese, and interpreted the provisions of legal codes in Chinese for the purpose of transplanting continental European law. Under such circumstances, both native Taiwanese and Mainlanders of the first generation of legal scholars were influenced by Japanese-oriented jurisprudence, which actually derived from prewar Germany. Not surprisingly, Japanese law and legal theories continued to dominate Taiwan's legal community in the 1950s and the 1960s.

The next wave of foreign influence came as postwar Western law and legal theories were transplanted to Taiwan by new generations of Taiwanese legal scholars. It was crucial to Taiwanese legal development that the majority of second-generation Taiwanese legal scholars, emerging in the mid-1960s, were native Taiwanese and often went to West Germany for advanced studies. When they returned to Taiwan, these scholars directly introduced the legislation, decisions, and legal theories of postwar West Germany to the Taiwanese legal community through precise translations. Therefore, Taiwan was not only influenced by German law through Japanese translations, but also directly by Germany.<sup>41</sup> In addition, some second-generation Taiwanese legal scholars took advanced studies in Japan and frequently translated postwar Japanese legislation, decisions, and legal theories into Chinese. These were often borrowed from the United States or West Germany. Postwar Western law and jurisprudence, emphasizing constitutional democracy and dogmatic application of law, thus gradually appeared beginning in the 1970s and became influential in academic circles thereafter in Taiwan.<sup>42</sup>

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<sup>40</sup> See generally *id.* at 1372–86.

<sup>41</sup> A Taiwanese civil law scholar, who went to Germany for advanced studies, pointed out that some legal theories of civil law in Taiwan were influenced by Japan for a long time, but were later learned directly from Germany after a new generation of Taiwanese legal scholars emerged in the 1970s. See TZU-CHIANG CHEN, TAIWAN MINFA YU RIBEN ZHAIQUANFA ZHI XIANDAIHUA [TAIWANESE CIVIL LAW AND THE MODERNIZATION OF JAPANESE LAW ON OBLIGATIONS] 174–75 (2011).

<sup>42</sup> See generally Tay-sheng Wang, *Jurisprudence of Postwar Japan*, *supra* note 39, at 1400–03.

The third-generation Taiwanese legal scholars, emerging in the mid-1980s, successfully brought foreign laws and legal theories into Taiwan's legislation and judicial decisions. The majority of third-generation legal scholars received Ph.D. degrees in Germany or the United States. A smaller number of scholars finished their doctoral programs in Japan or Taiwan, with a few receiving degrees from France, England, and other countries.<sup>43</sup> Following the democratization of Taiwan beginning in the late 1980s, the martial law that had been enforced in Taiwan under the KMT regime since 1949 was lifted, requiring that the ROC law be reformed. Liberal-oriented legal scholars of the second and the third generations therefore strongly pushed new legislation modeled on the foreign law that they studied abroad or learned through their local legal education.<sup>44</sup> Meanwhile, partly because of their compatibility with the ROC legal system, many German fundamental principles of public law were first translated by German-trained Taiwanese legal scholars and then officially accepted in the constitutional interpretations made by the Council of Grand Justice, which was composed of many second and/or third-generation legal scholars.<sup>45</sup> On the other hand, American-trained legal scholars made more of a contribution in introducing new approaches to legal research to the legal community in Taiwan; for example, they introduced the studies of law and society, economic analysis of law, and so on.<sup>46</sup>

Following the lead of the second generation and to a greater extent, the third generation, the fourth-generation Taiwanese legal scholars, emerging in the 2000s, continue to introduce foreign legislation, judicial decisions, and legal theories to Taiwan after completing advanced studies abroad (usually in Germany and the United States) or domestically. The fourth-generation scholars, however, have also begun to rethink the

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<sup>43</sup> There are no official statistics on the academic backgrounds of all Taiwanese legal scholars. The author, therefore, performed a survey of the academic backgrounds of all members of the Taiwan Law Society, which is the largest association of jurists in Taiwan. Scholars have reached the same conclusion regarding academic backgrounds of the legal faculty in National Taiwan University, established in 1946. See TAY-SHENG WANG & WEN-LIANG TSENG, TAIWAN FAXUEHUI SISHINIAN SHI: ZIYOU MINZHU FAZHI DE TUISHOU [THE FORTY-YEARS HISTORY OF TAIWAN LAW SOCIETY: A PROMOTER FOR FREEDOM, DEMOCRACY, AND RULE OF LAW] 147 (2011); TAY-SHENG WANG, GUOLI TAIWAN DAXUE FALÜ XUEYUAN YUAN SHI (1928–2000): TAIDA FAXUE JIAOYU HUIGU [A HISTORY OF NATIONAL TAIWAN UNIVERSITY COLLEGE OF LAW: RETROSPECT OF LEGAL EDUCATION IN TAIDA] 69–72 (2002) [hereinafter TAY-SHENG WANG, A HISTORY].

<sup>44</sup> See Tay-sheng Wang, *Jurisprudence of Postwar Japan*, *supra* note 39, at 1406.

<sup>45</sup> See SHU-PENG HUANG, BIANQIAN SHEHUI ZHONG DE FAXUE FANGFA [LEGAL METHODOLOGY IN A CHANGING SOCIETY] 228–29 (2009).

<sup>46</sup> See TAY-SHENG WANG, A HISTORY, *supra* note 43, at 118.

traditional approach of adopting foreign laws without criticism. The foreign laws of liberal countries were in fact used by many second and third-generation scholars as a tool to criticize domestic legislation or legal interpretations under the KMT's authoritarian rule. These scholars felt that the foreign rules were almost universally appropriate and just.<sup>47</sup> The third-generation scholars successfully brought liberal-oriented foreign laws into the positive law of Taiwan, but over time, some of them began to pay attention to how these transplanted laws were implemented by Taiwanese courts and the extent to which they had already been accepted by Taiwanese society. Meanwhile, beginning in the 1990s, a more Taiwan-centered approach for legal studies emerged.<sup>48</sup> After two decades of actual administration and judicial interpretation of newly-received foreign laws in Taiwan, the fourth-generation scholars are now easily able to combine their training abroad and legal practice in Taiwan to develop a new style of legal research. They can share Taiwan's legal experiences with other countries, and at the same time learn from foreign laws in a more fundamental way to improve the lives of Taiwanese people.<sup>49</sup> If all generations of Taiwanese legal scholars, especially fourth-generation scholars, are engaged in this dialogue, Taiwan will not only import, but also export Taiwanese legal thinking to the world.

As a special case, transplanting contemporary American laws into Taiwan initially depended on political conditions in Taiwan, rather than legal academics. Prior to World War II, there were no American legal elements present in Taiwanese law. After 1949, however, the ROC in Taiwan developed close political and economic ties with the United States in order to protect itself from a military invasion by Communist China. Early in the 1960s, U.S. laws relating to the mortgage on moveable property and securities exchange were transplanted to the ROC legal system. Taiwan generally imported foreign law based on civil law, rather than based on common law, and these U.S. financial laws were code-based rather than common law-based. In the 1980s, threatened by trade retaliations from the United States, the Taiwanese government adopted U.S.-style punitive

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<sup>47</sup> See Tay-sheng Wang, *Jurisprudence of Postwar Japan*, *supra* note 39, at 1402–03.

<sup>48</sup> See TAY-SHENG WANG, *A HISTORY*, *supra* note 43, at 118.

<sup>49</sup> In the past, Taiwanese legal scholars merely imitated foreign legislation, adopted foreign dogmatic interpretations, and welcomed foreign legal theories, without further examining the purposes, social conditions, and constitutional or statutory structures of certain foreign legal measures. In modern times, these factors are taken into consideration when advocating for importation of foreign legislation. See Tay-sheng Wang, *Jurisprudence of Postwar Japan*, *supra* note 39, at 1411.

damages, which were not included in the German-based Civil Code, into Taiwan's intellectual property laws.<sup>50</sup> These examples further illustrate that the transplantation of foreign laws is generally decided in accordance with political needs. Nevertheless, U.S. influence on Taiwan has become so strong that Taiwan's legislature adopted the U.S. injunction system when enacting the Family Violence Prevention Law in the 1990s and introduced the U.S. system of independent directors to laws relating to corporate governance of large-scale companies in the 2000s.<sup>51</sup> In addition to legal codes, statutes for special legislative purposes, often imported from U.S. law, have recently had a large impact on Taiwanese society and daily life.<sup>52</sup>

#### IV. LOCALIZATION OF TRANSPLANTS

##### A. *Taiwan-Centered Revisions of Transplanted Codes*

It was often controversial to argue which foreign country's laws were most appropriate for legal transplantation. In Taiwan, those foreign laws that were transplanted into Taiwan frequently became somewhat confused with regards to their origins. When Taiwan's legislature wanted to adopt the principles of U.S. trust law for economic development in Taiwan, it enacted the 1995 Trust Law that was actually modeled on Japanese law. The reason for this selection is that like Taiwanese law, Japanese trust law has been implemented in a legal system which is rooted in the civil law tradition. By contrast, U.S. trust law is based on the common law system.<sup>53</sup> Similarly, since 2003, Taiwanese law has to a large extent followed U.S.-style procedure for criminal justice. The technical origin of this legislation, however, is the Japanese criminal procedure law, which had been reformed to adopt U.S. institutions during the U.S. occupation period.<sup>54</sup>

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<sup>50</sup> TAY-SHENG WANG, TAIWAN FALÜSHI GAILUN [GENERAL DISCUSSION ON TAIWANESE LEGAL HISTORY] 121 (4th ed. 2012) [hereinafter TAY-SHENG WANG, TAIWANESE LEGAL HISTORY]; Wen-yeu Wang, *Lun Daxing Qiye zhi Gongsi Zhili Fazhi* [Discussion on the Legal Institution of Corporate Governance of Large-scale Company], 200 YUEDAN FAXUE [TAIWAN L. REV.] 282 (2012).

<sup>51</sup> See TAY-SHENG WANG, TAIWANESE LEGAL HISTORY, *supra* note 50, at 121, 289; Wen-yeu Wang, *Discussion*, *supra* note 50, at 282–83.

<sup>52</sup> See TSE-CHIEN WANG, *supra* note 35, at 30–31.

<sup>53</sup> See TZU-CHIANG CHEN, *supra* note 41, at 180.

<sup>54</sup> The former head of Taiwan's Supreme Court said the Taiwan courts attempted to imitate postwar Japanese criminal procedural law, in which Japanese prosecutors had a heavier burden to prove the defendants' guilt during trial than their counterparts in Taiwan had, to urge Taiwan's prosecutors to be more prudent in deciding whether to charge the suspect or not so the number of lawsuits in the court could decrease. See TAIWAN FAJIE QIXIU KOU SHU LISHI, DIER JI [THE ORAL HISTORY OF THE ELDER IN



In other cases, Japanese law became a model for codification merely because a legal practice originated in Taiwan during Japanese colonial rule. For example, Japanese *ne-teito* (fixed mortgage), by which the debtor furnished security for an undetermined number of debts within some fixed limit, was a traditional practice in Japan, and became prevalent in Taiwan due to its implementation during Japanese rule. The ROC Civil Code drafted in China did not include such a practice, but it was held valid by Taiwanese courts.<sup>55</sup> The 2007 revision of the ROC Civil Code finally expressly added this practice, called “maximum amount mortgage,” by referring to Japanese law.

The most important development in Taiwanese law is that the ROC codes, transplanted from Republican China, have been revised for today’s Taiwanese society by referencing the legal theories of foreign countries. The ROC Civil Code enacted in Republican China seventy years ago was to a large extent modified by a popularly-elected Taiwanese legislature in the late 1990s for the first time. One-third of the provisions in the “book on obligations” of the ROC Civil Code were revised in 1999 and became effective in 2000. Through this modification, many economic activities prevalent in current Taiwanese society have been regulated by the ROC Civil Code.<sup>56</sup> This revision was frequently modeled after the laws and legal theories of contemporary Germany and Japan; however, those foreign laws and legal theories were selectively, not completely, adopted by Taiwanese jurists.<sup>57</sup> In the 2000s, Taiwan’s legislature, with the assistance of many Taiwanese legal scholars who were trained abroad, also significantly modified the “book on rights over things” in the Civil Code promulgated in Republican China in 1929. For example, the “maximum amount mortgage” in Taiwanese society has been codified in the “book on rights over things,” as discussed above.

With regard to the ROC Criminal Code, it has been modified for Taiwanese society to a certain degree. After taking effect in Taiwan in 1945, the ROC Criminal Code did not change in any significant way until the 1990s. In the 1990s, some modifications were made in response to the demands of Taiwanese social movements and also in response to

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TAIWAN’S LEGAL COMMUNITY, VOL. II] 202, 205–06 (SSU-FA-YUAN SSU-FA-HSING-CHENG-TING [DIVISION ON JUDICIAL ADMINISTRATION, JUDICIAL YUAN] ed., 2006).

<sup>55</sup> See Tay-sheng Wang, *Taiwan*, *supra* note 2, at 156.

<sup>56</sup> See TAY-SHENG WANG, *TAIWANESE LEGAL HISTORY*, *supra* note 50, at 286.

<sup>57</sup> See TZU-CHIANG CHEN, *supra* note 41, at 187–94.

technological-age crimes in contemporary Taiwan.<sup>58</sup> Despite these changes, some legal scholars argued it was necessary to make broader revisions because a quarter of all articles in the ROC Criminal Code had never been applied in postwar Taiwan.<sup>59</sup> In 2005, the “book on general provisions” of the ROC Criminal Code underwent a large-scale revision, becoming effective on July 1, 2006. This revision cited the legislation of Germany, Japan, and the United States, and emphasized its support from Taiwanese legal scholars specializing in criminal law, although it has been argued that only some of criminal law scholars really participated in the revision.<sup>60</sup> However, the 2005 revision did not comprehensively update the kinds of offenses in the Criminal Code that were enacted for Republican China seventy years ago. It is unclear whether this revision fully responds to the social and economic demands of present Taiwan. For example, the drunk driving offense in the Criminal Code has recently been modified for traffic safety, which the general public became concerned about following some traffic accidents that occurred in Taiwan.<sup>61</sup>

The ROC Code of Civil Procedure effective in today’s Taiwan is largely different from the one enacted in Republican China. After taking effect in Taiwan in 1945, the ROC Code of Civil Procedure was fully revised in 1968, at which time the numbering of articles was totally changed. The 1968 revision, however, did not modify the fundamental principles for civil procedure existing in the old code. Based on research by second and third-generation Taiwanese legal scholars, a series of revisions for the Code of Civil Procedure were made in 1999, 2000, and 2003.<sup>62</sup> These revisions refined the basic structure of civil procedure, which was originally modeled on German or Japanese law, for the purpose of meeting the actual needs of Taiwanese civil courts.<sup>63</sup> As the modern civil procedural law transplanted

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<sup>58</sup> See TAY-SHENG WANG, *TAIWANESE LEGAL HISTORY*, *supra* note 50, at 244 (for example, the women’s movement in Taiwan pushed for reform on the criminal code, and certain activities involving the use of computers were criminalized).

<sup>59</sup> See Tsun-ming Tsai, *Taiwan Xingfa zhi Fazhan* [*The Development of Taiwan’s Criminal Law*], in XIN SHIJI TAIWAN FALÜ ZHI ZHANWANG YANZAO HUI ZHUANJI [REPORT FROM THE FORUM ON THE PROSPECT OF TAIWAN LAW IN NEW CENTURY] 157, 167 (2001).

<sup>60</sup> See SHAN-TIEN LIN, ER LING LING WU NIAN XINGFA XIUZHENG ZONGPING [GENERAL COMMENTS ON THE 2005 REVISION OF THE CRIMINAL CODE] 87, 126–28, 159 (2007).

<sup>61</sup> See Huang-yu Wang, *2013 Nian Xingshi Fa Fazhan Huigu* [*Retrospection on the Development of Criminal Law in 2013*], 43 (special issue) TAIDA FAXUE LUNCONG [Nat’l Taiwan U. L. Rev.] 1227, 1229–32 (2014).

<sup>62</sup> See generally TAY-SHENG WANG, *TAIWANESE LEGAL HISTORY*, *supra* note 50, at 309–11.

<sup>63</sup> See LIEN-KUNG CHIU, CHENGXU XUANZE QUAN LUN [ESSAYS ON THE RIGHT TO SELECT IN THE PROCEDURE] 7, 99–109 (2000).

from foreign countries had already been enacted, the Taiwanese legislature and legal scholars chose to improve rather than completely abandon the existing code. On the other hand, these revisions emphasized the necessity of revising transplanted legal institutions for the purpose of addressing local problems. In this way, the recent transplantation of foreign law has been in harmony with the needs of local Taiwanese.

Similar to the civil procedural law, the ROC Code of Criminal Procedure effective in present Taiwan is quite different from the one enacted in Republican China. The ROC Code of Criminal Procedure was fully revised in 1967, but did not modify the fundamental principles of criminal procedure found in the old code. In 1982, the Code allowed a suspect to employ attorneys when he or she was interrogated by the police or prosecutors, but the attorneys could do nothing but stand beside the suspect. Accompanying the democratization of Taiwan in the 1990s, this code was modified in 1997 to abolish the power of prosecutors to detain suspects. Furthermore, the 2002 and 2003 revisions of the Code broadly modified criminal procedure by introducing U.S.-style criminal proceedings.<sup>64</sup> This radical change again illustrates the prevalence of transplantation of U.S. law in the postwar era. Nonetheless, judging by the fact that Japanese law based on the civil law tradition had been used to introduce U.S. law, the civil law tradition originally adopted by the colonial law under Japanese rule (as well as being part of the law of Republican China) has been firmly accepted by the legal system of present Taiwan.

#### B. *Legislation of Local Customs*

Many customs in Taiwanese society have been codified through the revisions of the ROC Civil Code. The business practices of *hui* (a rotating credit association) and *tang* (pawn) originated from Chinese legal traditions and remained prevalent in postwar Taiwan. However, the former was merely regulated by customary law, and the latter was never recognized in customary law under the ROC legal system on the grounds that there were no written provisions relating to it in the ROC Civil Code transplanted from continental Europe. With the advent of the popularly-elected legislature in the 1990s, the customary law relating to *hui* was codified in the “book on obligations” of the Civil Code in 1999, and *tang* has been enacted to be a recognized security interest in the “book on rights over things” of the Civil

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<sup>64</sup> See generally TAY-SHENG WANG, TAIWANESE LEGAL HISTORY, *supra* note 50, at 256–58.

Code in 2007.<sup>65</sup> This was the beginning of the postwar Taiwanese trend of transforming customary law into legislation. The 2007 revision of the Civil Code allowed the rights over things to be created according to “customs,” by which the enforceability of certain customs of indigenous peoples could be recognized in Taiwan’s modern legal system.<sup>66</sup> Through this legislative language, customary laws can continue to be transformed into legally enforceable precedents.

From a historical perspective, the drafts made by the Japanese authorities for codifying Taiwanese customary law during the 1909–1914 period have finally taken effect after nearly 100 years. For example, Article 2 of the Ordinance for *Tai* Right (mortgage),<sup>67</sup> drafted in 1913, expressly codified Japanese *ne-teito* (fixed mortgage) from the customary law,<sup>68</sup> but this ordinance failed to take effect due to the objection of the government in metropolitan Japan. Notwithstanding, the 2007 revision of the “book on rights over things” of the ROC Civil Code successfully codified the “maximum amount mortgages,” which were initially recognized as customary law under the ROC legal system. A local popularly-elected legislature, emerging from the 1990s onwards, is obviously more interested in the legislation of customs because legislators are inclined to satisfy the needs of those people who are already comfortable with their own local customs. The legislation of customs, however, is not merely representative of legal practice, but is frequently a product of a value judgment mixed with modern legal terminology and institutions transplanted from foreign countries.

Ancestor worship (*chi-ssu kung-yeh*) in Taiwan is another example of the legislation of customs. Ancestor worship was recognized as merely a customary relationship between male-successors by Taiwanese courts during the Japanese colonial period and in the postwar era. The colonial government also tried to enact a special law to regulate ancestor worship in the early 1910s,<sup>69</sup> but ultimately failed. Nonetheless, in December 2007 a

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<sup>65</sup> See *id.* at 87, 286. The *hui* has been translated as “a rotating credit association” in English. Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 L. & SOC’Y REV. 193, 214–16 (1994).

<sup>66</sup> Taiwan Civil Code, art. 757 (amended 2007).

<sup>67</sup> For customs relating to “*tai*,” see SANTARO OKAMATSU, *supra* note 25, at 150–55.

<sup>68</sup> See Tay-sheng Wang, *Santaro Okamatsu Documents*, *supra* note 29, at 85.

<sup>69</sup> For discussion of this legislation in 1911, see RINJI TAIWAN KYÜKAN CHÖSAKAI [PROVISIONAL COMMITTEE ON INVESTIGATIONS OF LAWS AND CUSTOMS IN THE ISLAND OF FORMOSA], HÖAN SHINSAKAI KAIGI GIJI ROKU [RECORDS OF HEARINGS FOR BILLS] 57–91 (1910–11).

statute was enacted to establish a group of people who worship the same ancestors and give them status as a legal entity under Taiwan's positive law. However, this special statute has reshaped the traditional character of ancestor worship because male-successors continue to be members of ancestor worship, but female-successors were only allowed to be included as members of this entity if they had no brother or were approved to possess membership by the supra-majority of all members.<sup>70</sup> This law has been held constitutional by the Grand Justices in the Interpretation No. 728 (made in March 2015), but is still under severe criticism in the legal community of Taiwan.

Legal ideas received from foreign countries do encourage Taiwanese to change their own traditions, notably through the revision of the "book on family" and the "book on succession" in the Taiwanese civil code. Under Article 1059 of the ROC Civil Code, parents are allowed to decide the surname of their children—whether they will use the father's or the mother's name is decided by written agreement—and a child who has become an adult is allowed to select the surname of either that person's father or mother.<sup>71</sup> This provision overrules the Han Chinese tradition that the child's surname should always be the father's. The new law respects modern ideas of individualism and equality. In addition to the tradition regarding surnames, another tradition required certain ceremonies for a legitimate marriage. This practice was to a large extent respected by the positive law in colonial or postwar Taiwan. After the 2007 revision of the "book on family" in the ROC Civil Code, however, household registration with the government has become required for a lawful marriage for the first time.<sup>72</sup> Furthermore, Article 1148 of the Civil Code provides that an heir is liable for the debts of the decedent only to the extent that the decedent's

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<sup>70</sup> Act for Ancestor Worship Guild, art. 4, FAWUBU FAGUI ZIKIAOKU [MINISTRY OF JUSTICE LAWS AND REGULATIONS DATABASE] (2007), <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=D0020063> ("For the guilds that existed before the promulgation of the Act, their successors should abide by related rules of their regulations. For those without any regulations, their successors should be the male offspring of the family (including adopted children). For those without any male offspring, they should designate the female members in the family who have not been married. The husbands of the female members via uxorilocal marriage or the male children carrying with their maiden names (including the ones that are adopted or without a lawful father) may also serve as successors. For the others (women, adopted female children and adopted sons-in-law) fulfilling one of the following criteria, they can serve as successors too: (1) 2/3 of the entire body agrees their qualification. (2) 2/3 of current successors agree their qualification (50% of the entire body must be present."). See also Tay-sheng Wang, *Lun Taiwan Shehui Shang Xiguan de Guojia Fa Hua* [Legalization of Societal Customs in Taiwan], 44 TAIDA FAXUE LUNCONG [NAT'L TAIWAN U.L. REV.] 1, 50–51 (2015).

<sup>71</sup> See YEN-HUI TAI, TUNG-HSIUNG TAI, & YU-JU TAI, QINSHU FA [FAMILY LAW] 407–10 (2009).

<sup>72</sup> See *id.* at 95–97.

properties are enough to pay.<sup>73</sup> This violates the traditional principal of Han Chinese that a son is entirely responsible for the debts of his deceased father.

It is evident that, with the assistance of well-trained Taiwanese legal scholars, the Taiwanese have voluntarily chosen to comply with the ideas of individualism and gender equity prevalent in contemporary Western law to reshape their own family and succession law. In other words, the trend of codifying local customs has not extended to the field of family and succession law.

## V. CONCLUSION

Meiji Japan, the first country to transplant Western/modern law in East Asia, emphasized the translation of continental European laws and theories into Japanese from its inception. Those translated foreign laws became the core parts of domestic legal codes so that the modernization of law could be achieved as quickly as possible. The legal practices of local people were thus almost entirely ignored, at least in legal codes, with the exception that family and succession law maintained some traditional elements for the interest of the ruling class. As a result, the official law was enacted in such a way to benefit the national policy, rather than taking into consideration the needs and daily life of the general public. As a Japanese colony, Taiwan did not completely enforce Japan's modern-style codes, but created a customary law system with modern legal terminology for civil law matters, primarily for the Japanese to avoid Taiwanese armed resistance. However, when the colonial government attempted to codify those customary laws based on Taiwanese legal practices, the Japanese imperial government objected because the existence of a code specifically enacted for Taiwan was contrary to the interests of the Japanese Empire. After all, the colonized Taiwanese could not independently decide what kinds of laws they wanted to adopt.

After the experience of utilizing Japanese law, which was primarily transplanted from continental Europe, for half a century, postwar Taiwan began to implement the ROC law. This ROC law was itself borrowed from continental European law by Republican China and was also influenced by prewar Japan. The Taiwanese were thus no strangers to the ROC legal codes. The ROC law took effect in Taiwan only after 1949, when the KMT

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<sup>73</sup> See HSIU-HSIUNG LIN, JICHENG FA JIANGYI [THE LECTURE ON SUCCESSION LAW] 13, 147–48 (6th ed. 2014).

regime lost its control over the Chinese mainland. Building on the first-generation Taiwanese legal scholars' knowledge of transplanted Japanese law, second-generation legal scholars translated laws and legal theories from postwar West Germany and Japan for the purpose of applying the transplanted codes in Taiwan. The third-generation legal scholars further introduced American legal thinking to postwar Taiwan, which had already adopted some American legal institutions through special statutes. With the advent of the democratization of Taiwan in the late 1980s, the second and third generations of Taiwanese legal scholars encouraged Taiwanese law to follow liberal democratic constitutionalism based on their studies in Germany, the United States, Japan, and other foreign countries. Thus, the modern law introduced in the 1890s did not truly become law in action in Taiwan until the 1990s. Furthermore, both those foreign laws meeting the needs of Taiwanese society and the customary laws derived from local legal practice have been increasingly included in Taiwan's legal codes or statutes for the benefit of the Taiwanese people.

In conclusion, the translation of foreign laws was usually codified for the purpose of transplanting Western laws in East Asian countries. This kind of codification, however, did not guarantee successful transplantation of foreign laws. Those foreign laws codified in domestic legislation are frequently too unfamiliar to be accepted by the native people. It is necessary to codify certain local legal practices at the same time as legal modernization to gain acceptance amongst the general public. Taiwan's case is illustrative. Modern Western law was translated by Taiwanese legal scholars themselves with Taiwanese societal needs in mind as the country moved toward democratization. This synchronization enabled active changes to old family and succession law customs within a modern law framework. As a result, previously foreign paradigms now had a Taiwanese gloss that made the unfamiliar underlying law more palatable. The localization of transplants is indeed imperative for the transplantation of Western laws in East Asian countries.