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Translation, Codification and Transplantation of Foreign Laws in Taiwan

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Tay-sheng Wang

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the democratization of Taiwan in the 1990s, many local legal practices in Taiwan were incorporated in the legal codes originally enacted for Republican China.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

Keywords: Translation, codification, transplant, Taiwan, Japanese law, Chinese law, East Asian law

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Introduction

Taiwan, sometimes called “Formosa,” was not brought to prominence on the historical stage of the world until the seventeenth century. The history of Taiwan’s legal development is short but complex. With the advent of Western powers in East Asia, Taiwan encountered its first exposure to law derived from the modern West (“modern law,” hereinafter) in the latter half of the nineteenth century. As I will discuss below, the first modern-style codes implemented in Taiwan were nevertheless products of the modernization of Meiji Japan, the first country to transplant Western/modern law in East Asia. Furthermore, the modernized codes that are effective in today’s Taiwan came, surprisingly, from Republican China (1911-1949) since 1945, after China’s long struggle for legal modernization from the late Qing era, and were finally rejected by Communist China in 1949.

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1 The term “Taiwan” is not restricted to Taiwan Island itself, but refers also to the Pescadore Islands and other subordinated islands. Kinmen and Matsu are regarded as part of Taiwan when I discuss events that occurred in Taiwan after 1949. On the general history of Taiwan, see Murray A. Rubinstein ed., TAIWAN: A NEW HISTORY (Armonk, NY: M.E. Sharpe, 2007).

2 For the socio-economic background of Taiwan’s case and the legal development of Taiwan from the 17th century to the mid-1990s, see Tay-sheng Wang, Chapter 4: Taiwan, in Poh-Ling Tan ed., EAST ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA 124-34 (Sydney: Butterwarths, 1997). On the development of constitutional law in Taiwan in the 2000s, see Tay-sheng Wang & I-Hsun Sandy Chou, The Emergence of Modern Constitutional Culture in Taiwan, 5(1) NATIONAL TAIWAN UNIVERSITY L. REV. 29-33 (2010).

3 Since the 1860s, four treaty ports in Taiwan ruled by the Qing Dynasty were open to foreigners; accordingly, some inhabitants in Taiwan had already been exposed to Western insurance law or company law brought by British businessmen and the like. See TAY-SHENG WANG, HUA-YUAN HSUEH, & SHIH-CHEH HUANG comp., ZHUIXUN TAIWAN FALU DE ZUJIE SHIJIAN BAIXUAN JI FALUSHI YANJU FANGEA [Tracing the Footprint of Taiwanese Law: 100 Selected Incidents and the Methodology of Legal History Studies] 48-49 (Taipei: Wu-nan, 2006). Nevertheless, Taiwan’s legal institutions underwent a radical change in 1895, when Japanese colonialists brought their modernized state laws to Taiwan, and the Western modern law continually dominated the positive law of post-war Taiwan. See Tay-sheng Wang, The Legal Development of Taiwan in the 20th Century: Toward A Liberal and Democratic Country, 11(3) PAC. RIM L. & POL’Y J. 531-39 (2002).
Influenced by the legal codes of prewar Japan and Republican China, the legal development of Taiwan should be understood with reference to the translation, codification and transplantation of Western laws in these two East Asian countries. The case of Taiwan is therefore to be more broadly examined from the perspective of legal development of modern East Asia, in which one of the most important features is to “receive” Western laws. The process of this “reception” always includes translation of foreign laws and jurisprudence, codification of foreign laws or local legal practices, and transplantation of modern law. This process will be further explored and illustrated by the Taiwan case, with the stories of Japan and China, in this article.

Taiwan has relatively unique characteristics in legal development, compared to Japan or China. After over forty years of authoritarian rule in the postwar era, Taiwan became a liberal and democratic country gradually in the 1990s, and the Taiwanese legal system underwent many reforms from then on. Today’s Taiwan has shaped her own law by using multiple foreign laws and jurisprudence. The experience of legal modernization in Taiwan thus encourages us to rethink the significance of translation and codification of law in the process of the transplantation of modern law in the East Asian countries.

I. Legal Transplantation Involving Japanese Modern Codes and Taiwanese Customary Law

1. Legal Experiences of Japanese Colonialists

Taiwan was ceded to the prewar Japanese Empire by Qing China under the treaty of Shimonoseki in 1895. Accordingly, Taiwan was already detached from the Chinese empire when Qing China decided to modernize her law in 1902. In fact, a Republic was established in Taiwan by the officials of Qing China on the island including local gentry

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4 Postwar Japan has not suffered such an authoritarian rule, and China has not become a liberal and democratic country yet. See id, at 536-39, 542-46, 548, 551-54, 556, 558-59.
and volunteers so as to prevent Japanese rule in 1895; but it failed to resist the invasion of the Japanese army. \(^6\) Under the contemporaneous global tendency of legal Westernization, \(^7\) Taiwan was thus led to proceed on this course by the entry of the Japanese empire, rather than a government organized by the residents on the island, which finally emerged in the 1990s, about a hundred years later. As a result, the Taiwanese, who were composed of Han Chinese immigrants on Taiwan and plains aborigines assimilated by those Han Chinese immigrants during the Japanese colonial period (1895-1945), were exposed to a modern law which had been brought and implemented by the Japanese authorities. As an exception to this, most of the mountain aborigines, who maintained their original culture and were gradually conquered by Japanese colonialists, did not have access to modern-style laws under the Japanese separation policy toward them. \(^8\) In any event, the extent to which peoples in Taiwan came into contact with modern law was controlled by their Japanese rulers and their decisions on implementation of such law, which decisions were influenced by Japan’s own experience with modern law. It is therefore necessary to understand the whole process of legal modernization of prewar Japan.

When acquiring Taiwan in 1895, Meiji Japan had been engaged in modernizing her own law merely for a quarter of a century. For introducing modern law which was different from legal traditions in East Asia, the Japanese had to invent a word for even such a fundamental term as “right” (kenri) for the translation of modern law. \(^9\) In 1869, the Japanese Meiji government began to translate the various French codes in a hurry. \(^10\) Western legal scholars were then invited to teach in Japan and to

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\(^6\) See id. at 206-07.

\(^7\) In the late nineteenth century, Western powers directly imposed their law or legal conceptions on their Asian or African colonies and indirectly induced a few Asian independent states to adopt Western law. On the situation in Thailand, another country in Asia, see M. B. Hooker, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 377-79 (Oxford: Clarendon Press, 1975).

\(^8\) The Japanese authorities did not apply the principle of rule by law to the mountain aborigines, whose affairs were almost dealt with by the police in colonial Taiwan. See generally Tay-sheng Wang, Rizhi shiqi gaoshan zu yuanzhu minzu de xiantai fazi chu tiyan: Yi guanyu exing de zhide wei zhong xin [Mountain Indigenous Peoples’ Initial Encounter with Modern Law under the Japanese Rule in Taiwan: On Criminal Sanctions], 40(1) TAIHA FAXUE LUNCONG [NTU Law Journal] 1-98 (2011).


\(^10\) The official who was in charge of translating French codes, Rinsho Mitsukuri, said that when he was ordered to translate French Penal Code, he did not understand much of it. He translated successively the Civil Code, the Commercial Code, the Code of Procedure, the Code of Criminal Instruction, the Constitution, etc., but admitted that “he really did a hazy translation.” See Ken Mukai & Nobuyoshi Toshitani, The Progress and Problems of Compiling the Civil Code in the Early Meiji Era, trans. by
assist the Japanese government in drafting Japan's modern codes. In addition to establishing legal education in Japan, a system allowing students to study abroad was promoted so that the Japanese had enough ability to translate Western law, generally using Chinese characters with Japanese pronunciation to translate legal terminology, and to comprehend modern jurisprudence.\footnote{See Dan F. Henderson, \textit{supra} note 9, at 418-19, 432. Article 3 of the 1875 Rules for the Conduct of Judicial Affairs provided that judgments in civil cases should be governed by custom in the absence of written law; and in the absence of custom, judgment should be based on reason. See also \textit{Enosuke Yamanaka} comp., \textit{Shin Nihon Kindaiho Ron} [Discussion on Japanese Modern Law, New Edition] 218-19 (Kyoto: Hōritsu Bunkasha, 2005).}

Japanese modern codes were developed based on the translation of continental European laws and jurisprudence. Once authority was established, criminal law followed to support it; not surprisingly, the first modern codes promulgated by Meiji Japan were the 1880 Criminal Code and the 1880 Code of Criminal Instruction, which were based on drafts made by Dr. Boissonade, a French advisor. On the other hand, the entire law of family and private transactions, as well as the law of civil procedure, remained until the 1890s Japanese customary law in unrecorded form, much of it unsuitable for modern social relations and commerce and in any event highly divergent from place to place. However, certain Western laws which had been translated into Japanese still entered the Japanese civil law through the judicial process as an expression of reason, a source of law to be applied by judges.\footnote{See Dan F. Henderson, \textit{id.}, at 430-31; \textit{Enosuke Yamanaka} comp., \textit{id.}, at 221-24, 259.} A draft of Civil Code based on French law was completed in 1890, but its implementation was postponed until later. The 1890 Code of Civil Procedure, modeled on German law, however, had been implemented since 1891. Finally, the first three books (general provisions, rights over things, obligations) of the new Civil Code were enacted in 1896 and to a large degree were influenced by German jurisprudence; and its last two books (family and succession) were enacted in 1898 and maintained the patriarchal family system.\footnote{See \textit{id.}, at 37-39. A word in Western law was often translated into several different words in Japanese by the expression of Chinese characters with Japanese pronunciation. For example, the modern concept of "constitutional law" was absent in Chinese legal traditions, but those Japanese who wanted to translate this word into Japanese employed different Chinese characters with Japanese pronunciation to express its meaning. See \textit{Manzo Watanabe, Gendai Houritsuugo no Shiteki Kousatsu} [The Historical Survey on Current Legal Terminology] 258-60 (Tokyo: Banrikaku Shobo, 1930).}
The questions of whether to adopt foreign laws and which foreign country’s code was best for legal transplantation were in fact answered in accordance with the needs of the ruling class of Meiji Japan. The Meiji government realized in the 1870s that the best means for Japan to end extraterritoriality for the purpose of becoming an independent state equal to the Western powers was to compile modern codes based on Western law, which was also necessary for adopting Western capitalism in order to “enrich the country and strengthen the army.”

Meiji Japan therefore turned to the continental European codes, at first the French and later the German, for their models; the American and English common laws, as well as Japanese customary laws, were not in a sufficiently coherent form that would enable the Japanese to adopt them as solutions to their urgent diplomatic or systematization problems. In contrast to the immediate abandonment of Japanese customary laws, the traditional family system of Japan was intentionally preserved in the Civil Code in order to maintain prewar Japan’s family state ideology of the Emperor system. Similarly, in the 1880s, the absolutist character of the Prussian Empire was more attractive to Meiji leaders than either the government of France or England, where democratic liberalism prevailed. This political selection further influenced the later development of Japan’s legal codes and jurisprudence, including the 1889 Meiji Constitution, which inclined towards executive supremacy. Indeed, the establishment of Japan’s modern legal system was a response to both internal and external needs of the state rather than to social necessity.

It is worth considering the special case of the codification of the Japanese traditional family system. At the beginning of compiling the Civil Code in 1880, the status law, including the law relating to family and succession, was drafted by the Japanese themselves, rather than the French advisor, on the ground that this law should be based on Japanese customs. Nevertheless, the 1890 Old Civil Code was not well received, thus its enforcement was postponed. The books on family and succession enacted in 1898 maintained the control of the head of household over its members. In fact, to incorporate some traditional Japanese practices into the family

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15 See Dan F. Henderson, supra note 9, at 432-33.
16 The author described this phenomenon as “pro-government selection in reception.” See TAY-SHENG WANG, supra note 14, at 31-33.
17 See ÉNOSUKE YAMANAKA comp., supra note 12, at 217, 258-60.
law was helpful in maintaining the cultural identity of the Japanese
people, although the main concern of the Meiji government was probably
that too radical change might result in chaos in the society. At any event,
prewar Japanese family law still adopted some of the individualist civil law
translated from Western law and jurisprudence because both the head and
every member of the household were allowed to have his or her personal
rights over property. Accordingly, Japanese indigenous family system
was in fact fundamentally modified by the received Western law and
jurisprudence in Meiji Japan.

2. Formulation of Colonial Legal System

The Japanese government did not automatically apply these modern
codes to Taiwan, which was not part of its territory when the codes were
drafted. The extent to which the Japanese modern code was
implemented in colonial Taiwan entirely depended on the political needs
of Japanese imperialists, which they based on their own experience in
implementing such codes in Japan. Following the practice of Western
colonial powers in those days, the Meiji government of Japan established
a special legal system for its rule in colonial Taiwan. Generally where
areas of law significantly concerned the authority of the ruling colonial
power, such as the structure of state powers, the judiciary and the system
of criminal sanctions, they predominantly accorded with the Japanese,
that is, “mother country’s” law. In contrast, most of those areas of law
that concerned the daily life of ordinary people, such as commercial
transactions and matters relating to the family and succession, complied
with native legal rules so as to avoid resistance to the new regime. Thus,
the criminal code, the code of criminal procedure, and the code of civil
procedure of the prewar Japanese Empire were enforced in Taiwan almost
from the beginning of colonial rule. The colonized Taiwanese thus were
forced to use foreign Japanese language, rather than local language, to
learn foreign Western legal institutions. It is often severely criticized by

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18 See MASAJI CHIBA, LEGAL PLURALISM: TOWARD A GENERAL THEORY THROUGH JAPANESE LEGAL
19 See ŌNOSUKE YAMANAKA comp., supra note 12, at 260.
20 See Edward I-te Chen, The Attempt to Integrate the Empire: Legal Perspective, in R. Myers & M.
Press, 1984)
today’s jurists that some modern/Western elements in these codes had been given up due to the enactment of several special laws in colonial Taiwan that in practice maintained Chinese legal traditions against modernity.\textsuperscript{21} However, at the beginning of the colonial rule, Taiwanese were actually more familiar with those special laws than Japanese modern codes.

Under such a circumstance, the Japanese colonialists employed so-called customary laws to deal with Taiwanese civil and commercial matters because customary laws appeared more friendly to the colonized. In colonial Taiwan, the 1898 Civil, Commercial, and Criminal Laws and the 1908 Taiwan Civil Law provided that civil and commercial matters involving Japanese (or foreigners except Chinese citizens) were to conform to the Japanese modernized civil and commercial codes but those involving only Taiwanese (or Chinese citizens) or relating to the land in Taiwan were to be decided in accordance with Taiwan’s “old customs” unless there were laws that provided otherwise. In other words, the laws governing Taiwanese civil and commercial matters as well as Taiwan’s land were rules in the Taiwanese customary law recognized by colonial courts or administrative branch. To help Japanese officials to find the Taiwanese customary law in individual cases, the colonial government established an institute, the Commission for the Investigation of Old Laws and Customs in Formosa, to find the legal rules existing in Taiwan’s old customs. Japan applied this research to its implementation of its legal regime, so that traditional customs would be interpreted using the jurisprudence and terminology of modern European, especially German, law.\textsuperscript{22} Therefore, the Taiwanese customary law shaped by Japanese jurists and officials was indeed a product of modernization, not a pure translation of wording about customs.\textsuperscript{23} Just as the prewar Japanese legal system had been organized by legal terminology and theories translated from Western jurisprudence, Japan

\textsuperscript{21} See generally TAY-SHENG WANG, supra note 14, at 47-50. For example, under the 1904 Summary Judgment Law, the heads of local government, like magistrates in Qing Taiwan, had the power to immediately adjudicate a broad range of criminal offenses; this power was more extensive than the similar system in metropolitan Japan. The didactic mediation by magistrates, a commonplace form of dispute resolution in traditional China, was also restored by the 1904 Civil Disputes Mediation Law in colonial Taiwan.

\textsuperscript{22} The English translation of its primary works on Taiwanese old customs, see SANTARO OKAMATSU, PROVISIONAL REPORT ON INVESTIGATIONS OF LAWS AND CUSTOMS IN THE ISLAND OF FORMOSA (Kobe: Commission for the Investigation of Old Laws and Customs in Formosa, 1902).

\textsuperscript{23} See TAY-SHENG WANG, supra note 14, at 49-50, 85, 140-44.
attempted to implement the law in colonial Taiwan using the same methods.

The Meiji government did not think it necessary to implement a modern-style civil code in Taiwan at that time. The pattern of using customary law was probably more desirable for the general public in East Asian societies because their legal practices and traditional values would be seriously taken into consideration. There existed compilations of the Japanese customary laws in the 1880s, but the customary law style was rejected in the early Meiji era of Japan in order to immediately end extraterritoriality as mentioned above. Interestingly, this style had been carried out in colonial Taiwan for another political reason.

Moreover, the Commission for the Investigation of Old Laws and Customs in Formosa was engaged in the codification of the Taiwanese customary law in order to enact the civil and commercial codes uniquely for the people, regardless of whether they were Taiwanese or Japanese, in the territory of colonial Taiwan during the 1909-1914 period. Judge-made customary law was merely derived from lawsuits in the court and thus did not necessarily cover all related matters in the future. In contrast, these drafts of Taiwan’s civil and commercial law not only codified the rules in the Taiwanese customary law, but also referred to and often actively included the legal provisions in the civil and commercial codes of Japanese, German, French, and other Western countries. The degree of modernity of these drafts was of course higher than the reality of Taiwanese customary law. The whole process meant that local legal practices were interpreted by foreign legal terminology and concepts, reviewed by judicial decisions, and finally reformed by the legislation of customs for the purpose of certainty and progress in law.

Nevertheless, a colony possessing its own civil and commercial codes within a specific jurisdiction would possibly promote the independence of the colony. Such a consequence was inevitably

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24 See Dan F. Henderson, supra note 9, at 432, n. 81.
25 See Tay-sheng Wang, supra note 14, at 145.
contrary to the interests of the prewar Japanese Empire, although the
Taiwanese would probably have welcomed the codification of those
customary laws, by which they could not only maintain their cultural
identity, but also use capitalistic laws coming from metropolitan Japan or
Western countries in their legal transactions. As a consequence, the
imperial government of Japan rejected taking into effect these drafts
proposed by the colonial government.

Based on Japanese nationalism, the Japanese imperial government
decided that the only one way for the Taiwanese to benefit from modern
civil and commercial law was to apply prewar Japan’s codes, rather than
Taiwan’s own codes. Like a common language, a single, uniform
system of law was regarded as a tool of nation-building in the territories
of the Japanese Empire.\footnote{See \textit{Lawrence M. Friedman, The Legal System: A Social Science Perspective} 221-22 (New
York, NY: Russell Sage Foundation, 1975).} Since 1923, under a policy of “extension of
the homeland,” almost all of Japan’s modern codes took effect in colonial
Taiwan, with some exceptions, so that the Taiwanese had more exposure
to modern law than before. One of the exceptions, the Taiwanese
customary law relating to family and succession matters, continued to be
applied to the Taiwanese during the later period of Japanese rule. That,
however, did not significantly obstruct the Taiwanese from modernizing
their laws because the Japanese civil code on family and succession itself
often does not reflect modern law.\footnote{See \textit{Tay-Sheng Wang}, supra note 14, at 53-55.} Perhaps because Japanese
colonialists themselves had to a certain extent incorporated their legal
traditions in the status law, that is, the family and succession law, they
were willing to treat the Taiwanese in the same way.

In sum, modern law had been transplanted into Taiwan to the extent
which it was helpful for the interests of the Japanese Empire, not the
Taiwanese people. Only the modern-style codes originally designed for
Japanese were available for Taiwanese transplanting Western
individualistic law. As a consequence, the Taiwanese had already to a
certain degree become familiar with modern law through the application
of Japan’s modernized codes in a colony.\footnote{See \textit{id.}, at 184-86.}
II. Legal Transplantation through the Modern Codes of Republican China and Foreign-trained Legal Scholars

1. Continuity of Legal Transplantation

After the defeat of Japan in the Second World War in 1945, China under the administration of the Chinese Nationalist Party (Koumintang, KMT hereinafter) took over Taiwan on behalf of the Allies. All Japanese residents were ousted from Taiwan after the war. The people who migrated from the Chinese mainland after 1945, primarily in 1949, were known as “Mainlanders” and became the new ruling class in postwar Taiwan. Those people who had been ruled by the Japanese authorities in Taiwan were thus called “native Taiwanese.” As the Japanese colonialists did fifty years earlier, Mainlanders brought their legal codes and experience in Republican China to Taiwan. For the purpose of reintegrating Taiwan into China, the legal codes of the Republic of China (ROC) promulgated by the KMT regime were immediately and completely put into effect in Taiwan, although both Taiwan and the Chinese mainland had changed so much between 1895 and 1945 — politically, socially, and economically — such that the retrocession was less the resumption of historical ties than an attempt to forge an entirely new relationship.30

However, the native Taiwanese had little difficulty in applying the new ROC codes because these codes were substantially identical to the prewar Japanese legal codes that had already been enforced in Taiwan.31 This result was indeed a historical coincidence. In order to eliminate Western extraterritoriality, late Qing China followed the example of Meiji Japan to draft modern-style codes with the assistance of Japanese jurists. Republican China was continuously engaged in the codification of modern Chinese law, and it finally promulgated civil, criminal, and various procedural codes of the ROC from the late 1920s to mid-1930s.

31 On the civil law of Taiwan, See also TSE-CHIEN WANG, MINFA GAIYAO [General Discussion on the Civil Law] 26 (Taipei: Mu-hua Wang, rev. ed., 2009).
These ROC codes were always modeled on continental European, especially German, codes with legal terminology and jurisprudence strongly impacted by prewar Japan and more modern in provisions than the laws in Taiwan under Japanese colonial rule.\textsuperscript{32} These laws, however, had poor implementation in the Chinese mainland partly due to the chaos in Republican China. It is ironic, on the other hand, that the extension of Japan’s modern codes to Taiwan since 1923 actually laid a firm foundation for the extension of Republican China’s modern codes to Taiwan in 1945. As a result, the native Taiwanese could be continuously exposed to modern law through the Japanese-oriented ROC codes without interruption despite the change of regimes, although neither Japanese codes nor the ROC codes were originally enacted for Taiwan and her people.\textsuperscript{33}

Since late 1949, the ROC codes became applicable in Taiwan only. Due to the defeat of the KMT in the Chinese civil war, the KMT-led ROC central government moved to Taiwan in December 1949. Taiwan became a \textit{de facto} state in late 1949, because there was an independent sovereign government on the island. On the basis of its different territory and population, the ROC on Taiwan was actually quite different from the original ROC government that had been succeeded by the People's Republic of China (PRC) government, the new Chinese government, established on October 1, 1949. The KMT regime in Taiwan continued to implement the ROC legal system established in Republican China, with the enforcement of the wartime laws (until 1991), in large part for the purpose of proclaiming itself the legitimate government of China.\textsuperscript{34}

\section*{2. The Promotion of Four Generations of Legal Scholars}

\textsuperscript{32} For example, a citizen was entitled to bring a lawsuit against administrative organs under the ROC code for Administrative Litigation; in contrast, administrative litigation was legally impermissible under the legal system of colonial Taiwan. In addition, a daughter had no right to inherit the family property of her deceased parents under Taiwanese customary law in colonial Taiwan; however, she had the right to inherit the family property of her deceased parents under the ROC Civil Code.

\textsuperscript{33} \textit{See generally} TAY-SHENG WANG, \textit{supra} note 14, at 175-76. When Republican China drafted and later promulgated these modern codes, Taiwan was not part of its territory.

\textsuperscript{34} \textit{See} Tay-sheng Wang, \textit{supra} note 3, at 537-38.
A group of legal scholars in Taiwan, including not only native Taiwanese but also Mainlanders, emerged for the first time in postwar Taiwan. Although native Taiwanese made up about 86 percent of the total population of Taiwan in the 1950s, those legal scholars who were native Taiwanese constituted a minority of the first generation of Taiwanese legal scholars. In prewar Taiwan, Japanese assumed a near monopoly over legal academic circles on the island; almost no native Taiwanese became legal scholars in colonial Taiwan, although many native Taiwanese studied law and even became legal professionals, and a few of them became law professors outside of Taiwan. After the end of World War II, all Japanese legal scholars left Taiwan. Furthermore, some of native Taiwanese legal scholars were excluded from the postwar legal community because they had worked for the Japanese authorities. Among the first-generation legal scholars, the number of native Taiwanese was thus small, but these scholars were considerably familiar with the prewar Japanese experiences in translating, codifying, and transplanting modern law.

The majority of the first-generation Taiwanese legal scholars were Mainlanders. Accompanying the KMT regime which fled to Taiwan in 1949 were a large number of Mainlanders, including many famous legal scholars. With the support of the KMT regime, these Mainlander legal scholars had overwhelming influence on the legal community in Taiwan. It is to be noted, however, they had experienced the legal development of Republican China and thus their legal concepts and legal interpretations of the ROC law were also influenced by prewar Japanese law and jurisprudence. After the legal modernization of China in the late Qing era, prewar Japanese legal scholars and their writings played a prominent role in introducing modern law to China and helped the Chinese to codify their own laws. It is fair to say that in the prewar era, the Japanese translated German law and legal materials; meanwhile, the Chinese translated Japanese law and legal materials, codified their own laws in Chinese, and interpreted the provisions of legal codes in Chinese for the purpose of transplanting continental European law. Both native Taiwanese and Mainlanders of the first generation of legal scholars were

36 See generally, id., at 1372-86.
therefore influenced by Japanese-oriented jurisprudence, which actually derived from prewar Germany. Not surprisingly, Japanese law and legal theories continued to dominate Taiwan’s legal community in the 1950s and the 1960s.

The next wave of foreign influence came as postwar Western law and legal theories were transplanted to Taiwan by new generations of Taiwanese legal scholars. It was crucial to Taiwanese legal development that the majority of the second-generation Taiwanese legal scholars, emerging from the mid-1960s onwards, were native Taiwanese and often went to West Germany for advanced studies. When they returned to Taiwan, these Taiwanese scholars directly introduced the legislation, decisions, and legal theories of postwar West Germany to the Taiwanese legal community by precise translations; thus Taiwan was not only influenced by German law through Japan, but also directly from Germany. On the other hand, some of the second-generation Taiwanese legal scholars remained to study law in Japan and frequently translated into Chinese postwar Japanese legislation, decisions, and legal theories, which were often borrowed from the United States or West Germany. The mainstream of postwar Western law and jurisprudence, emphasizing constitutional democracy and dogmatic application of law, thus gradually appeared in Taiwan from the 1970s; nevertheless, it had not prevailed in Taiwan’s legal community yet before the late 1980s.

The third-generation Taiwanese legal scholars, emerging from the mid-1980s on, successfully brought foreign laws and legal theories into Taiwan’s legislation and judicial decisions. The majority of the third-generation legal scholars were those who received their Ph.D. degrees in Germany or the United States. A lesser number of the scholars finished their doctoral programs in Japan or Taiwan, with a few receiving degrees from France, England, and other countries.

37 A Taiwanese civil law scholar, who went to Germany for advanced studies, pointed out that some legal theories of civil law in Taiwan had been influenced by Japan for a long time, but were later learned directly from Germany after a new generation of Taiwanese legal scholars emerged in the 1970s. See Tzu-Chiang Chen, Taiwan Minfa Yu Riben Zhaiquanfa Zhi Xiangdaihua [Taiwanese Civil Law and the Modernization of Japanese Law on Obligations] 174-75 (Taipei: Angle Publishing Co., 2011).

38 See generally, Tay-sheng Wang, supra note 35, at 1400-03.

39 There is no an official statistics on the academic backgrounds of all Taiwanese legal scholars. The author therefore performed a survey of the academic backgrounds of all members of the Taiwan Law Society, which is the largest association composed of jurists in Taiwan. The same conclusion has been reached on the basis of the academic backgrounds of the legal faculty in National Taiwan
Following the democratization of Taiwan since the late 1980s, the martial law had been lifted so that the ROC law needed to be reformed based on liberal constitutionalism. Liberal-oriented legal scholars of the second and the third generations therefore strongly pushed new legislation which was modeled on the foreign law that they studied abroad or learned in local legal education. Meanwhile, partly because of their compatibility with the ROC legal system, many of the German fundamental principles of public law were first translated by German-trained Taiwanese legal scholars and then officially accepted in the constitutional interpretations made by the Council of Grand Justice, which was heavily influenced by legal scholars. On the other hand, American-trained legal scholars made more of a contribution in introducing new approaches of legal research; for example, the studies of law and society, economic analysis of law, and so on, to the legal community in Taiwan.

On the other hand, American-trained legal scholars made more of a contribution in introducing new approaches of legal research; for example, the studies of law and society, economic analysis of law, and so on, to the legal community in Taiwan.

Following the lead of the second generation and even more the third generation, the fourth-generation Taiwanese legal scholars, emerging from the 2000s, continue to introduce foreign legislation, judicial decisions, and legal theories to Taiwan after completing advanced studies abroad (most in Germany and the United States) or domestically. The fourth-generation scholars, however, are expected to rethink the traditional approach of adopting foreign laws without criticism. The foreign laws of liberal countries were in fact used by many second and third generation scholars as a tool to criticize domestic legislation or legal interpretations under the KMT’s authoritarian rule. These scholars felt that the foreign rules which differed from domestic law were almost universally appropriate and just. The third-generation scholars successfully brought liberal-oriented foreign laws into the positive law of Taiwan, but over time some of them began to pay attention to how these transplanted laws were implemented in Taiwanese courts and the extent to which they had already been accepted by Taiwanese society.

University, which has been established since 1946. See Tay-sheng Wang & Wen-liang Tseng, Taiwan Faxuehui Sishinian Shi: Ziyu Minzhu Fazhi de Tuishou [The Forty-years History of Taiwan Law Society: A Promoter for Freedom, Democracy, and Rule of Law] 147 (Taipei: Taiwan Law Society, 2011); Tay-sheng Wang, Guoli Taiwan Daxue Falu Xueyuan Yuan Shi (1928-2000): Taida Faxue Jiaoyu Hug [A History of National Taiwan University College of Law: Retrospect of Legal Education in Taida] 69-72 (Taipei: National Taiwan University College of Law, 2002).


41 See Tay-sheng Wang, supra note 39, at 118.

42 See Tay-sheng Wang, supra note 35, at 1402-03.
Meanwhile, the Taiwan-centered approach for legal studies appeared from the 1990s on. After two decades of actual administration of newly-received foreign laws in Taiwan since the 1990s, the fourth-generation scholars are easily able to combine their training abroad and legal practice in Taiwan in developing a new style of legal research. They can share Taiwan’s legal experiences with other countries for promoting mutual understanding, and at the same time learn in a more fundamental way from foreign laws to improve the legal lives of the Taiwanese people. If all generations of Taiwanese legal scholars, especially the fourth-generation ones, are engaged in doing this job, Taiwan will not only import, but also export Taiwanese legal thinking to the world.

As a special case, transplanting contemporary American laws into Taiwan initially depended on political sector, rather than legal academic circle. There was not any American legal element in the ROC law before World War II. After 1949, however, the ROC in Taiwan had close political and economic ties with the United States in order to protect itself from a military invasion from Communist China. Early in the 1960s, American laws relating to the mortgage upon moveable property and securities exchange had been transplanted to the ROC legal system; Taiwan generally imported foreign law which was based on civil law, rather than law based on common law, and these American financial laws were code based rather than common law based. In the 1980s, threatened by trade retaliations from the United States, the Taiwanese government adopted American-style punitive damages, which were not included in the German-based Civil Code, into Taiwan’s intellectual property laws. These examples illustrate again that the transplantation of foreign laws is generally decided in accordance with political needs. Nevertheless, American influence on Taiwan has become so strong that Taiwan’s legislature actively adopted the injunction system in American law when enacting the Family Violence Prevention Law in the 1990s, and introduced the US system of independent directors to laws relating to the corporate governance of large-scale companies in the 2000s. In

43 See TAY-SHENG WANG, supra note 39, at 118.
44 In the past, Taiwanese legal scholars merely imitated foreign legislation, adopted foreign dogmatic interpretations, and welcomed foreign legal theories, without further examining the purposes, social conditions, and constitutional or statutory structures of certain foreign legal measures. In modern times, these factors are taken into consideration when advocating the importation of foreign legislation.
45 See TAY-SHENG WANG, TAIWAN FALUSHI GAILUN [General Discussion on Taiwanese Legal History]
addition to legal codes, statutes for special legislative purposes, often imported from American law, have recently had a large impact on Taiwanese society and daily life.46

III. Localization of Transplants

1. Taiwan-centered Revisions of Transplanted Codes

After the democratization of Taiwan in the 1990s, those foreign laws which had been transplanted into Taiwan frequently became somewhat confused with regards to their origins for the sake of convenience to Taiwanese law. When Taiwan’s legislature wanted to adopt the principles of American trust law for economic development in Taiwan, it enacted the 1995 trust law that was actually modeled on Japanese law. The reason for this selection is that like Taiwanese law, Japanese trust law has been implemented in a legal system which is rooted in the civil law tradition; in contrast, American trust law is based on the common law system in the United States, which has no counterpart in Taiwanese legal system.47 Similarly, since 2003, Taiwanese law has to a large extent followed American-style procedure for criminal justice. The technical origin for this legislation, however, is the Japanese criminal procedural law which had been reformed to adopt American institutions during the American occupation period.48

In another case, Japanese law became a model for codification merely because such a legal practice in Taiwan was originated from Japan in colonial days. Japanese ne-teito (fixed mortgage), by which the

47 See TZU-CHIANG CHEN, *supra* note 37, at 180.
48 The former head of the Taiwan’s Supreme Court said that the Taiwan court attempted to imitate postwar Japanese criminal procedural law, in which Japanese prosecutors had a more heavy burden to prove defenders guilty in the trial than their counterparts in Taiwan had, to urge Taiwan’s prosecutors to be more prudent in deciding whether to charge the suspected or not so that the number of lawsuits in the court could decrease. See SSU-FA-YUAN SSU-FA-HSING-CHENG-TING [Division on Judicial Administration, Judicial Yuan] ed., TAIWAN FAJIE QIXIU KOUCHU LISHI, DIER JI [The Oral History of the Elder in Taiwan’s Legal Community, *Vol. II*] 202, 205-06 (Taipei: Judicial Yuan, 2006).
debtor furnished security for an undetermined number of debts within some fixed limit, was a traditional practice in Japan, and became prevalent in Taiwan due to the Japanese rule. The ROC Civil Code drafted in China did not include such a practice, but it was held valid by Taiwanese courts.\footnote{See Tay-sheng Wang, supra note 2, at 156.} Finally, the 2007 revision of the ROC Civil Code has expressly added this practice, called “maximum amount mortgage,” by referring to Japanese law.

The most important development in Taiwanese law is that the ROC codes, transplanted from Republican China, have been revised for today’s Taiwanese society with reference to legal theories of foreign countries. For example, the ROC Civil Code that was enacted in Republican China seventy years ago was to a large extent modified by a popularly-elected Taiwanese legislature in the late 1990s for the first time. One-third of the provisions in the “book on obligations” of the ROC Civil Code were revised in 1999 and became effective in 2000. This revision frequently followed the laws and legal theories of contemporary Germany and Japan; however, those foreign laws and legal theories were selectively, not completely, adopted by Taiwanese jurists.\footnote{SeeTZU-CHIANG CHEN, supra note 37, at 187-94.} In the 2000s, Taiwan’s legislature, with the assistance of many Taiwanese legal scholars who were trained abroad, also significantly modified the “book on rights over things” in the Civil Code promulgated in 1929.

The ROC Code of Civil Procedure effective in Taiwan is largely different from the one enacted in Republican China. After its taking effect in Taiwan in 1945, the ROC Code of Civil Procedure was fully revised in 1968, at which time the numbering of articles was totally changed. The 1968 revision, however, did not modify the fundamental principles for civil procedure in the old code. Based on the research of the second and the third generations of Taiwanese legal scholars, a series of revisions for the Code of Civil Procedure had been made in 1999, 2000 and 2003.\footnote{See generally TAY-SHENG WANG, supra note 45, at 309-11.} These revisions in fact refined the basic structure of civil procedure, which was originally modeled on German or Japanese law, for the purpose of meeting the actual needs of Taiwanese civil courts.\footnote{See LIEN-KUNG CHIU, CHENGXU XIANZI QUAN LUN [Essays on the Right to Select in the Procedure] 7, 99-109 (Taipei: the author, 2000).} As the modern civil procedural law transplanted from foreign countries had already been
enacted, the Taiwanese legislature and legal scholars chose to merely improve rather than completely abandon the existing code. On the other hand, these revisions emphasized the necessity of revising transplanted legal institutions for the purpose of resolving local problems. By this way, the transplantation of foreign law has been in harmony with the needs of the local Taiwanese.

The 1935 ROC Criminal Code has been to a certain extent modified for Taiwanese society. After taking effect in Taiwan in 1945, the ROC Criminal Code did not change in any significant way until the 1990s. In the 1990s, there were some modifications made in response to the demands of Taiwanese social movements, and also in response to new-style crimes in contemporary Taiwan. Despite these changes, some legal scholars argued that it was necessary to make more broad revisions because a quarter of all articles in the ROC Criminal Code had never been applied in postwar Taiwan. In 2005, the General Principle of the ROC Criminal Code had a large-scale revision, becoming effective on July 1, 2006. This revision also cited the legislation of Germany and Japan and that of the United States, and emphasized its being supported by Taiwanese legal scholars specializing in criminal law, although it has been argued that only some of criminal law scholars really participated the task of revision. However, the 2005 revision did not try to update the kinds of offences in the Criminal Code that were enacted for Republican China seventy years ago. It is unclear whether this revision has fully responded to the social and economic demands of present Taiwan.

Similar to the civil procedural law, the ROC Code of Criminal Procedure effective in present Taiwan is quite different from the one enacted in Republican China. The ROC Code of Criminal Procedure was fully revised in 1967, but did not modify the fundamental principles of criminal procedure found in the old code. In 1982, the Code allowed a suspect to employ attorneys when he or she was interrogated by the police or prosecutors, but such attorneys could do nothing but stand beside the suspect. Accompanying the democratization of Taiwan in the 1990s, this code was modified to abolish the power of prosecutors to detain suspects in

1997. Furthermore, the 2002 and 2003 revisions of the Code broadly modified the criminal procedural structure by introducing American-style criminal proceedings, which were not adopted when the Code was enacted in Republican China nearly seventy years ago. This radical change again illustrates the prevalence of transplantation of American law in the postwar era. However, judging from the fact that Japanese law based on civil law tradition had been used to introduce American law, as discussed above, the civil law tradition which was originally adopted by the colonial law under Japanese rule as well as being part of the law of Republican China has been firmly accepted by the legal system of present Taiwan.

2. Legislation of Local Customs

Many customs in Taiwanese society have been codified in the revision of the ROC Civil Code. The business practices of *hui* and *tang* originated from Chinese legal traditions and remained prevalent in postwar Taiwan. However, the former was merely regulated by customary law, and the latter was never recognized in customary law under the ROC legal system on the grounds that there were no written provisions relating to them in the ROC Civil Code transplanted from continental Europe. With the advent of the popularly-elected legislature in the 1990s, the customary law relating to *hui* was codified in the “book on obligations” of the Civil Code in 1999, and *tang* has been enacted to be a recognized security interest in the “book on rights over things” of the Civil Code in 2007. This was the beginning of the postwar Taiwanese trend of transforming customary law into legislation. The 2007 revision of the Civil Code allowed the rights over things to be created according to “customs” (see article 757), by which the enforceability of certain customs of indigenous peoples could be recognized in Taiwan’s modern legal system. Through this legislative language, customary laws can continue to be transformed into legally enforceable precedents.

From a historical perspective, the drafts made by the Japanese authorities for codifying Taiwanese customary law during the 1909-1914
period have finally taken into effect after nearly one hundred years. For example, Article 2 of the Ordinance for Tai Right (mortgage)\textsuperscript{57} drafted in 1913 expressly codified Japanese ne-teito (fixed mortgage) from the customary law,\textsuperscript{58} but this ordinance failed to take effect due to the objection of the government in metropolitan Japan. Notwithstanding, the 2007 revision of the “book on rights over things” of the ROC Civil Code successfully codified the “maximum amount mortgages,” which was initially recognized as customary law under the ROC legal system. A local popularly-elected legislature is obviously more interested in the legislation of customs because legislators are inclined to satisfy the needs of those people who are already comfortable with their own local customs. The legislation of customs, however, is not merely a representation of legal practice, but is frequently a product of a value-judgment, mixed with modern legal terminology and institutions transplanted from foreign countries.

Ancestor worship (Chi-ssu kung-yeh) in Taiwan is another example of the legislation of customs. Ancestor worship was recognized as merely a customary relationship between male-successors by Taiwanese courts during the Japanese colonial period and in the postwar era. The colonial government also tried to enact a special law to regulate the ancestor worship in the early 1910s,\textsuperscript{59} but ultimately failed. Despite this, in December of 2007, a statute was enacted to create a grouping of people who worship the same ancestors and give them status as a legal entity under Taiwan’s positive law. More importantly, this special statute has reshaped the character of ancestor worship because female-successors were allowed to be included as members of this entity (see article 4 of this statute). Such a modification for traditional ancestor worship is of course influenced by the idea of equity in gender, derived from the modern West.

Legal ideas received from foreign countries also encourage Taiwanese to change their own traditions, notably through the revision of the “book on family” and the “book on succession” under Taiwanese civil code. Under the Article 1059 of the ROC Civil Code, parents are allowed to decide the

\textsuperscript{57} For customs relating to “Tai,” see SANTARO OKAMATSU, supra note 22, at 150-155.
\textsuperscript{58} See Tay-sheng Wang, supra note 26, at 85.
\textsuperscript{59} For discussion of this legislation in 1911, see RINJI TAIWAN KYŪKAN CHŌSAKAI [Provisional Committee on Investigations of Laws and Customs in the Island of Formosa], HOAN SHINSAKAI KAIGI GIJI ROKU [Records of Hearings for Bills] 57-91 (Taihoku: Rinji Taiwan Kyūkan Chōsakai, n.d.).
surname of their children – whether they will use the father’s or the mother’s name is decided by written agreement – and a child who has become adult is allowed to select the surname of either that person’s father or mother. The Han Chinese tradition that the surname of child should always be that of the father has been overruled by this modern law. The new law respects modern ideas of individualism and equality. In addition, certain ceremonies were required for a legitimate marriage in the Han Chinese community in Taiwan. This practice was basically respected by the positive law in colonial or postwar Taiwan. After the 2007 revision of the “book on family” in the ROC Civil Code, however, household registration with the government has become required for a lawful marriage for the first time. Furthermore, Article 1148 of the Civil Code provides that the heir is liable for the debts of the decedent only to the extent that the decedent’s properties are enough to pay. This completely violates the traditional principal of Han Chinese that a son is entirely responsible for the debts of his deceased father.

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

**Conclusion**

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

After the experience of utilizing Japanese law which was primarily transplanted from continental Europe for half a century, postwar Taiwan began to implement the ROC law. This ROC law was itself borrowed from continental European law by Republican China, with the influence of prewar Japan. The Taiwanese were thus not a stranger to the ROC legal codes. The ROC law took effect in Taiwan only after 1949, when the KMT regime lost its control over the Chinese mainland. Building on the first-generation Taiwanese legal scholars’ knowledge of transplanted Japanese law, second-generation legal scholars translated laws and legal theories from postwar West Germany and Japan for the purpose of applying the transplanted codes to social reality in Taiwan. The third-generation legal scholars further introduced American legal thinking to postwar Taiwan, which had already adopted some American legal institutions by special statutes. With the advent of the democratization of Taiwan in the late 1980s, the second and the third generations of Taiwanese legal scholars encouraged Taiwanese law to follow liberal democratic constitutionalism based on their studies in Germany, the United States, Japan, and other foreign countries. The modern law transplanted beginning in the 1890s became truly law in action in Taiwan in the 1990s. Furthermore, both those foreign laws meeting the needs of Taiwanese society and the customary laws derived from local legal practice are increasingly included in Taiwan’s legal codes or statutes for the benefit of the Taiwanese people.

In sum, the translation of foreign laws was usually codified for the purpose of transplanting Western laws in East Asian countries. This kind of codification, however, did not guarantee successful transplantation of foreign laws. Those foreign laws codified in domestic legislation are frequently too strange to be accepted by the native people. It is necessary to codify certain local legal practice at the same time in the
legal modernization for the general public. Taiwan’s case illustrates that after modern Western law was translated by Taiwanese legal scholars themselves in accordance with the needs of Taiwanese society and played an important role in democratization of Taiwan, the Taiwanese people have certainly transplanted modern Western law, by which they have actively changed their old customs in the family and succession law. The localization of transplants is indeed imperative for the transplantation of Western laws in East Asian countries.