

The Impact of Modern Western Law on the Chinese in Taiwan

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This article explores the interaction between Western legal models and traditional Chinese law in Taiwan. Professor Wang first provides an overview of Taiwanese political and legal history. He then examines the dual introduction of Western Continental legal models – by the Japanese in the first half of the last century and by the Nationalists in the latter half. He focuses on constitutional, commercial, family and inheritance law. Professor Wang concludes that whilst aspects of traditional Chinese legal culture persist in Taiwan, the concepts of modern Western law have gained widespread acceptance among the Taiwanese. Mr Cooney's annotations provide further elaboration for readers not familiar with Taiwan.

Note on the Meaning of Taiwan

When 'Taiwan' is referred to in this article, it includes the island of Taiwan itself, the Pescadores group and its associated islands. In other words, those areas which are today under the effective jurisdiction of the 'Government of the Republic of China'. The scope of control exercised by political authorities in Taiwan has varied in different historical periods.¹ However, this article uses the effective jurisdiction of the present political authority as its point of reference. 'Taiwan' in this sense also includes, in addition to the areas just mentioned (which constitute by far the greater part of the land mass), Orchid Island and Green Island, both of which lie close to Taiwan, as well as the islands of Kinmen and Matsu, among others, which are subject to the Taiwanese political authorities. The inclusion of Kinmen and Matsu as part of Taiwan is controversial,² but from the perspective of people rather than place, it is inappropriate to exclude those islands' residents from the Taiwanese community, since half a century of frequent contact with the residents of Taiwan has produced a sense of communal-ity. Finally, although the legal territory claimed by current government in Taiwan – the government of the Chinese Nationalist Party (*Kuomintang*)³ – still includes the mainland ruled by the People's Republic of China ('PRC'), and the Republic of Mongolia, these areas are not considered part of 'Taiwan' in this article.

I. The Chinese in Taiwan

A. Ethnic History

Taiwan was originally inhabited by Austronesians, not the people of Han ethnicity whom we today call the 'Chinese' (*Huaren*). The languages of those original inhabitants belonged to the Austronesian language family, which is also known as the Malayo-Polynesian language family. Thus, they share a common origin with Malay and Tagalog. The first Chinese settlers on Taiwan, from Fujian Province, distinguished, generally speaking, between two Austronesian groups: the Mountain Peoples (*Gaoshanzu*) and the Plains Peoples (*Pingpuzu*). As the names imply, the former lived in mountainous areas and the latter in the lower areas (although this was not an absolute division). Scholars generally agree that the Mountain Peoples can be further grouped into nine tribes and the Plains Peoples into 10. These tribes all had different languages and cultures. The Plains Peoples were later assimilated by Chinese immigrants, so in current Taiwanese usage the term 'Aborigines' usually refers to the Mountain Peoples (Zhou, 1997: 24-6, 36-42).

As this article is a contribution to research on Chinese law, it concentrates on the 'Chinese-Taiwanese', that is, Taiwanese of Chinese descent. The discussion also applies to the assimilated Plains Peoples, but not those Aboriginal Taiwanese (the Mountain Peoples) who still maintain a distinct culture.

The Chinese immigrated from the mainland to Taiwan at different periods. From a historical perspective, there were two waves of migration. Generally speaking, the first wave began in the 1630s, when the Dutch East India Company encouraged Chinese peasants to farm uncultivated land in Taiwan. These peasants established immigrants' villages in the south of the island with a total population of 50,000 to 100,000. This represented a significant change from the earlier scattered Chinese incursion into Taiwan, which was solely for purposes of fishing or trade (Zhou, 1997: 47).⁴ The Dutch forces were driven from Taiwan in 1660 when around 30,000 Chinese soldiers under the leadership of Koxinga⁵ were stationed there. In 1683, the Qing Dynasty, which had been established by the Manchus, occupied Taiwan. Although the Qing authorities prohibited Chinese immigration into Taiwan by law, large numbers of Chinese from the famine-stricken mainland provinces of Fujian and Guangdong continued to migrate to Taiwan illegally. The overall population of Chinese in Taiwan increased from 200,000 at the end of Koxinga's rule to around 2,000,000 in 1811 (Chen, 1979: 379).

One can therefore say that, by the end of the eighteenth century, a society of Chinese immigrants had formed on Taiwan, extending to most parts of the island. The key feature of this society was its traditional Chi-

nese culture, but at the same time it was a settler society (indicated by the 'one field two masters' system (*yitian erzhu*)) with a characteristic local Taiwanese culture (practising, for example, a system of paying betrothal money to a bride's parents (*pinjin qigao*)). In 1895, when Japanese rule over Taiwan began, the population had reached 2,500,000. During the 50 years of Japanese rule, the Taiwanese connection with the mainland – the immigrant homeland – was almost entirely broken; instead, Taiwan developed close links with its colonial power, another East Asian country.

The second wave of Chinese immigrants did not experience Japanese colonial rule over Taiwan. They moved to the island in large numbers during the final stages of the Second World War, in particular around 1949. While Taiwan was under Japanese rule, they had experienced events on the Chinese mainland, including the Revolution of 1911, the confused fighting between warlords, and the War of Resistance against the Japanese. Some came to Taiwan in 1945 in the guise of victors over Japan, and replaced the Japanese ruling authorities. Since these people viewed Taiwan as a province, the Taiwanese-Chinese who had experienced Japanese rule were called 'people of this province' (*benshengren*). These were further sub-divided into Fulao⁶ (Minnan People) and Hakka, on the basis of linguistic and cultural differences. By contrast, the people who migrated from 'China proper' (as it was called at the time) from 1945 were called 'people from the other provinces' (*waishengren* – rendered here as 'Mainlanders'). Although this second wave began migrating to Taiwan in 1945, it was at the end of 1949 that the greatest number arrived. This was a result of the defeat on the mainland of the Kuomintang Government led by Chiang Kai-shek. At that time, more than 1,000,000 Chinese poured into Taiwan.

Today, the Chinese in Taiwan can be divided into three ethnic groups: the Fulao (Minnan), the Hakka, and the 'Mainlanders'. They constitute respectively 70 per cent, 10 to 15 per cent and 12 to 15 per cent of Taiwan's population of 21.8 million. Together with Taiwan's Aboriginal population, which represents 1 to 2 per cent of the total population, they comprise Taiwan's four main ethnic communities (Wang, 1997b: 126).⁷

B. Political History

For long periods the Taiwan area has not formed part of China. If the political authority occupying the land to the south-east of the Asian mainland, south of the Great Wall, inhabited predominantly by Han Chinese and formerly known as the 'Central Plains' (*Zhongyuan*), is called 'China' (a designation implying a 'nation') then of the districts which today form part of the Taiwan area, the earliest to fall under Chinese dominion was the Pescadores group. Relatively reliable material indicates that China

established an administrative post there in the fourteenth century, during the Yuan Dynasty.⁸

However, it was only in the 1680s that for the first time a part of the island of Taiwan itself was occupied by China, then under Qing dynasty rule. Before that time parts of Taiwan were ruled either by self-governing Aboriginal tribes, or by the Dutch Republic (1624–62), or by Koxinga (1662–83: during this period, mainland China was under Qing control). The parts of Taiwan administered from the post established by the Qing Government expanded in pace with the steady increase in the Chinese immigrant population (this took place from 1683 to 1895). If the Qing Dynasty is considered 'China',⁹ then Taiwan was, during this 212-year period of Qing rule, 'a part of China'. But, as a result of the Treaty of Maguan, concluded by the Qing and the Japanese in 1895, Taiwan island and the Pescadores group were separated from China and became a part of Japan.

In 1945, after 50 years of Japanese rule, China, representing the victorious Allied Powers, took over the Taiwanese possessions of the defeated Japanese. Taiwan and the Pescadores thus became part of China for a second time. Nevertheless, this time the period of integration with China was very short, lasting only four years, from 1945 to 1949. Since its founding on 1 October 1949, the current political authority on the Chinese mainland (the People's Republic of China) has not governed any part of Taiwan, while the central government of the previous regime, the Republic of China, moved to Taiwan at the end of 1949, becoming the highest political authority there. Apart from continuing to occupy Taiwan island and the Pescadores, that government also exercises jurisdiction over Kinmen and Matsu, which originally belonged to the Chinese mainland.¹⁰ Taiwan is not a part of China in so far as China today refers to the PRC. Accordingly, the Chinese in Taiwan are 'Chinese outside China'.

Because of their 'Chinese' identity, the Chinese in Taiwan have been influenced by legal concepts developed in traditional China. Yet because they have lived in Taiwan, they have also directly experienced the legal systems of a number of different nations. The legal cultures of the Chinese people can be traced back to traditional China ('traditional' is used to distinguish this period from modern China), and this is true of the Taiwanese-Chinese, whether we are speaking of the first or second wave of immigrants. Of course, as the inhabitants of Taiwan are mainly Chinese, traditional Chinese legal concepts are very widespread in Taiwan.

However, the Taiwanese have also encountered various rulers from dissimilar cultural backgrounds, especially over the last 100 years, when they were ruled by Japan and the Republic of China, two different 'nation-states', each for 50 years. It is the experience of Japanese rule that

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distinguishes the first wave of Chinese immigrants from the second. The Japanese and Chinese Republican legal codes actually have a common characteristic, namely that, with respect to their normative legal content, they are based for the most part on the law of modern continental nations (especially Germany). This is what scholars call the 'reception of modern Western law'.

Now, the first wave of Chinese immigrants to Taiwan, being subject to Japanese law, came into contact with Western law relatively early. When they came under the jurisdiction of the law of the Chinese Republic after the Second World War, this baptism in Western law continued. The impact of Western law on the second wave of Chinese immigrants began rather later on the Chinese mainland, and then continued after the end of the war when they moved to Taiwan. However, they had experienced only the law of the Republic of China.¹¹ Today, although the Chinese in Taiwan are still nurtured in traditional Chinese legal culture, they live at the same time within a system of modern, positive, Western-style law.

This article intends to examine the emergence of a modern, Western legal system and legal concepts in Taiwan in the guise of positive law (whether Japanese or Chinese Republican). It considers the extent to which these have influenced Taiwanese-Chinese society. In other words, after the Chinese immigrated from the mainland to Taiwan and became part of the current of Taiwan's historical development, to what extent did they accept modern Western law and abandon traditional Chinese law? Or, putting it another way, to what extent have they retained their traditional legal ideas?

II. Modern Western-style Positive Law

A. The Reception of Western Law under Japanese Rule

The introduction of modern, positive, Western-style law in Taiwan began under Japanese rule (1895–1945). When the Japanese occupied Taiwan, they realised that, given the political, cultural and other differences that existed between Taiwan and Japan proper, it would not be appropriate to establish identical legal institutions at a stroke. So, following the precedent of contemporary Western colonial powers, they carefully selected part of the 'mother country's law' (*muguofa*) and part of the 'native law' (*turenfa*) so that both would constitute the content of the positive law to be implemented in colonial Taiwan. Generally where areas of law significantly concerned the authority of the ruling colonial power – such as the structure of state organs, the judiciary and the system of criminal sanctions – they predominantly accorded with the 'mother country's' law. In contrast, most of those areas of law that concerned the daily life of

ordinary citizens – such as commercial transactions and matters relating to the family and inheritance – followed native law.

Japan had already more or less adopted modern continental legal codes in 1890, before it occupied Taiwan.¹² Consequently, the law of the mother country, which was the ‘law of Japan proper’ (*riben neidi fa*), was in reality modern Western-style law. On the other hand the native law, which applied to Taiwanese of Chinese descent and which corresponded to ‘Taiwanese Qing Dynasty law’, was a branch of traditional Chinese law. Thus, modern Western law first entered Taiwanese-Chinese society alongside the swords of the Japanese rulers, wearing the cloak of the ‘law of Japan proper’ and assuming the respectable identity of positive state law. But in the positive law that applied specifically to the colonial area of Taiwan there were some elements belonging to traditional Chinese law.

During the later period of Japanese rule, more modern Western-style legislation was introduced into the positive law of the Taiwanese colonial area. In the 1910s, the Japanese Empire faced the rising influence of the idea of self-determination among colonised ethnic groups around the world. In order to eliminate the ‘ethnic self-identification’ of its colonised peoples, the Empire decided to strengthen its promotion of assimilationism. It set about implementing, as much as it could, a common system throughout both the home and colonial areas. Adopting the ‘metropolitan law¹³ extension principle’, it extended, as far as possible, the applicability of the law of Japan proper to colonial areas. Consequently, from 1 January 1923, the greater part of Japanese law was directly implemented in Taiwan, including the Japanese Civil and Commercial Codes, apart from those parts concerning family law and succession. This ‘metropolitan law extension’ was in reality equivalent to the extension of modern Western law. The incorporation of Western law into Taiwanese positive law was paralleled by the submersion of traditional Chinese laws; the effect was that the more one grew, the more the other disappeared.

We may say, then, that because Taiwan was almost entirely cut off from mainland China during the first half of this century, and was ruled instead by the Japanese who were under the influence of modern Western law, there were considerable opportunities for Taiwan to accept this system of law. At the same time China had attempted to receive Western law. It had, around the 1930s, promulgated similar modernised legal codes based on continental law. However, owing to the chaos of ceaseless war, and out of a sense of ethnic self-respect or human inertia, it found it difficult to carry out ‘suicidal’ reforms of traditional Chinese law. China was able to give real effect to the norms in Western-style legal codes only to a very limited extent, and perhaps most of them remained mere ‘law in books’.

B. Reception of Western Law under Nationalist Rule

Nonetheless, when in 1945 Taiwan once again came under Chinese rule, at least on the level of positive law, the modern Western-style laws (drafted in China during the 1930s) were already in existence. The legal system of the Republic of China took effect in Taiwan from 25 October 1945. This system of positive laws that the Chinese Nationalist Party brought with them to Taiwan had, like the system introduced by the Japanese, the character of 'laws imposed by foreign rulers'. These laws bound both the first wave of Chinese immigrants and the Aboriginal people, who had no choice but to accept them. As luck would have it, the newly introduced legal system of the Republic of China was akin to the preceding Japanese system: both were an adoption of modern continental law. Indeed, much legal terminology was similar. This meant that modern Western law, in its positive form, continued to guide Taiwanese society.

Moreover, Taiwan did not follow the mainland in implementing socialist law when in 1949 the PRC became the new political authority in China. From the end of 1949 Taiwan and China had, in reality, split into two separate countries, implementing two different legal systems. Taiwan continued to implement the legal system of the Republic of China introduced to the island in 1945, a system based on modern Western capitalist law.

Western legal norms have been an important element of Taiwan's legal system ever since 1949. However, after 1949, the government of the Republic of China on Taiwan joined the cold war camp of the Western democracies led by the USA, in order to resist the threat of annexation by the Chinese Communist Party (Tian, 1989: 269–70). Although there were certain democratic mechanisms modelled on the West in the legal system of the Republic of China – such as a parliament empowered to supervise the executive government and a judiciary exercising independent powers of adjudication – such mechanisms were a great inconvenience to the dictatorial control of Chiang Kai-shek's Nationalist Government. General Chiang kept up the appearance of a 'democratic state' and sedulously maintained the elements of Western law within the Republic of China legal system.¹⁴ However, on the pretext of slogans such as 'the country being in dire peril' or 'protecting public order' and so on, he froze the freedoms and rights that citizens of democratic countries ought to enjoy.

Nevertheless, as positive law in Taiwan maintained its outwardly Western form, Taiwan's political dissidents were able to invoke many aspects of modern Western legal theories, such as the possession of basic human rights, fixed elections and 'one vote, one value', in order to challenge the legitimacy of rule by General Chiang's Nationalist regime. Consequently, in pace with the political democratisation movement which has been ac-

tive in Taiwan since the 1980s, those modern, Western legal norms that had been long suppressed were 'unfrozen' one after the other, and their effect as positive law, previously on hold, could at last be felt.

C. Accepting Western Positive Law Distinguished from Accepting Western Legal Values

The operation of a modern Western legal system cannot be separated from the 'human' factor. Although Western legal norms have appeared in Taiwan over the past 100 years, it is questionable whether the people enforcing the law genuinely believed in the values in Western law or whether they had the capacity to implement them. For the first 50 years the Japanese ruling class (at least initially) viewed a Western-style legal system merely as a tool for enriching the nation and strengthening its military power (Wang, 1995b; 1997a), and, in Taiwan, for serving colonial interests. Whether the Japanese conscientiously sought to promote a Western-style legal system is a matter for conjecture (Wang, 1994: 28–31, 36–7). Nonetheless, the legal profession that emerged during Japanese rule received a sound training in Western jurisprudence. These people presided over a court system based on Western positive law in a professional and honest manner, and showed a considerable degree of independence in their adjudication. They thereby built up a degree of public confidence (Wang, 1995a: 27–46).

For the last 50 years, the Chinese Nationalist Party ruling circles, like the Japanese, viewed Western-style law as a ruling tool. What was worse, the scandal of judicial corruption shook popular confidence in the judiciary. By way of contrast, legal scholars, the majority of whom had studied in democratic countries (such as West Germany, Japan and the USA), fostered a group of legal professionals who upheld modern Western law. This group has gradually become prominent in judicial and political circles, and in the last few years views on legal matters in Taiwan have, compared with before, tended towards perspectives on legal values developed in the modern West. For example, the most recent interpretations of the Council of Grand Justices¹⁵ have given relatively strong regard to the protection of human rights and to gender equality.¹⁶

It is true that Western-style laws have become the main ingredient of Taiwan's 'official law', but does this mean they will be implemented by state agencies, or have real normative force in the social lives of ordinary citizens? This requires that ordinary citizens commonly accept the legitimacy of these Western norms. In modern nation states the most important vehicle for moulding the values of ordinary citizens is national education. However, if we look at the content of national education in Taiwan over the last 100 years, we find that matters such as the protection of human

rights, the necessity of following due process before imposing punishments, and others of the most fundamental values of Western law have been almost entirely absent. This must be attributed to the two regimes that ruled Taiwan in succession. Since they wished to attain Western-style power, they could not avoid adopting Western-style law, but they did not have a genuine commitment to basic Western values. As a result, some legal concepts deriving from traditional Chinese law may persist among the Chinese in Taiwan, in the form of 'unofficial law' (Wang, 1997b: 154), and these produce a restraining effect on the official modern Western legal concepts with which they interact.

The discussion so far has been a general account of the influence of modern Western law on the Taiwanese-Chinese. The remainder of this article will provide two illustrations of this influence, and these are drawn from two major areas of law.

III. Constitutional Law

A. Traditional China

The modern Western concept of constitutionalism did not exist in traditional Chinese law. If the term 'constitution' is understood to represent, rather broadly, as those fundamental legal norms that pertain to the operation of political power, the organisation and structure of high level organs or the relationship between the people and the state (Xu, 1993: 9), then we may say that a constitution did exist for more than 2000 years of imperial Chinese history. This consisted of basic legal norms such as the imperial succession, the appointment by the emperor of the chancellor (*zaixiang*) who oversaw the bureaucracy, the establishment by the emperor of the six ministries, the system of *corvée* performed by imperial subjects, the payment of taxes, and so on.

But regardless of its content, this constitutional structure in no way corresponded to the *constitutionalism* that developed in the West in modern times. Put simply, regarding political organisation traditional Chinese law emphasised the centralisation of authority in, and the autocratic rule of, the sovereign. In contrast, modern Western law stresses the separation of powers, and mutual checks and balances. As regards the relationship between the rulers and the ruled, traditional Chinese law considered that a benevolent sovereign and his or her officials would bestow favours upon the common people that he or she governed, and that these subjects would have to accept obediently the guidance of the sovereign. In contrast, modern Western law is founded on a distrust of those in power, and considers that the people may demand that the state not infringe on their basic rights and freedoms. It goes without saying that Chinese people, who for

so long were steeped in the tradition of imperial rule, did not originally think in terms of modern Western constitutionalism!

B. Constitutional Development under the Japanese

Under Japanese rule, the Taiwanese-Chinese came into contact for the first time with a constitution possessing some aspects of constitutionalism. Whether, as a matter of legal theory, the Meiji Constitution promulgated before the Japanese occupation of Taiwan applied in its entirety to the Taiwanese colonial area, was subject to dispute during the colonial period. Most state organs, as well as most scholars, were of the view that it did (Wang, 1997a: 1909). In any case, Japan before the Second World War modelled its constitutional structure on Prussia. Although it incorporated modern Western systems of parliamentary politics and the separation of powers as a means of carving up political power between the sovereign and the bureaucracy, basic human rights and the mutual checks and balances between arms of government that are the essence of constitutionalism were viewed as less important. They were not, therefore, made a detailed part of the system (Li, 1997: 21). Indeed, the parliamentary system, and the system of separation of powers (that is, those elements of the Constitution that had a flavour of constitutionalism) were not generally implemented in Taiwan because the Japanese needed to maintain autocratic colonial rule.¹⁷

Some of the Taiwanese who had experienced Japanese rule became familiar with constitutionalism. In the 1920s, intellectuals who had been nurtured in modern Western legal and political thought began to appear in Taiwanese-Chinese society, and the majority of these were inclined towards constitutionalism. The more active among them even demanded that the Japanese authorities enact a colonial constitution based on the principles of constitutionalism, or establish a colonial assembly. In particular cases they also invoked articles in the Japanese Constitution providing for the right of petition, the protection of personal liberty, and so on. However, at that time constitutional thought was not transmitted through national education, and the impact intellectuals had on ordinary people was limited. The substance of constitutionalism could not easily enter popular knowledge, let alone become popular conviction. Further, from the latter part of the 1930s until 1945, the governors of Taiwan were military officers; and moreover, during the Second World War, the environment was not favourable to the spread of constitutionalism.¹⁸

C. Constitutional Development under the Nationalists

For the second wave of Taiwanese immigrants, who during that period were still living on the Chinese mainland (that is to say, the

'mainlanders'), developments in constitutional politics took a similar course to those experienced by the first wave of immigrants living under Japanese rule. At the beginning of the twentieth century, Qing China planned to introduce a Japanese-style system of constitutional monarchy. However, in 1911 the system of government became 'republican' and subsequently China sank into decades of civil war. This made it impossible to enact or implement a constitution applicable to the whole country. In 1936, the Nationalist Government prepared a draft constitution, but from 1937 China was again at war, this time against the Japanese. It emerged from the conflict only in 1945. To be sure, there were some intellectuals on the Chinese mainland during that period who were inclined towards Western liberal constitutionalism, but there were also many who leant towards communism and the Soviet system. As for the vast number of illiterate Chinese peasants, they perhaps would have had no knowledge then of what an 'ism' might be.

During the short period this century that Taiwan became a part of China, China coincidentally completed and formally began to implement its first Constitution, which bore some characteristics of constitutionalism. In 1945 China, as an ally of the war victors, took over Taiwan. From the beginning of 1946, the two main Chinese political parties, the Nationalists and the Communists, attempted to decide on a national political and constitutional system through the Political Consultative Conference. However, the Communists ultimately withdrew from consultations and this set off the Nationalist-Communist civil war. The Nationalists nevertheless continued to promote their constitution, and, in order to attract the support of other political parties, incorporated aspects of constitutionalism into their political system. On 1 January 1947, the Nationalists promulgated the Constitution of the Republic of China, which came into force on the 25 December that same year.

In 1949 the Communists routed the Nationalists and established the PRC, based on the Soviet system. They decided not to implement the Nationalists' Constitution. In fact, this Constitution had not received the consent of the Chinese people as a whole and had been in force for less than two years. The defeated Nationalists moved to Taiwan in 1949. Their claim to represent all of China served to rationalise their rule, as well as their political slogan of 'counterattacking the mainland'. Today the Nationalist Constitution of the Republic of China, enacted 50 years ago for all of China, still formally applies in Taiwan, although, as will be described below, there are now certain 'Additional Articles'.

After 1949, the second wave of Chinese immigrants, together with the earlier immigrants, endured innumerable hardships until finally they were able to create a society, which, to a high degree, puts into practice the spirit of constitutionalism. The Nationalist Government of Chiang

Kai-shek, which had formed and seized power during the military chaos of the warlord era, was at first a dictatorship lacking any disposition to constitutionalism. In 1947, the third year after occupying Taiwan, the Nationalists perpetrated the '228 Incident',¹⁹ in which they ruthlessly suppressed groups demanding human rights, and large scale arrests and executions followed. Those among the elites of the first wave of Chinese immigrants who had held constitutionalist convictions under Japanese rule were forced into a fearful silence. After Chiang's central Government moved to Taiwan in 1949, it instituted the oppressive authoritarian rule known popularly as the 'White Terror' in order to consolidate its political power. Provisions concerning fundamental human rights were treated as dross. Consequently, during the 1960s, when liberals who had grown up on the mainland, led by Lei Chen, demanded that constitutionalism be put into effect in Taiwan, they too were suppressed.

D. The Constitution and Democracy

Not until the late 1970s and early 1980s did the Taiwanese demand that the Nationalist Government, then led by Chiang Ching-kuo,²⁰ return to the path of Western constitutionalism. These Taiwanese were mainly Minnan and Hakka elites from the first generation born after the Second World War. They invoked Western constitutional theory, already laid out in articles of the Republic of China Constitution, in order to pursue the political power from which they had long been excluded. In the later part of the 1980s, following Taiwan's political democratisation movement, constitutionalism gradually entered the mainstream of Taiwanese-Chinese society, including all ethnic groups. This was true even of members of Chiang's Nationalist ruling clique, who had, in the past, opposed constitutionalism. This was because political power came into the hands of Lee Teng-hui, a Minnan Taiwanese, forcing the ruling clique to cry for 'checks and balances' and 'the protection of human rights'.

These events do not mean that constitutional politics in Taiwan are now completely identical to that in Western democracies. For example, the current Taiwanese Constitution has five branches of government, and it includes two relics continuing the imperial Chinese tradition of a 'Control Branch' and an 'Examination Branch'. Of course, according to current Western theory and practice, it is sufficient to separate governmental powers into the executive, the legislature and the judiciary.

The flaws in the 'five-power system' have already been exposed,²¹ but the government fears abolishing the system. This fear appears to be due to the imperial Chinese belief that 'our ancestors' law cannot be changed'. The Ming and Qing Dynasties used 'statutes' (*li*) to express the legitimacy of their rule, regarding them as the unchangeable 'ancestors' law'.

However, the later emperors circumvented this by promulgating 'regulations' (*li*) to undermine these statutes.

Similarly, Taiwan's constitutional law is subject to the precondition that the original text of the Republic of China Constitution cannot be amended. However in the 1990s, 'Additional Articles' (*zengxiu tiaowen*) have already been enacted or amended four times – in 1991, 1992, 1994 and 1997. Admittedly, in other democratic countries there are also examples of constitutional provisions that cannot be amended; but the particular method of altering the constitution in Taiwan – preserving the original form but changing the substance – is employed by the Nationalist Government because it considers that the constitutional code represents it as being the 'legitimate government of China' (Yeh, 1998: 11–12). This is founded on the traditional Chinese idea of 'keeping the calendar and upholding legitimacy' (*feng zheng shuo, yang zheng tong*).

The repeated amendment of the Constitution within a period of six years has seriously harmed its prestige as the basic law of the nation. Yet the permanence of substantive constitutional norms is apparently not a matter of great concern to the Taiwanese people; in the traditional way of thinking, the content of the 'constitution', if not the form, changes along with the rulers.

IV. Civil and Commercial Law

A. Traditional China

The concept of 'civil law' (*minshifa*), as it is known in continental legal systems, did not exist in traditional Chinese law. In continental law there is a distinction between civil and criminal matters; civil law refers to all those legal norms regulating general social relations between private persons and does not concern the state's power to punish. Alternatively, if we extend the content of the norms to include those regulating commercial conduct, that is, commercial law, we can refer to 'civil and commercial law' (*minshangshifa*), and distinguish both from 'criminal law', which regulates matters concerning state punishment. As there was no conceptual distinction in traditional Chinese law between 'civil' and 'criminal', the Chinese in Taiwan originally had no awareness of what is called 'civil and commercial law' as a distinct aspect of law.

If, working backwards, we use current concepts to observe past facts and make a detailed inquiry as to whether traditional Chinese law indeed produced norms that today would be classed as matters within the scope of civil and commercial law, then we would conclude that it did. These consisted of official regulations (*guanfu zhidingfa*) and local custom. The most important source of norms for those social relations that are today categorised as commercial and civil matters was unofficial local custom, but

these norms could only be weakly enforced. There were also official regulations that dealt with households, marriage, farms, land, money and debts; but there were very few specific provisions and there was little opportunity for directly applying them to the facts of particular cases. Further, their legal effect was mostly that of criminal sanction. An official would, perhaps, be required to perform a particular act in accordance with a statute or regulation (both being orders of the sovereign). For example, he might investigate the payment of interest on principal in a certain case, and order the debtor to pay it to the creditor. However, ordinary citizens had no right to require the official to take this course of action (Wang, 1997a: 366–7).

B. Civil and Commercial Law under Japanese Rule

Under Japanese rule, state law received from the continental legal system began to intrude into Taiwanese civil and commercial relations in a major way. In the 1870s the Japanese had embarked on the task of enacting a modern Continental Code and, in 1898, they finally completed and then implemented a Civil and a Commercial Code. These were based in particular on German law, and their content was so comprehensive that they regulated all kinds of social relations between private citizens. However, when the Japanese occupied Taiwan in 1895, they did not fully apply these codes to the island, even though it had become part of Japanese territory. According to the provisions of Order Number 8 of 1898, issued by the Governor-General of Taiwan, the Japanese Civil and Commercial Codes applied only to civil and commercial activities involving citizens of Japan proper. Activities that simply concerned Taiwanese were to be regulated by the ‘old Taiwanese-Chinese customs’ (*jiuguan*).²²

However, this certainly did not mean the continued operation of the laws applying under Qing rule. Under the legal system of the modern Japanese state, in order for the content of local customs to be accepted as ‘customary law’ and applied in particular cases, they had to be approved by a court or an authorised administrative agency. These bodies could also modify them. For example, the reports of the official Japanese agency, the ‘Temporary Committee for the Investigation of Old Taiwanese Customs’ (*Linshi Taiwan Jiuguan Diaochahui*) record a practice among the Taiwanese-Chinese to the effect that a stakeholder in a partnership was liable for the debts of the partnership only to the extent of his or her stake; yet, in the customary law recognised by the courts, the stakeholder was held to be ‘jointly and severally liable’ (*liandai zeren*), as in continental law (Wang, 1997a: 298, 308). Further, as discussed below (see ‘Family and Inheritance under the Japanese’, pp 221–3), the courts, basing their opinions on modern Western legal values, refused to give legal effect to certain

old customs on family and inheritance matters that reflected traditional Chinese legal thinking, because they violated public order and good morals (*gongxu liangsu*).

The general principle that old customs would be applied to the civil and commercial affairs of the Taiwanese was also commonly excluded by special civil laws, which promoted the regulation of those affairs by continental law. For example, there was a practice, originating early in the history of Chinese expansion in Taiwan, of regulating certain land on the 'one field, two masters' principle (*yitian erzhu*). One person substantively developed and controlled the land (*xiao zuhu* or 'small lease-holder'). Another obtained the authority to develop the land and the designation 'landlord' from the government office (*da zuhu* or 'large lease-holder'). The former was obliged to pay the latter a yearly fee in grain (*zugu*), known as the 'large rent' (*dazu*). In Order Number 6 of 1904, the Governor-General of Taiwan abolished the customary right of receiving 'large rent' (compensating those who had held this right). This created an 'only one master per field' system, the rights of the 'master' approximating those of the 'owner' (*suoyouquanren*) in Japan's continental-style Civil Code (Wang, 1997c: 29).

Another example is the change to one aspect of the Taiwanese customary law of securities, the *tai*.²³ At the beginning of this century, when a Western-style financial system was being introduced into Taiwan, the banks wanted to ask financiers to provide reliable security. They wanted to abolish the previous *tai* practice whereby, when a loan was taken out, possession of the security did not need to be transferred to the creditor. The banks, on the other hand, expected that if, at the time a debt fell due, it could not be paid off, the security would be auctioned with the creditor bank enjoying a priority entitlement to the proceeds. The Governor-General of Taiwan, in the *Land Registration Rules* of 1905 (*Tudi Dengji Guize*), vested in the holder of the *tai* a right that did not exist under earlier practice, namely,

in relation to the land of the person who provides security, an entitlement to the proceeds prior to other creditors. The provisions in the auction law concerning mortgage rights shall be applied to the '*tai*' right. (Wang, 1992: 25, 31)

In other words, for the purposes of promoting the development of a capitalist Taiwanese economy headed by Japanese, the colonial authorities enacted special civil laws converting the *tai*, a Taiwanese-Chinese custom, into a mortgage right similar to that in the modern Japanese Civil Code. This tactic of retaining a name but changing the substantive content was a case of 'pouring new wine into old bottles'.

The Japanese living in Taiwan were a further source of influence on the legal practices of the Taiwanese-Chinese because they, as citizens of

Japan proper, used the continental-style Civil and Commercial Codes. During the Japanese colonial period, the colonisers were the dominant political, economic and cultural force in Taiwan and it was natural that the Taiwanese-Chinese would, through their commercial dealings with them, be influenced by the Japanese experience of using modern, Western civil and commercial systems. So, for example, the Taiwanese-Chinese imitated the organisational structure of the Japanese company (*kaisha*) for the purposes of reforming their previous system of pooling capital. Now, since the Japanese company was derived from a modern Western capitalist legal system, being influenced by Japanese company law meant being influenced by Western law. Moreover, provided that the Taiwanese included at least one Japanese shareholder, they were able to organise any form of company prescribed in Japan's Commercial Code (instances of this happening are too numerous to mention). Again, Taiwanese-Chinese could accept any kind of negotiable instrument written by a citizen of Japan proper in accordance with Japanese commercial law. These means of payment were of modern Western origin (Wang, 1997a: 311–15).²⁴

Further, since the lowest available interest rate on loans was for mortgages offered by Japanese banks, applications for loans made under a modified *tai* or a Japanese-style mortgage rapidly increased. This caused the number of loans made under the alternative *dian*²⁵ system to decline. The *dian* system had been very prevalent in Chinese society; however, although it had already been transformed to a certain extent along continental lines in 1905, it was not as popular as before (Liu, 1996: 85, Table 2, 89–90). This explains why, according to a report in 1909, the form of mortgage generally used by Japanese banks, the *ne-teito* or 'fixed mortgage',²⁶ became widespread in Taiwan. The *ne-teito* is still commonly used in Taiwanese banking circles and among the general population, although it is now called the 'maximum amount mortgage' (*zuigao xian'e diya*) (Wang, 1997b: 156).

Western civil and commercial law entered the lives of the Taiwanese-Chinese to an even greater extent from 1923, when the Japanese Civil and Commercial Codes (apart from the chapters on family and inheritance) came into force directly in Taiwan from 1 January that year. Consequently, traditional Taiwanese conventions ceased to apply to civil and commercial transactions concluded solely between Taiwanese-Chinese; modern continental-style civil and commercial laws applied instead. Where a *tai* was in existence, the provisions concerning Japanese mortgages would subsequently apply. When a *dian* was in existence, provisions applicable to pledges of real (immovable) property applied. Clearly, 'new wine' was being poured into 'new bottles'. Since the Japanese Civil Code stipulated that the term during which a pledge was in force was limited to 10 years, the *dian* created before 1923 were all extinguished by 31

December 1933. From then until the end of Japanese rule, the traditional Chinese relationship based on the *dian* did not exist in positive law in Taiwan (Liu, 1996: 82; Wang, 1997c: 36, 33–5). Taiwanese could also establish any form of company under Japanese law; they no longer needed to find a Japanese participant as in the earlier period of Japanese rule. By the end of the Japanese colonial period the number of companies established by Taiwanese was equal to those established by Japanese, indicating that the Taiwanese had already grown accustomed to continental-style corporate structures (Wang, 1997a: 319–21). Similarly, Taiwanese could both accept and make any form of negotiable instrument under Japanese commercial law. During Japanese rule, the well-known Taiwanese political and business figure Wu San-lian had a cheque account in the Changhua Bank, which was a joint stock company (the Japanese *kabushiki gaisha*). The chequebook of this account still exists (Gao, 1993: 11–12). In fact, even today, Taiwanese who experienced Japanese rule still use the characters *shou* and *xing*, pronounced in Taiwanese, to signify ‘negotiable instrument’, rather than the Mandarin *piaoju*. This is, of course, a reference to life under the Japanese.

C. Family and Inheritance under the Japanese

As for family and inheritance matters in Taiwan, Western law had some influence during Japanese rule, but this was limited. Prior to the Second World War, the two chapters of the Japanese Civil Code that dealt with family and inheritance, in comparison with the other chapters, adopted relatively few Western, individualistic legal forms, and these were in any case not directly applied in Taiwan while it was under Japanese control. The statutes concerning Taiwanese family and inheritance matters consistently provided that they be dealt with ‘according to old custom’ or ‘according to custom’ (Wang, 1997d: 130). However, in practice, in the process of applying such ‘old customs’ and ‘conventions’ (*xiguan*), courts brought certain modern Western legal concepts and terminology into their judgments. This occurred in four ways.

Firstly, courts might recognise the existence of certain old customs and apply them, but their way of articulating this would be influenced by continental civil law. For example, a court might rule that: ‘according to the old custom, marriage and divorce are not permitted simply on the basis of the will of the parties, but must comply with the will of the parents’. This formulation, although it recognises the importance of the entitlements of one’s seniors (*zunzhangquan*), nevertheless conceptualises the husband and wife as ‘parties’ (*danshiren*) to a ‘marriage contract’ (*hunyin qiyue*); the marriage is not viewed, as it was under the old custom, as the union of two ‘families’ (*jia*) (Wang, 1997d: 134–5).

Secondly, courts might recognise the existence of certain old customs but decline to give them legal force, on the basis that they violated 'public order and good morals'. For example, courts held that the old custom of 'selling' (*jiamai*), 'pledging' (*chudian*), or 'giving' (*zengyu*) a wife meant treating a woman as the object of a transaction. It was held to be in violation of public order and good morals, and thus invalid. The old custom of demanding the wife's family pay back her betrothal money (*pinjin*) on divorce was also held to be void on public order and good morals grounds, because the money was equated with the 'price of her body' (*shen jiaqian*) (Wang, 1997d: 134–5). Obviously, this perspective derives from the modern Western emphasis on human dignity, and the prohibition on trade in the human body.

Thirdly, courts might hold that the particular content of an old custom had to conform with legal principle (*fali*). For instance, some courts found that

the convention by which it was easy for a man to leave a concubine, but that a concubine did not have an absolute right to leave the man, failed to respect the dignity of the concubine and restrained her innate liberty. It violates public order and good morals. (Wang, 1997d: 136)

Consequently, when a concubine petitioned to leave her 'husband', the court found that 'according to legal principle' she should be treated equally; she could leave him without being subject to any limitations (Wang, 1997d: 136). The terms 'human dignity', 'liberty', and 'equal treatment' are, of course, all values upheld by modern Western legal theory.

Fourthly, the courts could find that a new custom had appeared. One aspect of this theory was that a custom could spontaneously produce new content. For example, in earlier times it was the convention among Taiwanese that for an adoption to occur, it sufficed that there be an agreement between the biological father and the foster father. But the courts held that 'this custom has improved by itself as times have changed and culture has progressed'. Thus, according to the current custom, the foster child's consent was required, or agreement to the adoption by the biological parents, on behalf of the child (Wang, 1997d: 138). This so-called 'cultural progression' referred to the diffusion of modern Western law.

Another aspect of this theory was that some articles of the Civil Code had come to be accepted as custom in Taiwan, but because they were not 'old customs', the judges considered them as legal principle under the relevant provisions of the Japanese Civil Code. Now, it happened that in some cases, these Civil Code provisions that had come to be seen as customs were of Western origin. For example, people could renounce their inheritances, or state that they would be responsible for the debts of the deceased only to the extent of the inheritance. Such a provision contrasted

with the old custom that emphasised that 'a son must repay the debts of his father' (Wang, 1997d: 139). This reflects indirect Western influence. However, as most people were afraid to bring their family and inheritance disputes before the courts, the courts' opinions on the Westernisation of these matters could not easily enter into their legal life.

D. Civil and Commercial Law under the Nationalists

With the change to Chinese rule in 1945, the second wave of immigrants brought the modern Chinese Civil and Commercial Codes, and their experience of those Codes, to Taiwan. In the early years of the century, the modernising Chinese had, with the help of Japanese legal scholars, drafted a Chinese Civil Code in imitation of the German precedent. However, because of the upheavals in Chinese politics, the implementation of this continental-style Chinese Civil Code was long delayed. Judges were able to make certain provisions in the draft code the grounds for their judgments only on the basis that they were legal principle. Not until 1929 could the Civil and Commercial Codes of the Republic of China be promulgated and put into force. But their effectiveness varied from place to place, and in reality they were not implemented in the vast rural areas. Both of these laws became the basis for Taiwan's civil and commercial law from 25 October 1945.

The Westernised orientation of Taiwan's civil and commercial laws was not disrupted by the change of regime in 1945. The contents of the newly introduced Civil and Commercial Codes of the Republic of China were similar to that of the corresponding Japanese laws, since both had a common source in modern continental, particularly German, law. For example, provisions concerning the classes and content of rights over things (*wuquan*), possession, superficies (*dishangquan*),²⁷ emphyteusis (*yongdian*; Japanese: *eikosakuken*),²⁸ mortgage (*diyaquan*; Japanese: *teitoken*), and pledges over personal property (movables, *dongchan zhiquan*) were all alike. The dissimilarities were that the Republic of China's Civil Code made provision for the *dian* but not for pledges over real property (immovables, *budongchan zhiquan*), or preferential rights over personal property (*dongchan xianqu tequan*). But these differences were not very significant, because after the Second World War few Taiwanese made use of the *dian* system. Further, pledges over real property established during Japanese rule could not, under the applicable provisions of the Civil Code, be of more than 10 years' duration, so that in 1955, at the latest, any remaining pledges ceased to have effect (Liu, 1996: 92–3, 106).

Moreover, the various forms of corporate organisation in the Republic of China's Company Law could also be found in Japan's Company Law. For example, the Chinese joint stock company (*gufen youxian gongsi*) was

the Japanese *kabushiki gaisha*, the Chinese limited company (*youxian gongsi*) was the Japanese *yugen gaisha*, and so on. The same applied to negotiable instruments. The provisions in the Republic of China's Negotiable Instruments Law concerning bills of exchange (*huipiao*), promissory notes (*benpiao*), and personal cheques (*zhipiao*), corresponded to the Japanese *kawase tegata*, *yakusoku* and *kogitte*.

Consequently, the first wave of Chinese immigrants had made extensive use of continental-style civil and commercial legal practices, and the 1945 change of regime brought about only a change in nomenclature. For example, in the chequebook used by Wan San-lian referred to above, the dating system was changed from imperial Japanese years to the years of the Chinese Republic, as though a change of dynasty had occurred. The Chinese term was added after the Japanese term for personal cheque, and the title of the Changhua Bank was amended to delete the Japanese term for company limited by shares. Otherwise, the cheques continued in use until their expiry date in February 1952.

E. Family and Inheritance under the Nationalists

In family and inheritance matters the pattern was similar. The relevant chapters of the Republic of China Civil Code did contain many provisions reflecting traditional Chinese patriarchal attitudes, but in comparison with the corresponding provisions in force under Japanese rule, they were more influenced by modern Western thought. For example, they stipulated that both male and female children could inherit property. Furthermore, many of the Chinese who migrated to Taiwan with the Nationalists came from urban areas on the mainland. These were the areas where the government had been able to implement the modern civil and commercial codes, so these migrants already had experience of them.

F. Recent Developments

From the 1950s until the present day, the two waves of Chinese immigrants have together developed Taiwan's Westernised civil and commercial law. During the 1950s, the government in Taiwan, with the encouragement of the American Aid Commission, began drafting the Law on Transactions Secured by Personal Property (*Dongchan Danbao Jiaoyi Fa*). This was enacted in 1963 and implemented the following year. By introducing the American system of mortgage over personal property (which did not exist in German law), this legislation made it easier for the Taiwanese industrial, commercial and agricultural sectors to take out bank loans (banks could thenceforth obtain securities for their loans without possessing the objects provided for security).²⁹ This was the first time structures taken from common-law countries entered Taiwan's civil and

commercial legal system; such borrowing had not occurred under the Japanese. From this time forward, the reception of Western law would no longer be limited to continental law. Similarly, the Securities Exchange Law (*Zhengquan Jiaoyi Fa*), which was first drafted in 1962 and then enacted and implemented in 1968, was prepared with the participation of American advisers and adopted the American law of securities administration (Lai, 1984: 3–7). The existing continental-style, capitalist legal system, together with the newly introduced American-style regulations concerning commercial transactions, strengthened Taiwan's market economy, and caused Western-style laws to permeate even more deeply into the everyday life of the Taiwanese (Su, 1993: 268; Wang, 1996: 61–2).

Moreover, in the 1980s, the family and inheritance chapters in the Republic of China's Civil Code, which were originally rather conservative, began to evolve in the direction of recognising rights of gender equality. For example, in a 1985 amendment, property registered under a wife's name was no longer taken in principle to form part of the husband's property (Civil Code, art 1017). Further, in circumstances leading to the termination of a marriage such as divorce, or the death of a spouse, both spouses could seek half of all the assets gained while the relationship existed (Civil Code, art 1030). Again, a legislative measure in 1996 retrospectively extended the principle that property registered in the wife's name belongs to the wife, to property acquired before the 1985 amendment to art 1017 came into force. And in 1996, the Civil Code provision providing that where the parents disagree over how a child's rights should be exercised, the father's will should prevail, was amended to stipulate that where a disagreement arose, the court would determine the matter in the best interests of the child (Civil Code, art 1089). This amendment was triggered by a 1994 decision of the Council of Grand Justices in which they held that the original provision violated the constitutional guarantee of equality between the sexes.³⁰

This certainly does not mean that Chinese customary law has completely disappeared in Taiwan. There are many women in present-day Taiwan who, under the influence of the traditional Chinese custom that only men can inherit family property, renounce the right of inheritance they enjoy under Westernised positive law. They either willingly do this, or are driven to it because of their personal relationships. It is true that people have the right to renounce under the positive law. However, apart from the unfavourable situation where inherited debts exceed assets, why would many women be willing to give up this benefit? This must be due to the influence of the old values that they or their relatives continue to hold.

Similarly, even in joint stock companies, which have a very 'up-to-date' feel about them, practices carried over from the structure of the traditional Chinese 'pooled capital' firm (*hegu qiye*) can be seen in actual

company organisation and operation. For example, 'family firms' are in the majority, shareholders normally agree together on people chosen to manage firms, and so on (Wang, 1997a: 325, 328).³¹ And although this article has repeatedly referred to the gradual expansion of modern financial structures, such as banks, which has led to Western-style mortgages becoming popular in Taiwan, traditional Chinese communal financial structures – such as rotating credit associations (*hehui* or *biaohui*) – are still strong and effective in Taiwanese society.³²

V. Conclusion

Chinese have been migrating to Taiwan in large numbers since the beginning of the seventeenth century, and today they constitute the major ethnic groups in Taiwan. The first wave of Chinese immigrants began to come into contact with modern Western law from the end of the nineteenth century. This was when Taiwan was a colony of Japan, a nation that had already received modern continental law. After 50 years of Japanese rule, the Taiwanese had gained considerable familiarity with Western-style legal systems. The second wave of Chinese immigrants, on the other hand, participated on the mainland in the movement for westernising the law. From 1945 they brought legal codes, also based on modern Western law, to Taiwan and, together with the first wave of immigrants, implemented this form of positive law in Taiwan.

Over the last 10 years or so, as the effects of Chiang's Nationalist authoritarian rule fade away, and as Taiwan's capitalist economy has continued to prosper and grow, ideas of Western constitutionalism have gradually flourished, in contrast to the traditional Chinese idea of 'using law as a tool for autocratic rule'. In addition, many civil and commercial legal forms, deriving from modern Western capitalism, have gained widespread acceptance among Taiwanese-Chinese. It is undeniable that Chinese society in present-day Taiwan still retains many aspects of traditional Chinese legal culture. But we can also say that, at the least, the Taiwanese-Chinese today live in a legal culture which is almost entirely different from that of their ancestors 100 years ago, and the essential reason for this is that the elements of modern Western law have now been incorporated into their society.

Notes

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(Translator's note) The Pinyin system of transliteration is used in this article. However, this system is not officially used in Taiwan, which, generally speaking, uses the Wade-Giles system. Where an official Taiwanese transliteration is known, that is used.

- 1 For a detailed discussion of the scope of actual control by political authorities in Taiwan, see Wang, 1997a: 265–72, 277–8.
- 2 Kinmen and Matsu are defined as parts of Fujian Province in the law of the Republic of China so as to avoid the limitation of that government's effective territorial area to Taiwan alone.
- 3 Pinyin: *Guomindang*.
- 4 Discussion here concerns the situation on the island of Taiwan itself. Chinese had settled on the Pescadores in the twelfth century during the Song Dynasty; see Wang, 1997a: 263.
- 5 (*Translators note*) Koxinga (*Zheng Chenggong*) (1624–62) was a leader of anti-Qing resistance forces in China. He moved to Taiwan after the Manchu Qing defeated Ming forces on the mainland.
- 6 (*Translator's note*) 'Fulao' is derived from Fujian Province, and *lao* 'people'. 'Lao' also has the connotation of 'hillbilly'.
- 7 Owing to contact and intermarriage between the groups, the loss of ethnic languages resulting from the sole official language being Mandarin (the 'National Language') and similar factors, the differences between the three Chinese ethnic communities are gradually blurring. However, differences in perspective still remain because of their diverging historical experiences, and variations in political and economic status.
- 8 It is possible that a number of ancient Chinese writings are accounts of Taiwan, but this is mainly conjecture. The State of Wu during the Three Kingdoms Period (AD 222–80) and the Sui Dynasty (AD 581–618) sent troops to places such as 'Yizhou' and 'Liuqiu' (which did not have a fixed meaning at that time). They are thought to refer to present-day Taiwan. Yet these were only cases of 'setting fire to the seats of government, taking thousands of men and women as prisoners, loading military materials and returning home' (*fen qi guanshi, yu qi nannü shuqian, zai junshi er yuan*). This is relatively similar to invading another country; it is not obviously including that area in China's territory, establishing an administrative post and demanding that the people there pay tax and render service (*naliang yingcha*). Although Chinese people migrated to the Pescadores during the Song Dynasty, and some scholars claim they were subject to the jurisdiction of Jianjinjiang County, the Song historical records recovered by officials during the Ming Dynasty do not record South Song jurisdiction over the Pescadores, so this is still a matter of doubt. See Zhou, 1997: 46–7; Wang, 1997a: 262–3.
- 9 (*Translator's note*) The author here is alluding to the fact that the Qing was a Manchu, not a Han Chinese, dynasty.
- 10 After the central government of the Republic of China moved to Taiwan in 1949, although it retained its previous title, there was a very important change with respect to two major elements that constitute a nation: territory and population. The Republic of China possessed only Taiwan and its population and was thus not the same Republic of China to whose political authority over China the PRC had succeeded: see Wang, 1997a: 276–8.
- 11 The first wave of immigrants to Taiwan were subject to Japanese rule from 1895. Before the end of the nineteenth century the Japanese had, to a significant degree, introduced into Taiwan a Western-style judicial system, a criminal code and so on. The introduction of a similar Western-style system into mainland China occurred at the beginning of the twentieth century. Some of the people who experienced this change in legal systems later migrated to Taiwan as part of the second wave of migrants: see below, section II.
- 12 Japan's introduction of a Western-style legal system had already been largely completed by 1890; Japan had possessed codes drafted on continental, especially Prussian, legal models, including a Constitution, the Law of the Organisation of the Court, the Criminal Code, the Code of Criminal Procedure and other important codes. Although a draft of the Civil Code had already been promulgated in 1890, its full implementation was delayed until 1898, after Japan had occupied Taiwan. For a general introduction on this issue, see Ryosuke, 1958: 366–538; Wang, 1995b: 1–15.
- 13 (*Translator's note*) That is, the law of Japan proper.
- 14 Because the Republic of China government drew close politically to the USA, aspects of modern Western law from common law legal systems began to enter the continental-style

legal system of Taiwan. This was particularly the case with laws relating to commercial transactions: see 'Recent Developments', pp 224–6 of this article.

- 15 (*Translator's note*) This is the judicial organ in Taiwan empowered to interpret the Constitution.
- 16 For example, for a long period, according to the Provisions for the Eradication of Hoodlums (*Jiansuxiao Liurang Tiaoli*), prosecutorial authorities could compel a person to answer a summons without having to initiate any judicial process, and when those prosecutorial authorities issued a reprimand to a person designated a 'hoodlum', then, apart from raising an objection with the Police Department of the Ministry of the Interior, that person could not lodge an administrative appeal or commence administrative litigation. Moreover, according to the Code of Criminal Procedure, a prosecutor had the power to detain an accused person. But very recently, the Council of Grand Justices, citing the relevant guarantees of personal liberty in art 8 of the Republic of China Constitution, held that these provisions were invalid (Interpretations 384, 392). Their interpretations turned on the Western idea that the imposition of a penalty requires due process. Similarly, art 1089 of the Civil Code provides: 'Where the parents disagree over the rights exercised over children, the rights shall be exercised by the father'. This provision was in force for many decades, and it is only recently that lawyers called for a constitutional interpretation of it on the grounds that it violated the constitutional requirement of gender equality. The Council, based on the concept of 'gender equality' originating in the modern West, declared that the provision was invalid (Interpretation 365). See also below, n 29 and accompanying text.
- 17 Sonobe Satoshi, who at that time served as a professor at the Imperial University in Taipei, made the frank comment that 'the implementation of constitutionalism in Taiwan is still incomplete. There is no separation between legislative and executive power; . . . there is only frail protection given to the freedom and rights of the common people': see Wang, 1997a: 221. Moreover, there was at that time no colonial parliament in Taiwan.
- 18 For more detail, see Wang, 1997a: 223–5, 229–30.
- 19 (*Translator's note*) This refers to a massacre of Taiwanese, which took place on 28 February 1947.
- 20 (*Translator's note*) The son of Chiang Kai-shek. He became President of the Republic of China in 1978 and remained President until his death in 1988. In 1987, he lifted martial law on Taiwan.
- 21 Under the imperial system there was no organ reflecting the popular will that could supervise the bureaucracy and the emperor for the purpose of preventing corruption in civil administration. There was only a specialist office of supervisors established within the bureaucracy for overseeing officials. However, in a system of democratic government, if there is already a parliament, what need is there for such a 'Control Branch' (*jianchayuan*)? The separation of powers that results from the existence of the Control Branch in fact leads to the loss of the Legislature's ability to supervise executive organs efficiently, and indirectly expands executive power. For example, it is the Control Branch, rather than the Legislature, that has the power to investigate the conduct of officials. In addition, under the present system, members of the Control Branch are nominated by the President, who is part of the executive arm of government. It is therefore hard to expect that they would strictly supervise the administration. Furthermore, the sanction the Control Branch can ultimately impose is simply to refer the matter to the Public Functionaries Disciplinary Committee, which is a part of the Judicial Branch. It cannot conduct impeachment proceedings itself. As for the Examination Branch, and its separation from the Executive Branch, the problem here is overlapping functions. This has led the executive branch to establish a separate Bureau of Personnel Administration, which exercises equivalent examination powers concerning the officials in this branch. Granted, examinations should be kept independent from political influence, but the examination which generates the most public confidence in Taiwan, the High School General Examination, is in fact administered by the Executive Branch. It is fair to say that, while we may concede that the independence of bodies exercising powers of supervision and examination should be strengthened, this does not require that separate 'branches' of government be set up on the same level as the legislature and the executive.

- 22 For the complete text of the articles, see Wang, 1997a: 305.
- 23 (*Translator's note*) Professor Wang has provided further clarification of the nature of the *tai* in his doctoral thesis:
 According to Taiwanese custom, the *tai* was the deposit of a title deed in an immovable object or immovable rights, which traditionally served as the evidence of a proprietary right by way of security for a loan. The holder of the *tai*, however, neither possessed immovable objects nor immovable rights nor could he use and take the fruits thereof, although he could receive interest from the debtor. He naturally had no way to obtain payment by selling the debtor's immovable objects or immovable rights. (1992: 345)
- 24 See Wang, 1997a: 311–15.
- 25 (*Translator's note*) Various forms of *dian* have existed in Chinese society. Professor Wang explains in his thesis (1992: 343–4) that in Taiwan, the *dian* consisted of the transfer of possession in immovable objects or immovable rights to a creditor. The creditor could then use and take advantage of the object or right. The debtor had no obligation to pay interest on the loan. If the debtor failed to repay the loan at the stipulated time, the *dian* holders might not obtain payment by selling or otherwise disposing of the transferred object or right but could instead continue to use them until the debts were paid.
- 26 (*Translator's note*) Professor Wang has indicated that under this form of mortgage the debtor furnished security for an undetermined number of debts within a fixed amount.
- 27 (*Translator's note*) This is a right to use the land of another for constructing houses and growing trees.
- 28 (*Translator's note*) This is a right to conduct agricultural activities on another's land, subject to payment of rent.
- 29 See Wang, 1996: 36–7. In 1953, to facilitate industry financing through the banks, the Taiwanese government examined Japan's system of mortgages for financial associations. The government then enacted the Industrial and Mining Mortgage Law (*Gongkuang Diya Fa*) and the Implementing Provisions for Registering Industrial and Mining Associations (*Gongkuang Caituan Dengji Banfa*), but these were repealed when the Law on Transactions Secured by Personal Property came into force: Wang, 1996: 35. The 1953 laws were probably enacted because the Nationalist Government wished to continue the system of financial association mortgages established in Taiwan under Japanese rule. However, since considerations of political power determined which country's law would be accepted, when Taiwan began to depend on American aid, it switched to American legal models.
- 30 See Interpretation 365. It is true that the Council of Grand Justices has made a considerable contribution to the protection of women's rights and interests. However, certain of their other decisions leave room for debate. For example, in Interpretation 372, the Council reviewed a decision of a lower court that held:
 Where one party to a marriage is subject to such ill treatment that continued cohabitation is unendurable, she or he can petition for divorce. However, when the conduct of one of the parties is indecent (*bujian*) and the other party temporarily reacts in anger, engaging in excessive conduct, this does not constitute unendurable ill treatment.
 The Council, while stating that the Constitution ensured the protection of human dignity and personal safety, also maintained that 'society also expected that the institution of marriage would be protected'. They concluded that the lower decision was constitutional.
 This interpretation is relevant to domestic violence cases. In such cases, the victims are usually women, because they generally have weaker physical strength. Consequently, the interpretation is tantamount to reducing the extent of legal protection afforded to women. It may be suspected of condoning the right of punishment, which traditional China allowed husbands to exercise against wives. However, it is captive to the traditional Chinese idea of 'urging unity, not separation' (*quan he bu quan li*).
- 31 Of course, in Western company law, similar 'closed corporations' and 'shareholder agreements' can develop. What is emphasised here is that the family firms and other organisational practices already existed in the 'pooled capital' arrangements; they were not modelled on Western legal forms.
- 32 A *hehui* is an organisation of more than two people, convened by a meeting head (*huishou*), where the parties mutually agree to put in capital at regular intervals on the

basis that they will also receive sums from the pooled contributions of the group. The first person to receive a sum from the contributions (without interest) is the head. Subsequent sums are taken by other members of the group according to a system previously agreed on by the members. The head collects contributions from each member and pays them to the member who has bid for them in a particular instance. This system is still widespread in Taiwan and the Civil Code has been amended to regulate it. See Winn, 1994: 214–16.

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