

CHAPTER 4

TAIWAN

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[4.0.1] Taiwan is a small, rich, and somewhat chaotic but vigorous country. Having been ruled by six regimes in nearly 400 years, Taiwanese society has had a mixed inheritance of Eastern and Western legal traditions, including Chinese and Japanese influences, so that its present legal system is more complex than might be expected. This chapter will discuss Taiwan's legal system from normative and practical perspectives, so as to demonstrate the system's various facets.¹

I. Introduction — Socio-Economic Background

Geography

[4.1.1] Taiwan (sometimes called 'Formosa') is an island located on Asia's Pacific Rim, between Japan and the Philippines. The Taiwan Straits, an expanse of ocean about 165 km wide, separates the island from mainland China. It has a total area of 36,000 km², a little larger than the Netherlands and a trifle smaller than Switzerland.² Compared to its neighbours, Taiwan is a small country.

Mountains dominate much of Taiwan, with human settlement primarily located along the western and southern coastal plains. Only 25–30 per cent of the island is suitable for agriculture and, although Taiwan has modest deposits of coal, petroleum, and natural gas, generally it is resource poor.

Since World War II, Taiwan has undergone rapid urbanisation, with over 70 per cent of the population of 21,000,000 living in or near cities. The capital city of Taipei is home to 3.5 million people, and even more people live in suburban Taipei county.³ 2.7

1. I thank Professors H Ma and J Hwang, National Taiwan University (NTU), for providing helpful materials. Special thanks also to M J McGinn and Professor S Cooney, who revised the English in the manuscript and gave valuable comments. I remain responsible for any opinions or errors herein. During the writing of this chapter, my father became ill, and on 21 April 1996, the day on which I completed the first draft of the manuscript, he died. This paper is dedicated to the memory of my beloved father, Wang T'ien-szu (1931–96).
2. See Cohen (1992), p 8; Hsieh Chiao-min, 'The Physical Setting of Taiwan' in *Taiwan in Modern Times*, Sih (ed), St John's University, New York, 1973, p 2.
3. See Cohen (1992), p 10.

[4.1.2] The term 'Taiwan' is not restricted to Taiwan Island itself, but refers also to the Pescadore Islands and other 'subordinated islands'. The Pescadore Islands, a chain of 64 small islands to the west (known as 'the Pescadores'), have a total area of 126 km² and a long historical association with Taiwan proper. There are 15 tiny islands off Taiwan Island itself, such as Green Island, Orchid Island, Shiaoliuchiu and Tiaoyutai Island (under protest) which are geographically subordinate to Taiwan. It is questionable whether Kinmen Island and Matsu Island, very small islands located off the coast of mainland China, are part of Taiwan. Because these two islands have been controlled by the government of Taiwan since 1949, they are regarded as politically subordinated islands of Taiwan.⁴ Similarly, Tungsha Island and Taiping Island in the South China Sea are subordinated islands of Taiwan.⁵

Composed as it is of the islands mentioned above, Taiwan has constituted a de facto independent state since 1949. It is referred to as 'the Republic of China' (ROC) in the domestic official law, but is now referred to as 'the Republic of China in Taiwan' within the international community. Due to the objections of the People's Republic of China (PRC), most countries in the United Nations, and in the world generally, do not have official diplomatic relations with Taiwan, but they do maintain close economic ties with this prosperous country.⁶

Ethnic groups

[4.1.3] The earliest inhabitants of Taiwan were possibly the ancestors of today's Aborigines, who account for merely 1–2 per cent of Taiwan's population. In terms of race, Taiwan's Aborigines belong to the Proto-Malay group and are different from the Han Chinese, another race in Taiwan. Linguistically and culturally, the Aboriginal peoples are akin to the Malayo-Polynesian peoples of the Philippines and other parts of South-Eastern Asia.⁷ Aborigines in Taiwan have suffered oppression from foreign rulers and colonising peoples for nearly four centuries. Early plains-dwelling Aborigines, the Pingpu peoples, are now almost extinct due to assimilation with Han Chinese. Presently, there are nine distinct ethnic groups among Taiwan's Aborigines, dwelling in the plains area and mountainous regions. The culture and lifestyle of Aborigines in Taiwan has changed dramatically over the years. Many young Aboriginal people move to the cities and are usually not as fluent in their ancestral language as they are in the Han Chinese language.⁸

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4. The government of China (PRC) was founded in 1949, and has never controlled these two islands.
 5. Regarding the Kinmen Islands, Matsu Islands, Tungsha Island and Taiping Island, see *The Republic of China Yearbook 1995* (referred to as *The ROC Yearbook 1995*), Government Information Office, The Republic of China, Taipei, 1995, pp 23–5.
 6. See G Klintworth, 'Australia–Taiwan: The Evolving Relationship' in Klintworth (1994), pp 267, 289–91.
 7. See Wang (1992), p 28.
 8. See *The ROC Yearbook 1995*, pp 34, 38–9.

[4.1.4] The Han Chinese, the dominant race in Taiwan, may be divided into three sub-groups. The largest sub-group, about 70 per cent of the total population of the islands, is Southern Fukienese. In the twelfth century, some Han Chinese who were from the southern Fukien Province of China, and spoke a Fukien dialect, migrated to the Pescadores. From the early seventeenth century onwards, especially in the eighteenth century, numerous Southern Fukienese crossed the Taiwan Straits and settled in Taiwan proper. These people were ruled by the Dutch Republic (1624–62), the Cheng Kingdom (1662–83) and Ch'ing China (1683–1895) before Japan occupied Taiwan in 1895. In the late seventeenth century, another group of Han Chinese, speakers of the Hakka dialect from Kwangtung Province of Ch'ing China, began large-scale migration to Taiwan. The Hakka form about 10–15 per cent of Taiwan's present population.⁹ Although these two sub-groups speak different dialects, they share the experience of the Japanese rule of Taiwan (1895–1945) during which the Taiwanese identity gradually emerged. Both of these sub-groups suffered political discrimination by the Kuomintang (or KMT, the Chinese Nationalist Party) government after 1945.¹⁰

The third Han sub-group is the 'Mainlanders', who came to Taiwan from mainland China after World War II, particularly during the period from 1948–50 after the Chinese civil war. Today, Mainlanders, the majority of whom are Taiwan born, make up 12–15 per cent of the total population of Taiwan. When Mainlanders initially arrived in Taiwan, they were often socially segregated from the Taiwanese, and mostly spoke Mandarin Chinese, a language unknown to the other inhabitants of Taiwan who spoke their own dialects or Japanese. Most importantly, those Mainlanders who were supporters of the KMT assumed a near monopoly over political power on the islands until Taiwan's democratisation in the late 1980s.¹¹ Through their overwhelming influence on national education and mass media, Mainlanders spread their China-centred historical perspectives and traditional Chinese values throughout Taiwan, persisting in disseminating a Chinese identity.¹² They disregarded the history and culture of the other two Han Chinese sub-groups, and that of the Aboriginal people, and oppressed any presence of the identity of these Taiwanese.

[4.1.5] In present-day Taiwan, the tension between Taiwanese and Mainlanders has decreased, due to the gradual reduction in language barriers through the promotion of the national language (Mandarin Chinese) movement, along with more intermarriage and the existence of more frequent inter-ethnic social ties.¹³ Issues related to the various ethnic groups, however, will probably continue to influence the political and legal development of Taiwan. For example, some native Taiwanese complain that their history and culture (including lan-

9. See Wang (1992), pp 28–9, 34, 40–1, 48; Cohen (1992), p 13.

10. The Southern Fukienese and Hakkas were initially excluded from the leadership of the KMT government.

11. See Tien (1989), pp 36–40.

12. See, for example, Wilson, *Learning to Be Chinese: The Political Socialisation of Children in Taiwan*, The MIT Press, Cambridge, 1970.

13. See Tien (1989), p 42.

guages) have not yet been treated fairly by the national education system and the mass media. By contrast, some Mainlanders feel that they are oppressed by the majority ethnic groups partly because they have lost their original governing status in Taiwan. The majority of Mainlanders, especially those who were born in China, and some Taiwanese who accepted the ideology instilled by the KMT government for years, continue to identify more strongly with China than with Taiwan. Nevertheless, a large number of Taiwanese and a few Taiwanese-born Mainlanders have begun gradually to cherish Taiwanese culture and to advocate the national identity of Taiwan.¹⁴ In order that all four of these ethnic groups can be considered as a whole, the term 'Taiwanese' used hereinafter, means, unless otherwise stated explicitly or implicitly, those people who presently live in Taiwan, regardless of their ethnic origins.

Economic activities

[4.1.6] Taiwan has experienced considerable economic success. It is the world's 20th largest economy and 13th largest trading nation. In 1993, Taiwan's gross national product (GNP) grew 5.87 per cent to US\$200.1 billion, and the per capita GNP reached US\$10,566, the 25th highest among those countries with a population of over 1,000,000.¹⁵

The Taiwanese seem to have a talent for business. Early in the seventeenth century, the inhabitants of Taiwan were introduced to trade and commerce by Dutch colonial rulers, and were continuously involved in east Asian international trading under the administration of the Cheng Kingdom. When Taiwan was a part of Ch'ing China, trade was maintained between Taiwan and the Chinese mainland. Particularly after four treaty ports in Taiwan were open to the West in 1860, Taiwan's international trade was far more prosperous than any other province in mainland China.

The historical importance of trade in commodities instilled in the people a market-oriented attitude.¹⁶ During the Japanese colonial period, although the Japanese controlled Taiwan's large enterprises, the Taiwanese dominated small and middle-scale businesses. Under the authoritarian rule of the KMT government, most Taiwanese were afraid to participate in politics, and therefore focused their energy on business activities. It is not unusual for a Taiwanese businessperson, suitcase in hand, to search for trading opportunities all over the world.

[4.1.7] Industrialisation and capitalism are well-developed in modern Taiwan. During the Japanese period, Taiwan acquired a sound economic foundation in its agricultural sector and modern infrastructure.¹⁷ Although some new industries were introduced to Taiwan in the late 1930s, it was basically still an agrarian society at the end of Japanese rule.¹⁸ Beginning in the late 1950s, the

14. On this issue, see generally Wachman, *Taiwan — National Identity and Democratization*, M E Sharpe, Armonk, 1994.

15. *The ROC Yearbook 1995*, p 205.

16. Wang (1992), pp 35, 62.

17. See Tien (1989), p 18; see generally Ho (1978), pp 41–106.

18. Ho (1978), p 90.

KMT government took measures to promote export-oriented industrial development, and it met with considerable success, partly because world trade was expanding rapidly with little protectionism. In the 1970s, Taiwan's Government began to emphasise high-tech and capital-oriented industrial development as means of further improving Taiwan's industrial infrastructure.¹⁹ Capitalist social relations continued to evolve as the economy industrialised, and more people entered the ranks of the middle class.²⁰ Today, commerce, manufacturing and service industries employ 75 per cent of the workforce; agriculture now employs just 13 per cent and contributes only 5 per cent to GDP.²¹ Meanwhile, many Taiwanese capitalists who have benefited from industrialisation invest their money in other countries, including China and some South-East Asian countries.

2. Historical Development of Taiwan's Legal System

Pre-modern period (pre-1895)

[4.2.1] The indigenous tribal legal systems of the Aboriginal peoples originated in the days of oral history. Aborigines immigrated to Taiwan several thousand years ago, from different places with different languages and customs. They were ruled by their own customs, and matriarchy appears to have prevailed in those Aboriginal tribes.²² There was no king to unite all of the tribes in Taiwan at that time. From the perspective of Europeans, the island inhabited by Aborigines was merely 'terra nullius' (a Latin phrase meaning 'no one's land').²³

[4.2.2] The first foreign regime on Taiwan was established by Western maritime powers, and was foreign in the sense that the rulers came from outside Taiwan. In 1624, the Dutch Republic began exercising her sovereignty over the south-western plains of Taiwan proper (not including the Pescadore) in accordance with the theory of occupation in Western international law. In 1626, the Spanish began governing the northern part of the island, but they were finally ousted by the Dutch in 1642.²⁴ The Spanish rule was so short that it left little influence on Taiwan's legal system. The Dutch, on the other hand, brought certain western legal practices to Taiwan; for example, the land survey unit of *Kah* (a corruption of the Dutch word *akker*) which was established during the Dutch period, is still in use in Taiwan.²⁵ The Dutch colonial government in Taiwan

18. Ho (1978), p 90.

19. See Tien (1989), pp 19–21.

20. Gold (1986), pp 87–8.

21. Cohen (1922), p 54.

22. See generally Lee Hsiao-feng and Liu Feng-sung, *T'ai-wan li-shih yueh-lan* [Reading Taiwanese History], Tzu-li wan-pao, Taipei, 1994, pp 14–21.

23. P'eng Ming-min and Huang Chao-t'ang, *Taiwan no hoteki chi-i* [Legal status of Taiwan], Tokyo Daigaku Shuppankai, Tokyo, 1976, pp 4–5.

24. With regard to the Pescadores, the Mongol Empire in China (1280–1368) first installed a local administrative office to govern the islands. When the Dutch occupied Taiwan proper, the Pescadores were under the jurisdiction of Ming China. See Wang (1992), pp 28, 31–2, 36.

25. Hung Chien-chao, 'Taiwan under the Cheng Family 1662–1683: Sinicization after Dutch Rule', Ph D dissertation, Georgetown University, 1981, p 68.

adopted a system of legal pluralism; the Europeans (ruling people), Aborigines (majority people) and Han Chinese (colonising, but not ruling, people) were all governed by their own separate legal systems.²⁶

At that time, Taiwan proper was one of the colonies of the Dutch East Indies in Batavia (in Jakarta). If the Dutch had not been defeated, and thus left Taiwan proper in 1662, the island would probably have undergone the same fate as Dutch Indonesia.

[4.2.3] The third alien regime in Taiwan was the Cheng Kingdom, founded by Han Chinese. In 1662, Cheng Ch'eng-kung (known as 'Koxinga' in the West) and his soldiers, who were Han Chinese from mainland China, were surrendered to by the Dutch in Taiwan, and imposed their authority over Taiwan proper and the Pescadores. Due to the Han Chinese background of the new ruling group, Taiwan was exposed to traditional Chinese law. However, the socio-economic conditions of Taiwan were, to a certain degree, different from those of the Chinese mainland. Under the rule of the Cheng Kingdom, Taiwan's legal system was unique with respect to China under the Ch'ing Empire (1644–1911). For example, unlike the Ch'ing government in enormous, heavily populated China, the Cheng government in Taiwan could maintain tight control over the common people (Han Chinese) through a limited number of officials. However, the Cheng regime governed Taiwan for only 21 years, and therefore did not have time to shape Taiwan into a state like Korea or Japan which possess their own unique legal systems, deeply influenced by Han Chinese legal traditions. In contrast, Taiwan was merged into imperial China after the Cheng regime surrendered to the Ch'ing Empire in 1683.²⁷

[4.2.4] The law of the fourth alien regime, Ch'ing China, had a significant impact on Taiwanese society. The Ch'ing Empire was the first Chinese Government to rule Taiwan proper. Founded by the Manchus, the Ch'ing Empire largely retained the traditional Han Chinese codes, and after it occupied Taiwan in 1683, extended the Ch'ing Code (traditional Chinese official law) to Taiwan. The duration of Ch'ing China's rule over Taiwan, that is, 1683–1895, was long enough to allow Taiwanese society to become familiar with its official institutions. More importantly, during the Ch'ing period, Han Chinese immigrants, who brought to Taiwan the legal customs of their home provinces in China, became the dominant ethnic group in Taiwanese society. At the conclusion of Ch'ing rule in Taiwan, traditional Chinese legal culture had become prevalent throughout the islands.

[4.2.5] It is necessary to trace briefly the legal concepts of traditional China. The ideology of the codes (enacted law, statute) of imperial China was derived from Chinese Legalism and Confucianism.²⁸

According to Legalism, the emperor had exclusive power to make law, which all officials and subjects had to obey strictly. Law was thus a regulatory

26. Wang (1992), p 33.

27. See generally Wang (1992), pp 36–41.

28. See Bodde and Morris (1973), pp 23–5.

tool of the emperor, rather than a means of protecting citizens against the state or resolving private disputes, both of which are considered functions of law in modern Western legal thought.

Most Chinese emperors also admired Confucianism. Traditional Confucianism acknowledged that there existed superior and inferior relations in politics, family and gender: namely, that the emperor was superior to the officials, the elder to the younger and the male to the female. According to Confucianism, everyone was expected to fulfil one's duties in accordance with one's status under these relations, so that the people with inferior status were always to obey the orders of their superiors. This was, of course, welcomed by the person who had supreme status, that is, the emperor. Not surprisingly, Chinese emperors employed law as an instrument to carry out the teachings of Confucianism, so Confucian ethics influenced the substantive contents of the official codes. For example, if an older member of a family assaulted a younger member, he or she would be lightly punished, if at all. On the other hand, if a younger member of a family assaulted an elder, he or she would be seriously punished, and perhaps even receive a death sentence. Imperial Chinese codes possessed the following general characteristics: they were family (not individual) oriented, duties (not rights) oriented, discriminatory and imposed the absolute supremacy of the emperor.

[4.2.6] Local custom also played a significant role in the legal system of traditional China. The Chinese code prescribed punishment for a wide variety of offences and a few non-penal measures (for example, the return of stolen things to their owners) and was similar in nature to what we refer to today as criminal law or administrative law. Criminal matters, in theory, were to be decided in accordance with the official code rather than in accordance with local custom. In practice, however, in places where the control of the emperor was weak, people imposed customary penal sanctions upon criminals, without regard to the official code. Local custom also governed what we refer to today as civil law matters. The official codes included some 'civil law' provisions relating to marriage, possession of land and other matters, but they were few in number. A wide range of civil law matters had therefore to be decided in accordance with local custom. In general, various local customs concerning family institutions (for example, marriage, adoption, kinship and lineage) were influenced by Confucianism, as was the official code. However, local commercial customs with respect to transactions, loans, leases and the like, were generally not affected by Confucian ideology, and varied throughout different geographical regions.

[4.2.7] The Ch'ing Code was poorly implemented in Taiwan. Partly because the code incorporated many provisions which were not suited to the people, who were largely immigrants, (for example, the tight restriction on Han Chinese migrating to Taiwan) the Han Chinese actually disrespected the Ch'ing Code. The corruption and inefficiency of the Ch'ing government further led people to distrust Ch'ing officials' administration of justice. The local customs of Taiwan virtually dominated people's legal lives. For example, the Ch'ing Code prescribed that interest on a loan might not exceed 3 per cent of principal per month. The regulations of the Taiwan pawnshop organisation, however,

contained a fee schedule prescribing monthly interest of 4–8 per cent for loans of less than \$30. Meanwhile, interest charged on commercial loans for shipping varied according to the level of risk involved in the voyage, with the round trip to Foochow costing 7 per cent per month, the round trip to Chenhai costing 15 per cent per month and the round trip to Tientsin costing 20 per cent per month. Thus, the official stipulation concerning interest was a dead letter in Taiwan.²⁹ As Brockman concluded, Han Chinese settlers in Taiwan had developed a highly sophisticated legal system of contract based on custom, although its enforcement was not quite perfect.³⁰

Japanese colonial period (1895–1945)

[4.2.8] In 1895 the Japanese Empire became the fifth alien regime in Taiwan. Wars broke out between Ch'ing China and Japan in 1894, due to a struggle for influence in Korea, and resulted in a ridiculous settlement. By the treaty of Shimonoseki, Korea was recognised as an independent state, but Taiwan, thousands of miles from the fighting, was ceded to Japan.³¹ The people in Taiwan desperately resisted the Japanese invasion of their land, even supporting the establishment by Ch'ing officials of the Republic of Formosa in Taiwan. As a result of this resistance, Japanese rule in Taiwan began with a brutal massacre. The 50 years of Japanese colonial rule have left an indelible stamp on Taiwan.

[4.2.9] One of the most important Japanese legacies to Taiwan was the introduction of the European legal system. Certain traditional Chinese legal measures were retained by the Japanese for the sake of convenience. Eventually, for the purpose of rapidly assimilating the Taiwanese (not including Mainlanders, who did not experience Japanese colonial rule in Taiwan) Japanese law was applied in Taiwan in 1923. As a result, official law in colonial Taiwan is mostly derived from modern Western law rather than from traditional Chinese law. The approach in official law of 'far away from China, march to the West', was initiated by the advent of the Japanese and has continued until the present.³²

[4.2.10] Despite the imposition of Western-style laws on the Taiwanese, it is unclear whether, when under Japanese rule, they adopted the Western legal concepts upon which these laws were founded. Although many Japanese official laws were enforced in Taiwan, and to some extent affected the Taiwanese concept of law, the extent of the transformation seems to have been quite limited, for many reasons. First, pre-war Japanese rulers themselves continued to regard law as simply an instrument for governing people under their authoritarian rule in colonial Taiwan. Under the colonial education system in Taiwan, students learned certain basic skills which were probably Western, but the Western

29. Brockman (1980), pp 85, 88.

30. *ibid*, pp 127–30.

31. During the period of the war, Japanese forces already occupied the Pescadores.

32. See Wang Tay-sheng, 'Pai-nien-lu T'ai-wan fa-lu te hsi-fang-hua' [The Westernisation of Taiwanese Law Over the Last Hundred Years], The Symposium on 'T'ai-wan chin-pai-nien shih, 1895–1995' [Taiwanese History in the Last Hundred Years], Wu San-lien Foundation, Taipei, 15–17 August 1995.

concepts of rights and liberalism were not emphasised.³³ In fact, people in colonial Taiwan did not even enjoy some of the fundamental rights granted by the pre-war Japanese Constitution. Second, the Taiwanese under Japanese rule, due to their law abiding spirit, ordinarily followed Western-style criminal legal institutions, and thus were exposed to principles such as the state's monopoly on the power to punish, the equality of punishment regardless of one's status and due process of law. In addition, they became familiar with Western property law and commercial law under the roughly developed capitalist economy in colonial Taiwan. On the other hand, however, the Japanese official law largely recognised the effectiveness of Taiwanese customary law concerning family and succession matters. These customary laws maintained traditional Confucianist values and deeply influenced the daily lives of Taiwanese. Ultimately, the 50 years of Japanese rule was too short to change radically the Taiwanese concepts of law.

In sum, during the Japanese colonial period, although the Taiwanese (excluding Mainlanders) became familiar with a number of Western legal institutions, they did not become exposed to the essence of modern Western law. That is, law as a means of protecting citizens against the state or of resolving private disputes.

KMT Authoritarian Period (1945–87)

[4.2.11] After the defeat of Japan in World War II, the Chinese Nationalist Party (KMT), the government of the Republic of China (ROC), took over Taiwan on behalf of the allied powers, and established the sixth and last alien regime in Taiwan in 1945. Since 1949, the transformation of Taiwan's legal sovereignty has become increasingly complex. Prior to ratification of a treaty concerning the disposition of the territory of Japan, the KMT government had already lost its actual control over mainland China, where the People's Republic of China (PRC) had been established by Chinese communists in 1949.

The KMT declared its sovereignty over Taiwan on the ground that it was still the legitimate government of China. The PRC countered that it was the sole legitimate government of China, and that China possessed sovereignty over Taiwan. As a result, the San Francisco Peace Treaty of 1951 merely required Japan to give up its sovereignty over Taiwan; it did not designate the recipient of this sovereignty. With respect to Taiwan's status in international law, many asserted that this issue should be resolved by the self-determination of the Taiwanese. From 1945–49, Taiwan was a part of China because the KMT exercised control over Taiwan. However, as of 1949, Taiwan has been a de facto independent state, separate from China. The KMT, which exercises control over Taiwan, has not had sovereignty over China since that time.³⁴ In the

33. See Tsurumi, *Japanese Colonial Education in Taiwan, 1895–1945*, Harvard University Press, Cambridge, 1977, p 144.

34. The KMT has consistently refused to acknowledge that it has lost sovereignty of mainland China.

last 100 years or so (1895–1995), Taiwan has in fact been separate from the government of China for 96 years.

[4.2.12] The KMT government in Taiwan proclaimed in 1945 that the ROC legal system was to become effective immediately, with a few exceptions.³⁵ Thus, the ROC legal system, the basic laws of which were codified in the late 1920s and early 1930s, became effective in Taiwan (even though at the time the laws were drafted, Taiwan belonged to Japan). It is an historical coincidence that the ROC's basic laws generally followed the continental European system (especially German and Swiss law). In fact, the early drafts of ROC law were even done by Japanese jurists; consequently, ROC law was not much different from the Japanese law which had been implemented in Taiwan prior to 1945. Furthermore, the ROC's local government in Taiwan modelled itself on the Japanese government-general in colonial Taiwan, and continued the latter's authoritarian rule. The authoritarian position of the Japanese was merely replaced by the Mainlanders coming from China.

This deeply frustrated the native Taiwanese who had expected to have political participation under the new Han Chinese regime. In 1947, many disappointed people protested, and the barbarous KMT army fired upon protestors and innocent bystanders throughout the island. This incident of 28 February 1947 surpassed the brutality of the PRC's Tiananmen massacre of 4 June 1989. During this ruthless suppression, the KMT government killed a large number of native Taiwanese intellectuals and successfully discouraged the general native populace from participation in the political and official legal system which influenced their daily lives.³⁶

[4.2.13] In late 1949, when the central government of the ROC moved to Taiwan, the KMT government continued to function under the framework of the ROC Constitution of 1946, which was designed for the entire Chinese mainland. Some new laws, enacted after the KMT government moved to Taiwan, were influenced by American law, particularly in the field of commercial law. However, many new laws were enacted to consolidate the power of Chiang Kai-shek, the authoritarian leader of the KMT.

Pursuant to anti-communist laws in 1948 and martial law in 1949, the KMT regime enacted many statutes and regulations which seriously restricted civil and political rights.³⁷ By these measures, the executive branch of the government extended its powers into nearly every aspect of people's daily lives. The executive branch was formally controlled by the party (KMT) but actual control was exercised by Chiang Kai-shek, and after his death, by his son, Chiang Ching-

35. Some Japanese laws remained effective, but they were soon abolished.

36. Wang (1992), pp 401–11. On the incident of 28 February 1947, see generally Lai, Myers and Wei, *A Tragic Beginning, The Taiwan Uprising of February 28, 1947*, Stanford University Press, Stanford, 1991.

37. Temporary Provisions for the Period of Mobilisation and Suppression of (the Communist) Rebellion of 1948 and the Martial Law of 1949 both became effective before the ROC's central government moved to Taiwan.

kuo. Many native Taiwanese, and even a number of Mainlander dissidents, were victims of this authoritarian one party rule.

[4.2.14] In the early 1980s, the political situation in Taiwan changed. The KMT regime had lost its status in most international organisations as the legitimate government of China. The KMT government, then, had to turn to the people of Taiwan for its legitimacy. Meanwhile, a new generation of Taiwanese intellectuals who were influenced by Western liberal ideas began gradually to demand political and legal reform. Eventually, the KMT ruling group led by Chiang Ching-kuo, whose core members were largely Mainlanders, agreed to many of the demands of the Taiwanese people. Martial law was lifted in 1987; several months later, Chiang Ching-kuo died. The KMT authoritarian rule in Taiwan began gradually to decline.³⁸

Taiwanese democratic period (1987– the present)

[4.2.15] From the late 1980s to the early 1990s, a series of political reforms promoted democracy in Taiwan. In 1986, Taiwanese political dissidents successfully established an opposition party, the Democratic Progressive Party (DPP), and began to challenge the KMT-imposed political order. With the trend toward democracy, Taiwan's legal system also began to change. For example, the anti-communist law of 1948 was repealed in 1991. The old Constitution was, to a certain extent, amended in 1991, 1992 and 1994, through the passing of 'additional articles'. Moreover, relatively fair elections were held in the 1990s.³⁹ These elections allowed the KMT government to transform itself from a foreign regime to a native one.

The political reforms in the last decade, however, have not led to significant change in Taiwan's legal system. As one commentator observed, Taiwan's Grand Justices have played an increasingly significant role in promoting legal reform through their power of judicial review.⁴⁰ However, the whole body of statutes and regulations enacted during the authoritarian period has not been carefully reviewed. Some statutes have been retained and only their titles have changed. For example, the words 'the Period of Mobilisation and Suppression of Rebellion' have been deleted from the title of the Assembly and Parade Law, but its contents have remained intact. Further legal reform is clearly necessary in Taiwan.

3. The Constitution and Government

[4.3.1] The following paragraphs contain a concise description of the formal official law in Taiwan. Wherever necessary, legal practice is considered. Since the legal development of Taiwan has already been discussed, the law to be

38. Tien (1989), pp 12–16, 64–104.

39. 1991, 1992, 1994 and 1995, in which all Taiwanese citizens of 20 years of age were entitled to vote.

40. Cooney (1997).

referred to is that presently in effect in Taiwan; those provisions which have been amended are omitted.

The Constitution stipulates that the ROC, founded on the Three Principles of the People, shall be a democratic republic of the people, to be governed by the people and for the people. The Three Principles of the People was the political theory of Sun Yat-sen, first leader of the KMT, and considered to be the founding father of the ROC.⁴¹ The fact that the ideology of the KMT is still cited in the first article of the Constitution reflects the legacy of the original party-state rule in Taiwan. Article 2 of the Constitution states that the sovereignty of the ROC shall reside in the whole body of citizens. The definition of the citizenry of the ROC depends on the definition of the ROC's territory. Article 4 of the Constitution merely states that 'the territory of the ROC shall be defined in accordance with its original boundaries ...'. When the question of whether those boundaries includes Mongolia was presented to the Council of Grand Justices, the council responded that this 'political question' was not appropriate subject matter for judicial review.⁴² The KMT government in Taiwan continues to claim its sovereignty over mainland China (including Mongolia) but refers to it as 'the mainland area', as distinct from Taiwan, 'the free area'.⁴³ In certain laws of the ROC, such as the Employment and Service Law of 1992, however, the people in mainland China are regarded as foreigners.⁴⁴

Rights and freedoms

[4.3.2] One of the important characteristics of the Westernised Constitution is its inclusion of provisions concerning rights and freedoms of the people. Chapter II of the ROC Constitution also provides extensive political, economic and social freedoms which ROC citizens theoretically enjoy. These include, but are not limited to: first, equality before the law regardless of sex, religion, race, class or party affiliation; second, personal freedom (the right of habeas corpus); third, freedom of speech, teaching, writing and publication; fourth, freedom of assembly and association; fifth, the rights to existence, work and property; and, sixth, the right to an education.⁴⁵ However, Art 23 of this chapter enables the freedoms to be restricted 'to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain social order, and to advance public welfare'. Interpretation of this broad exception could virtually abrogate constitutional rights and freedoms. However, in present-day Taiwan, Art 23 has

41. Ma (1985), p 4.

42. See Interpretation 328 of the Council of Grand Justices; see also Cooney (1997), p 174.

43. See Additional Art 10 of the Constitution.

44. The purpose of the Employment and Service Law is to promote the employment of the ROC's citizens (see Art 1) but Art 68 of the Law stipulates that the employment and regulation of those people on mainland China who are employed to work in Taiwan shall, in principle, follow the related provisions concerning foreigners.

45. Arts 7, 8, 11, 14, 15 and 22; see also Ma (1985), pp 7–8; Cooney (1997), pp 175–81.

tended to be interpreted strictly. Consequently, the Taiwanese enjoy more rights and freedoms than before.

Parliamentary structure

[4.3.3] The parliamentary structure in today's Taiwan is unique and, in the opinion of this author, strange. Having been influenced by the theory of Sun Yat-sen, the Constitution provides for a National Assembly. The 325 members of the current National Assembly were elected by the Taiwanese citizens for a four-year term in 1996.⁴⁶ The members of the National Assembly exercise their powers as follows: first, to submit a proposal with regard to the recall of the president and vice-president, which is later decided by the Taiwanese citizens; second, to pass a resolution on the impeachment of the president and vice-president instituted by the Control Yuan (discussed later); third, to amend the Constitution; and, fourth, to review the appointment of certain personnel nominated by the president.⁴⁷

In addition, again based on Sun Yat-sen's theory, the ROC Government powers are separated into five, and vested in five independent departments called *yuan*. That is, the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan and the Control Yuan.⁴⁸

[4.3.4] Under the Constitution, the Legislative Yuan is 'the highest legislative organ of the state'. The members of the Legislative Yuan are also elected by the Taiwanese citizens for a three-year term.⁴⁹ Its functions are mainly: first, to exercise general legislative power on behalf of the people; second, to hear reports on administration presented by the head (premier) of the Executive Yuan and to request the Executive Yuan to alter important policies; third, to examine the budget of the state; fourth, to review the appointment of the head of the Executive Yuan nominated by the president; and, fifth, to submit a bill for amendment of the Constitution to the National Assembly.⁵⁰ Therefore, the role of parliament in Western countries is jointly filled by the National Assembly and the Legislative Yuan in the ROC.⁵¹

[4.3.5] Nevertheless, Taiwan's parliamentary system is not quite the same as the system of an Upper House and a Lower House which exists in most countries of the British Commonwealth. In the British system, a statute must be

46. See *The ROC Yearbook 1995*, p 96.

47. See Additional Arts 1 and 2 of the Constitution. The National Assembly had power to elect and recall the president and vice-president, but since 1996 the president and vice-president have been directly elected by the Taiwanese citizens. The power to recall the presidency should therefore be exercised directly by the citizens. However, in accordance with the additional articles, the recall must be initiated by proposal of the assembly, which is motioned by one-quarter of all members of the assembly, consented to by two-thirds of such members and then passed by more than half of the valid ballots to recall cast by more than half of all voters in Taiwan.

48. Ma (1995), p 5.

49. The members presently stand at 165 after the 1995 election.

50. See Arts 57, 62, 63 and 174 of the Constitution.

51. *The ROC Yearbook of 1995*, p 95.

passed by both Houses and special procedures exist for resolving deadlocks between them.⁵² In Taiwan, a statute may be enacted by the Legislative Yuan without the involvement of the National Assembly, and there is no institutional way to resolve a conflict between these two 'parliaments'. Some have proposed abolishing the National Assembly because, as of 1996, the president is directly elected by the people rather than by the National Assembly. Moreover, the Constitution can be amended through referendum without submission of a bill by the National Assembly.

[4.3.6] Another question which is not resolved is whether the president or the head of the Executive Yuan (premier) has the ultimate decision-making power with respect to the administration of the state. According to the Constitution, the president, as the chief of the state, represents the country in its foreign relations and at state functions. All acts of state are conducted in his or her name. The president also has power to nominate the head of the Executive Yuan and the Auditor-General of the Control Yuan, with the consent of the Legislative Yuan. In addition, the president has the power to nominate the head and vice-head of the Judicial Yuan, the Examination Yuan and the Control Yuan, as well as the Grand Justices, members of the Examination Yuan and members of the Control Yuan, with the consent of the National Assembly. The president may also, by resolution of a council of the Executive Yuan, issue emergency orders to deal with national crises, and later present them to the Legislative Yuan for ratification. When there are disputes among the various yuans, the president may initiate mediation.⁵³

Nevertheless, when the president issues decrees, the countersignature of the head of the Executive Yuan, or countersignatures of both the head of the Executive Yuan and ministers or chairpersons of the commissions concerned, are required by the Constitution⁵⁴ Moreover, the Constitution clearly states that the Executive Yuan shall be 'the highest administrative organ of the state', and is 'responsible to the Legislative Yuan'.⁵⁵ It therefore seems that the head of the Executive Yuan has the supreme decision-making power, and thus should be responsible for the administration of the state.

This legal issue, in fact, did not present any difficulty in the past because the leader of the KMT always possessed supreme power. As a result, this question was not settled during the most recent amendment of the Constitution. As of 1996, the current president has been directly elected by the Taiwanese citizens and, in fact, has exercised more political power on the basis of prevailing popular support. Hence, adequate supervision of the president has become absolutely necessary in law. Unfortunately, this supervisory function is not assumed by appropriate institutions under the current Constitution because the Legislative Yuan is only able to supervise the Executive Yuan, not the president. Moreover, the National Assembly can only propose to recall the president and vice-

52. Chisholm and Nettheim (1992), p 49.

53. See Chapter II, Additional Art 2.

54. Art 37.

55. Arts 53 and 57.

president under exceptional circumstances, and impeach them after proceedings instituted by the Control Yuan, whose head and members are nominated by the president.

Examination and Control Yuans

[4.3.7] The Examination Yuan and the Control Yuan were instituted separately from the other three yuans, because Sun Yat-sen thought that the examination and censor systems in imperial China could remedy problems resulting from the Western separation of government power into three branches.⁵⁶ The Examination Yuan is in charge of examinations for civil servants, professionals, technicians and others.⁵⁷

[4.3.8] Under the amended Constitution, the Control Yuan exercises the powers of impeachment, censure and audit, and is regarded as a quasi-judicial organisation whose members must independently, over party affiliation, exercise their powers.⁵⁸ The Control Yuan may institute impeachment proceedings against a public functionary, including the president or vice-president, who is deemed guilty of dereliction of duty or in violation of law. However, the final disposition in cases involving civil servants or military personnel is decided by the Committee on Discipline of Public Functionaries under the Judicial Yuan, and, for the president or vice-president, by the National Assembly.⁵⁹ Similarly, the Control Yuan may censure a functionary whose offence is punishable by at least an immediate suspension of duty or penalty, and then the superior of the censured person must deal with the matter in accordance with the Law on Discipline of Public Functionaries.

In addition, the Control Yuan may investigate the operations of the Executive Yuan and its subordinate organisations and propose corrective measures, and then the Executive Yuan or its subordinate organisations must take appropriate action. Finally, the Control Yuan supervises the budget execution of all government organisations. It is controversial that the administration of the Executive Yuan may be challenged by the Control Yuan, whose members are not elected by the people. (The Judicial Yuan of the central government will be discussed, together with the court system, below.)

Local government

[4.3.9] There are three levels of local government in Taiwan. The two provincial governments (Taiwan and Fukien) are subordinate to the central

56. See Ma (1985), pp 5, n 4.

57. For example, those in charge of civil servants' personnel matters, such as employment, registration, service-rating, commendation, pecuniary aid in case of death, retirement and the old age pension. Since 1967, however, the Personnel Administrative Bureau has been established under the Executive Yuan according to the Temporary Provisions, and then the additional articles, because it is impractical to deprive the Executive Yuan of all powers relating to civil servant personnel matters: see Art 83 of the Constitution.

58. See Additional Art 6 of the Constitution.

59. See Interpretation 262 of the Council of Grand Justices.

government but, with municipalities and counties, exercise some delegated powers.⁶⁰ Taiwan's provincial government is led by the governor who, with the provincial council, is elected by the people. The Fukien provincial government supervises Kinmen and Matsu, two very small counties, and its governor and provincial council are nominated by the central government.⁶¹

Taipei's and Kaohsiung's city governments, composed of an elected mayor and city council, are directly subordinate to the central government. The heads and councils of the counties and townships are also elected.

[4.3.10] There is unnecessary duplication in administrative structure and in the division of authority between the central government and the Taiwan provincial government.⁶² The governing population of the Taiwan provincial government constitutes about 80 per cent of that of the central government.⁶³ The territory belonging to the Taiwan provincial government occupies about 98 per cent of that belonging to the central government. Some believe that it is unnecessary to have four administrative levels in such a small country. The problems arise from the presumption in Taiwan's official law that Taiwan (not including Kinmen and Matsu) is only a province of China.

4. Sources of Law

Statutes

[4.4.1] The most important sources of law in Taiwan, as in other countries whose legal systems are based on the European legal system, are the statutes enacted by the legislature. Several basic codes were enacted to deal with fundamental legal relationships, and a large number of individual supplementary statutes have also been enacted. For example, in a dispute arising out of the purchase of a new car from an automobile dealer, the Civil Code will govern basic issues, such as whether both parties have the capacity to enter into a contract of sale, and whether there is a real agreement between them. If the buyer paid with a cheque, an individual statute, the Law of Negotiable Instruments, will be applicable. If the car has certain flaws, another special statute, the Consumer Protection Law, may be applied in addition to the Civil Code. In adjudicating such a case, the judge must apply those provisions in the Civil Code and other statutes as rules of law.

Civil Code

[4.4.2] The basic codes in Taiwan's legal system will be briefly introduced. First, the Civil Code follows the arrangement of its German archetype, and

60. See Arts 107–11 of the Constitution.

61. See *The ROC Yearbook 1995*, pp 115–23.

62. Tien (1989), p 105.

63. Almost all of the remaining 20 per cent are governed by the Taipei and Kaohsiung city governments. The Fukien provincial government governs a very small number of people.

contains five books: that is, the Books of General Principles, Obligations, Rights over Things, Family and Succession.⁶⁴ The first three books, collectively referred to as 'the property law', incorporate the fundamental concept of individualism with its three basic principles of absolute ownership, freedom of contract and responsibility for negligence. The other two books, usually called 'the status law', are also, in principle, modelled on modern European law. However, due to the impact of the patriarchal system in traditional society, certain provisions in the Books of Family and Succession to some degree favour the male. These discriminatory provisions are being modified. For instance, Art 1089 provides that when parents are divided on how to exercise rights on behalf of their child, the father's decisions take priority. This provision was held to be unconstitutional by the Council of Grand Justices in 1994, because it violates the provision guaranteeing gender equality.⁶⁵

[4.4.3] Taiwan does not have a separate commercial code. Commercial matters are provided for either in the Book of Obligations, or in the four 'special laws regarding civil matters' called the Company Law, Law of Negotiable Instruments, Insurance Law and Admiralty Law. These laws basically follow European law, but have been increasingly influenced by Anglo-American law through several revisions.⁶⁶ Sometimes, these statutes have not had the effect on Taiwanese society which was originally anticipated. For example, a cheque is designed to be a payment tool, like cash, under the Law of Negotiable Instruments. However, Taiwanese people often use so-called 'post-dated cheques' in a credit transaction.

Criminal Code

[4.4.4] The Criminal Code is a fundamental law which adopts many criminal law principles of European law.⁶⁷ In addition, there are a number of special criminal statutes concerning national security, corruption, economic regulation, etc. The punishments for offences in these special statutes are often more severe than those for similar offences in the Criminal Code.

Civil procedure

[4.4.5] Major procedural provisions dealing with civil matters are also codified. An action is instituted by filing a petition with the civil court, specifying the parties and their agents and the subject matter and containing a statement of the matters for adjudication. In principle, the court may not render a judgment on any matter not mentioned by the parties, and so the judgment will be based on the legal points and facts that have been raised by the parties. A party who alleges a fact in his or her favour has the burden of proof with respect to it. The

64. See Ma (1985), pp 12–17.

65. See Interpretation 365 of the Council of Grand Justices; see also Cooney (1997), p 178.

66. See Ma (1985), pp 17–20.

67. For example, the provision that a person may not be punished except when expressly provided by law, sentencing without regard to the social class of the accused and the limiting of criminal liability to the accused only, not his or her family members.

parties may retain attorneys to represent them in the proceedings, or they may appear *pro se*.⁶⁸

The court of first instance conducts the preliminary proceedings to elucidate the points at issue and investigate related evidence, and then commences the oral proceedings for making a judgment.⁶⁹ Those proceedings may be simplified in a 'summary procedure' which is applied to civil litigation concerning small amounts of money, or to certain kinds of civil disputes.⁷⁰ A party dissatisfied with the judgment may make an appeal to the court of second instance.

The appellate court may re-examine both questions of law and of fact raised by the parties before it renders its judgment.⁷¹ A re-appeal may be made against the judgment of the court of second instance where the potential benefit from such a re-appeal exceeds NT\$300,000. The court of third instance reviews the legality of the reasoning rendered by the court of second instance, and its decision is final.⁷² Only under certain exceptional circumstances may a final decision be challenged by instituting an action for retrial.⁷³

[4.4.6] The Code of Civil Procedure also provides for reconciliation and compromise in court, which is, in effect, an agreement between the parties. Reconciliation is required, with a few exceptions, in actions subject to summary procedure, or in certain actions concerning the status law (for example, divorce cases) and can be effected for other civil disputes by the court upon the application of the party concerned. Compromise, on the other hand, may be attempted by the court at any stage of the proceedings after actions have been initiated.⁷⁴ A reconciliation or compromise concluded before the court shall have the same effect as an irrevocable judgment.⁷⁵

Other important statutes relating to civil procedure are the Law of Compulsory Execution, Bankruptcy Law, Law Governing Non-litigious Matters, Law of Public Notarisation and the Commercial Arbitration Act.

Criminal procedure

[4.4.7] Criminal proceedings are governed mainly by the Code of Criminal Procedure. Unlike civil proceedings, criminal proceedings are, to some extent, inquisitorial in nature. A criminal action is commenced either by public

68. Arts 68, 221, 244, 277 and 388 of the Code of Civil Procedure.

69. *id.*, Arts 265–76.

70. *id.*, Art 427.

71. *id.*, Arts 445–53.

72. *id.*, Arts 464–9.

73. *id.*, Art 496.

74. *id.*, Arts 377, 403, 577 and 587.

75. *id.*, Arts 380 and 416. A reconciliation or compromise beyond the court is often employed to resolve disputes in Taiwanese society. From the perspective of official law, unlike a reconciliation or compromise concluded before the court, there merely exists an agreement between the parties concerned in such a reconciliation or compromise.

prosecution initiated by a procurator or by private prosecution instituted by the offended party.⁷⁶ Public prosecution is the usual procedure for criminal cases.

[4.4.8] If a procurator is aware of a suspicion of an offence having been committed (in practice usually reported to the procurator by the police) he or she immediately begins an investigation of the suspect, makes available evidence and finally decides whether to prosecute the suspect.⁷⁷ During the investigation, the procurator is empowered to summon, arrest, examine or detain (or release on bail, or restrict the residence of) the suspect, to search the person, property, dwelling house or other premises of the suspect, and, after the search, to attach (or seize) those things which can be used as evidence.⁷⁸ Although the suspect may employ an advocate during the investigation, his or her presence is only permitted when the suspect is examined by the police or procurator.⁷⁹ However, the over-expansive authority of the procurator will be diminished in the future. The Council of Grand Justices held in 1995 that the provisions relating to the procurator's power to detain were unconstitutional.⁸⁰ In order to allow the legislature sufficient time to enact new provisions, the Grand Justices allowed the unconstitutional provisions to continue to have effect until 22 December 1997, at the latest.

[4.4.9] Preliminary to the hearing, the judge is entitled, first, to examine or detain the accused, second, to summon a witness, expert witness or interpreter and obtain or order the production of an exhibit and, third, to conduct a search, attachment or inspection.⁸¹ In addition, the judge is obligated to investigate evidence ex officio for the sake of discovering the truth, although the procurator bears the burden of proof as to the facts of the alleged crime.⁸² The procurator, the defendant or defendant's attorney may examine the court's record and exhibits and make copies during the period of trial. They may also request the judge to take ex officio measures for investigating evidence.⁸³ During trials, the judge directs the entire proceedings and the procurator acts as the plaintiff on behalf of the state. At the hearing, the procurator states the essential points of the prosecution and the judge examines the accused regarding the facts surrounding the alleged crime. After this examination, the judge investigates the evidence and, later, arguments on the law and facts are presented by the procurator, the accused, and the advocate, in that order. The judge then makes a decision.⁸⁴ There is no jury system in Taiwan.

[4.4.10] The Code of Criminal Procedure, like the Code of Civil Procedure, allows the parties the right of three appeals. After the decision becomes final, the convicted may also file an action for retrial. In addition, in the event that it is

76. Arts 264 and 319 of the Code of Criminal Procedure.

77. id, Arts 228–31 and 251–60.

78. id, Arts 71–153.

79. id, Art 245.

80. See Interpretation 392 of the Council of Grand Justices, dated 22 December 1995.

81. Arts 101, 273–4 and 277 of the Code of Criminal Procedure.

82. id, Arts 161 and 163.

83. id, Arts 33 and 163 II.

84. id, Arts 285–9, 299 and 301.

discovered that the trial was conducted contrary to law, the procurator-general may file an 'extraordinary appeal' in order to set aside that which was contrary to law.⁸⁵

[4.4.11] These codes for civil and criminal procedures have been enforced for nearly a century.⁸⁶ However, the general population of Taiwan does not seem completely familiar with these official procedural laws originating from Western law; this especially applies to the Code of Criminal Procedure. On the other hand, the ROC Government has not strictly implemented the provisions of the Code of Criminal Procedure. For example, under the Code, the procurator must be present in court and conduct arguments with the defendant, or the defendant's attorney, on the date of the hearing.⁸⁷ However, in the past, the procurator was often absent from court, and at present, although the procurator attends court, he or she seldom forwards arguments at hearings.

Administrative law

[4.4.12] The last of Taiwan's basic statutes is the administrative law. There does not exist a general code for administrative law. In fact, many statutes enacted for various fields of law commonly share the term 'administrative law', partly because these statutes cannot clearly be classified into civil, criminal or procedural law. It is probably more practical to list several important statutes ordinarily regarded as administrative law in Taiwan than it is to attempt to make broad generalisations about the nature of administrative law. These statutes are the Nationality Law, the Assembly and Parade Law, the Labour Union Law, the Urban Planning Law, the Basic Labour Standards Law, the Press Law, the Law for the Punishment of Police Offences and the Military Service Law.⁸⁸ However, although these statutes are generally considered to belong to the category of administrative law, many include certain provisions relating to civil liabilities or criminal penalties.⁸⁹

Regulations

[4.4.13] In addition to statutes, regulations promulgated by the executive branch are also considered to be a source of law. Because Taiwan's social situation

85. *id.*, Art 441.

86. After 1889, the Japanese codes of civil and criminal procedure were largely enforced in colonial Taiwan. The ROC Codes of civil and criminal procedure, which were similar to the pre-war Japanese codes, became effective in Taiwan as of 1945. See Wang (1992), pp 119, 122, 401–5.

87. Arts 280 and 289.

88. The list includes Criminal Law of the Armed Forces, the Military Trial Law, the Land Law, the Customs Law, the Banking Law, the Income Tax Law, the University Law, the Trademark Law, the Patent Law, the Consumer Protection Law, the Securities Exchange Law, the Forestry Law, the Highway Law, the Law for the Appointment of Civil Servants, the Law Governing Lawyers, the Law of Administrative Appeal and the Law of Administrative Proceedings.

89. For example, Arts 7–9 of the Consumer Protection Law stipulate the civil liabilities of manufacturers and dealers of goods; most provisions in Chapter 7 of the Copyright Law contain criminal penalties.

is complex and changing, a statute often leaves the details up to an executive agency which itself handles the daily details of the matters concerned. It is to be noted, however, that the regulations must not be in conflict with the Constitution or with statutes.⁹⁰ Laws and regulations promulgated by local governments are another source of law in Taiwan. Similarly, these local laws and regulations must not be in conflict with the Constitution or the statutes of the central government.⁹¹

Judicial precedents

[4.4.14] Judicial precedent is not strictly a source of law in Taiwan's official legal system. The doctrine of judicial precedent found in the common law system is not recognised in Taiwan, where the lower court is not bound to follow the precedents of the Supreme Court and the Supreme Court is not bound to follow its own decisions.⁹²

However, authority has always been accorded to Supreme Court decisions. Since the time of the establishment of the ROC judicial system in mainland China in the early part of the twentieth century, judges of the lower court traditionally have referred to the precedents of the Supreme Court. In addition, pursuant to Art 25 of the Organic Law of Courts, the Supreme Court may not overrule a precedent of its own making unless a certain procedure defined by the Organic Law is followed. Not all of the Supreme Court's decisions are accorded precedent status, only those which have been selected by a committee of Supreme Court judges; such cases represent different categories and are published by the Judicial Yuan.⁹³ When referring to a precedent, a Taiwanese judge, unlike a judge in the common law system, merely follows statutory interpretations abstracted from the precedent, and entirely disregards the issue of whether the facts in the case before him or her are similar to facts in the precedent case.⁹⁴

Custom

[4.4.15] Custom plays only a supplementary role in Taiwan's official sources of law. Under the present Taiwanese official law, custom may become a source of civil law. Article 1 of the Civil Code states that '[i]n civil matters, if there is no provision of law applicable to a case, the case shall be decided according to custom ...'.⁹⁵ This stipulation means that the provisions of comprehensive civil statutes in

90. See Art 172 of the Constitution; Hai-nan Wang et al, *Fa-hsueh ju-men* [Introduction to Jurisprudence], Yueh-tan Publishing Co, Taipei, 1993, pp 119–20.

91. See Art 116 of the Constitution.

92. See Ma (1985), p 24; Chisholm and Nettheim (1992), pp 22–3.

93. See Ma (1985), pp 24–5.

94. cf, Chisholm and Nettheim (1992), p 42.

95. This article continues to state that 'if there is no such custom, the case shall be decided in accordance with the general principles of law'. Accordingly, the general principles of law may also be a source of law for civil matters. In practice, however, this seldom happens. This paper therefore omits the general principles of law from the discussion regarding sources of law.

principle supersede all related civil custom.⁹⁶ Moreover, custom is not in any way applicable to criminal or procedural law matters.⁹⁷

Only those customs recognised by courts may become sources of law. A 'custom' in the Civil Code should satisfy the requirements of, first, regularity of conduct, second, that there is a general conviction that the custom is law and, third, that it is not contrary to public order and good morals. A judge thus has to identify the existence of a custom, and decide to adopt or reject it on a case-by-case basis.⁹⁸ Relying on the term 'public order and good morals', a judge influenced by the ideology of Western-oriented official codes can easily reject native custom which is based upon traditional values and practice.

[4.4.16] From the perspective of official law, indigenous law is merely custom. Therefore, it is very difficult to incorporate indigenous legal practice of Taiwanese society into the official law unless the legislature has adopted such an indigenous legal practice. Some indigenous customs, however, have been accepted by statutes or by the courts, as discussed later.

Treaties

[4.4.17] The question of whether an international treaty automatically becomes part of the national law is still not settled in Taiwan.⁹⁹ No statutory provision deals directly with the issue, and the precedents published by the Judicial Yuan have not yet included a decision expressing the court's attitude towards this controversial question.¹⁰⁰

5. The Judiciary

[4.5.1] The Judicial Yuan is established by the 'five powers' Constitution as 'the highest judicial organ of the state'. The Judicial Yuan has a head, a vice-head, and 15 Grand Justices. The Grand Justices, who serve nine-year terms, constitute the Council of Grand Justices, as well as the Constitutional Court. In addition, the Judicial Yuan has the following subordinate organs: the Supreme Court, the high courts, the district courts, the Administrative Court and the Committee on the Discipline of Public Functionaries. The Judicial Yuan supervises matters concerning 'judicial administration' (for example, appointment and promotion of personnel) of those subordinate organs, but may not interfere with their exercise of judicial functions (for example, adjudication of civil, criminal, and administrative litigation) in a particular case. Moreover, the

96. The Civil Code contains a very small number of provisions which accord priority to custom in certain specified situations: for example, Arts 68 and 429.

97. However, it is said that most scholars in Taiwan consider that custom is applicable to matters concerning administrative law. See Wang (1993), pp 123, 141.

98. See Art 2 of the Civil Code; Ma (1985), p 26.

99. See Wang (1993), p 121.

100. This is probably because the lack of diplomatic recognition of Taiwan by most other nations results in Taiwan entering into only a few international treaties. Nevertheless, in order to gain support from the international community, Taiwan's legislature often enacts laws to adopt the provisions of various international treaties.

Judicial Yuan and its subordinate organs must be independent from the other branches of government.¹⁰¹

Council of Grand Justices

[4.5.2] The Council of Grand Justices interprets the Constitution and unifies the interpretation of laws and regulations. Constitutional interpretations are made when there are doubts concerning, or disputes over, first, the application of the Constitution, second, the constitutionality of statutes or regulations or, third, the constitutionality of statutes governing provincial or county self-government and statutes and regulations promulgated by provincial or county governments. Petitions for the council, therefore, may be filed by government agencies, such as the National Assembly, the president, the other four yuans or any court which believes that the statute or regulation governing a case pending in court is in conflict with the Constitution. An individual whose constitutional rights have been infringed, and who has already exhausted all judicial remedies provided by law, may also petition for an interpretation as to whether the law or regulation applied by the court of final instance contravenes the Constitution.

When in its application of a law or ordinance a government agency has an interpretation of the law or ordinance which differs from an interpretation already expressed by itself or another government organ, it may request a united interpretation by the Council of Grand Justices, unless it is legally bound to obey the expressed interpretation or has the authority to revise it.¹⁰² Following the democratisation of Taiwan, the number of petitions coming before the Grand Justices has significantly increased.¹⁰³

[4.5.3] The Grand Justices also sit as a Constitutional Court, to consider the constitutional validity of political parties. The Ministry of the Interior may, as the agency overseeing political parties, petition the Constitutional Court for the dissolution of a political party whose objectives and activities are alleged to endanger the existence of the ROC or its free and democratic constitutional order. The Constitutional Court may decide to accept or dismiss such a case.¹⁰⁴ There have not yet been any cases of this kind.

Judicial hierarchy

[4.5.4] The court system in Taiwan is divided into ordinary courts for cases involving civil and criminal law and administrative courts for cases involving administrative law. The judicial hierarchy in the ordinary courts is composed of the following three levels:

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101. See Arts 77–8 of the Constitution; Arts 3, 5, 7–15 and 19–20 of the Organic Law of Judicial Yuan.
 102. See Arts 4–7 of the Law for Hearing Cases of Grand Justices in the Judicial Yuan; Interpretation 371 of the Council of Grand Justices.
 103. See Cooney (1997), p 172.
 104. See Additional Art 4 of the Constitution. This provision was passed by the National Assembly in 1992. See also Arts 19 and 26 of the Law for Hearing Cases of Grand Justices in the Judicial Yuan.

- at the lowest level, district courts and their branches, which hear civil and criminal cases in the first instance;
- at the intermediate level, high courts and their branches, which hear appeals against judgments of district courts or their branches as the court of second instance; and
- at the highest appellate level, the Supreme Court, which reviews judgments by lower courts as to their compliance with, or violation of, pertinent laws or regulations.

However, there are exceptions to this 'three level and three instances' system. Criminal cases relating to rebellion, treason and offences against friendly relations with foreign states are handled by high courts as the courts of first instance, and appeals may be filed with the Supreme Court.¹⁰⁵

Procurators

[4.5.5] The office of procurator is established at every level of the court system (the role of procurators has been discussed). At the Supreme Court level, there is an established procuracy, with a number of procurators of whom one is appointed procurator-general. At the level of the high courts and district courts and their branches, there are a number of appointed procurators, of whom one is appointed the chief procurator. A procurator performs his or her judicial functions independently of the court. However, procurators must follow the orders and direction of their supervising officers, of whom the procurator-general is the head. The administrative affairs of the procuracy are supervised by the Ministry of Justice of the Executive Yuan, rather than by the Judicial Yuan. In theory, nevertheless, the Minister of Justice is not allowed to direct procurators to exercise their judicial functions in specific cases.¹⁰⁶

Other courts and institutions

[4.5.6] The Administrative Court is charged with the adjudication of administrative suits. Access to the Administrative Court is obtained only after the exhaustion of internal administrative remedies.¹⁰⁷ In a case in which an individual's rights have been injured by an unlawful administrative measure, and if no decision concerning a second administrative appeal has been given within three months or if the individual is dissatisfied with the decision, the individual may institute administrative proceedings in the Administrative Court. The judgment of the Administrative Court is final and not subject to appeal.¹⁰⁸ Many of the cases it decides involve tax law, trademark law and patent law. In the last

105. See *The ROC Yearbook 1995*, p 109.

106. See Ma (1985), pp 29, 32.

107. Any person, on the ground that his or her rights or interests have been injured by an unlawful or improper administrative measure on the part of a central or local government agency, may file an administrative appeal with a competent organ of a higher administrative level. If the person disagrees with the decision, he or she may then file an administrative reappeal with a competent organ of an even higher administrative level.

108. Ma (1995), pp 32-3.

decade, the number of suits in the Administrative Court increased from 3082 (in 1985) to 4801 (in 1994). However, the rate of dismissal of the proceedings remains high: on average, 86 per cent.¹⁰⁹

[4.5.7] The Committee on the Discipline of Public Functionaries serves as the court for the trial of disciplinary offences by government officials. Under Taiwan's legal system, the power of discipline over public functionaries is vested in the judicial branch. Impeachment proceedings are instituted by the Control Yuan. The committee comprises nine to 15 senior civil servants, five to seven of whom must be former judges, and conducts its proceedings in secret, with the accused public functionary presenting its defending arguments. There are six disciplinary orders which the committee may make.¹¹⁰ In practice, the majority of public functionaries disciplined by the committee are officials either of low rank or in local government.¹¹¹

[4.5.8] Institutions besides the court system exist for the resolution of disputes. One of these is the commercial arbitration system. Parties who have entered into a written agreement of arbitration in accordance with the Commercial Arbitration Act may submit disputes arising out of business transactions to the commercial arbitration association in Taiwan. An award rendered by arbitrators has, as far as the contending parties are concerned, the same legal effect as an irrevocable judgment of a court. However, the award cannot be the subject of execution unless a competent court has issued a ruling of execution. On the other hand, a foreign award made beyond the territory of Taiwan cannot be executed unless its effectiveness has been recognised by Taiwanese courts.¹¹² Recently, because many disputes arising from construction contracts have been settled by arbitration, the general public of Taiwan has become familiar with the arbitration system.

[4.5.9] In addition to arbitration, the Committee for Reconciliation at the Township Level, whose members are recommended by the township chief and approved by the township council, may effect reconciliation for civil disputes or minor criminal cases. If an agreement has been reached through reconciliation and then approved by the courts, it has the same effect as a final judgment, and the injured party may not subsequently bring a criminal action.¹¹³ A reconciled agreement does not become effective until the courts approve it, and only a small number of these agreements are not approved by the courts.¹¹⁴

109. See Ssu-fa-yuan (1995), pp 687, 697.

110. These are: dismissal, suspension from office, demotion, reduction of salary, demerit and reprimand. See Ma (1985), pp 33-4; *The ROC Yearbook 1995*, p 109.

111. See Ssu-fa-yuan (1995), pp 816-20.

112. See Ma (1985), pp 34-5; Arts 1, 21 and 30-33 of the Commercial Arbitration Act; Rules Governing the Organisation of Commercial Arbitration Association and Arbitration Fee.

113. Arts 1, 3 and 23-5 of the Law for Reconciliation in Township.

114. Ssu-fa-yuan (1995), p 304.

6. The Legal Profession

[4.6.1] Judicial officials, that is, judges and procurators, are the key judicial personnel in courts. A law graduate from a university or a person who possesses specified qualifications may take the competitive examination for judicial officials. If successful in the examination, the person may be qualified for appointment as a judge or procurator. Before such an appointment, the candidate must complete one and a half years of professional training at a training institute.¹¹⁵

Judges and procurators are seldom selected from those who have been lawyers,¹¹⁶ and the lack of experience of young judicial officials is often criticised. A number of judges and procurators in Taiwan are female.¹¹⁷

[4.6.2] In order to safeguard the independence of the judiciary, senior judges and procurators are granted life tenure.¹¹⁸ A hierarchical system exists amongst judicial officials. A judge or procurator of the District Court, after serving for a number of years, may seek promotion to become a judge or procurator of the high court, and then proceed to the Supreme Court.

[4.6.3] Public defenders and public notaries are important judicial personnel. Under the Code of Criminal Procedure, if the minimum punishment for the offence in question is not less than three years, or if a High Court has jurisdiction over the first trial and no attorney has been employed, the presiding judge shall assign a public defender provided by the state. (When necessary, the same rule applies to other cases.)¹¹⁹ The public defenders office is established at the District Court level. A law school graduate or a person with specified qualifications who has passed the required examination may be qualified for appointment as a public defender.

Matters of public notarisation, such as the execution of a certificate of authentication or the acknowledgment of a private instrument, are monopolised by public notaries employed by the court rather than dealt with by private practitioners. Public notary offices established by district courts typically comprise a law school graduate who has passed the examination or a senior clerk.¹²⁰

[4.6.4] Practising lawyers, on the other hand, are not officials of the court. A law school graduate or a person with some specified qualifications who has passed the bar examination and completed a six month internship in a law

115. See Arts 9 and 27 of the Law for Personnel Affairs of Judicial Personnel.

116. Lawyers, and even law teachers under certain conditions, are qualified to serve as judges and procurators. See Arts 9 and 12 of the Law for Personnel Affairs of Judicial Personnel. Partly because it is not easy to satisfy the required conditions, few practising lawyers become judges or procurators.

117. According to statistics of the Judicial Yuan in 1995, 22 per cent of all judges in Taiwan are female.

118. See Art 81 of the Constitution; Arts 10 and 32-7 of the Law for Personnel Affairs of Judicial Personnel.

119. Art 31 of the Code of Criminal Procedure.

120. See Arts 1-2 and 4-5 of the Law of Public Notarisation.

firm may practise law in Taiwan.¹²¹ In the past, the bar examination was so competitive that only a handful of law school graduates were able to pass the examination. In contrast, retired judicial personnel (particularly judges and procurators), law teachers and officers of the military courts could easily qualify to become lawyers, and, even now, a large number of private practitioners are actually former judges or procurators. Recently, however, the pass rate of the bar examination has increased significantly. In theory, a foreigner may take Taiwan's bar examination,¹²² but so far no foreign lawyer has been admitted to practice in Taiwan, probably because the bar examination itself is so difficult. Nevertheless, many foreign lawyers do practise as consultants.

[4.6.5] Private practitioners are, to a certain extent, governed by judicial officials. Before practising, a lawyer must register at the District Court within the jurisdiction in which he or she wishes to practise, and join the local bar association; no lawyer may register at more than four district courts.¹²³ Disciplinary matters concerning lawyers are entrusted to the Committee on the Discipline of Lawyers and the Committee of Appeal on the Discipline of Lawyers.¹²⁴ These two committees are composed of lawyers and also judges and procurators in the high courts or the Supreme Court.¹²⁵

7. Legal Culture

[4.7.1] Values and attitudes exert significant influence over the interpretation and application of official law and upon the daily behaviour patterns of private individuals. A survey of legal culture in Taiwanese society is therefore imperative to understand the legal system of Taiwan.

Taiwan's legal postulates, that is, the values or ideas which justify and guide the legal system, originate from ancient China; the traditional legal postulates were dominated by Confucian ideas. However, many modern legal postulates received from Western law have gradually been adopted by Taiwanese society. It seems fair to say that Confucianism still has an impact on the Taiwanese legal system, but its influence is decreasing. Legal culture in present-day Taiwan¹²⁶ is a combination of traditional Chinese and modern Western legal concepts. A

121. See Art 3 of the Law Governing Lawyers.

122. *id.*, Art 45.

123. *id.*, Arts 7 and 11.

124. *id.*, Arts 39–44. The following disciplinary measures are available: warning, reprimand, suspension from practice for a period of not more than two years and dismissal or removal of the lawyer's name from the registry.

125. The Committee on the Discipline of Lawyers comprises three judges and one procurator of the High Court, as well as five lawyers. The Committee of Appeal on the Discipline of Lawyers comprises four judges and two procurators of the Supreme Court, two legal scholars and five lawyers.

126. See also Hwang Kwang-kuo, 'Lun-li yu fa-lu: T'ai-wan she-hui fa-chih kuai-ch'ang te she-hui hsin-li fen-shi' [Ethics and law: Socio-psychoanalysis on unusual rule of law in Taiwanese society], *Hsueh pao*, No 14, 1993, p 363.

Networks of interpersonal relationships

[4.7.2] The Confucianists had a relatively negative attitude toward law. According to Confucianism, the administration of law was understood to be punitive, coercive and morally debased in comparison with the uplifting spiritual influence of ritual practices and human relationships. Thus, the behavioural norms as prescribed by the five major relationships of Confucianism, those of father and son, ruler and subject, husband and wife, elder and younger brother and friend and friend, played a dominant role in people's daily lives. Legal norms, on the other hand, were relegated to a subordinate position in human affairs. In short, the social order contemplated by the Confucianists was based on networks of interpersonal relationships, rather than founded on a universal, dominant legal order. This ideology may be called the 'rule of man', in its broader sense, which is essentially different from the 'rule of law' concept of modern liberal philosophy accepted in the West.¹²⁷

[4.7.3] Although participation in relationships remains an important factor constituting the social order in contemporary Taiwanese society, relational practices do not provide the security necessary for economic transactions to take place between people who do not have any social or familial ties. Consequently, many legal mechanisms have been employed to compensate for the lack of relationships in contemporary society.¹²⁸ Winn points out that the necessity for many legal institutions resulted from the social changes accompanying Taiwan's rapid industrialisation and urbanisation.¹²⁹ It should also be noted, however, that before industrialisation and urbanisation occurred in Taiwan, legal mechanisms had already frequently been relied upon to deal with transactions.¹³⁰

Development of a legal mechanism: the *t'ai*

[4.7.4] The *t'ai* agreement in Ch'ing Taiwan (1683–1895) is an example of a legal mechanism employed to replace or to supplement relational ties. According to local custom in Ch'ing Taiwan, when a person sought to borrow money from others, he or she was often asked to transfer a deed for land to the lender so that if the borrower defaulted on payment the land could not be disposed of by the borrower. Because the subject of the suretyship involved in this kind of loan agreement was comparable to a foetus existing in a pregnant woman's body, such a suretyship was named *t'ai*, literally meaning foetus.¹³¹ The use of *t'ai* agreements perhaps demonstrates that when there was no well-established relationship between the parties concerned, the lender resorted to legal measures to secure his or her interest.

127. See Bodde and Morris (1973), pp 19–21; Winn (1994), pp 199–200.

128. See Winn (1994), pp 200, 205, 207.

129. *id.*, p 205. See also the socio-economic background of Taiwan described above.

130. See, for example, Brockman (1980), pp 76–136, for a discussion of how commercial contract law operated in Han Chinese society in Taiwan in the late nineteenth century.

131. See generally Rinji Taiwan kyokan chosakai, *Taiwan shiho* [Taiwan's private law] Vol 1 Pt I, Taipei, 1910, pp 710–41.

Also, perhaps, the use of *t'ai* agreements demonstrates that even though the parties to the loan agreement had social or familial ties, the lender did not entirely trust personal relationships in dealing with business transactions. As a matter of fact, those Han Chinese who migrated to Taiwan during the Ch'ing period ordinarily had to struggle to survive in an unstable environment, and were thus inclined to self-interest. In addition, kinship or family ties were generally not so commonplace in the immigrant society in Taiwan as they were in the traditional society of mainland China. Not surprisingly, legal devices such as the *t'ai* agreement were prevalent in Taiwan at that time.

[4.7.5] During the Japanese period (1895–1945) the *t'ai* agreement evolved into a powerful legal mechanism enforceable under Japanese official law. One of the characteristics of Japanese rule in Taiwan was that modern official law, based on the authority of the state, forcefully intervened in the daily lives of the people. In 1905, Japanese official law provided that anyone with *t'ai* rights, who had not been paid at the maturity of an obligation in his or her favour, could apply to the court to have an order for an auction of real estate under the *t'ai* agreement. This provision substantively changed the *t'ai* agreement into the Western-style mortgage agreement which had been incorporated by Japanese civil law; however, the term *t'ai* was still used.

Such a legal transformation of the traditional *t'ai* under the official law undoubtedly benefited the lenders, who acquired increased legal protection and became less dependent on relational practices. The modified substantive contents of the *t'ai* agreement were thus gradually adopted by the general public of Taiwan. As of 1923, rights existing under Taiwanese customary property law were supposed to be adjusted to correspond to similar rights under the Japanese Civil Code; therefore, the *t'ai* right was replaced by the mortgage right under the Japanese official law. However, the Taiwanese ordinarily continued to use the term '*t'ai* right' to express the legal concept of the Western-style mortgage under Japanese official law.¹³²

[4.7.6] Under the ROC legal system, mortgages in the name of *t'ai* have frequently been employed by illegal moneylenders. Because ROC law is very similar to the pre-war Japanese law enforced in Taiwan, it continued to provide for Western-style mortgages after the KMT government moved to Taiwan in 1945. In contemporary Taiwanese society, many moneylenders who illegally conduct banking activities resort to *t'ai* agreements to secure loans when they are not familiar with the borrowers. Such *t'ai* agreements are regarded as mortgage agreements under the official law.¹³³ It is interesting to note that such transactions, which are outside the scope of the official law, heavily emphasise legal mechanisms rather than relational practices.

[4.7.7] Legal institutions themselves are sometimes perceived as subordinate to interpersonal networks in Taiwan. Particularly under the authoritarian rule of the KMT, the administration of law has frequently been influenced by interper-

132. Wang (1995), p 15.

133. The official law will enforce mortgage of illegal underground moneylenders. See also Winn (1994), pp 223–5.

sonal networks in the ruling group. It is not surprising that the institutional flaws of the 'five power constitution' did not seriously impede the proper functioning of the government during this period, because such institutional flaws could easily be overcome by relational practices. The traditional practice of appealing to personal connections in order to influence the application of law by officials appears to have been commonplace in Taiwan. However, due to the democratisation of Taiwan, the impact of interrelational networks on law enforcement and public affairs has decreased.

Resolution of disputes

[4.7.8] The growing use of courts suggests the increasing significance of official law. During the Japanese period, the Taiwanese gradually became accustomed to using Western-style courts.¹³⁴ Under the KMT's rule, the number of lawsuits in courts has continued to grow. The number of new civil cases rose from 11,430 in 1950 to 245,940 in 1970, a more than twenty-fold increase over two decades, and in the 1980s the annual number of new civil cases reached 500,000.¹³⁵ From the increase in litigation it appears that Taiwanese society is moving steadily away from the anti-litigation Confucian ideal.¹³⁶ As the number of disputes brought to court increases, the effect of the official law on people's behaviour becomes stronger.

[4.7.9] On the other hand, the distrust of courts is a serious problem in contemporary Taiwanese society. According to a survey conducted in 1985, when asked whether they agreed that the decisions of criminal courts were fair, only 50–60 per cent of people in the Taipei area answered that they 'partly' or 'considerably' agreed, 20–5 per cent of the respondents replied that they 'partly' or 'completely' disagreed and about 20 per cent had no comment. Interestingly, practising lawyers had less confidence in the courts than did other people. Faced with the same question, about 31 per cent of the practising lawyers in Taiwan replied that they 'partly' disagreed that the decisions of courts were fair, and as many as 8 per cent 'completely' disagreed.¹³⁷ This negative attitude towards courts results, in part, from the corrupt reputation of procurators and judges in Taiwan, although such corruption is probably not as bad as most people believe. The negative attitude also results from the failure on the part of some practising lawyers in Taiwan to perform properly the functions of advocates in a modern judicial system; this has been because the number of lawyers has been limited and because training has not always been sufficient.¹³⁸

[4.7.10] It is necessary to explain further the paradox that while Taiwanese people ordinarily distrust courts they bring a large number of lawsuits. Litigation

134. See Wang (1992), pp 224–5, 239–40.

135. Su (1993), p 276.

136. *id.*, p 277.

137. See Ku Chung-hua, 'Fa-chih yu hsin-jen-i-ke fa-lu she-hui-hsueh ta t'an-t'ao' [Rule of law and trust: An examination from sociology of law], *Hsueh pao*, No 14, 1993, p 212.

138. Winn (1994), pp 203–4.

is usually selected as the method for resolving disputes simply because, in many areas, no other alternative exists.

In rural Taiwan, a tight network of interpersonal relationships often exists. When a dispute occurs, the parties can easily find a mediator who has relational connections with both of them and who is well-respected in the community. Litigation may thus be avoided. However, in the urban areas of Taiwan, particularly the new cities, such networks are not always in place. Parties in these areas therefore cannot help but resort to a formal institution such as a court. This is in spite of the fact that they may often doubt the court's impartiality and try to influence charging officials by means of their interpersonal relationships. With the urbanisation of Taiwan, the number of lawsuits has grown steadily. Institutionalised reconciliation is available, but it is not often used by Taiwanese people; this is probably because its members do not necessarily have relational ties with the disputing parties and lack the authority of officials.

The economic development of Taiwan has also contributed to the increase in litigation. In fact, most litigation in Taiwan involves economic activities, such as loans, and real estate transactions.¹³⁹ It appears that commercial activity results in an increase in legal actions. The arbitration system, another institution for the resolution of commercial disputes, is rarely employed by disputing parties. Finally, judging by this author's experience of legal practice, the main concern of Taiwanese in deciding whether to bring an action to court is generally the rational calculation of costs and benefits. If considered necessary, a Taiwanese does not hesitate to file a lawsuit, but the parties may still engage in conciliation through interpersonal relationships. Many lawsuits are actually initiated for the purpose of coercing the other party to accept the terms or conditions of conciliation.

8. Transplanted Law and Indigenous Law

[4.8.1] Since Taiwan's official law is modelled primarily on modern Western law, a tension exists between transplanted law and indigenous law. The principles of many transplanted laws adopted from modern Western law have been affirmed by Taiwanese society, but others have not. Some Taiwanese indigenous laws, derived from Han Chinese legal traditions or from the Japanese legacy, have been integrated into the current official legal system; others are invalid under the official law but are nevertheless often followed by Taiwanese people.

[4.8.2] For example, marriage and adoption by sale were prevalent in Taiwanese society during the Ch'ing period. After 1895, Japanese official law provided that family matters involving only Taiwanese or Chinese persons were to be decided in accordance with Taiwan's old customs. However, when applying this provision, the Japanese courts in Taiwan held that marriage by sale was

139. Su (1993), p 281. The same situation existed during the Japanese period. See Moser, *Law and Social Changes in A Chinese Community: A Case Study from Rural Taiwan*, Oceana Publications, New York, 1982, p 32.

prohibited because it was against 'public order and good morals' based on modern Western law. Thus, a covenant which provided that a marriage was terminated upon the failure to pay fully an agreed dowry was held to be invalid on the ground that the transaction was, in essence, a sale.¹⁴⁰ In addition, the court decided in 1920 that the practice of buying children for adoption was contrary to public order and good morals and was therefore invalid.¹⁴¹

An indigenous legal practice is not easily abolished by official law. In 1917, contracts for female indentured servants, prevalent since the Ch'ing period, were held to be invalid on the basis of the 'public order and good morals' rule. However, an official report in 1931 stated that Taiwanese people continued frequently to hire female indentured servants, by 'adopting' the servant as a daughter.¹⁴²

Legal concepts transplanted from the modern West had begun to challenge some of the Taiwanese indigenous status laws during the period of Japanese rule. When ROC law began to be enforced in Taiwan in 1945, both marriage by sale and adoption by sale became illegal under the official law, and under the ROC Civil Code a person may not be regarded as an object of a business transaction. After half a century, marriages and adoptions by sale are seldom practised in Taiwanese society. The disapproving attitude of Western official law is a major factor in this development.¹⁴³

[4.8.3] However, some transplanted legal concepts in the official law have not been completely accepted by Taiwanese society. For example, although the Code of Criminal Procedure adopted the concept of respect for the dignity and rights of individuals as emphasised by modern Western law, most Taiwanese people do not regard such a concept highly. Instead, they maintain their traditional attitudes to criminal punishment, such as their preference for public rape trials and public execution of gangsters.¹⁴⁴

Under the current Criminal Code, the prosecution of rape may be instituted only upon complaint of the victim.¹⁴⁴ However, according to a recent survey, the majority (73.7 per cent) of people in Taiwan disagreed that the victim's complaint should be required for the prosecution of the crime of rape. Only a small minority (9.1 per cent) of people in Taiwan agreed that the victim's complaint should be necessary. With respect to this survey, one commentator stated that the issue of whether the victim's complaint should be required for a 'public' rape trial to take place involved a conflict between the effective suppression of crime and protection of the victim's privacy. The commentator concluded that most of the survey respondents thought that the effective suppression, to maintain social order, of a

140. Wang (1992), pp 121, 380.

141. Judgment No 473, Appeal Division, High Court, 1920.

142. Wang (1992), pp 386-7.

143. See Yeh Jiunn-rong, 'T'ai-wan min-chung te fa-lu-kuan' [Legal consciousness of Taiwanese people], The Symposium on Application of Data Concerning Social Tendency in Taiwan, Academia Sinica, Taipei, 15 March 1993, p 6.

144. See Arts 221 and 236.

serious crime like rape is far more important than the protection of a victim's interests.¹⁴⁵

The traditional attitude that the importance of social order far outweighs that of the interests of individuals is also reflected by another response in the same survey. A majority (58.2 per cent) of the respondents agreed to public execution of criminals (gangsters) which was commonplace in traditional China but is not permitted under current Taiwanese official law. Only a small number of people (27.4 per cent) disagreed with public executions. Those who agreed with public executions of criminals seemed to consider that they were an effective tool in restraining the expansion of crime. The issue of whether such proceedings despoiled human dignity was entirely neglected.¹⁴⁶ It is evident that many Taiwanese people still maintain certain indigenous concepts influenced by Chinese legal traditions.¹⁴⁷

[4.8.4] A few Taiwanese indigenous institutions have, by legislation, been merged into the official law. Under imperial Chinese law in Ch'ing Taiwan, a person who assaulted his or her older family members suffered a harsher punishment than one who assaulted a stranger. Although the Taiwanese Criminal Code adopts the Western principle of equality in punishment, the Code imposes more severe punishment for the offence of killing or injuring one's lineal blood ascendant (for example, a parent) than for the offence of killing or injuring others.¹⁴⁸

[4.8.5] Other indigenous laws continue to be effective under the official law through the rulings of courts. The indigenous practice of maximum amount mortgage is an interesting example. The *ne-teito* (fixed mortgage), by which the debtor furnished security for an undetermined number of debts within a fixed amount, was a traditional practice in Japan. The Japanese Civil Code did not expressly provide for *ne-teito* contracts, but Japanese courts nevertheless approved such a device as early as 1901.¹⁴⁹ It was reported in 1907 that the *ne-teito* contract was prevalent in credit transactions in Taiwan.¹⁵⁰ Thus, after the 50 years of Japanese rule, this kind of contract for credit transactions became a part of Taiwanese indigenous law. Although the ROC Civil Code does not explicitly provide for such a practice, it has also been held valid by ROC courts in the name of 'maximum amount mortgage'.¹⁵¹

145. See Yeh (1993), p 6.

146. *id.*, p 7.

147. 'Indigenous' here does not refer to Taiwan's Aborigines but to the early Han Chinese immigrants. In this sense, indigenous concepts actually stem from the same Chinese legal tradition which informed the development of KMT conceptions of law and social control.

148. See Arts 272 and 280–1 of the Criminal Code.

149. M Chiba, 'Three-Level Structure of Law in Contemporary Japan — The Shinto Society' in *Asian Indigenous Law In Interaction with Received Law*, M Chiba (ed), KPI, London, 1986, p 331.

150. See Reporter, 'Hontō ne-teito keiyaku no hattatsu' [The growth of fixed mortgage contract on the island], (1907) *Hoin geppo*, 1:2, pp 77–8.

[4.8.6] However, some indigenous laws are in conflict with the transplanted official law. In accordance with the traditional law in Ch'ing Taiwan, only sons, not daughters, were able to inherit property of the family. The practice of only allowing sons to inherit family property was left intact under Japanese rule. However, under the ROC Civil Code, which adopted the principle of gender equality from the modern European law, not only sons, but daughters, have the right to inherit the property of their deceased parents.¹⁵² Nevertheless, the voluntary waiver of one's right to inherit is allowed by the ROC Civil Code.¹⁵³ A survey conducted in 1966 showed that daughters seldom inherited their parents' property in rural Taiwan, although the number of women who inherited their parents' property has increased in urban areas.¹⁵⁴ The main reason why the majority of women agreed to waive their statutory right to inherit is that the indigenous law concept that a married daughter should not inherit the property of a family which she has 'left', remains prevalent in Taiwanese society. In this example, an indigenous law is contrary to the official transplanted law but remains prevalent in society.

9. Contemporary Legal Issues

[4.9.1] The most serious issue surrounding the legal system is that official law is still not trusted by the populace as a means of resolving various political, social or private disputes. Some commentators attribute this phenomenon to the anti-law attitude of Confucianism. This author thinks that the influence of Confucianism on Taiwanese society may be overemphasised, and that the lack of trust in official law may in fact result from problems inherent in the laws themselves.

[4.9.2] A constitution typically embodies the common political beliefs of a nation. However, that is not the case in Taiwan. The authority of the ROC Constitution has been weakened due to the fact that this law is the subject of recurring controversy. The Constitution was originally enacted for mainland China rather than for the islands of Taiwan, and its contents have been dominated largely by the ideology of the KMT party. It is therefore not surprising that the Constitution is one of the main sources of political disputes in contemporary Taiwan.

151. See Judgment Nos T'ai-shang 776 of 1973 and T'ai-shang 1097 of 1977, both of which are officially selected precedents of the ROC Supreme Court. Another example is the rotation credit association. A group of people agree to meet regularly, each making contributions of an agreed amount, creating a pool of savings that is given to the highest bidder. The right to bid is reserved for members who have not received the collected pool, until each member has received the pool once. As the association did not exist in Western European societies, there was no such institution in the European Civil Code. The Japanese and ROC Civil Code imported from Europe thus do not provide for this indigenous practice. Notwithstanding, the institution has been held valid in accordance with the customary law by both Japanese colonial courts and ROC courts: see Fa-wu-pu (1992), pp 544-6, 576, 588.

152. Art 1138 of the Civil Code.

153. See Art 1174 of the Civil Code.

154. Fa-wu-pu (1992), p 505.

Also, under the ROC Constitution, Taiwan is not a state but merely a province.¹⁵⁵ However, an increasing number of Taiwanese consider that Taiwan is, in fact, an independent state to which the international community gives de facto recognition, and they demand that the Constitution also recognise this. Independence does not necessarily imply that the name of the nation must be changed; it would be sufficient to declare that the territory of the ROC is limited only to Taiwan. However, the governing party, the KMT, rejects this proposal.¹⁵⁶

The recent revisions of the ROC Constitution have not dealt with the controversies relating to constitutional issues. Therefore, it is not likely that the Constitution, the fundamental norm of the legal system, and its subordinate official laws will gain widespread respect in the near future.

[4.9.3] The legislature and judiciary in Taiwan have not yet been reformed to meet the demands of the new socio-political situation. It is true that the Council of Grand Justices has declared invalid certain statutes and regulations left over from the authoritarian period, but the Grand Justices can change the law only with respect to those cases which happen to come before them. Furthermore, Taiwanese courts, in charge of implementing official law, have not gained popular support. Due to the influence of Chinese judicial traditions, judicial officials, including judges and procurators, are usually conservative, some have a pro-government attitude and some of them may be corrupt. To a certain degree, the judicial hierarchical system in Taiwan detracts from the independent nature of the judiciary. Furthermore, some judicial officials are young and lack sufficient practical experience of the world, and experienced judicial officials often leave public office for private practice. In light of the above, it is evident that the Taiwanese judiciary requires thorough reform.

[4.9.4] The distrust of law results partly from historical factors. For over 400 years, the official law has been employed by foreign rulers as a tool to suppress the native people. The official law typically meant various restraints upon people's behaviour and harsh punishment. The populace of the islands seldom considered an official law to have been enacted primarily in the interest of the people. In present-day Taiwan, because the authoritarian rule of the KMT has passed, many individuals fearlessly violate some official laws without regard to the welfare of the entire country. This chaotic transitional period will only end as a result of the continued advancement of democracy in Taiwan. Due to the gradual prevalence of Western democratic ideas on the island, the official law will acquire more legitimacy through the processes of democracy. The people

155. However, under the current ROC law, Kinmen and Matsu are a part of another province, Fukien Province.

156. The largest opposition party in Taiwan, the DDP, is in favour of declaring Taiwan an independent nation. However, another main opposition party, the New Party, whose members are mostly former members of the KMT, agrees with the KMT on this issue. Recently some former supporters of the DDP established another party, the Taiwan Independence Party, to advocate strongly the national building of Taiwan.

will accept an official law enacted by the legislature when the processes of popular elections and fair political participation are developed further.

[4.9.5] Another issue is whether law reform adopts a Western model or indigenous legal norms. The official law is generally modelled on modern Western law, but the influence of indigenous law still exists to a certain extent in contemporary Taiwan. The Taiwanese are thus frequently confused by the conflicting legal concepts deriving from transplanted and indigenous laws. In the past, the process of reception of Western law was determined by two foreign regimes. Taiwanese official law adopted the continental European legal system merely because the Japanese and KMT regimes had already adopted this system before they came to govern the islands. Furthermore, transplanted official laws were enforced by these two authoritarian governments from the top down. The populace did not know the reasons for adopting these Western-style laws and neither were they taught to understand the purpose and meaning of the transplanted laws. Both governments often blamed the people for not observing newly transplanted legal concepts. Neither the Japanese nor the KMT regime instilled in the Taiwanese such fundamental principles of modern Western law as liberalism and individualism. The government merely required the people blindly to obey Western-style official laws. Consequently, the Taiwanese have become aware of various Western-style institutions under the official law but they have not necessarily accepted such laws as fair or just.

[4.9.6] It is necessary for Taiwan to transplant certain Western laws into its legal system. From the viewpoint of the people, modern Western law, which emphasises the protection of individuals, must often be preferable to imperial Chinese law, which emphasised the authority of government under the pretext of social order. If the Taiwanese people choose democracy, certain legal institutions which have developed from Western democracy will probably become necessary in Taiwan. Moreover, unlike China, Taiwan is a relatively small country. Taiwan must comply with legal concepts generally accepted in the international community so that it can gain increased acceptance and continue to survive. Legal Westernisation is helpful for the further internationalisation of Taiwan.

However, the reception of Western law should result from an autonomous decision-making process. The issue of whether a certain Western law should be adopted by the official law is essentially a choice of legal policies. This decision should be made by the people after a public discussion regarding the costs and benefits involved in the adoption of the particular law. However, a law which results in social benefits in the West will not necessarily give rise to the same benefits in Taiwan, because each society has its own unique features. When a Western law is selected to be transplanted to Taiwan, the law must adapt itself to Taiwanese soil: that is, to such local social conditions as the prevalence of various relational practices. If possible, modern Western-style laws may be introduced by the transformation of certain existing indigenous practices, as the example of *t'ai* agreements illustrates. Taiwan's law must, in form and substance, meet the social needs of contemporary Taiwan, without regard to whether those laws originate from Western traditions or indigenous practice.

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