

## Article

# Inheritance Dispute Resolution in Paiwan Tribes

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### ABSTRACT

*The aim of this article is to explore the interaction of plural legal orders concerning the issue of inheritance in Paiwan tribes and the position of the Paiwanese people under such regulatory frameworks. Relevant cases collected from the district courts are analyzed, and the in-depth interviews with Paiwanese mediators, indigenous people and lawyers who dealt with relevant disputes are carried out. This article finds that judges, lawyers and local mediators resist hegemonic state law and try to preserve the community law of vusam inheritance in a variety of ways. However, state law enjoys a superior status over community law in terms of Article 1 of the Civil Code. Therefore, the legal status of indigenous peoples still cannot be improved. Moreover, the majority of interviewees who were the vusams of the family believed that the customary law of vusam inheritance should be codified, while most of the interviewees who were the younger siblings in the family tended to hold a more cautious attitude towards the codification of such customary law. Additionally, the binding force of such a customary law has been undermined by the patriarchal culture of Han people, the stigmatization of indigenous culture, and Christianity. It is also found that the dispute-resolution mechanism of “family council” practices in the Paiwan tribes might be an excellent alternative to settling the inheritance disputes of Paiwanese people. This article argues that Paiwanese people, including the vusams and younger siblings, should be able to determine whether and how the customary rule of vusam inheritance should*

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*be encoded as a statute, according to the discourse of legal pluralism and the concept of self-determination embedded in Article 1 of both ICCPR and the ICESCR.*

**Keywords:** *Paiwan, Legal Pluralism, Inheritance, Civil Code, Self-Determination, Indigenous People*

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## I. FOREWORD

The “Paiwan” is a group of indigenous people in the southern part of Taiwan. The eldest child of each family in Paiwan tribes is called “*vusam*”, which means the best millet seed kept from the last season. The *vusam* enjoys a privileged status among brothers and sisters, and is entitled to inherit the social status, the house and the household property at birth. Being the representative of the family in the tribes, the firstborn also has the duty to carry on the household line and look after each family member of the household. However, the right of inheritance is supposed to be equally shared by the eldest child and the younger siblings, in accordance with Article 1138 and Article 1144 of the Civil Code.<sup>1</sup>

It may be seen that plural legal orders, including the state law enacted by *Han* people, the customary rules of indigenous people, and the colonial laws brought by the Dutch and Japanese governments, co-exist in the legal history of Taiwan.<sup>2</sup> So far, the customary rules of indigenous people are generally overlooked in Taiwanese legal education, because the courts do not recognize the indigenous legal practice unless it has been adopted and codified as a part of statutes under the civil-law system. It will therefore be instructive to explore the legal position of indigenous people in inheritance dispute resolution in Taiwan, and the interactions of the state law and Paiwanese customary rule of “*vusam* inheritance” in the courts, the Mediation Committees of the Town Councils, and the local communities.

## II. LITERATURE REVIEW

A. *Literature Concerning Right of Inheritance in Terms of Civil Code*

According to Article 1138 of the Civil Code (unless otherwise specified, hereinafter refers to Taiwan Civil Code), entitlement to inheritance is based on blood relations and marriage, rather than clan relations. Gender equality is embodied in this article as well. Heirs who are entitled to inheritance other than the spouse of the deceased are ranked in the following order: (1) Lineal descendants by blood; (2) Parents; (3) Brothers and sisters; (4) grandparents on both the father’s side and the mother’s side of the deceased.

Most existing law textbooks concerned with succession mention the modernization process of the Civil Code modeled after the German and Swiss Civil Codes in the late 1920s and early 1930s. The new concepts of

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1. Minfa (民法) [Civil Code] § 1055-1 (promulgated by the Nationalist Government, Dec. 26, 1930, effective May 1, 1931, as amended Jan. 14, 2015) (Taiwan).

2. WANG TAY-SHENG (王泰升), TAIWAN FALUSHI GAILUN (臺灣法律史概論) [INTRODUCTION TO TAIWAN’S LEGAL HISTORY] 10 (2004).

individualism and an individual's capacity to enjoy inheritance rights are emphasized as symbols of social progress and modernization. The traditional concept of the *Han* people that only sons may be regarded as heirs of the deceased is criticized as a backward idea.<sup>3</sup>

Professor Tay-sheng Wang further indicates that the Civil Code in Taiwan more or less recognizes the customs of *Han* people. However, the civil customs of indigenous people are entirely overlooked. Therefore, the indigenous people in Taiwan are forced to accept not only Western legal concepts, but also *Han* customs. For example, Article 3 Section 2 of the *Regulation Standard for Indigenous Peoples' Status 1991* stipulated that "The children of indigenous women who marry into a non-indigenous family do not acquire the status of indigenous people. The children of non-indigenous women who marry into an indigenous family acquire the status of indigenous people. The children of indigenous men who marry into a non-indigenous family do not acquire the status of indigenous people, unless the children adopt the surnames of their fathers." Obviously, this regulation follows the patriarchal customs of *Han* people encoded in Article 1059 of the Civil Code 1985, which is in conflict with the indigenous customs of family relationship and succession in matrilineal societies (such as Amis).<sup>4</sup>

It is important to note that the population of Taiwan is composed not only of *Han* Chinese, but also indigenous peoples and recent immigrants. Amounting to 526,720 persons in 2012, indigenous peoples constitute 2.28% of Taiwan's population.<sup>5</sup> Under Article 1 of the Civil Code stating that "if there is no statute applicable to a civil case, the case shall be decided according to customs . . .", the provisions of Civil Code basically supersede related civil customs.<sup>6</sup> Therefore, the customary rules of inheritance practiced in indigenous tribes are excluded from the discussion of law textbooks concerning Civil Code. Neither the justifiability of recognizing

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3. LIN HSIU-HSIUNG (林秀雄), JICHENGEFA JIANGYI (繼承法講義) [THE HANDOUT OF SUCCESSION LAW] 7, 15 (2012); TAI YAN-HUI (戴炎輝) & TAI TUNG-HSIUNG (戴東雄), JICHENG FA (繼承法) [LAW OF SUCCESSION] 13, 34 (2003); Tseng Wen-Liang (曾文亮), *Taiwan Jiachan Zhidu De Yanbian* (臺灣家產制度的演變) [The Evolution of Family Property System in Taiwan], 40 SI YU YAN: RENWEN YU SHEHUI KEXUE ZAZHI (思與言：人文與社會科學雜誌) [THOUGHT AND WORDS: J. HUMANITIES AND SOC. SCI.] 249, 249 (2002); HERBERT HAN-PAO MA, LAW AND TRADITIONS IN CONTEMPORARY CHINESE SOCIETY 52-56, 191 (1999).

4. WANG, *supra* note 2, at 322.

5. Zhonghua Minguo Neizhengbu Tongjichu (中華民國內政部統計處) [Department of Statistics, Ministry of the Interior, R.O.C.], 101 Nian 11 Yue Di Yuanzhu Min Renkou Gaikuang (101年11月底原住民人口概況) [General Overview of Indigenous People's Population in the Late November of 101<sup>st</sup> Year of Republic Era] (2012), [http://www.moi.gov.tw/stat/news\\_content.aspx?sn=6968](http://www.moi.gov.tw/stat/news_content.aspx?sn=6968) (last visited Aug. 30, 2013).

6. Tay-Sheng Wang, *Chapter 4. Taiwan, in ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA* 124, 144-45 (Tan P.-L. ed., 1997).

aboriginal customary laws nor the interaction of statutes and indigenous customary rules are frequently discussed in Taiwan's legal literature. By contrast, aboriginal customary laws concerning hunting and its interactions with state laws are discussed more.<sup>7</sup>

### B. Literature Concerning Paiwan People

The only literature in English that refers to the Paiwan people and law available in the LexisNexis law database concerns Paiwan glass-bead handicraft and the *Protection Act for the Traditional Intellectual Creations of Indigenous Peoples*.<sup>8</sup> Ethnographic literature provides diverse information regarding Paiwan's custom of "vusam inheritance". Ku Kun-Hui (2008) argues that the traditional concept of "first-born (vusam)" continues to play an important role in Paiwan electoral strategies on a regional level.<sup>9</sup> Tan Chang-Kwo (2003) indicates that the house is normally inherited by the first-born (vusam) regardless of gender in the Paiwan tribes, while other junior siblings will move out and establish their own houses. In funerals based on traditional religion, a temporary soul altar will be set up by the firstborn of the deceased.<sup>10</sup>

Bein Chiang (1993) claims that the firstborn in Paiwan tribes has a superior jural status as the heir of the household. At the birth of a first born, he/she is entitled to inherit the house, the household property, and the duty to carry on the household line. Whether a certain amount of property is given to the younger siblings at marriage would thus totally depend on the mercy of the eldest surviving child. If the eldest son/daughter refuses to give the younger siblings anything, even the parents are not able to claim on the property.<sup>11</sup> As for the married-in spouse of a first born, he/she is required to return to his/her natal household upon the death of the first-born who died childless, because the title held by the deceased would be automatically

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7. E.g., Lin Chang-Chen (林長振), *Yuanzhuminzu Shouliequan Zhi Lifa Guiding Ji Sifa Wenti* (原住民族狩獵權之立法規定及司法問題) [*Legislative Laws and Judicial Rules on Indigenous Hunting Rights*], 4 TAIWAN YUANZHUMINZU YANJIU XUEBAO (台灣原住民族研究學報) [J. TAIWAN INDIGENOUS STUD. ASS'N] 21 (2014); Wang Huang-Yu (王皇玉), *Yuanzhumin Chiyou Qiangxie Wenti Zhi Yanjiu* (原住民族持有槍械問題之研究) [*On the Issue of the Possession of Firearms by Taiwanese Aborigines*], 5 TAIWAN YUANZHUMINZU YANJIU JIKAN (台灣原住民族研究季刊) [TAIWAN J. INDIGENOUS STUD.] 1 (2012).

8. Chih-Chieh Yang, *A Comparative Study of the Models Employed to Protect Indigenous Traditional Cultural Expressions*, 11 ASIAN-PAC. L. & POL'Y J. 49, 71-74 (2008).

9. Kun-Hui Ku, *Ethnographic Studies of Voting Among the Austronesian Paiwan: The Role of Paiwan Chiefs in the Contemporary State System of Taiwan*, 81 PAC. AFF. 383, 405-06 (2008).

10. Chang-Kwo Tan, *Tradition and Christianity: Controversial Funerals and Concepts of the Person among the Paiwan, Taiwan*, 73 OCEANIA 189, 192, 196 (2003).

11. BIEN CHIANG, HOUSE AND SOCIAL HIERARCHY OF THE PAIWAN 17 (1993).

transferred to his/her next younger sibling in this case.<sup>12</sup>

A number of studies also assert that the first-born, regardless of sex, has a paramount status in the socio-jural domain in Paiwan tribes. The superiority of the first-born is embodied in various aspects, including the inheritance of property, and succession to houselines and social class of the household. The younger siblings are supposed to provide gifts to their eldest sibling, and wish to receive blessings for crop fertility, abundance of game, and lifetime happiness in return. The chief, as the first born in a direct line of descent from the original house of the village, is perceived as the eldest among the elder off-spring of all villagers. It is believed that the chief inherently owns the power to control fertility of land in his/her territory. It is also found that a chief can increase in power by marrying another firstborn chief, because both households and territories can theoretically be combined.<sup>13</sup> However, whether the customary rule with reference to “*vusam* inheritance” still has the legal status of customary law in Paiwan tribes has not been examined by the anthropological literature mentioned above.

Through the participatory observation of the annual harvest festival and in-depth interviews with district council mediators and indigenous people themselves, Grace Ying-Fang Tsai argues that the customary rule of “*vusam* inheritance” is regarded as law and practiced constantly in Paiwan tribes. She advances the view that the custom of “*vusam* inheritance” should not be recognized merely as a source of law within the jurisdiction of the civil-law tradition, inferior to the statutes. Rather, it should be codified in order to rule inheritance disputes of the members of Paiwan tribes. In other words, the concept of “contribution portion” should be introduced to the codified customary law of *vusam* inheritance, so that *vusam* would be entitled to most of the family property in cases where the responsibility of looking after family members has been fulfilled by him/her. The younger siblings should also be able to obtain a bigger share of family property in cases in which they make contribution to the maintenance of parents. It is suggested that the codified customary law of “*vusam* inheritance” should be reviewed regularly, based on the legal consciousness of the Paiwan people.<sup>14</sup> Nevertheless, the way in which the customary rule of “*vusam* inheritance” interacts with the Civil Code in and out of courts, and whether the original mechanism of dispute resolution still exists in Paiwan tribes, have not thus

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12. *Id.* at 120.

13. Kazuko Matsuzawa, *The Social and Ritual Supremacy of the First-born: Paiwan Kinship and Chieftainship* 244-47 (1989) (unpublished Ph.D. dissertation, Syracuse University).

14. Tsai Grace Ying-Fang (蔡穎芳), *Jicheng Zizhi? – Zi Peiwanzu De Guandian Chufa* (繼承自治? – 自排灣族的觀點出發) [*The Autonomy of Inheritance? – A Perspective from Paiwan*], 4 TAIWAN YUANZHUMINZU YANJIU JIKAN (台灣原住民族研究季刊) [TAIWAN J. INDIGENOUS STUD.] 101, 171-72 (2011).

far been explored by the literature.

C. *Literature Regarding Legal Pluralism and Indigenous Rules*

Discourses of legal pluralism indicate that legal centralism, which regards the law as a systematic and unified hierarchical ordering of normative proposition, is a myth. Law actually operates on the ground as a complex collection of regulatory orders interweaving unpredictable patterns of interaction and negotiation.<sup>15</sup> Law usually serves as a mechanism of social control for dominant groups, while alternative forms of ordering practiced by subordinate groups may persist and limit the processes of domination through law.<sup>16</sup> Meanwhile, legal pluralism is regarded as a powerful tool to recognize the dual existence of both state law and indigenous customary rules in the context of indigenous society.<sup>17</sup>

To better understand the dynamics of the imposition of law and of resistance to law, the way in which plural legal orders interact with each other within the courthouse and during the alternative dispute resolution practices have come under the spotlight at the forum of legal pluralism. D'arcy Vermette argues that indigenous people in Canada have resisted the imposition of colonial rules in the past, and have proceeded to protest imposition of the Canadian legal system over indigenous cultures and communities. According to his observation, courts in Canada are not appropriate sites to argue for autonomy or to pursue an anti-colonial agenda, because the law is designed to preserve the norms of the majority. In addition, the debate concerning indigenous rights and the ability to create and interpret the laws tend to be dominated by the colonizer. As long as the courts fail to accept indigenous people's legal concepts, they will continue to be an inappropriate institution for settling disputes over indigenous rights.<sup>18</sup>

Taking the Hopi Tribal Court as an example, Justin B. Richland found that the judge did not give any opportunity for litigants to cross-examine the witnesses produced by their opponents in a hearing of a dispute over property inheritance. Consequently, which party produced the more credible understanding of custom and traditional practices could not be determined by cross-examination.<sup>19</sup> Moreover, the judge did not allow the elders to

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15. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1, 3, 39 (1986).

16. Sally Engle Merry, *Legal Pluralism*, 22 LAW AND SOC'Y REV. 869, 890 (1988); Sally Engle Merry, *Law and Colonialism*, 25 LAW AND SOC'Y REV. 889, 917 (1991).

17. Lindsay Short, *Tradition versus Power: When Indigenous Customs and State Laws Conflict*, 15 CHI. J. INT'L L. 376, 390-93 (2014).

18. D'arcy Vermette, *Colonialism and the Suppression of Aboriginal Voice*, 40 OTTAWA L. REV. 225, 257-58, 262 (2008-2009).

19. Justin B. Richland, "What are You Going to Do with the Village's Knowledge?" *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 LAW & SOC'Y REV. 235, 260 (2005).



discuss the actual world and express their comments on the facts of the case, so as to get the senior members of the community to produce more abstract, generalized principles of custom and tradition compatible with the Anglo-American style law-making in the hearing process. As a result, the Hopi elders were required to provide their knowledge of customs and tradition in an abstract way, while their authority to resolve the dispute was denied.<sup>20</sup> Richland asserted that the multiple and sometimes conflicting means of dispute resolution and the complex norms of tradition, law and culture were overlooked by the Hopi tribal court.<sup>21</sup>

So far, only one journal article with reference to “legal pluralism”, “family mediation” and “aborigine”/“indigenous people” is available from the LexisNexis law database and the EBSCOhost Online Research databases. Professor Yun-Hsien Diana Lin argued that Taiwanese aborigines became a minority in Taiwan, owing to the fact that the number of *Han* immigrants grew dramatically between 1680 and 1892. As the *Han* people and aborigines established a closer business relationship, the indigenous tribes were assimilated by *Han* culture, and even adopted *Han* identities.<sup>22</sup> Therefore, indigenous customary law and its interaction with the state law in the process of civil mediation are not explored in this article.

However, the discussion about the mediation of indigenous disputes does exist. In Bangladesh, for example, *Shalish* is a mediation procedure to resolve local disputes concerning marital disharmony or property partition. Here, the disputing parties, influential local leaders and male village elders participate in the mediation sessions lasting for several months. Government-administered *Shalish* and the NGO-facilitated one provide further opportunities for women to be involved in the mediation process. Traditional norms with reference to family dispute resolution are thus incorporated with the state justice system.<sup>23</sup>

In the Philippines, to take another example, a traditional mediation programme known as the Barangay Justice System has been established for the Malay immigrants who moved to Philippines by boats several thousand years ago. Originally, the disputes are resolved by friends and neighbors within the kinship groups of Barangays. The government-administered mechanism of dispute resolution is handled by ten to twenty mediators comprising of the residents of the village. The customs and norms of the indigenous community are applied to the mediation sessions. Settlements

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20. *Id.* at 264.

21. *Id.* at 267-68.

22. Yun-Hsien Diana Lin, *Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernization*, 6 E. ASIA L. REV. 191, 193 (2011).

23. Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239, 263-65 (2005-2006).

reached in the process of mediation are recorded and submitted to the municipal court, because they are legally binding and enforceable by the courts. However, this mechanism of dispute resolution tends to overlook the social framework that produces the disputes, such as the problem of unemployment among village youth.<sup>24</sup>

As for alternative dispute resolution other than mediation, some states allow the indigenous justice system to exist independently of formal juridical institutions under low-level surveillance. For example, most indigenous disputes with reference to family emerging in the Chittagong Hill Tracts in southeastern Bangladesh are brought before the village *Karbari*, who sits with a council of aged persons and country gentries. Informal hearings are held to resolve the conflicts at village level. The *Karbari* and his council seek reconciliation rather than the truth between the involved parties. Disputing parties usually plead for themselves, instead of being represented by lawyers. If the dispute is too complex to be resolved by the *Karbari*, or if the disputing parties refuse to accept the decision made by the *Karbari*, the case is tried by the headmen through a somewhat more formal procedure. Complaints are usually made via a written petition, and testimony is offered orally in most cases. In general, the *Karbari* and the headmen are not obliged to preserve written records of the cases. Only the complicated family disputes are sent to the chiefs' courts.<sup>25</sup> Additionally, the state courts retain limited jurisdiction over family cases arising in the Chittagong Hill Tracts, in which the indigenous justice system is active.<sup>26</sup>

Nevertheless, the way in which plural regulatory orders interact with each other in the case of Paiwanese inheritance in and out of courts has not thus far been explored by the existing literature through the perspective of legal pluralism yet.

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24. *Id.* at 265-67.

25. Raja Devasish Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT'L & COMP. L. 113, 129-32 (2004).

26. *Id.* at 127 (even though the government of Bangladesh does not recognize indigenous peoples as "indigenous", this means that the Bangladesh polity has very little "space" for the political aspirations and basic human rights of its indigenous people. Therefore, the indigenous people's custom-based land and natural resource rights are overlooked by the existing government of Bangladesh. However, the situation is different from the point of view of customary family law or personal law, because the Bangladesh legal system adopts a pluralistic approach to the personal laws of its entire population. The personal laws of different peoples are administered in terms of different principles, based largely on religion. In other words, the legal system of Bangladesh recognizes different personal laws for the Muslims (Muslim Law) and for the Hindus (Hindu Law). The accommodation of the tribal customary laws of the indigenous peoples concerning family relationship does not oblige the state of Bangladesh to stretch itself too much. The laws are seen neither to threaten the integrity of the existing legal system, nor to require the system to create any new "space"); *Id.* at 140-41 (consequently, it may still be appropriate to call Bangladesh a legally plural country in terms of indigenous family law).

## III. METHODOLOGY

It may be said that state-enforced law is only one of the regulatory forces that affect the actions people take, and the relationships among local residents.<sup>27</sup> The law is, in effect, a highly complex aggregation of principles, practices, norms, and the activities of legislative, adjudicative and administrative agencies. Therefore, law and the social context in which it operates should be simultaneously examined.<sup>28</sup>

Tribal societies can generate rules and customs internally, but can also be exposed to the rules and other regulatory forces evolved from the larger social matrix and might be affected by them.<sup>29</sup> To explore the interactions of plural legal orders concerning the issue of inheritance in Paiwan tribes and the position of Paiwanese people under such regulatory framework, first of all, two court cases were collected from the website of Judicial Yuan (hereinafter, Taiwan), by inputting the keyword “Paiwan”. To understand how plural legal orders operated out of court, secondly, in-depth interviews with Paiwanese mediators and indigenous people living in the tribes were carried out in the Love town (dating from July 2007 to November 2009) and the Spring Town (dating from September 2010 to October 2013) of Pingtung, and the Linen Town (in September 2012) of Tai-Tung.<sup>30</sup>

At the start of the research, most of the respondents introduced by local mediators and town councils were chiefs or noble people in the tribes, and were regarded as “knowledgeable about the tradition of *vusam* inheritance”. Wang Yin-da also indicates that only the noble people and priests in Paiwan tribes own knowledge with reference to the history of noble families, the Paiwanese mythology, and the procedure of various ceremonies. Owing to the fact that the civilians do not have this kind of knowledge, they do not encounter the dilemma of whether to maintain the traditional culture or not.<sup>31</sup>

No matter whether the researcher is of indigenous origin or not, taking a specific standpoint without reviewing the researched culture critically is likely to lead to maintaining a specific class of the researched ethnic group without taking other classes’ opinions into account.<sup>32</sup> To avoid such possible

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27. SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 78 (2000).

28. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC’Y REV.* 719, 719 (1973).

29. MOORE, *supra* note 27, at 55-56.

30. The names of the towns visited are transcribed in a homophonic way so as to protect the privacy of the interviewees.

31. Wang Yin-Da (汪英達), *Paiwanzu Shehui Wenhua Bianqian Dongli Chutan: Yi Tian-Gao Cun Weili (排灣族社會文化變遷動力初探：以天高村為例)* [An Exploration of the Dynamics of Paiwanese Social-Culture Transformation: Taking Tian-Gao Village as an Example], 32 & 33 *RENLEI YU WENHUA (人類與文化)* [MAN AND CULTURE] 130, 143 (1998).

32. Tan Chang-Kwo (譚昌國), *Lishi Shuxie, Zhutixing Yu Quanli: Dui ‘Paiwanren Xie Paiwanzu Lishi’ De Guancha Yu Fansi (歷史書寫、主體性與權力：對「排灣人寫排灣族歷史」的觀察與反*

flaws in the research method, efforts have been made to reach the interviewees with different class and birth-order backgrounds through the researcher's personal connections in the indigenous tribes. The backgrounds of the respondents are provided in Appendix Part of the interview records collected from Love Town have been analysed in another work<sup>33</sup> and are excluded from the data reviewed in this article.

This research initially intended to observe the process of mediation at the Mediation Committee of Love Town Council. However, there was no case with reference to inheritance occurring in the period from July 2007 to November 2009 in the Love Town. Therefore, this may be identified as a research limitation of this article.

#### IV. INDIGENOUS PEOPLE'S POSITION UNDER THE INTERNATIONAL LEGAL FRAMEWORK

Anne Griffiths argues that the interactions of law at the local level are based on and influenced not only by regional and national norms, but also international networks of power and information.<sup>34</sup> For example, the recognition of indigenous peoples and their customary laws is developed by the global movement of indigenous peoples human rights. Although United Nation Declaration on the Rights of Indigenous Peoples (hereinafter, UNDRIP)<sup>35</sup> is not legally binding for states that have agreed with its adoption, it provides indigenous peoples an international human rights standards to justify their pursuit of recognition.<sup>36</sup> Whether the legal status of indigenous people in Paiwan tribes has been improved by UNDRIP is worthy of further examination.

It may be said that the UNDRIP is an important development in the history of international law relating to indigenous peoples. Article 3 of UNDRIP provides that indigenous peoples have the right to self-determination, which enables them to pursue their economic, social and cultural development. Moreover, Article 4 stipulates that indigenous peoples

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愚) [*Historical Writing, Subjectivity and Power: Some Reflections on 'Self-Writing' of the Paiwan*], 59 TAIDA WEN SHI ZHE XUEBAO (臺大文史哲學報) [HUMANITAS TAIWANICA] 65, 90 (2003) (indigenous people in Paiwan tribes are constituted by the chiefs, the noble people and the civilians. Professor Tan argues that Paiwanese researchers should be aware of their own backgrounds and avoid maintaining the views of a specific class without knowing it. I believe that *Han* researchers should carry out the research projects in a class sensitive way. The opinions of the younger siblings or the civilians (the powerless people) should also be taken into account).

33. Tsai, *supra* note 14.

34. Anne Griffiths, *Pursuing Legal Pluralism: The Power of Paradigms in a Global World*, 64 J. LEGAL PLURALISM AND UNOFFICIAL L. 173, 174 (2011).

35. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007) [hereinafter UNDRIP].

36. *Id.* at 184-85.

have the right to self-government in matters concerning their internal and local affairs. Article 34 further indicates that indigenous peoples should have the right to promote, develop and maintain their institutional structures and their distinctive judicial systems, customs, spirituality, traditions, procedures and practices. The question of whether a system of Egalitarian Juridical Pluralism (EJP), where the indigenous judiciary is on equal footing with the ordinary civil law judiciary, is an appropriate exercise of Article 34 and Article 3 deserves consideration. Owing to the fact that the UNDRIP is generally not legally binding on states,<sup>37</sup> some scholars argue that violations of the rights declared therein are not necessarily enforceable against states in international courts.<sup>38</sup> Moreover, EJP is neither a binding rule of customary international law, nor required by Article 34 of UNDRIP. Therefore, it can only be said that EJP is not an inappropriate exercise of Article 34, because Article 43 proclaims that the rights recognized by *UNDRIP* only constitute the minimum standard for the survival, dignity and well-being of the indigenous people of the world.<sup>39</sup>

However, other scholars maintain that the provisions of UNDRIP reflect a degree of states' opinion juris, and go towards creating customary international law with reference to indigenous rights at the international level. In addition, UNDRIP has been adopted by the Human Rights Council, an international institution, and applied as a fundamental frame for actions both by the Council itself and by other United Nations agencies. Moreover, the actions of government and courts in countries such as Japan, Bolivia and Belize have shown that UNDRIP is regarded as establishing requirements for action and has persuasive impact domestically.<sup>40</sup> Consequently, it may be asserted that indigenous judiciary should be on equal footing with the civil-law judiciary in accordance with Article 3 and Article 34 of UNDRIP.

In practice, some states allow the indigenous judiciary to exist independently of the state judicial organs, while embedding it in low-level surveillance; that is, a process of appeal to the formal state system is provided. For example, community courts, *regulos* (traditional leaders of

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37. Siegfried Wiessner, *Re-Enchanting the World: Indigenous People's Rights as Essential Parts of a Holistic Human Rights Regime*, 15 *UCLA J. INT'L L. & FOR. AFF.* 239, 255 (2010) (according to Article 10 & Article 11 of the UN Charter, United Nations declarations are characterized as "recommendations" without legally binding force).

38. Christopher J. Fromherz, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 *U. PA. L. REV.* 1341, 1343 (2008).

39. *Id.* at 1377-78.

40. BENJAMIN J. RICHARDSON, SHIN IMAI & KENT MCNEIL, *INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES* 175 (2009); Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 121, 122-24 (S. Allen & A. Xanthaki eds., 2011).

traditional African society), traditional authorities, religious authorities and traditional healers are all recognized in Mozambique<sup>41</sup> as vehicles to resolve disputes in the relevant tribes or community. Traditional dispute resolution forums are suggested to be left alone to apply and develop their own traditional law and to exercise traditional authority in their own communities. In contrast, jurisdiction of statutory courts should be limited to examine a traditional forum's decision for compliance with constitutional human rights standards.<sup>42</sup>

Even though Taiwan is not a member state of the United Nations and did not vote in favour of the UNDRIP, the fundamental principles of the UNDRIP are enshrined in the Indigenous Peoples Basic Law (hereinafter, IPBL).<sup>43</sup> For example, Article 30 of the IPBL stipulates that traditional customs, cultures and values of indigenous peoples should be respected in the law-making process, mediation, arbitration, judicial procedures and government administration so as to protect the rights of indigenous peoples. In cases where the indigenous persons involved in the legislative, administrative or judicial systems are unable to understand the official language, Mandarin Chinese, an interpreter who speaks tribal languages shall also be provided. Moreover, indigenous courts or tribunals may be established in order to protect indigenous peoples' rights and access to the judicial system. This rule resonates with Article 34 of UNDRIP, which proclaims that indigenous people shall have the right to promote, develop and preserve their unique traditions, practices, juridical customs or systems.

Article 34 of the IPBL further indicates that relevant regulations in compliance with the rules provided in IPBL shall be amended or made by the relevant authority within three years of enactment. However, thus far, the delegated regulations with reference to indigenous customary laws in Taiwan are quite rare.<sup>44</sup> Under the civil law system, therefore, indigenous peoples in Taiwan are mainly ruled by the statutes promulgated by *Han* people. In other words, indigenous traditions and judicial customs are ignored in the judicial system, because the customary laws of indigenous peoples are not codified or formally surveyed by the Judicial Yuan.<sup>45</sup>

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41. Mozambique voted in favour of UNDRIP when it was adopted by the General Assembly of the United Nations on 13 Sept., 2007.

42. David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 YALE HUM. RTS. & DEV. L.J. 59, 99-104 (2011).

43. Yuanzhuminzu Jibenfa (原住民族基本法) [Indigenous Peoples Basic Law] (promulgated by the Legislative Yuan, Feb. 5, 2005, effective Feb. 5, 2005, as amended June 24, 2015) (Taiwan).

44. For example, Civil Code § 1055-1 (2014). (Taiwan) stipulates that child custody should be decided in terms of the best interests of the child. All of the conditions, including the tradition, culture and values of different ethnic groups, should be carefully examined and considered in the visiting reports of the social workers as well.

45. ZHONGHUA MINGUO FAWUBU (中華民國法務部) [MINISTRY OF JUSTICE OF R.O.C.], TAIWAN MINSHI XIGUAN DIAOCHA BAOGAO (臺灣民事習慣調查報告) [INVESTIGATION REPORT OF

The only progress that has been made in accordance with Article 30 of the *IPBL* is that the Indigenous *ad hoc* Chambers were put to the test in January 2013 in nine District Courts, because the indigenous people's underprivileged status in litigation and the distinctiveness of the rules concerning indigenous peoples were recognized by the Judicial Yuan. Moreover, the Indigenous *ad hoc* Chamber aimed to maintain the consistency of judicial opinions with reference to indigenous peoples.<sup>46</sup> The Indigenous *ad hoc* Chamber was further established in the District Courts of Keelung, Taipei, Shilin, New Taipei, Taichung, Chunghua, Yunlin, Taoyuan and Yilan, the High Court and its branches in Hualien, Taichung, Tainan and Kaohsiung, and the High Administrative Court in Taipei, Taichung & Kaohsiung in September 2014. Over the past few months, customary laws of indigenous peoples in Taiwan have been collected and incorporated into the training courses for the judges and lawyers. However, it may be argued that the legal status of indigenous peoples in Taiwan is unable to be improved simply through the establishment of the Indigenous *ad hoc* Chamber because most of the judges still rule cases involving indigenous peoples in accordance with the existing statutes rather than the customary laws embedded in the social context of the tribes.<sup>47</sup> Moreover, interpreters who

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TAIWAN'S CIVIL CUSTOM] (2004) (a survey of the customs of the indigenous peoples in Taiwan was carried out by Japanese scholars when Taiwan was colonized by Japan in 1895-1945. Such records are not updated after the Second World War, while the local customs of *Han* People are surveyed and written up by the Judicial Yuan, which becomes the most important customary reference for the judges in dealing with relevant civil disputes in cases where *Han* people are involved).

46. The District Courts which are carrying out the project of Indigenous Peoples' Tribunal are located in Taoyuan, Hsinchu, Miaoli, Nantou, Chiayi, Kaohsiung, Pingtung, Taitung, and Hualien. See Zhonghua Mihguo Sifayuan (中華民國司法院) [Juridical Yuan of R.O.C.], *Sifayuan Zhiding 9 Diyuan 102.1.1 She Yuanzhuminzu Zhuanting Huo Zhuangu* (司法院指定9地院102.1.1設原住民族專庭或專股) [Juridical Yuan of R.O.C. Assigned 9 District Courts To Set Indigenous People's Tribunals on 1<sup>st</sup> January, 2013], 1615 SIFA ZHOUKAN (司法周刊) [JUDICIAL WEEKLY] 1, 1 (2012); Chen De-Min (陳德民), *Lun Sifayuan Shezhi Yuanzhuminzu Zhuanye Fating* (論司法院設置原住民族專業法庭) [The Study of Juridical Yuan Set Indigenous People's Tribunals], 38 FAFU HUIXUN (法扶會訊) [INFORMATION OF LEGAL AID FOUNDATION] (2012), [http://www.laf.org.tw/tw/b3\\_1\\_2.php?msg1=36&msg2=422&PHPSESSID=is3gvnni06hgsutkr9p32gl155](http://www.laf.org.tw/tw/b3_1_2.php?msg1=36&msg2=422&PHPSESSID=is3gvnni06hgsutkr9p32gl155) (last visited Jun. 13, 2015).

47. Kumuwadan & Banhow (拈慕瓦旦·巴浩), *9 Yuanmin Zhuanting Man 3 Ge Yue Zhishin Chengji Jianshi* (9原民專庭滿3個月 執行成績檢視) [An Examination of the Three-month Practice of Nine Indigenous People's Tribunals] YUANMINZU DIANSHITAI (原住民族電視台) [TAIWAN'S INDIGENOUS TV], Apr. 24, 2013, [http://www.tipp.org.tw/news\\_article2.asp?N\\_ID=35948](http://www.tipp.org.tw/news_article2.asp?N_ID=35948) (last visited May 19, 2013) (even though a few indigenous customary rules, such as "pig killing and pork sharing" which are essential elements of engagement ceremony, have been recognized by the Supreme Court and the Kaohsiung District Court in 2003 & 2008, the majority of the customary rules concerning indigenous family (such as the custom of vusam inheritance practiced in the Paiwan tribes) are still not codified by the statutes and overlooked by the District Courts under the legal system of civil law); AWI MONA(蔡志偉), HUANG CHU-CHENG (黃居正) & WANG HUANG-YU (王皇玉), GUONEI YUANZHUMINZU ZHONGYAO PANJUE ZHI BIANJI JI JIEXI (國內原住民族重要判決之編輯及解析) [THE EDIT AND ANALYSIS OF IMPORTANT COURT CASES CONCERNING INDIGENOUS PEOPLES IN TAIWAN] 147-50, 165-69, 189-95, 197-201 (2013) (such a kind of customary rule can only be

speak both tribal languages and Mandarin Chinese are not available for each indigenous group. None of the interpreters in the courts were able to speak the tribal language of *Siasiat*.<sup>48</sup>

*ILO 169*,<sup>49</sup> drafted by the International Labour Organization (ILO) in 1989 and entered into force in 1991, articulates that indigenous peoples should be able to live and develop as different communities in terms of indigenous interests. Article 8 indicates that the customs and customary laws of the indigenous peoples should be considered when national laws and regulations are applied. Moreover, indigenous people should have the right to preserve customs and institutions compatible with fundamental rights in terms of state law and internationally recognized human rights.<sup>50</sup>

To take the Australian experience as an example, however, Alison Humphry argues that such standard setting does not lead to respect for indigenous law and institutions. On the contrary, customary law is only considered when non-indigenous law is applied, which strengthens assimilation and weakens self-determination.<sup>51</sup>

Article 1 of both the International Covenant on Civil and Political Rights<sup>52</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>53</sup> (ICESCR) declare that all people have the right to self-determination. In other words, people should be able to freely determine their political status and pursue their economic, social and cultural development. The state parties to the present Covenants should also promote the realization of the right of self-determination. The Covenants provide

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preserved through special contracts created by the heirs of the deceased, such as the partition agreement of inheritance).

48. Kumuwadan, Banhow, NO, KacawFuyan & Ataw (特慕瓦旦、巴浩、NO、KacawFuyan、Ataw), *Yuanmintai Wanjian Xinwen: Yuanmin Zhuanting 14 Zu Tongyi Weiqi, Sifa Quanyi Loudong* (原民台晚間新聞：原民專庭14族通譯未齊 司法權益漏洞) [Evening News of Taiwan Indigenous TV: the Legal Rights Were Infringed Because Interpreters of Indigenous People's Tribunals Was Not Available for All Indigenous Group] YUANMINZU DIANSHITAI (原住民族電視台) [TAIWAN'S INDIGENOUS TV], Apr. 25, 2013 (In 2013, none of the interpreters in the courts was able to speak the tribal languages of Seediq, Ita Thaw, Yami and Siasiat. However, the Taichung High Court has hired interpreters who can speak Seediq and Thaw languages. Taidong District Court also has interpreters speak Yami in 2015), [http://www.youtube.com/watch?v=acJQd\\_qclpg](http://www.youtube.com/watch?v=acJQd_qclpg) (last visited: Oct. 22, 2015).

49. International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 (1989).

50. Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 HARV. HUM. RTS. J. 71, 91-92 (2011); PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 345 (2002).

51. Alison Humphry, *An Opportunity Lost for Aboriginal Self-determination: Australia's Compliance with ILO 169*, 2 MURDOCH U. ELECTRONIC J. L. 6 (1995), <http://www.austlii.edu.au/au/journals/MurUEJL/1995/17.html> (last visited Nov. 30, 2014).

52. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

53. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.



important legal resources for the right of self-determination for indigenous peoples.<sup>54</sup>

Even though self-determination might not refer to a right to independent statehood, it may be understood as the right of cultural groupings to the social, political and legal institutions necessary to allow them to live and develop in terms of their distinct culture and customs.<sup>55</sup> Many indigenous communities also preserve their own customary laws and dispute resolution and adjudicative mechanisms as forms of autonomous governance and a dimension of self-determination.<sup>56</sup>

Owing to the fact that ICCPR & ICESCR are both transformed by the Legislative Yuan of R.O.C (Taiwan's parliament) and the Act to Implement the ICCPR & ICESCR has been promulgated in 2009, provisions protecting human rights in both Covenants have domestic legal status.<sup>57</sup> Moreover, Article 8 articulates that all levels of governmental institutions and agencies should review the relevant laws, regulations, directions and administrative measures in terms of both Covenants. All rules incompatible with both Covenants should be amended within two years after the Act comes into force. According to Article 141 of R.O.C. Constitution,<sup>58</sup> furthermore, treaties and the Charter of the United Nations should be respected by the government so as to promote international cooperation, advance international justice and ensure world peace. Therefore, it may be said that the Covenants should enjoy a superior status over other domestic laws, and new legislation should not contradict the Covenants.<sup>59</sup> Consequently, indigenous people in Taiwan are entitled to the right of self-determination in the legal system and mechanisms of dispute resolution, according to Article 1 of both Covenants.

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54. THORNBERRY, *supra* note 50, at 124.

55. S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 842 (1989-1990).

56. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 151-52 (2004).

57. Gongmin Yu Zhengzhi Quanli Guoji Gongyue Ji Jingji Shehui Wenhua Quanli Guoji Gongyue Shixingfa (公民與政治權利國際公約及經濟社會文化權利國際公約施行法) [Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] § 2 (2009) (Taiwan) (it indicates that provisions protecting human rights in the two Covenants have domestic legal status) [hereinafter, Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] (promulgated Mar. 31, 2009, effective Dec. 10, 2009).

58. ZHONGHUA MINGUO XIANFA (中華民國憲法) (CONSTITUTION OF THE R.O.C.) § 141 (1947) (Taiwan).

59. Hsu Hui-Yen (徐揮彥), *Lun Jingji, Shehui Ji Wenhua Quanli Guoji Gongyue Zhong Wenhuaquan Zhi Guifan Neihan – Woguo Shijian Wenti Zhi Chutan* (論經濟、社會及文化權利國際公約中文化權之規範內涵—我國實踐問題之初探) [*The Study on the Normative Content of the Cultural Rights on International Covenant on Economic, Social and Cultural Rights and the Examination of ROC's Practice*], 6 ZHONGHUA GUOJIEFA YU CHAOGUOJIEFA PINGLUN (中華國際法與超國界法評論) [CHINESE (TAIWAN) REVIEW OF INTERNATIONAL AND TRANSNATIONAL LAW] 453, 495 (2010).

## V. INDIGENOUS PEOPLE'S POSITION UNDER STATE LAW

Under the “Black Letter” tradition of legal education, court cases are assumed to be decided through the application of substantive and procedural rules to evidence. To “think like a lawyer” is regarded as knowing how to apply legal rules to evidence, in compliance with judicial precedents.<sup>60</sup>

In fact, the wider legal system, the changing attitudes within the community and the state, and the multiple forces derived from the societies they are located in, all have an impact on the local courts. The judicial field, as a site of struggle, is an area of legally structured and socially patterned activity. Like a magnet, the structure of the field and its practices exercise a force upon everyone who comes within its range. However, the sources of these “pulls” are normally overlooked by people who experience them.<sup>61</sup> Thus, case records of local courts could offer a rich source of issues, conflicts and law in context.<sup>62</sup>

A. *Court Rulings Overlooking the Customary Law of Vusam Inheritance*

Four case records with reference to the customary law of “Vusam Inheritance” developed in Paiwan tribes were collected from the database of case records provided by the Judicial Yuan. In Civil Case No.25 of Pindong District Court 2004 (CASE 1),<sup>63</sup> the deceased had two daughters, the older one passed away and the eldest granddaughter became the “vusam” of the family. Based on the customary practice of Taiwan tribes, the eldest granddaughter of the deceased (the defendant) was privileged in inheriting whatever the deceased left, including the property and rights belonging to the head of the family. The younger grandchildren all agreed to follow the tradition, while the younger daughter of the deceased (the plaintiff) insisted on “half share of the family land”. The judge ruled that:

Article 1 of Civil Code stipulates that custom of indigenous tribes would come to be relevant only if the concerned matter is not regulated by the state law. Therefore, the practice of “Vusam Inheritance” in Paiwan tribes should be excluded from forming the legal basis of inheritance case, because Article 1138 of Civil Code

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60. DONALD BLACK, *SOCIOLOGICAL JUSTICE* 91-92 (1989).

61. Richard Terdiman, *Translator's Introduction to "The Force of Law: Toward a Sociology of the Juridical Field"*, 38 *HASTINGS L.J.* 805, 806 (1986-1987).

62. AGNETE WEIS BENTZON, ANNE HELLMUM, JULIE STEWART, WELSHMAN NCUBE & TORBEN AGERSNAP, *PURSuing GROUNDED THEORY IN LAW: SOUTH-NORTH EXPERIENCES IN DEVELOPING WOMEN'S LAW* 56 (1998).

63. Pindong Difang Fayuan (屏東地方法院) [Pindong District Court], Minshi (民事) [Civil Division], 93 Jia Su Zi (家訴字) No. 25 (2004) (Taiwan) (93家訴字第25號民事判決).

provides children of the deceased equal right to inheritance.<sup>64</sup>

Therefore, state law appears to dominate the litigation process in the district court. The customary rule of “*vusam* inheritance” seems to be treated as an inferior resource of law in the legal system of civil law. According to the interview records of the plaintiff’s lawyer and one of the defendants, however, this court case was tried by two judges one after another, and both judges encouraged both parties to seek settlement. As the plaintiff’s lawyer stated:

*The first judge explored ways to settle the case, but it was impossible for both parties to agree on a settlement. The plaintiff wanted to inherit half of the property in terms of the Inheritance Law of Civil Code, while the defendants argued that only the eldest granddaughter of the deceased was entitled to all of the property because she was the heir of the family. During the litigation process, the defendants applied to have the evidence investigated, and the headmen of the tribe were invited to prove that the customary rule of “vusam inheritance” did exist in the Paiwan tribe, under which the eldest son or daughter would be able to inherit all of the assets owned by the deceased. The relatives of both parties also said that a part of the family property had been conveyed to the plaintiff when her father was still alive, and the plaintiff was told that she could not inherit anything more from her father. As the plaintiff’s legal representative, however, I denied that such things had been discussed, and the Inheritance Act (Law) rather than the customary law of Paiwan tribes should be applied to this case in terms of (Article 1 of) the Civil Code.*

*The first judge spent over one year investigating the customary rule of Paiwan tribes. The case was then transferred to another judge, since the first judge was relocated somewhere else. The second judge told the defendants that the case would be decided according to the Civil Code if the settlement could not be reached. Eventually the court ruled the case on the basis of statute. (R1)<sup>65</sup>*

The eldest grand-daughter of the deceased (one of the defendants) also provided her side of the story concerning the litigation process. Her father married into her mother’s family because her mother was the eldest child of her grand-parents. Her father earned a lot of money by teaching, purchased

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64. *Id.* at 3 (translated by author).

65. Interview with R1 (2008.02.09).

lands and registered the newly-bought real estate under her grand-father's name.<sup>66</sup> When her grand-father passed away, her aunt (the plaintiff) insisted on having a half share of the "family fortune" partially earned by her father. As she stated:

My aunt disagreed with the customary rule of "vusam inheritance" in Paiwan tribes. It was useless for the relatives to persuade her to follow such rules. *I applied for mediation in the town council, but my aunt did not attend the mediation session.* When the case was brought to the court, she denied that a part of the assets registered under my grand-father's name had been paid by my father. *At the beginning I begged her to stick to the customary rules of Paiwan tribes, because the eldest son/daughter was required to look after each family member (including the collateral relatives by blood) under the customary rule of "vusam inheritance". . . .* For example, one of my younger brothers received surgical treatment when he was unemployed. I paid the medical expense for him amounting to NT\$80,000, while the second or the third siblings were not required to pay anything. Only a few of them might be willing to share at most one eighth of the medical expense, but most of them would regard it as a sole responsibility born by the eldest son/daughter. . . . I also live with one of my uncles because he is still single and too old to live alone. . . . However, my aunt was not willing to comply with the customary rule of inheritance.

I provided a lot of information with reference to Paiwan's customs in the court. Neighbours of the farmland registered under my grand-father's name also came to the court to prove that my father paid for the real estates. When my aunt told the first judge that there was no such concept as "vusam" in Paiwan tribes, the judge blamed her, stating that she would be entitled to nothing on the basis of the customary rule. Nevertheless, the first judge was relocated, and the final decision of the district court was formed without taking the customary rule of "vusam inheritance" into consideration by the second judge. (R26)<sup>67</sup>

According to Article 377 of the Civil Procedure Code,<sup>68</sup> the court may

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66. SHIEH JER-SHENG (謝哲勝), TUDIFA (土地法) [LAND LAW] 136 (2006). Tudifa (土地法) [Land Act] § 30 (Taiwan) provided that only the persons who cultivated the farmland by themselves enjoyed the right to purchase farmland. However, this provision was abolished in 2000.

67. Interview with R26 (2012.09.08).

68. Minshi Susongfa (民事訴訟法) [Civil Procedure Code] § 377 (promulgated by the Legislative Yuan, Feb. 1, 1968, effective Feb. 1, 1968, as amended Jul. 1, 2015) (Taiwan).

seek settlement at any time, irrespective of the phase of the proceeding reached. Moreover, a final settlement has the same effect as a final judgment with binding effect.<sup>69</sup> Even though the judges' decisions need to comply with the Civil Code and the precedents of the Supreme Court, both parties are allowed to take the customary rule of "vusam inheritance" into consideration when they try to reach a settlement. Therefore, it may be argued that the judges tried to alleviate the gap between the "modernized Inheritance Act (Law) enacted by *Han* people and the customary rule of "vusam inheritance" practiced in Paiwan tribes through the mechanism of settlement. In other words, the customary rule of "vusam inheritance" was not entirely overlooked by the judges.

During the litigation process, moreover, the headmen of the tribe and the relatives of both parties were invited by the defendants to prove that the traditional custom of "vusam inheritance" still existed in the Paiwan tribe. The first judge also spent over one year investigating this customary rule.<sup>70</sup> It might be tenable to say that the customary law of "vusam inheritance", as one of the bases for dispute resolution, was reinstated and emphasized during the process of investigating the evidence. Nevertheless, once both parties failed to agree on a settlement proposal, state law was given a superior status to the customary rule of "vusam inheritance" by the district court, as a legal resource of civil cases.

In Civil Case No.30 of Taitung District Court 2009 (CASE 2),<sup>71</sup> the mother-in-law (the plaintiff) wished to establish that the daughter-in-law (the defendant) should return two pieces of land inherited from her late husband, who was the eldest son, and the *vusam*-to-be in this family. The plaintiff was represented by a Paiwanese lawyer. When the father of this family died, the land was given to the eldest son on one condition: an heir should be produced so that the land could be passed to the following generations. Otherwise, the land should be returned to the mother-in-law, the existing head of household (*chia chang*), or anyone who would inherit the status of the head of this family in the future.<sup>72</sup> According to the "property-partition agreement" reached upon the father's death, the plaintiff argued that the resolutive condition was fulfilled, and the land ceased to be owned by the eldest son upon his death, since he died childless.<sup>73</sup> Therefore, it was

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69. *Id.* § 380.

70. *Id.* § 283 (stipulates that the concerned parties have the burden of proof with regard to customs, local ordinances and foreign laws which are unknown to the court. The court may investigate these rules on its initiative as well).

71. Taitung Difang Fayuan (臺東地方法院) [Taitung District Court], Minshi (民事) [Civil Division], 98 Su Zi No. 30 (2009) (Taiwan) (98訴字第30號民事判決).

72. The plaintiff of this case still has a younger son.

73. Civil Code § 99 para. 2 (Taiwan). (stipulates that if a juridical act is subject to a resolutive condition, it ceases to be effective on the fulfillment of the condition).

asserted that the daughter-in-law was not entitled to land inherited from her late husband.

However, the court ruled that such an agreement was not binding to the daughter-in-law, because she was not a member of this family yet, and did not participate in the agreement when it was reached in 1974.<sup>74</sup> Therefore, the daughter-in-law was entitled to the land inherited from her late husband, rather than being bound to return it in accordance with the agreement and Article 179 of the *Civil Code*.<sup>75</sup>

It appeared that the Paiwanese lawyer tried to explain the customary law of “*vusam* inheritance” by adopting the concept of “property-partition contract”, popularly practiced in *Han* society. Within the cultural frame of the *Han* people, however, the legal story of “*vusam* inheritance” told by the Paiwanese lawyer in Mandarin Chinese failed to tailor to the concept of indigenous people in Paiwan tribes.

The “property-partition contract” is a form of deed unregulated by the *Civil Code* in the Chapter of the “Particular Kinds of Obligations”. It is binding only on the persons who participate in reaching the agreement. The inheritance rights of the heirs who did not take part in reaching such agreement should not be deprived by it.<sup>76</sup> Originally this form of contract is popularly practiced in *Han* society.<sup>77</sup> It is a document that records the decision concerning the division of household property (*fen-chia*). Division is executed on the basis of male members of the family, who are allowed to occupy certain rooms within the household after marriage and in turn are called *fang*. Girls will stop being a member of their natal family since their wedding day and become “her husband’s wife”, who sleeps and keeps her personal possessions in the new room prepared by the groom’s family. The timing of dividing the household property according to the number of *fang* is not fixed or directly connected with the death of the father in the household. It may be initiated by the parents during their lifetime, or launched by the sons after the formers’ deaths.<sup>78</sup> Eight documents of property division drafted in Yen-Laio (a small village in the southern part of Taiwan) have been collected and analysed by Myron L. Cohen, an American

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74. The daughter-in-law got married to the eldest son in 1994.

75. Civil Code § 179 (Taiwan). (provides that a person who acquired interests without any legal ground and prejudice to the other shall be bound to return it. The same rule shall be applied if a legal ground existed originally but disappeared subsequently).

76. Wu Yi-Shun (吳宜勳), *Fenchan Qiyueshu Wenti Zhi Yanjiu* (分產契約書問題之研究) [*Research on Property-Partition Contract*], 1 GONGZHEN FAXUE (公證法學) [NOTARY LAW REVIEW] 35, 37 (2004).

77. *Id.* at 36.

78. Shuzo Shiga, *Family Property and the Law of Inheritance in Traditional China*, in CHINESE FAMILY LAW AND SOCIAL CHANGE: IN HISTORICAL AND COMPARATIVE PERSPECTIVE 109, 116-17 (D. C. Buxbaum ed., 1978); Myron L. Cohen, *Developmental Process in the Chinese Domestic Group*, in FAMILY AND KINSHIP IN CHINESE SOCIETY 21, 27 (M. Freedman ed., 1970).

anthropologist.<sup>79</sup>

Nevertheless, it may be tenable to say that the differences among the Inheritance Act (Law) of the Civil Code, the customary law of “*vusam* inheritance” practiced in Paiwan tribes, and the “property-partition contract” popularly done by *Han* people are so enormous that the Paiwanese lawyer failed to fight against the state law for his Paiwanese client successfully through borrowing the concept of “property-partition contract” prevalent in *Han* society. For one thing, only sons are allowed to take part in the “property-partition agreement” in *Han* society,<sup>80</sup> while the eldest son/daughter is the only heir of the family in Paiwan tribes. As for the Civil Code, the rights of inheritance are conferred on the surviving spouse, sons and daughters.

In addition to the above, the surviving daughter-in-law whose husband died childless would be entitled to the property only if she continued to live with the family of her late husband, stayed single and adopted a son chosen by the head of her late-husband’s clan in *Han* society.<sup>81</sup> In cases where the eldest son/daughter died childless in Paiwan tribes, the surviving spouse is not entitled to inherit the property originally owned by the family of the deceased. If the surviving spouse marries into the family of the deceased, he/she is able to take the dowry back and have one-fourth of marital property only.<sup>82</sup> According to Article 1138 of the Civil Code, however, the surviving spouse has the right to inherit anything owned by the deceased, including property acquired from succession.<sup>83</sup>

Even though the practice of “property-partition contract” in *Han* society might be able to evade the principle of gender equality demonstrated by Article 1138 of the Civil Code, the daughter-in-law who did not participate in the formation of the contract would still be entitled to a share of her

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79. MYRON L. COHEN, HOUSE UNITED, HOUSE DIVIDED: THE CHINESE FAMILY IN TAIWAN 243-53 (Appendix B: Family Partition Documents) (1976); Myron L. Cohen, *Family Partition as Contractual Procedure in Taiwan: A Case Study from South Taiwan*, in CHINESE FAMILY LAW AND SOCIAL CHANGE: IN HISTORICAL COMPARATIVE PERSPECTIVE 176, 188-96 (D. C. Buxbaum ed., 1978).

80. Daughters and daughters-in-law are entitled to dowry payments given by their natal families only.

81. Tseng, *supra* note 3, at 268-69.

82. Hsu Koun-Min (許功明), *Paiwanzu Caichan Tixi Ji Guannian De Chubu Fenxi (排灣族財產體系及觀念的初步分析)* [A Preliminary Analysis of Material Property System Among the Paiwan], 4 Ziran Kexue Bowuguan Xuebao (自然科學博物館學報) [BULLETIN OF NAT'L MUSEUM OF NAT. SCI.] 167, 178 (1993).

83. When a divorce takes place and the statutory marital property regime dissolves, the remainder of the property obtained by the husband or wife in marriage should be equally distributed to the husband and the wife in terms of Civil Code § 1030-1, while the property acquired through succession are excluded from the distribution scope. For the surviving spouse, therefore, the way of property partition upon the death of the *vusam* in terms of Paiwanese customary law is similar to the division of marital property in the case of divorce, according to the Civil Code.

husband's property in the case of inheritance. If the widowed daughter-in-law is unwilling to waive her right to inherit the property owned by her late husband, the family of the deceased will be unable to take their "family property" back from the daughter-in-law who lost her husband.<sup>84</sup> In spite of the fact that the defendant does not have the right to inherit the property of the deceased under the customary law of Paiwan tribes, the concept of "property partition contract" applied by the Paiwanese lawyer is unable to preserve the tradition of "vusam inheritance" in cases where the daughter-in-law did not participate in reaching an agreement upon the father's death, or refused to relinquish her right to inherit the property owned by her late husband.<sup>85</sup> As a result, the state law played a dominant role in the interactions of the Civil Code, the concept of "property partition contract" in Han society and the customary law of "vusam inheritance" in the Paiwan tribes.

#### B. *Court Rulings Recognizing the Customary Law of "Vusam Inheritance"*

The customary rule of "vusam inheritance" was preserved through state law in more recent court cases, while the responsibility of vusam to look after younger siblings was also mentioned or emphasized by the court rulings. In the Summary Proceeding's Case No.62 of Taitung District Court 2012 (CASE 3),<sup>86</sup> the plaintiffs (two younger sisters) claimed that the four pieces of land registered under the name of the defendant (the eldest brother and the vusam of the family) were actually owned by all of the daughters and sons of the deceased parents, and entrusted to the eldest brother. In other words, the name of the eldest brother was only borrowed upon registration, and the contract of the trust should be terminated. The defendant should transfer one-sixth of the land ownership to the plaintiffs respectively. However, the defendant asserted that five younger siblings and their mother had reached a settlement of inheritance with him upon the death of their father, in which the land ownership was allocated to him only. He had also registered as the owner of the land left by his father in accordance with the partition agreement of inheritance signed by all of the heirs of the deceased. Even though he gave the younger siblings a share of the rent of land, this did not mean that the latter had land ownership. He did so just because the custom of "vusam inheritance" also required the only heir of the family to take care of the younger siblings.

The case was investigated by the court. The second son of the family

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84. MINISTRY OF JUSTICE OF R.O.C., *supra* note 45, at 534-35.

85. Civil Code § 1174. (stipulates that an heir may waive his or her right to inheritance).

86. Taitung Difang Fayuan (臺東地方法院) [Taitung District Court], Minshi (民事) [Civil Division], 101 Tung Jian Zi No. 62 (2012) (Taiwan) (101東簡字第62號民事判決).



stated that it was the father's will to leave the land ownership to the eldest child, who would be the head of the family upon the father's death. The father also asked the vusam to give a share of the rent of the land to each younger sibling. The third son of the family also mentioned that the eldest brother did not attend school and worked with the father when he was very young, so as to support the family. Therefore, it was the father's wish to give the land to the eldest child, who was also responsible for looking after the aged parents.

Consequently, the court rejected the plaintiffs' claim, because none of the documents provided by the plaintiffs mentioned that the land was entrusted to the defendant and the name of the defendant was only "borrowed" by the younger siblings in the land-registration procedure. Having a share of the rent was rather the vusam's responsibility to take care of the younger siblings in terms of the custom of "*vusam* inheritance" than a symbol representing the plaintiffs' ownership of land. It may be tenable to say that the custom of "*vusam* inheritance" is preserved legally via "the partition agreement of inheritance" in this case, because the agreement is still effective if some heirs of the deceased are disadvantaged by its terms.

As for the Summary Proceeding's Case No.320 of Chouzhou Summary Division of Pingtung District Court 2014 (CASE 4),<sup>87</sup> the plaintiff (the third daughter of the vusam) claimed that the land in dispute was given to her by her mother, the vusam of the family. Owing to the fact that land ownership had been transferred to the plaintiff, she insisted that the defendant should return the land in dispute and remove the house built on it. However, the defendant asserted that the land in dispute was inherited by his eldest aunt from his grandfather in terms of the Paiwanese custom of "*vusam* inheritance". The house on which it was built was originally constructed by his grandfather to accommodate his mother, the fourth daughter in the family. According to the tradition of "*vusam* inheritance", the eldest child should look after the younger siblings. Therefore, his eldest aunt let his mother stay in the house on that piece of land without any payment being required for 30 years. The defendant argued that the land in dispute was the only place for his family to stay, while the family of the plaintiff had their own house located just next door. Article 148 of the Civil Code stipulates that a right shall be exercised in accordance with the means of good faith. Additionally, a right cannot be exercised for the main purpose of damaging the other people's rights. However, the plaintiff violated this rule and intended to expel the family members of the defendant from the land.

The court found that the old house on the land in dispute was built by

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87. Pingtung Difang Fayuan (屏東地方法院) [Pingtung District Court], Minshi (民事) [Civil Division], 103 Yuan Chao Jian Zi No. 2 (2014) (Taiwan) (103原潮簡字第2號民事判決).

the grandfather of both parties to accommodate his fourth daughter, the mother of the defendant. The mother of the plaintiff, as the *vusam* of the family, inherited the land from her father. Therefore, the contract of loan for use created by the grandfather and the mother of the defendant, which only required the mother of the defendant to return the land after gratuitous use, should also be inherited by the mother of the plaintiff. In addition, the mother of the plaintiff did not demand that the mother of the defendant return the land ten years ago, when the latter rebuilt a new house on it. Therefore, the court ruled that the contract of loan for use still existed between them. It was quite reasonable for the defendant and his mother to believe that the mother of the plaintiff would not demand the return of the land in terms of Article 767 of the Civil Code. Moreover, the plaintiff obtained the ownership of the land without paying any money, because it was given to her by her mother who inherited it from the grandfather of both parties. Therefore, the plaintiff's claim to exercise her right of ownership and require the defendant to return the land was regarded as violating the principle of good faith stipulated by Article 148 and rejected by the court.

It may be tenable to say that the customary rule of *vusam* inheritance was preserved by the mothers of both parties through mutual agreement. Additionally, the *vusam*'s responsibility to take care of the younger siblings was also emphasized by the court. Consequently, even though the plaintiff's claim was not extinguished by the extinctive prescription,<sup>88</sup> the court still ruled against her and indicated that her legal action had violated the principles of good faith.

#### VI. INDIGENOUS PEOPLE'S LEGAL PRACTICES AT THE COMMUNITY LEVEL (OUT OF COURT)

##### A. *The Customary Law of "Vusam Inheritance" Practiced by the Mediation Committee of the Town Council*

According to the interview records of the defendant (the *vusam* of the deceased, R28) in Civil Case No.25 of Pingtung District Court 2004 (CASE 1),<sup>89</sup> the case was brought to the mediation committee of the township prior to the court, so as to settle the dispute. She stated that "All of the mediators in this town are upstanding senior members of the community with good character and integrity. They have a better understanding of indigenous rules and things. Real mediations can be carried out by these people chosen by the township office." However, the plaintiff (the younger daughter of the

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88. The claim based on Civil Code § 767 (Taiwan) can not be enforced if it is not exercised within fifteen years according to Civil Code § 125.

89. 93 *Jia Su Zi No. 25*.

deceased) did not attend the mediation session, and eventually brought the case to the District Court for conflict resolution. Why did the disputing parties fail to reach an agreement through use of mediation service in town?

Article 26 of the Township and County-Administered City Mediation Act (hereinafter, TCCMA)<sup>90</sup> requires the township to submit the mediation agreement to the court within its jurisdiction for further review in ten days, when the mediation has been accomplished. In cases where the contents of the mediation agreement cannot be approved by the court due to violation of the state law or conflict with public policy/public moral, the court shall inform the township of the exact reasons. Once the mediation agreement is approved by the court, in contrast, the mediation settlement has the same effect as a binding judgment under the civil litigation procedure according to Article 27 of TCCMA.

Although the mediation settlement can be developed by the disputing parties through negotiation and bargaining for the terms of agreement according to their normative rules and values, it appears that the state law provides an inescapable framework for the practice of normative orders. Indeed, the chairman of the mediation committee in Spring Town (R27) mentioned as follows:

When we deal with the property disputes among brothers and sisters, we always give both parties the opportunities to provide information and learn about each other. Then the understanding and expectations of disputing parties will be reorganized and adjusted in order to evolve a more specific discussion about possible terms of an agreed outcome. . . . Of course, we would communicate with each party in terms of traditional custom and ideas for life. However, the mediation agreement needs to be sent to the court for further review, and judges may disapprove with it due to the conflict with state law. (R27)<sup>91</sup>

Nevertheless, it may be argued that the customary rule of “*vusam* inheritance” practiced in Paiwan tribes was preserved by the local community in a variety of ways. In other words, the state law might intend to penetrate and restructure the customary rules of indigenous people, but the latter might resist and try to stop the penetration by picking up the rules of the former.

During the interview with the chairman of the mediation committee in

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90. Xiangzhenshi Tiaojie Tiaoli (鄉鎮市調解條例) [Township and County-Administered City Mediation Act] § 26 (promulgated by the Legislative Yuan, Jan. 22, 1955, effective Jan. 22, 1955, as amended Dec. 30, 2009) (Taiwan) [hereinafter, TCCMA].

91. Interview with R27 (2010.Sep.19)

Spring Town (R27), for instance, another mediator sitting beside the chairman mentioned that,

“According to the custom of Paiwanese, the concerned property should be inherited by the eldest grand-daughter of the deceased, but the court ruled that the plaintiff was entitled to half a share of the heritage. The court’s ruling is in conflict with the customary rule practiced in Paiwan tribes. . . . *We would suggest that local people should distribute the land in the traditional manner. For example, if the size of the land given to the eldest son or daughter is five tenths of a hectare, only three tenths of a hectare of land will be allocated to the second sibling.* If the dispute cannot be settled by mediation, it might be brought to the court and ruled in terms of the state law but the party who was against the traditional custom would not definitely win the case.”

Owing to the fact Article 1138 and 1141 of the Civil Code provides a *per capita* distribution of the deceased’s assets, the eldest child and other siblings are supposed to have an equal share of the estate. However, any heir may demand the partition of the inheritance at any time in terms of Article 1164 of the Civil Code. Moreover, the Rehearing Precedent No.44 of the Supreme Court 1979<sup>92</sup> indicates that the partition agreement of inheritance can still be effective, in spite of the fact that the spouse of the deceased or some of the heirs might be disadvantaged by the terms of the agreement. Professor Lin Hsiu-Hsiung also agrees with the court on this point.<sup>93</sup> Therefore, it may be tenable to say that the mediators in Spring Town choose to draw on the mechanism of “inheritance partition” provided by the state legal system so as to preserve the customary rule of “*vusam* inheritance”.

To take another example, even though the plaintiff’s lawyer (R25) of Civil Case No.30 of Taitung District Court 2009 (CASE 2)<sup>94</sup> mentioned that the disputants did not seek mediation service before the case was brought to the court, an interviewee who used to be the chairman of the mediation committee in the Spring Town during the 1970s (R30) expressed his opinion on this case as follows:

[T]he question asked: Have you ever dealt with such kind of inheritance dispute?

Interviewee’s answer: We must deal with such kind of dispute

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92. Zuigao Fayuan (最高法院) [Supreme Court], Minshi (民事) [Civil Division], 68 Tai Zai Zi (台再字) No. 44 (1979) (Taiwan) (68台再字第44號民事判決).

93. LIN, *supra* note 3, at 116.

94. 98 Su Zi No. 30.

according to the content of the agreement reached by the natal family of the deceased son. We will suggest the surviving spouse of the eldest son take half share of the assets under her husband's name acquired after marriage, but she is not entitled to anything passed down to her husband by her parents-in-law. We will try to help the disputing parties reach a mediation agreement towards that direction. The District Court will not disapprove of it if the disputing parties are willing to agree on such settlement plan. However, if the surviving spouse of the eldest son could not accept this way of mediation, the case would be brought to the court. The court would deal with it in accordance with the succession law of the Civil Code. If she insisted, therefore, she would be able to inherit half a share of the assets under her late husband's name that was passed down by her parents-in-law. (R30)<sup>95</sup>

The interviewee appeared to approve the litigation strategy adopted by the plaintiff's lawyer in CASE 2,<sup>96</sup> and maintained that the property-partition agreement reached by the family of the deceased actually resonated with the customary rule of "vusam inheritance" in Paiwan tribes, and the surviving spouse of the deceased son who was not a party to this agreement should still follow this customary rule of inheritance. Therefore, it may be said that the customary rule was highly respected by the Mediation Committee of the Town Council. Settlement of inheritance partition provided by Article 1164 of Civil Code was also encouraged by the Mediation Committee in order to preserve the customary rule of *vusam* inheritance.

However, pretrial bargaining in the towns may be described as bargaining in the shadow of the law.<sup>97</sup> Given that such bargaining is carried out under a set of legal rules and expectations concerning what might happen if the case was brought to the court,<sup>98</sup> both the plaintiff of CASE 1<sup>99</sup> and the defendant of CASE 2<sup>100</sup> chose to assert their legal rights of inheritance in the District Courts rather than negotiate with the other parties through mediation that might be conducted according to the customary rule of "vusam inheritance".

Moreover, the mediators very often bring their own values and

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95. Interview with R30 (2013.10.8).

96. 98 Su Zi No. 30.

97. Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982).

98. Anne Bottomley, *What is Happening to Family Law? A Feminist Critique of Conciliation*, in WOMEN IN LAW: EXPLORATIONS IN LAW, FAMILY AND SEXUALITY 162, 179 (J. Brophy & C. Smart eds., 1985).

99. 93 Jia Su Zi No. 25.

100. 98 Su Zi No. 30.

perceptions, and these may affect the interaction of disputants and encourage a settlement acceptable to them according to their own ideas, even though detachment and objectivity might be emphasized by certain mediators as a fundamental work.<sup>101</sup>

It is also important to note that mediators who adhere to the morality and good neighborliness of the community might usually be regarded as less effective, and used less often.<sup>102</sup> It was quite possible for the disputing parties in CASE 1 and CASE 2 not to reach an agreement through the mediation service in the town because certain disputants who wished to assert their legal rights of inheritance already predicted that the mediation might be carried out in accordance with the customary rule of “*vusam* inheritance”.

Nevertheless, this article argues that indigenous people should enjoy the right to maintain and develop their distinctive customs, traditions, judicial systems and practices in accordance with Article 34 of UNDRIP and Article 30 of *IPBL*. In particular, the article considers whether the tradition of “*vusam* inheritance” is still practiced by the indigenous people as a customary law in Paiwan tribes, and whether the mediation in towns should be conducted in terms of the succession law of the Civil Code or the customary rule of “*vusam* inheritance”.

Additionally, Sally Engle Merry asserts that mediators often introduce the customs and values of their communities and encourage settlements that resonate with the community’s standard of good behavior. Furthermore, the disputing parties might be more willing to compromise and settle with the other party when the residential or kinship ties exist. If the disputing parties planned to live in the same community permanently, they might be keen to maintain a peaceful relationship with the other party through mediation settlement, so as to avoid gossip or scandal.<sup>103</sup> However, Gallin Bernard indicates that villagers in Taiwan are more willing to resolve their disputes via the courts than through mediation, because urbanization and social transformation have disintegrated the stable and close-knit phenomenon of communities and mutual dependence among villagers.<sup>104</sup> Owing to the fact that the social contexts of *Han* villages and Paiwan tribes are heterogeneous, this article also seeks to ascertain whether the original mechanism of dispute

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101. PHILIP. H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 213-14 (1979); Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC’Y REV. 709, 729 (1988).

102. Harrington & Merry, *Id.*, at 730.

103. Sally Engle Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America*, 2 THE POLITICS OF INFORMAL JUSTICE 17, 30-32 (1982).

104. Bernard Gallin, *Conflict Resolution in Changing Chinese Society: A Taiwanese Study*, in POLITICAL ANTHROPOLOGY 265, 267-72 (M. J. Swartz, V. Tuner & A. Tuden eds., 1966).

resolution still exists in Paiwan tribes. It also seeks to enquire as to whether the Paiwan tribes still live in small-scale societies and feel that they prefer to seek peace and need to maintain a friendly relationship with others through the tribal mechanism of conflict resolution when they have disputes with other people.

B. *The Customary Law of “Vusam Inheritance” Practiced by the Local Community*

By comparing the “legal sensibilities” of Islamic, Indic and Malaysia cultures through selecting the fundamental concepts in each culture and comparing them, Clifford Geertz argues that law is “a species of social imagination”.<sup>105</sup> Law should not only be recognized as a collection of values, principles, rules, norms and practices abstracted from the social context in which it exists but also an unique way of imaging the real.<sup>106</sup> The words “*haqq*”, “*adat*” and “*dharma*” are regarded as keys to understanding the social institutions and cultural formulations that surround local people.<sup>107</sup>

Taking Ottawa Indians’ customary law as an example, Matthew L.M. Fletcher also maintains that the customs and traditions of Indian people can be discovered from the tribal language and stories that are widely spoken and told/retold. When tribal judges seek to find and apply customary law on a court case, Fletcher suggests that fundamental value and rules signified by a word or phrase in the tribal language should be identified. If the judges of the tribal court could identify the word “*hazho’ogo*” developed from the Navajo Nation, for instance, the fundamental principle concerning how Indian people interact with each other as individuals could also be learned.<sup>108</sup>

In *The History of Paiwan*, a Paiwanese scholar of cultural study named Tung Chun-Fa highlights the concept of “*vusam*” as being particularly important to Paiwan tribes. “*Vusam*” means the best seed kept from the last season.<sup>109</sup> It also means “the eldest child of each family”. Owing to the fact that Paiwan tribes are constituted by three different classes, comprising the chief, the noble and commoners,<sup>110</sup> the eldest child of each family is

105. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 232 (1993).

106. *Id.* at 173, 184; Moore, *supra* note 28, at 719.

107. GEERTZ, *supra* note 105, at 186-87.

108. Matthew L. M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE L. 57, 94 (2007).

109. Tung Chun-Fa (童春發), *Jiangou Paiwanzu Lishi: Chutan* (建構排灣族歷史—初探) [*Constructing the History of Paiwan: An Early Investigation*], in TAIWAN YUANZHUMIN LISHI WENHUA XUESHU YANTAOHUI LUNWENJI (臺灣原住民歷史文化學術研討會論文集) [THE HISTORY AND CULTURE OF INDIGENOUS PEOPLE IN TAIWAN] 175, 197 (Den Sian-Ching (鄧憲卿) ed., 1998).

110. SHIH LEI (石磊), FAWAN: YIGE PAIWANZU BULUO DE MINZUXUE TIANYE DIAOCHA BAOGAO (筏灣：一個排灣族部落的民族學田野調查報告) [SU-PAIWAN: AN ANTHROPOLOGICAL

regarded as the only heir of the family, who is entitled to the social status and most of the property owned by the family.<sup>111</sup> Therefore, it could be argued that the concept of “*vusam*” is the cornerstone of Paiwan society. A “*vusam*” might be the *vusam* of the chief’s family, the noble family or the commoners’ family. Each family in each class has its own “*vusam*”, too.

“*Vusam*” is entitled to the social status and most of the property owned by the family, according to the customary rule of “*vusam* inheritance”. In other words, the family name, the nobility of the family, and the right to specific ways of decoration derived from the social status are passed on to the “*vusam*” only. For example, if the head of the family is a chief, only his or her “eldest child” could inherit such a social status, and enjoy the right to wear feathers of male eagle (“*qalis*” in Paiwan language), and the right to use the symbol of human beings on clothing and house decorations, as the privileges of being a chief. As for the family house, the best and the largest part of the family land, the holy jewellery composed of glazed beads, and the holy pottery inherited from the ancestors, are all given to the eldest child of the family.<sup>112</sup>

In contrast, the younger brothers and sisters of the “*vusam*” might receive only a tiny portion of family land or certain personal belongings as dowry (“*tsutur*” in Paiwan language) upon their marriage, so as to build a new house for their first-born child.<sup>113</sup> The younger siblings would be able to borrow the glazed beads and holy pottery from the *vusam* of their natal family for ceremonies, but the former would need to start the new household from scratch by clearing wild areas for cultivation, unless his or her spouse was the *vusam* of another family.<sup>114</sup> Apart from marrying into a family with

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INVESTIGATION OF A PAIWAN VILLAGE] 84-85 (1971); WANG KUI (DEMALAT-KUI) (王貴 (德瑪拉拉德—貴)), PAIWAN: LAWAERYAZU BULUO GUIZU ZHI TANYUAN (排灣—拉瓦爾亞族部落貴族之探源) [PAIWAN: THE ORIGIN OF NOBLE PEOPLE IN RAVAL TRIBES] 107-09 (2002) (the chief is called “Mamazangiljan”, the noble is called “Paulu” and normal citizens are called “Adidan”).

111. TUNG CHUN-FA (童春發), TAIWAN YUANZHUMIN SHI: PAIWANZU SHIPIAN (臺灣原住民史：排灣族史篇) [THE HISTORY OF INDIGENOUS PEOPLE IN TAIWAN: THE HISTORY OF PAIWAN] 296-97 (2001).

112. KUO TUNG-SHIUNG (PASALJAI TJANGKUS) (郭東雄), PINGDONGXIAN CHUNRIXIANG QIJACUN BULUO ZHI (屏東縣春日鄉七佳村部落誌) [TRIBAL GAZETTEER OF TJUVECEKATAN (CHI-JIA IN MANDARIN CHINESE)] 56-57 (2006); HSU KO-MIN (許功明) & KE HUI-YI (柯惠譯), PAIWANZU GULOU CUN DE JIYI YU WENHUA (排灣族古樓村的祭儀與文化) [RITUAL AND CULTURE OF PAIWAN IN KU-LOU VILLAGE] 206-07 (1994).

113. Shih Lei (石磊), *Fawancun Paiwanzu De Jiating Jiufen* (筏灣村排灣族的家庭糾紛) [*Family Disputes of Paiwan in Fa-Wan Village*], 32 ZHONGYANG YANJIUYUAN MINZUXUE YANJIUSUO JIKAN (中央研究院民族學研究所集刊) [BULLETIN OF THE INSTITUTE OF ETHNOLOGY ACADEMIA SINICA] 311, 314 (1971).

114. Chou Fen-Tzu (周芬姿), *Paiwanzu Vusam Guannian Xia De Hunyin Zhidu, Peiou Guanxi Yu Qinshu Jiegou* (排灣族*Vusam*觀念下的婚姻制度、配偶關係與親屬結構) [*The Marriage Institution, Spousal Relationship and the Structure of Relatives under the Paiwanese Concept of Vusam*], 21 LIANGXING PINGDENG JIAOYU JIKAN (兩性平等教育季刊) [GENDER EQUITY



higher or equal social status, the class of their children would become one rank lower than their natal family's. Therefore, people coming from a noble family might fall into the class of commoners after three generations, because their ancestors are not *vusam*.<sup>115</sup> People with humble status in the tribes may also have noble ancestors.

Is the tradition of “*vusam* inheritance” still believed and practiced by the indigenous people as a customary law in Paiwan tribes? According to the interview records collected from the Paiwan tribes of Love Town (R2–R23), the majority of the interviewees (R10, R13, R14, R15, R17, R19, R21, R23) regard the “*vusam*” as the only heir of each family, while very few interviewees (R9, R11) maintained that the binding force of “*vusam* inheritance” had been weakened and it was not a necessity for the eldest child to stay at home.<sup>116</sup> As for the interview records gathered from Spring Town and Linen Town, where the disputes of CASE 1<sup>117</sup> & CASE 2<sup>118</sup> emerged (R24–R38), the positive attitude towards *vusam* as the only heir of each household was also shared by the majority of the interviewees (R24, R25, R26, R27, R28, R29, R30, R34, R37, R38).

R28 (aged 52) and R34 (aged 60), as chiefs in Spring Town, argued that the tradition of “*vusam* inheritance” was still perceived as law, and practiced daily by Paiwanese people. The former pointed out that the custom of “*vusam* inheritance” was consistently followed in Spring Town. Even though the environment had changed a lot, the eldest offspring of the family was highly respected in the tribes. It seems that the eldest offspring were regarded as the guardian angel of family members. (R28) The latter further indicated that parents in his father's generation would say that everything owned by the family should be passed down to the eldest child, while the younger siblings could ask the eldest brother or sister for help. However, he only told his eldest child “the ways to look after the family” when the eldest son had finished school and started working. (R34)

Some interviewees brought up as the eldest child of noble families (R27, R31, R37, R38) and a civilian family (R29) also share the same view as the chiefs mentioned above. For instance, R37, a homemaker who used to work as a bus attendant and an insurance sales agent, stated that,

[T]he question asked: Did you tell your eldest child that everything in this household would be hers and she had to stay at home?

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EDUCATION QUARTERLY] 14, 30 (2003).

115. TIEN TZE-I (DAXIWULAWAN BIMA) (田哲益 (達西烏拉彎·畢馬)), PAIWANZU SHENHUA YU CHUANSHUO (排灣族神話與傳說) [THE MYTHS AND LEGENDS OF PAIWAN] 219 (2003).

116. Tsai, *supra* note 14, at 142-51.

117. 93 *Jia Su Zi No. 25*.

118. 98 *Su Zi No. 30*.

The interviewee's answer: Yes, of course. For example, the expensive glass beads amounting to NT\$100,000 or 200,000 each will be passed down to her. I also taught her how to deal with all kinds of domestic affairs. (R37)<sup>119</sup>

Being the eldest child of the family, however, R37 also mentioned that it was the *vusam*'s responsibility to look after aged parents and younger siblings. As she said,

“Why is the eldest child entitled to the biggest share of family property? If I am ill, she is supposed to take care of me. The younger children will establish their own families. They might come to visit, but my eldest daughter will be responsible for looking after the whole family. . . . I am the eldest daughter in my family as well. I sacrificed myself for two younger brothers and one sister. My parents were not able to make ends meet. Therefore, I had to start working when I was young. My younger brother was able to attend a private high school because I worked as a bus attendant and paid for the expensive tuition fee. (R37)”<sup>120</sup>

It may be tenable to say that the right of inheritance is tied to the obligation of supporting each member of the household in terms of the customary rule of *vusam* inheritance. In other words, even though the *vusam* is entitled to inherit most of the family property, he or she is required to look after the aged parents, and the younger siblings of last generation and the same generation who are unmarried or divorced.<sup>121</sup> The obligation of the *vusam* to look after younger siblings can also be proved by the Summary Proceeding of Case No.62 of Taitung District Court 2012<sup>122</sup> & the Summary Proceeding of Case No.320 of Chouzhou Summary Division of Pingtung District Court 2014,<sup>123</sup> in which the *vusams* of the families are allowed to inherit the ownership of the family lands in accordance with the state law, while the younger siblings and their offspring receive a share of the land rent, or are able to use the family land gratuitously, according to the contract of loan for use.

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119. Interview with R37 (2013.10.12).

120. *Id.*

121. TAIWAN ZONGDUFU LINSHI TAIWAN JIUGUAN DIAOCHAHUI (臺灣總督府臨時臺灣舊慣調查會) [TEMPORARY INVESTIGATION COMMITTEE OF GOVERNOR-GENERAL OF TAIWAN CONCERNING TAIWAN'S OLD CUSTOMS], FANZU GUANXI DIAOCHA BAOGAOSHU: DIWUJUAN, PAIWANZU (番族慣習調查報告書：第五卷・排灣族) [INVESTIGATION REPORT OF INDIGENOUS CUSTOMS: PAIWAN VOL.5] 16 (2003).

122. *101 Tung Jian Zi No. 62.*

123. *103 Yuan Chao Jian Zi No. 2.*

Pang Li-fu argues that the chief class (*Mamazangilan*) and the civilian class (*Adidan*) of Paiwan tribes are in a reciprocal rather than exploitative relationship. Civilian families share their harvest with the chief, and the chief is responsible for resolving disputes evolved in the tribe for the civilians.<sup>124</sup> Similarly, it may be argued that the relationship between the *vusam* and the younger siblings are reciprocal, but not oppressive. The *vusam* is responsible for maintaining elderly parents and single brothers and sisters, and is entitled to inherit most of the family property in return. Younger siblings will receive help from the *vusam* when they build a new house to start their own families. In cases where the marriages of younger siblings break down, they can always go back to their natal family and be taken care of by the *vusam*.

In another example, R29 (aged 31), a government employee, pointed out that the concept of “*vusam*” and the customary rule of “*vusam* inheritance” were still emphasized in Spring Town, because the festival of worshipping ancestors was constantly held every five years (*maleveq* in Paiwan language) in several tribes. However, being the eldest daughter of the family, she complained that,

[T]he eldest child is brought up in a different way. He or she is expected to be responsible for everything. Whenever the younger siblings made mistakes, the eldest child would be blamed by parents. My parents always expect me to have a better performance than my younger brothers and sisters. My younger sister was allowed to go out and had fun with her friends when she was a school girl, but I was required to stay at home and study hard. Whenever the relatives come to visit, they will ask about my latest situation but not my younger siblings'. They might be relieved if I am capable of looking after the whole family through studying hard and obtaining a good job. . . . If the eldest child of the family is a daughter, it is also difficult for her to get married because the majority of the male population in Taiwan is not willing to marry into the wife's family. (R29)<sup>125</sup>

Two interviewees of Spring Town and Linen Town (R24, R30) who were not the *vusam* of the family also agreed that such a traditional rule of inheritance was recognized as a customary law in the tribes. R24 (aged 45), a clergyman in Linen Town, told his eldest daughter that her husband had to marry into her family in the future when she was a primary school student.

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124. PANG LI-FU (潘立夫), *KAVULUNGAN PAIWANZU WENMING: YIGE MEIYOU WENZI, JINQIAN DE SHEHUI* (KAVULUNGAN排灣族文明：一個沒有文字、金錢的社會) [PAIWANESE CIVILIZATION OF KAVULUNGAN: A SOCIETY WITHOUT WORDS AND MONEY] 19 (1998).

125. Interview with R29 (2010.09.07).

As he stated,

[*V*]usam is the firstborn child of the family, who is not only privileged in inheritance but also responsible for the household. I am the second child of my family. My mother used to be the head of the household because she was the eldest among her brothers and sisters. My father married into my mother's family. Therefore, I know what it feels like when the head of the household is a girl. My mother also told my eldest sister that it was her honour and her duty to look after the family. (R24)<sup>126</sup>

R30 also told his eldest child, the firstborn son, to be in charge of the maintenance of their household. It may be argued that the *vusam* is educated or disciplined to take care of each family member in the process of up-bringing, and such a concept is expected to be internalized by the eldest child of Paiwanese family. The same view is shared by the younger siblings in Paiwan tribes.

According to the interview records of R25, R26 & R33, the tradition of *vusam* inheritance is still regarded as a customary law in the tribes. However, its binding force has been undermined because the existing civil law is in conflict with such customary rule of inheritance, and the indigenous culture suffers from stigmatization in Taiwanese society. R25 and R26 mentioned that the *vusams* of their families happened to be the eldest daughters. Their parents expected the firstborn girls to stay with the natal family after marriage, but neither of them followed such a traditional rule. As a result, no one was willing to step in the shoes of the *vusam*. R26 (aged 35), the second daughter of a civilian family, indicated that,

[M]y family takes the traditional concept of *vusam* for granted. However, my elder sister married into her husband's family. My grandfather was extremely angry for this, because my brother-in-law was supposed to marry into my family. My brother-in-law used to have an elder brother, but the latter died and the former became the *vusam* of his family. My elder sister did not want to make things difficult for her husband. Eventually, my grandfather did not ask my brother-in-law to marry into my family. I'm still single. At the beginning, my family expected me to perform the duty of *vusam*. However, I rejected that proposal because I would rather be free. I told my elder sister that I would be willing to provide her assistance, but I would not be willing to take

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126. Interview with R24 (2012.09.09).

on the role of *vusam*. She should tell her husband's family that she also has to take care of her natal family. (R26)<sup>127</sup>

Moreover, R25 (aged 48) argued that the customary rule of "*vusam* inheritance" was still preserved in the tribes, but not followed as strictly as before, because some indigenous people (such as his eldest sister) had highly negative experiences of being stigmatized for being indigenous.

It may be asserted that the practice of *vusam* inheritance is undermined by the patriarchal culture of the *Han* people. The customary law of *vusam* inheritance is being regarded as inferior to the dominant family culture of *Han* people because indigenous people in Taiwan were considered as less worthy races and their cultures as inferior to the cultures of the *Han* colonizers.<sup>128</sup> Consequently, some Paiwanese girls chose not to comply with the indigenous customary rule of *vusam* inheritance and to marry into their husbands' families.

Only three interviewees from Spring Town and Linen Town (R32, R35, R36), none of whom were the *vusam*, pointed out that the tradition of "*vusam* inheritance" was not believed as law and practiced in their daily lives. This is clearly depicted in the interview with R35 (aged 36), a community developer,

[T]he question asked (*hereinafter* Q): Does the tradition of *vusam* inheritance still have the same binding force as law?

The interviewee answered (*hereinafter* A): It's the pressure derived from the public opinion. You will definitely encounter people's judgment and whisper if you stay here. However, if you move to somewhere else, you won't feel any pressure from such kinds of public opinion. Even though the eldest child is required to stay in the tribe, most of the young people choose to purchase real estates in big cities. Only elderly people would stay here, because they are used to living in the tribe. For those who stay somewhere else, they would plan to move back home when their aged parents retire.

Q: Did your parents tell you that everything in this household would be owned by your eldest sister, and she had to support the whole family?

A: occasionally my father tells jokes and says that these wooden handcrafts would be mine or would belong to one of my elder sisters. He treats his children equally. However, everyone in this tribe would acknowledge that everything in this house belongs

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127. Interview with R26 (2012.09.08).

128. Mattias Ahren, *Indigenous Peoples' Culture, Customs, and Traditions and Customary Law - The Saami People's Perspective*, 21 ARIZ. J. INT'L & COMP. L. 63, 64 (2004).

to the eldest offspring.

Supplement provided by the interviewee's mother: the eldest child is normally assigned to stay at home so as to look after the aged parents. However, some elderly people were actually attended by the younger siblings of the *vusam*. Therefore, I decide to treat my children alike. (R35)<sup>129</sup>

The same view is shared by R36 (aged 70), a homemaker, and R32 (aged 44), a primary school teacher. Both acknowledged that indigenous people in the Spring Town still took the tradition of "*vusam* inheritance" for granted. However, they did not follow such a customary rule which would require them to tell their children that everything owned by the family would be passed down to the eldest one. The eldest son of R36 stated that his mother had not told him how the family property would be divided, even though he was already 50 years old. Children were treated equally in his family. People in Paiwan tribes used to think highly of *vusam*. Nevertheless, it was quite common for young people to buy new houses in big cities rather than in the tribe located in a rural area. In addition, most people were employed by various industries for a living. A lot of family farms were thus deserted. The only thing which might be able to demonstrate the continuity of the tradition of "*vusam* inheritance" is that the eldest child, especially in cases where it happened to be a daughter, would be required "not to marry into the spouse's family". (R36)

It may be seen that Christianity is embraced by the respondents (R32 & R36) who are both civilians and do not intend to pass the concept of "*vusam* inheritance" down to the next generation. Indeed, it seems that the civilians are more willing to accept foreign religion such as Christianity, because the knowledge of Paiwanese tradition is controlled by the noble people and the chiefs, and whether to insist on practicing Paiwanese tradition is not an issue for the civilians.<sup>130</sup> Moreover, Professor Chun-Fa Tung indicates that the spread of Christianity challenges the attitude of Paiwan tribes towards the chiefs, customs, religion, myths and religious rituals. The original and hierarchical social order based on family relationship and "*vusam* inheritance" is undermined by the concept of democracy imported by the church organisations.<sup>131</sup> It is also true that the aged parents of noble family might hesitate to follow the traditional rule of *vusam* inheritance, because elderly people might fall into poverty if the *vusam* fails to fulfill the obligation of supporting their aged parents.

Under the contradiction among plural legal orders concerning

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129. Interview with R35 (2013.09.01)

130. Wang, *supra* note 31.

131. TUNG, *supra* note 111, at 176.

inheritance in the Paiwan tribes, it is also interesting to note that twenty-four out of thirty-seven Paiwanese interviewees of Love Town, Spring Town and Linen Town (R3, R6, R9, R10, R12, R13, R15, R16, R18, R19, R20, R21, R23, R24, R26, R28, R30, R31, R32, R33, R34, R35, R36, R37) mentioned that some parents in the tribes might pass the family assets down to the eldest child as gifts in property when the latter was born, attended schools or got married in order to preserve the customary rule of “*vusam* inheritance”.

R20 of Love Town explained that the eldest child could benefit from gift-tax deduction by receiving gifts in property from the parents when the latter was still alive. The same point was also made by R26, who indicated that her father had given each child a piece of land, 2.5 morgens<sup>132</sup> in size, because it was tax free. However, she was not sure whether her brothers and sisters would be able to partition the rest of the family land peacefully under her father’s name.

Moreover, R35 pointed out that the younger siblings are able to know his/her share of family property after the wedding. It was true that a part of the family assets would be given to the groom as a betrothal gift for the bride’s family. The amount of betrothal gift depended upon the social status of the newlyweds in the clanship. Nevertheless, the allocation of family property would actually take place at a meeting held by both families of the bride and the groom after the wedding. (R35)

Under the plural legal orders operating in Taiwan’s society, it may be said that Paiwanese families are profoundly affected by the Civil Code which is based on Western individualism. However, the practice of state legal order is also affected by Paiwanese families and their way of practicing customary rule of *vusam* inheritance.<sup>133</sup> To avoid equal partition of family property upon parents’ death stipulated in Article 1138 & Article 1144 of the Civil Code, therefore, some indigenous people of Paiwan tribes choose to pass the family assets down to the eldest child prior to the death of the aged parents.

R34 further maintained that family property had to be partitioned before the children got married. Younger siblings are also entitled to a share of assets, but the treasures passed down for generations would definitely be handed over to the *vusam*, because the precious glass beads were worshiped by the *vusam* everyday. As the *vusam* of the clan, moreover, each chief owned an “ancestors’ house (*papulisian/ vineqacaan* in Panwan language)”.

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132. A morgen was a unit of measurement of land in Germany and the Dutch colonies, including Taiwan and South Africa. The size of a morgen equals to 9699 square meter.

133. Peter Fitzpatrick, *Law, Plurality and Underdevelopment*, in LEGALITY, IDEOLOGY AND THE STATE 159, 159 (D. Sugarman ed., 1983) (Fitzpatrick, P. argues that the interactions between regulations and their framing social fields are persistent. One side of the interaction cannot be curtailed to the other.).

A witch or a wizard would be invited to the ancestors' house fourteen days before the harvest festival (*masaut* in Paiwan language) so as to communicate with the ancestors and carry out the ritual practice of ancestor worship. The same things would be conducted in the worship ceremonies of ancestral spirits, such as *maleveq* and *busau* (sending the ancestors back to heaven in the following year). In addition, the traditional materials left by the ancestors, such as the glass beads, needed to be worshipped on the same days. It took 5 days for the chief, and 3 days for the civilians, to complete the ritual of ancestral veneration. Therefore, the younger siblings would be able to obtain a share of the newly-bought assets, but not the treasures passed down by the ancestors. (R34)

It may be argued that the customary law of *vusam* inheritance is also linked with the tradition of ancestral worship in Paiwan tribes. The younger siblings of the chief's family would receive a portion of newly-bought family assets prior to the death of aged parents, while the *vusam* who inherited the social status of the chief would receive the family treasures relevant to the rituals for ancestor worship.

Article 1174 of the Civil Code provides that the inheritors may relinquish their right of inheritance. *Han* people often ask the daughters and the surviving spouse to waive their right of inheritance in order to keep family assets in the hands of the sons.<sup>134</sup> According to the interview records, however, only three Paiwanese interviewees (R11, R12 & R19) believed that younger siblings did not need to relinquish their right of inheritance because they did not have such kinds of rights. Another three interviewees (R15, R33, R34) mentioned that younger siblings might be requested to give up their share of family property in their neighborhood. Nevertheless, the majority of the interviewees (R7, R14, R16, R26, R38) believed that it was rare for parents or the *vusam* to require younger siblings to waive their right to inherit family property.

R26 claimed that she had never heard of anyone in Linen Town asking the younger siblings to relinquish their right of inheritance. She stated,

[*V*]usam represents the head of the family. Even though *vusam* is entitled to most of the family assets, he or she is the guardian angel of other siblings. If younger brothers or sisters encountered difficulties in marriage or workplaces, they can always go and seek refuge with the *vusam*. The *vusam* cannot refuse to take care of other siblings. It's an ethic and an unspoken agreement in the tribe.

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134. MINISTRY OF JUSTICE OF R.O.C., *supra* note 45, at 533-35; CHEN HWEI-SYIN (陳惠馨), FALU XUSHI, XINGBIE YU HUNYIN (法律敘事、性別與婚姻) [LEGAL NARRATIVE ON GENDER AND MARRIAGE] 53 (2008).



Therefore, asking the younger siblings to waive their rights of inheritance would hurt the relationship among family members, because a house inherited by the *vusam* is supposed to be an eternal home for everyone. (R26)<sup>135</sup>

According to interview records, additionally, it is important to know that the *vusam* might be required to relinquish his/her right of inheritance if he/she decides to marry into the spouse's family. (R3, R6, R13, R23, R29) It seems that parents try to make sure that most of the family resources are under the control of the eldest child actually staying at home. However, Fen-Tzu Chou argues that aged parents might still wish the eldest daughter who marries into her husband's family to receive the jewelry and land of the family, otherwise the former would die anxiously.<sup>136</sup>

### C. *The Codification of Customary Law*

Article 1138 of the Civil Code, which stipulates that the surviving spouse and the lineal descendants by blood of the deceased are all entitled to inheritance, is transplanted from the German and Swiss Civil Codes.<sup>137</sup> The gap between the law modeled after the western law and the legal consciousness of local people in Paiwan tribes may be evolved in the process of legal transplant, because the western value of individualism is imported by the law. Such a law can be incapable of resolving disputes in the local community, because it does not represent the value system of local people who might resist it inactively or openly. Promulgating tribal customary law relevant to the indigenous peoples it serves is likely to provide a better alternative to the transplantation of western law.<sup>138</sup>

In the codification process, moreover, the principles, norms and rules embodied in the long-continued practice of accepted social behavior approved by social, cultural and religious institutions should all be preserved so as to reflect the social phenomenon of legal plurality in the law platform.<sup>139</sup> Furthermore, customary law is not static in nature.<sup>140</sup> Changes

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135. Interview with R26 (2012.09.08).

136. CHOU FEN-TZU (周芬姿), XINGBIE, ZUQUN YU JIEJI ZHI SHEHUI QUGE: PAIWANZU FUNU DE HUNYIN, GONGZUO YU JINGJI SHENGHUO (性別、族群與階級之社會區隔：排灣族婦女的婚姻、工作與經濟生活) [SOCIAL SEGMENT OF SEX, ETHNICITY AND CLASS: THE MARRIAGE, WORK AND ECONOMIC LIVES OF PAIWANESE WOMEN] 61-62 (2002).

137. Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896 (Ger.); Schweizerisches Zivilgesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] Dec. 10, 1907 (Switz.).

138. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness-Reincorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1, 2, 3, 6 (2000); MA, *supra* note 3, at 53.

139. BIJITENDRA MOHAN MITRA, CODIFICATION OF TRIBAL CUSTOMARY LAW 25-26 (2003).

in customary law should be delineated fully and accurately in the process of codification.

Do indigenous people living in the Paiwan tribes hope the customary law of “*vusam* inheritance” is codified as a regulatory basis of dispute resolution within the jurisdiction of the civil law in Taiwan? According to Grace Ying-Fang Tsai, the interviewees in Love Town believe that the custom of “*vusam* inheritance” should be codified in order to rule inheritance disputes of the members of Paiwan tribes. It is suggested that the concept of “contribution portion” should be introduced so that the *vusams* who fulfill the obligation of family support could be entitled to most of the family property, and the younger siblings who make contribution to the maintenance of parents could also have a larger share of family property.<sup>141</sup>

According to the interview records collected in Spring Town and Linen Town, additionally, the majority of the interviewees who were the *vusam* of the family (R27, R28, R29, R31, R33, R34, R37) appeared to hold a positive attitude towards the codification of customary rule with reference to “*vusam* inheritance” in terms of Article 30 of the *IPBL*.<sup>142</sup> R28, who was a chief and worked as the head nurse in the local Public Health Centre, claimed that Paiwan tribes would be dismantled if the customary law of “*vusam* inheritance” was not codified. Once such a custom was codified as statute, the eldest child would be more willing to undertake the role of *vusam* in Paiwan tribes, which required the *vusam* to provide support whenever the younger siblings requested.”

R31, a civil servant, who came from a noble family, argued that the customary law of “*vusam* inheritance” was a fundamental virtue of

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140. Cruz, *supra* note 138, at 4.

141. Tsai, *supra* note 14, at 172, 181-82.

142. Under the civil-law system, customary law is only a supplementary source of law. In other words, customary law is not applicable if the relevant statutes exist. (SHIH CHI-YANG (施啓揚), MINFA ZONGZE (民法總則) [GENERAL PRINCIPLES OF THE CIVIL CODE] 54-57 (2007).) Moreover, family law and succession law are imperative regulations which outline the standard relationship for each family. The rights and obligations of each family member cannot be altered arbitrarily either. (TAI YAN-HUI, TAI TUNG-HSIUNG & TAI YU-ZU (戴炎輝、戴東雄、戴瑀如), QINSHUFA (親屬法) [FAMILY LAW] (2011).) Therefore, as long as the existing statutes concerning family relationship do not stipulate that “if there is a particular custom, such custom shall be prevalent” in specific provisions, the relationship of indigenous family is primarily ruled by the *Civil Code* created by *Han* people in terms of Western and *Han* family cultures. (SHIH, [GENERAL PRINCIPLES OF THE CIVIL CODE] at 54-57.) Consequently, the codification of customary laws could definitely improve the judicial position of indigenous people in civil courts. As for the contents of civil custom with reference to the indigenous family, some scholars have been commissioned by the Council of Indigenous People to carry out a series of investigations. However, the reports only provide fragmentary information with reference to the family relationships of each indigenous group. Therefore, it would be better if detailed and comprehensive information such as child custody and visitation, child maintenance, the grounds for marriage annulment, marital property and debt distribution could further be investigated and provided in the future, especially where the legal change of *Civil Code* adopted the regulatory model of “respecting particular customs” in specific provisions of family relationships.

Paiwanese that should be recognized as a source of law superior to the existing provisions of the Civil Code. She stated,

[T]he land, the knowledge of traditional rituals and customs would all be passed to the eldest child of a family. Younger siblings might get married and move to somewhere else far away from home. When the family members gather in special events such as the harvest festival, or the ceremony of ancestral worship (“*maleveq*” in Paiwan language), it is necessary for the eldest child to be the host or the hostess at home. He or she will prepare food or hold roadside banquets for younger siblings and friends. (R31)<sup>143</sup>

As for R29, the eldest daughter of a civilian family, she asserted that the customary rule of “*vusam* inheritance” was an inextricable element for Paiwanese culture. If such customary law could be codified and respected by the district court as a regulatory basis of dispute resolution, the distinctiveness of Paiwanese culture would be preserved. In the process of bringing up children, parents would tell the eldest child that he or she had to take a lot of family responsibilities. It was difficult for the younger siblings to understand how much pressure was put on the shoulders of the *vusam*. (R29)

Only one interviewee (R38), who was a retired policeman and the only child of a noble family, disapproved of the idea that the customary law of “*vusam* inheritance” should definitely be codified. His family used to live in the “Egret Tribe” of Spring Town and moved to Nan-he village later on. He believed that whether the Civil Code should be amended in terms of the customary rule of “*vusam* inheritance” was an issue that should be discussed by Paiwanese people. There were two tribes in the village he was staying in. When Tribal Councils came up with the draft Bills of customary law, he suggested that Town Council be responsible for integration in order to provide the district courts an appropriate ruling basis of dispute resolution. (R38) This view resonates with the opinion of a Paiwanese Professor Kao The-I, who asserts that Paiwanese Town Councils should be juristic persons as administrative agencies of self-governance. Tribal Councils should also be established under the administrative framework of Town Councils so as to carry out tribal self-governance programs effectively.<sup>144</sup>

Nevertheless, most of the interviewees who were the younger siblings in the family tended to hold a more cautious attitude to the codification of

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143. Interview with R31 (2010.09.08).

144. KAO TEH-I (高德義), YUANZHUMINZU ZIZHIZHIDU ZHI YANJIU YU GUIHUA: PAIWANZU, RUKAIZU JI YAMIZU (原住民族自治制度之研究與規劃: 排灣族、魯凱族及雅美族) [THE RESEARCH AND PLANS OF INDIGENOUS SELF-GOVERNANCE FOR PAIWAN, RUKAI AND YAMI] 152 (2004).

customary law concerning “*vusam* inheritance”. R30, who used to be the chairman of the Mediation Committee in Spring Town, stated that the number of disputes with reference to inheritance might be reduced if the custom of *vusam* inheritance was codified. However, he asserted that a portion of family assets should also be appropriated to the younger siblings by the *vusam* of each family; otherwise the latter would be blamed by other people.<sup>145</sup> Interestingly, he believed that it was not necessary to restore such tradition completely. More research should be carried out concerning customary law and codification.

In addition, he indicated that the *vusam* was entitled not only to the family property, but also to the social status of the family, and the right to use the names of the family house (*umaq* in Paiwan language). Taking his wife’s family as an example, the interviewee mentioned that his grandfather-in-law was born as the fourth child of a chief’s family. The third child became the *vusam* of the family, because two older children died in early ages. His wife wishes to carry on the house name which used to be owned by the second child of the chief’s family. However, such a request was rejected by the *vusam* of the family, since the chief tried to consolidate a higher social status for her younger grandchildren, who were a lot more junior than the interviewee’s wife according to the seniority in family relationship. He asserted that younger siblings should also be entitled to inherit a house name from older siblings or relatives. In other words, the right to use a house name with higher social status should not be solely owned or controlled by the *vusam* of the family.

R35, a community development worker, told me that the codification of the customary rule of “*vusam* inheritance” seemed to be unfair for younger siblings. She acknowledged that traditional culture should be respected. However, she believed that collective opinions with reference to supplementary measures should be pooled, in order to ensure the fairness of the codified custom.

A similar opinion was shared by R26, the second child of a civilian family and an employee of a development association of Community University. When she was asked if she believed that the custom of *vusam* inheritance should be codified as a part of the Civil Code in terms of Article 30 of *IPBL*, she replied,

[T]he result of the codification should be fair, because the *vusam* is not the only child born in the family. If the *vusam* is the only one who would be entitled to inherit the family assets, the younger siblings would not wish themselves to come to this world at all. The

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145. See also AWI MONA, HUANG & WANG, *supra* note 47, at 170.

unfairness would result in social chaos, because the younger siblings would wonder why the parents would have them as younger children without their approval and require them to work for the family. The younger siblings would agree that the *vusam* is responsible for making plans and managing family assets. However, the traditional custom of “*vusam* inheritance” is based on the fundamental concepts of “co-ownership and sharing. (R26)<sup>146</sup>

It may be tenable to say that the younger siblings believe that they are entitled to a portion of family resources including property, house names and the social status of the family. It would be inappropriate for the *vusam* of the family to regard himself/herself as the sole heir of the family who could distribute family resources dictatorially.

It is also interesting to note that elderly people of civilian families might be curious about the codification of the customary rule concerning “*vusam* inheritance” as well, because the *vusam* might not be able to fulfill the obligations traditionally imposed on the eldest child of the family. R36, the fourth child of her natal family and a homemaker of a civilian family after marriage, asserted that each child should be treated equally, no matter how many children the parents had. In other words, it is unnecessary for the custom of *vusam* inheritance to be preserved in the Civil Code. When I asked her if the custom should be codified as a part of the Civil Code, she stated,

[I]’m in my old age. In my opinion, the responsibility of the *vusam* is enormous. What should we do if the *vusam* fails to accomplish the task of looking after each member of the family? (R36)<sup>147</sup>

The only interviewee who was born a younger sibling and approved the codification of “*vusam* inheritance” was a primary-school teacher in Spring Town (R32). When I asked his opinion about the codification of the customary rule with reference to inheritance in Paiwan tribes according to Article 30 of *IPBL*, he suggested that the regulations concerning monarchy of foreign states, including the rights and duties of the king/queen and the members of the royal family, might be adopted and further modified on the basis of the existing social context of Paiwan tribes.

Taking the monarchy of UK as an example, the Queen’s duty includes summoning and dissolving parliament and giving royal assent to the legislation passed by the parliament. Although the Queen retains the right to object to any Bill, by convention, she never does. In spite of the fact that the

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146. Interview with R26 (2012.09.08).

147. Interview with R36 (2013.09.02).

general election is held for the members of the House of Commons, the Prime Minister and other government ministers are formally appointed by the Queen. Judges, officers in the armed forces, diplomats and senior clergy of the Church of England are also ordained by the Queen. She is responsible for the endowment of peerages, knighthoods and other honours as well. As the head of the state, the Queen owns the power to declare war and cease fire, to conclude treaties and to proclaim the boundaries of the territory.<sup>148</sup> Members of the royal family devote themselves to charity activities.<sup>149</sup> It may be said that the indigenous people in Paiwan tribes would still be able to legally construct a democratic society under the existing system of social class by adopting such regulatory modules of monarchy.

It is important to note that two interviewees (R24, R25) who are younger siblings of the family argued that whether the custom of “*vusam* inheritance” should be codified in terms of Article 30 of *IPBL* was an issue of self-determination and autonomy. R24, a clergyman in Linen Town, claimed that,

[I] don't think that the Indigenous Peoples Basic Law guarantees the fundamental rights of indigenous people in Taiwan, because it is enacted by the Legislative Yuan (the parliament) of the Republic of China. Only 8 out of 168 members of the parliament are elected as the representatives of indigenous people in the general election. Therefore, the Indigenous Peoples Basic Law might be abolished at any time because *Han* people have an absolute majority of seats in the parliament. In my opinion, the laws concerning indigenous people should be created outside the sovereignty of the Republic of China. Each ethnicity should be able to participate in the process of legislation, so as to make sure that each ethnic group is fairly treated in the aspect of law. (R24)<sup>150</sup>

A Paiwanese lawyer who was not the *vusam* of his natal family also argued that whether the Civil Code should be modified in terms of the traditional customs of indigenous people was an issue that should be decided by each ethnicity, rather than the government or the parliament of ROC. He said,

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148. The Act of Settlement 1701, 1 Ann. (U.K.), <https://www.royal.gov.uk/MonarchUK/HowtheMonarchyworks/TheActofSettlement.aspx> (last visited Nov. 30, 2014).

149. JOHN CANNON & RALPH GRIFFITHS, THE OXFORD ILLUSTRATED HISTORY OF THE BRITISH MONARCHY 626 (1998) (charitable and humane work is now the chief function and support of the British monarchy).

150. Interview with R24 (2012.09.09).

[T]here are two ways to resolve the conflicts between the Civil Code and the traditional custom of inheritance in Paiwan tribes. One is to establish a special regulation in the Civil Code in order to replace the original articles. The other is to empower the indigenous people with autonomy in legislation. Whether the law of inheritance should be amended is an issue that should be decided by indigenous people through our own parliament or Trial Councils. It should not be determined by the state sovereignty. It would be better if such issue could be decided by the autonomous parliament constituted by indigenous legislators so that the content of law could be concrete and easier to be executed. (R25)<sup>151</sup>

Indeed, self-determination is a basic-condition for indigenous peoples to enjoy the fundamental rights, develop specific ethnic identity, and control their own future.<sup>152</sup> Discourses of legal pluralism and self-determination are often addressed by indigenous peoples to reclaim legal heritage.<sup>153</sup> Owing to the fact that Article 2 of the Act to Implement the ICCPR & the ICESCR<sup>154</sup> stipulates that the provisions of both Covenants providing human-rights protection have domestic legal status, indigenous peoples in Paiwan tribes should be able to determine whether and how the customary rule of *vusam* inheritance should be encoded as a statute in terms of Article 1 of both Covenants.

As for the surviving spouses' right of inheritance under the customary rule of "*vusam* inheritance", none of the interviewees in Spring Town and Linen Town made any statement with reference to its codification. Nevertheless, some of them expressed their perception of Case Two<sup>155</sup>. In general, the interviewees who were the *vusam* of the family (R27, R29, R33, R34, R37, R38) believed that the daughter-in-law of Case Two<sup>156</sup> was not entitled to inherit her late husband's land passed down by his natal family. A married couple's property was supposed to be owned by the first-born child. If the *vusam* failed to provide financial support to the aged parents, the younger siblings, uncles or aunts of the *vusam* would be responsible for looking after them. (R38) In cases where the *vusam* died without any offspring, the family land should be returned to the natal family of the deceased, so as to be passed down to someone who could undertake the role

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151. Interview with R25 (2010.11.14).

152. Anaya, *supra* note 55, at 842.

153. Frédéric Mégret, *Is There Ever a Right to One's Own Law: An Exploration of Possible Rights Foundations for Legal Pluralism*, 45 *ISR. L. REV.* 3, 13-14 (2012).

154. Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights § 2 (2009) (Taiwan).

155. 98 *Su Zi No.* 30.

156. 98 *Su Zi No.* 30.

of the *vusam* for the family. The surviving daughter-in-law would remain a member of her late husband's family. A piece of land might be allocated by her late husband's family for her to farm for a living. (R27) If she got married again, the new *vusam* would have the right to decide which assets should be given to her as dowry. (R33)

Moreover, a few interviewees argued that the daughter-in-law of Case Two<sup>157</sup> would be entitled to the family land of her late husband in cases where a child was adopted, or her new husband married into her late husband's family. R29, the *vusam* of a civilian family, maintained that,

[I]t is important to continue the family line. According to the customary rule of *vusam* inheritance, family property is supposed to be passed down to the first-born child. Therefore, having a child is the premise of inheritance. Actually, adoption is another option for childless couples. For elderly people, passing down the family name and having someone to play the role of *vusam* are the most important things. Whether the *vusam* has blood relation with the family is not an issue. For example, one of my neighbour's neighbor, who is the eldest sister of my grandmother, adopts a girl from a *Han* family and raises her as the *vusam* of the family. *Han* people prefer boys, but gender is not an issue in Paiwanese families. (R29)<sup>158</sup>

In addition, R37 stated that if she was the daughter-in-law of Case Two,<sup>159</sup> she would pass down the names of her late husband's family to the first child born in her second marriage, and leave the inherited land to that child. She might move to another place if she had another child with the second husband. A similar opinion was shared by R34, a chief of the tribe, who indicated that if he met the same situation as Case Two,<sup>160</sup> his eldest daughter-in-law would be able to stay at home and asked her new husband to marry into his family if his eldest son passed away. The name and the social status of the chief's family would be passed down to the eldest child born in her second marriage. In other words, the family would be maintained by the surviving daughter-in-law.

Professor Bien Chiang argues that if the *vusam* died childless, the surviving spouse had to go back to his/her natal family, because the status of the *vusam* would be automatically passed down to the younger siblings of

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157. 98 *Su Zi No. 30*.

158. Interview with R29 (2010.09.07).

159. 98 *Su Zi No. 30*.

160. 98 *Su Zi No. 30*.



the eldest child.<sup>161</sup> According to the interview records with the *vusams*, however, the surviving spouse would be able to stay with her late-husband's family. It is important to note that the Paiwanese concept of family inheritance is different from the perspective of *Han* people.<sup>162</sup> Having someone to inherit the house and social status left by ancestors is a key point for *vusams*. Whether the heir has genetic connection with the existing members of the household is not concerned. Therefore, the surviving spouse would be able to stay with the in-laws and raise a child not genetically connected with her late husband as the *vusam* of the household.

Such a view is shared by R24, a younger sibling of a noble family, who maintained that if the daughter-in-law of Case Two<sup>163</sup> was willing to stay with her parents-in-law, the latter would support the former to manage domestic affairs of the family. Of course, it would be necessary for her to transform herself as a member of her late husband's family. If such a transformation was challenged by the parents-in-law or the younger siblings of her late husband, the dispute should be resolved by the chief or the senior members of the tribe who would also help the chief practice ancestor worship or distribute land and game.

This view is also shared by R31, the *vusam* of a noble family. She was the only eldest child of a family who recognized that the surviving spouse of Case Two<sup>164</sup> might have spent money or energy on the family land owned by the deceased. In this case, the surviving spouse should be entitled to one third of the family assets registered under the name of the deceased husband. As for the marital assets, the surviving spouse should have an equal share with her mother-in-law. (R31)

However, the opinions of the interviewees who are the younger siblings of the family are different from the *vusams*'. R35, an interviewee from a civilian family, claimed that the surviving spouse's right of inheritance stipulated by the Civil Code was based on individualism, while the tradition of *vusam* inheritance was constituted by the concept of the continuation of the clan. She wished the traditional concept with reference to the maintenance of a clan to be preserved in law.

Four interviewees (R25, R30, R32, R36) agreed with the customary rule of "*vusam* inheritance" and believed that the daughter-in-law of Case Two<sup>165</sup> was not entitled to the family assets of her late husband, because the latter died childless. The former could have a share of the marital assets only.

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161. CHIANG, *supra* note 11.

162. LIN, *supra* note 3, at 261 (*Han* people prefer to adopt sons from patrilineal relatives for the purposes of ancestral worship and family inheritance).

163. 98 *Su Zi No. 30*.

164. 98 *Su Zi No. 30*.

165. 98 *Su Zi No. 30*.

Otherwise the family of the deceased might be separated through the property division, and the younger generation might not look after the aged parents, which would result in more social problems in Paiwan tribes.

Nevertheless, R26 mentioned that she was not sure whether she would do the same thing as what the daughter-in-law of Case Two<sup>166</sup> did—claiming the surviving spouse's right of inheritance. Elderly people might argue that the assets under the deceased husband's name were passed down from last generation rather than earned by the younger couple, but the interviewee pointed out that the daughter-in-law might have contributed to preserving these assets. In other words, if the defendant of Case Two<sup>167</sup> did not manage the family well, and her husband had to sell the family land for a living, nothing would be left by her late husband upon his death. Therefore, she believed that such an issue still required further discussions.

Therefore, it could be said that most of the younger siblings disagreed with the idea that the surviving spouse of the deceased *vusam* was entitled to inherit family assets under the name of the deceased on the grounds of elderly maintenance and the continuation of a clan. Just like the case of divorce, only the marital assets should be divided upon the death of the *vusam*. The family property should be passed down to the younger siblings, who could undertake the role of the *vusam* for the household. It is also important to note that two interviewees also maintained that the surviving spouse's contribution to keep the family assets of the deceased *vusam* should be recognized. Whether the surviving spouse should be entitled to a share of such property would require further discussion.

#### D. *The Traditional Mechanism of Dispute Resolution*

The indigenous justice system has been recognized by the states in a variety of ways. An ombudsperson for American Indian Families in Minnesota, for example, takes part in traditional prayer and rituals with the clients before the meeting begins.<sup>168</sup>

Under the United States system of recognition of Indian jurisdiction, the traditional Navajo legal procedure is incorporated into the operation procedure of the "Navajo Peacemaker Court". Traditional Indian legal system is constituted by Indian clan and kinship groups, and emphasizes equality and reciprocal relationships.<sup>169</sup> When a dispute emerges, the

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166. 98 *Su Zi No.* 30.

167. 98 *Su Zi No.* 30.

168. Elena A. Baylis, *Minority Rights, Minority Wrongs*, 10 *UCLA J. INT'L L. & FOR. AFF.* 66, 133 (2005).

169. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 *B. C. INT'L & COMP. L. REV.* 55, 76 (1997).

traditional procedure of resolution is called “talking things out”. The person who claims injury may demand compensation and a modification of relationships between the wrongdoer and the victim. The dispute is judged by the relatives and clan members of the parties who are involved in the quarrel. A blood or clan relative of the person who demands the compensation may summon the participants to talk things out on request. The session is normally held after a meal starting with a prayer, which is a powerful word bringing in the supernatural not only as witnesses but also as associates and agents for action. An opportunity to speak will then be provided for each individual participating the session.<sup>170</sup> After the discussion with wrongdoers, talks with the victim and the relatives of both parties are conducted, and a justice planner will provide an opinion in terms of Navajo creation scripture, so as to identify the problem and to use Navajo wisdom to guide the disputing parties. The involved parties will further reach an agreement of action plan depicting the responsibilities of each participant to restore relationships.<sup>171</sup> By incorporating such a Navajo jurisprudence model into the modern dispute resolution process, harmony of the disputing parties and the communities can be reinstated.<sup>172</sup>

According to interview records conducted in Love Town, Spring Town and Linen Town, some interviewees asserted that the disputes with reference to inheritance were normally sorted by the head of the village (R10, R12, R15, R17, R26), aged persons (R5, R6, R15, R26, R27, R34) or the chiefs (R6, R15, R26, R34, R38).

R26 stated that the chief and aged persons in the tribe used to help reconcile the disputing parties on request. Sometimes, mediation is carried out via a divination ceremony of worshipping ancestors. Recently, the senior relatives of both parties who understood how the land in dispute was used would be an appropriate candidate of mediator. Owing to the fact that the village is quite small, and everyone knows each other very well, the head of the village might be an ideal mediator as well. (R26) An anthropologist Shih Lei also indicated that a temporary judicial committee constituted by the relatives of the wrongdoer and the victim would be summoned by the secretary of the chief (*Kalaiyan* in Paiwan language) once there was a dispute in the tribe.<sup>173</sup>

Other interviewees argued that local gentries (R10, R29, R35) and members of the parliament, County Council or the Town Council (R12, R17, R34, R37) played an important role in local dispute resolution. Still others regarded the Mediation Committee of the Town Council as a common

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170. *Id.* at 77-78.

171. *Id.* at 79.

172. *Id.* at 80.

173. SHIH, *supra* note 110, at 30, 152.

problem-solving institution in the tribes. (R5, R10, R11, R12, R17, R21, R31, R33)

However, the majority of the interviewees (R3, R4, R5, R6, R9, R10, R11, R14, R15, R16, R20, R24, R25, R28, R29, R30, R32, R33, R35, R36, R38) maintained that the conflicts concerning inheritance were often resolved by a traditional mechanism of dispute resolution in Paiwan tribes called the “family council” which consisted of senior members of the family, including (a) surviving parents, (b) brothers, sisters and cousins of the parents and grandparents, and (c) elder cousins of both parties.

Members of the family council normally witnessed the partition of family property after the wedding. Therefore, the senior relatives of the disputing parties would have considerable knowledge concerning how the assets were allocated by the deceased parents. (R36) Brothers and sisters of grandparents and parents would all be invited to take part in the process of dispute resolution with reference to inheritance. (R28) The session would be opened by a senior relative who was close to the family members of both parties. (R34) Patrilineal and matrilineal relatives of the disputing parties had an equal opportunity to express their opinions. Chiefs in the tribes and the leader of the town might be invited to “sit and listen” as witnesses of mediation, but they did not have the right to speak unless they were family members of the disputing parties. (R3, R30, R32, R34) Chiefs were advisers rather than decision makers in the whole procedure of conflict resolution. (R25) Junior family members of both parties would also be invited to attend the session and listen as witnesses of mediation. However, they did not have the right to speak in the mediation procedure. (R32) Younger siblings would explain why they intended to assert the right of inheritance to senior relatives of the disputing parties who would persuade both parties to compromise so as to reach an agreement. (R14, R16, R20) Such kinds of dispute often emerged in cases where the vusam did not fulfill his/her family duty. (R16)

Article 1131 of the Civil Code stipulates that members of a family council shall be selected from the following relatives of the deceased person and in the following order: (a) elder lineal relatives by blood; (b) elder collateral relatives by blood within the third degree of relationship; (c) relatives by blood of equal rank within the fourth degree of relationship. It is interesting to note that the membership of family council practiced in the Paiwan tribes is slightly different from the provision of the Civil Code mentioned above, because elder collateral relatives by blood within the fourth degree of relationship (e.g. Brothers and sisters of the grandparents) are also regarded as eligible members.

Moreover, Professor Chen Chi-yen argued that the family council stipulated by the Civil Code resonated with a traditional proverb derived

from Confucianism, “law should be kept outside the door of the family”.<sup>174</sup> Consequently, family law was privatized, and family disputes might be resolved entirely by the family council instead of courts. However, the regulations concerning family council were abolished by German and Japanese Civil Codes<sup>175</sup> in order to reinforce the interference of the state authority in family lives and dispute resolution, via the establishment of family courts. Therefore, Professor Chen Chi-yen suggested that the provisions of family council regulated by the Civil Code should be void, the family court should be established, and the family procedure law should be enacted in Taiwan.<sup>176</sup>

Nevertheless, Wei Yi-Nan maintained that settling the family disputes through litigation could be costly. It might also undermine the relationships among relatives of the disputants. If the disputes could be resolved by the family council before the litigation process began, the spirit of cooperation could be strengthened among the relatives of the disputing parties.<sup>177</sup> Additionally, Raymond D. Austin asserted that the Navajo jurisprudence model of USA using Navajo common law and traditional dispute resolution method such as “talking things out” to restore the harmony of the disputants worked extremely well in peacemaking.<sup>178</sup>

Therefore, it may be tenable to say that the dispute-resolution mechanism of the family council practiced in the Paiwan tribes might provide an excellent alternative to settle the conflicts of indigenous

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174. DEBORAH CAO, CHINESE LAW: A LANGUAGE PERSPECTIVE 20, 25 (2004) (Deborah Cao asserted that several quotations from some of the most influential pre-imperial Chinese thinkers could provide important information about Chinese legal culture and the Chinese concept of law and its functions in controlling social relationships. In the aspect of law and family, a paragraph of *Analecets* was quoted as below: “The Duke of She informed Confucius, saying, ‘Among us here, there are those who may be styled upright in their conduct. If their father has stolen as sheep, they will bear witness to the fact.’ Confucius said, ‘Among us, in our part of the country, those who are upright are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this’. It could be said that such a text resonated with the traditional concept, “law should be kept outside the door of the family”).

175. Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896 (Ger.); Minpo (民法) [Civil Code] (Japan).

176. Chen Chi-Yen (陳棋炎), *Cong Minfa Shang “Qinshu Huiyi” Lunji Jiashi Jiufen Zhi Jiejue Tujing* (從民法上「親屬會議」論及家事糾紛之解決途徑) [*Approaches to Family Dispute Resolution: A Perspective of “Family Council” in Terms of the Civil Code*], 14 TAIDA FAXUE LUNCONG (臺大法學論叢) [NATIONAL TAIWAN UNIVERSITY LAW JOURNAL] 161, 175-76 (1985); See also Liu Shao-You (劉紹猷), *Cong Jianhu Zhidu Kan Qinshu Huiyi Cunfei Wenti: Dui Minfa Xiuzheng Jianyi Zhi Er* (從監護制度看親屬會議存廢問題—對民法修正建議之二) [*Whether the Family Council Should Be Void? A Perspective of Guardianship*], 44 FAXUE PINGLUN (法學評論) [CHAS YANG LAW REVIEW] 10, 15 (1978).

177. Wei Yi-Nan (魏義男), *Youguan Qinshu Huiyi Zhi Tantaoyao* (有關親屬會議之探討) [*A Discussion of Family Council*], 12 XIANDAI DIZHENG (現代地政) [MODERN REAL ESTATE TAX & LAW MAGAZINE] 4, 4 (1992).

178. RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 200-01 (2009).

disputants and restore the harmony of the Paiwanese community. The elements of family council could also be developed into a workable framework and integrated into the mediation sessions held by the modern family court and the Mediation Committee of the Town Council, so as to readjust the relationship between the disputing parties and their relatives efficiently in terms of the legal consciousness of the Paiwanese people.

## VII. CONCLUSION AND SUGGESTIONS

This article finds that Article 30 of the *IPBL*, resonating with Article 34 UNDRIP, provides that the traditional customs and cultures of indigenous peoples shall be respected in the legislative process, mediation, judicial procedures, and government administration, so that the rights of indigenous peoples can be protected. Thus far, the Indigenous People's Tribunals have been put to the test in January 2013 in nine District Courts. However, the legal status of indigenous peoples in Taiwan still cannot be improved, because the judges still need to rule the court cases involving indigenous peoples in accordance with the existing state law promulgated by *Han* people, rather than the customary laws embedded in the social context of the tribes.

Such a problem also reflects the indigenous people's legal position in and out of the courtrooms. Taking customary rule of *vusam* inheritance practiced by Paiwanese people as an example, the state law enjoys a superior status than the customary law of Paiwan tribes in terms of Article 1 of the Civil Code. However, judges, lawyers and local mediators resisted the hegemonic state law, and tried to preserve the customary rule of *vuam* inheritance developed in the Paiwanese community in a variety of ways.

Court judges intended to alleviate the disparity between state law and community law<sup>179</sup> via encouraging the disputing parties to settle in the courts in terms of Article 377 of the Civil Procedure Code<sup>180</sup>. A Paiwanese lawyer tried to explain the community law by borrowing the concept of "property partition contract" practiced in the *Han* society in order to stop the surviving daughter-in-law from inheriting the property left by her late husband, the *vusam* of the family. By capturing Article 1164 of the Civil Code, mediators of the Town Council also tried to stop the penetration of the state law and resist the *per capita* distribution of the deceased's assets among the heirs and the surviving spouse required by Article 1138 and Article 1144 of the Civil Code.

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179. BOAVENTURA D. S. SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 391 (2002) (the ancestral laws of indigenous peoples is a form of community law. Recognizing the community law may legitimize and strengthen the identities of indigenous peoples).

180. Civil Procedure Code § 377 (Taiwan).

However, certain disputants who wished to assert their legal rights of inheritance might predict that the mediation at the Town Council would be carried out in accordance with the customary rule of *vusam* inheritance, and refused to attend the mediation session. The mediation agreements are also supervised by the District Courts in terms of Article 26 of the TCCMA<sup>181</sup>. Once the disputing parties fail to agree on a settlement proposal in the District Courts, judges still need to rule the cases according to the state law rather than the customary rule of Paiwanese community. Moreover, the *Han* concept of property partition contract also failed to preserve the tradition of *vusam* inheritance because the daughter-in-law did not participate in reaching the agreement. Consequently, it may be argued that state law played a dominant role in the interactions of the Civil Code, the *Han* norm of property partition contract and the customary law of *vusam* inheritance, in and out of the courtroom.

It is also found that the interviewees who are the eldest child of the family assert that the tradition of *vusam* inheritance is still regarded as law, and practiced daily in the Paiwanese community. *Vusam* is entitled to the social status and most of the property owned by the family, while the younger siblings might receive a portion of family land or certain personal belonging as dowry upon their marriage. The *vusam* is responsible for ancestral worship, taking care of the aged parents and the younger sibling who are single. Therefore, the relationship between the *vusam* and the younger siblings are supposed to be reciprocal, rather than oppressive.

Nonetheless, according to the interview records collected in Love Town, Spring Town and Linen Town, the binding force of such customary law has been undermined by the patriarchal culture of *Han* people, the stigmatization of indigenous culture, and Christianity. As a result, some Paiwanese girls chose not to follow the customary rule of *vusam* inheritance and married into their husbands' families. Some civilians who had no access to knowledge of Paiwanese tradition in the past time did not intend to pass the concept of *vusam* inheritance down to the next generation.

In addition, the equal partition of family property among the surviving spouse and children of the deceased required by Article 1138 and Article 1144 of the Civil Code reshapes the Paiwanese family, but the practice of state law is also affected by the Paiwanese familial culture. Some parents might pass the family assets down to the eldest child as gifts in property when the former are still alive, so as to preserve the customary rule of *vusam* inheritance.

According to the interview records carried out in Spring Town and Linen Town, moreover, the majority of the interviewees who were the *vusam*

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181. Township and County-Administered City Mediation Act § 26 (Taiwan).

of the family believed that the customary law of *vusam* inheritance should be codified, while most of the interviewees who were younger siblings in the family tended to hold a more cautious attitude towards the codification of such customary law. Indeed, the indigenous people in the Paiwan community are still able to construct a democratic society under the existing system of social class by adopting the regulations with reference to monarchy of foreign nations. However, the younger siblings asserted that they should be able to have a share of family resources including property, house names and the social status of the family. In other words, family resources should not be monopolized by the *vusams* of the family.

Furthermore, the younger siblings of the family maintained that the surviving spouse of the deceased *vusam* who died childless could only have a share of the marital assets, but not the land passed down by the deceased family on the grounds of elderly maintenance and the continuation of a clan. The family property should be passed down to the younger siblings who could undertake the role of the *vusam* for the household. The surviving spouse's contribution to keeping the family assets of the deceased *vusam* should also be recognized. As for the opinions of the interviewees who were the *vusams*, it was also argued that the surviving spouse of the deceased *vusam* who remained childless should not be entitled to inherit the land passed down by the family of the deceased. In general, the family land should be returned and passed down to someone who could undertake the role of the *vusam* for the family. A piece of land might be given to the surviving spouse by the new *vusam* to farm for a living. If the surviving spouse intended to get married again, he or she would receive dowry from the new *vusam*. According to the views of the *vusams*, however, the surviving spouse of the deceased *vusam* would still be entitled to the family land of the deceased in cases where a child was adopted, or the surviving spouse stayed with the family of the deceased in later marriage.

It was also found that the dispute-resolution mechanism of the "family council" practiced in the Paiwan tribes might be an excellent alternative to settle the inheritance disputes of Paiwanese people. The elements of family council could also be applied in the mediation sessions held by family courts and the Mediation Committee of the Town Council, so as to restore the harmony of the Paiwanese community in terms of the legal consciousness of Paiwanese people.

This article argues that human rights should be an emancipatory tool for the development of modern law.<sup>182</sup> Indigenous people in Paiwan communities, including the *vusams* and the younger siblings, should be able to determine whether and how the customary rule of *vusam* inheritance

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182. *Id.* at 280.



should be encoded as a statute according to the discourse of legal pluralism and the concept of self-determination embedded in Article 1 of both the ICCPR and the ICESCR in terms of Article 2 of the Act to Implement the ICCPR & the ICESCR.<sup>183</sup> Owing to the fact that Paiwanese people have many subfamilies,<sup>184</sup> and the customary rule of *vusam* inheritance might be slightly different in each community, bills of customary law could be drafted by Tribal Councils, then the Town Council should be responsible for integration so as to provide the District Courts an appropriate ruling basis of indigenous family disputes.

Moreover, law is an unsettled product of relations constituted by plural social norms.<sup>185</sup> If the customary law of *vusam* inheritance is codified as a statute, it should be continuously subject to challenge and change in terms of the identity and local knowledge of Paiwanese people. A continual programme of education in indigenous customary law should also be established at the undergraduate, postgraduate and judicial levels<sup>186</sup> so as to amend the disadvantaged legal status of indigenous people in Taiwan.

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183. Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights § 2 (2009) (Taiwan).

184. TUNG, *supra* note 111, at 54-70.

185. Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L.J. 115, 138 (1984).

186. Jennifer Corrin, *Accommodating Legal Pluralism in Pacific Courts: Problems of Proof of Customary Law*, 15 INT'L J. EVIDENCE & PROOF 1, 24 (2011).

**Appendix: List of Interviewees**

Interviewees	Sex	Age	Education	Ethnicity	Class	Birth order
Pingtung City						
Respondent 1 (R1)	M	72	Bachelor	Han		
The Love Town of Pingtung County						
R2	M	44	Associate	Paiwanese	noble	Vusam
R3	M	62	Associate	Paiwanese	noble	Vusam
R4	M	53	Associate	Paiwanese	noble	Vusam
R5	M	51	Diploma of Senior High School	Paiwanese	civilian	Vusam (originally being a younger sibling)
R6	F	31	Associate	Paiwanese	civilian	Vusam
R7	M	71	Associate	Paiwanese	chief	Vusam
R8	F	30	Bachelor	Paiwanese	civilian	Vusam
R9	F	53	Diploma of Senior High School	Paiwanese	chief	Vusam
R10	M	60	Associate	Paiwanese	noble	Vusam
R11	M	59	Associate	Paiwanese	noble	Vusam
R12	F	50	Diploma of Senior High School	Paiwanese	civilian	Vusam
R13	M	57	Associate	Paiwanese	noble	Vusam
R14	M	58	Bachelor	Paiwanese	civilian	Vusam
R15	F	42	Diploma of Senior High School	Paiwanese	civilian	Vusam
R16	F	60	Diploma of Junior High School	Paiwanese	noble	Vusam
R17	F	47	Diploma of Primary School	Paiwanese	civilian	younger sibling
R18	F	43	Diploma of Junior High School	Paiwanese	civilian	younger sibling
R19	F	55	Associate	Paiwanese	civilian	younger sibling
R20	F	45	Bachelor	Paiwanese	noble	younger sibling
R21	M	49	Bachelor	Paiwanese	noble	younger sibling

Interviewees	Sex	Age	Education	Ethnicity	Class	Birth order
R22	F	62	Diploma of Junior High School	Paiwanese	civilian	younger sibling
R23	F	75	Unschooling	Paiwanese	noble	younger sibling
The Linen Town of Tai-tung County						
R24	M	45	Ph.D.	Paiwanese	noble	younger sibling
R25	M	48	Master	Paiwanese	noble	younger sibling
R26	F	35	Associate	Paiwanese	civilian	younger sibling
The Spring Town of Pingtung County (the Bainai family and the Joimojok family)						
R27	M	55	Diploma of Senior High School	Paiwanese	noble	Vusam
R28	F	52	Bachelor	Paiwanese	chief	Vusam
R29	F	31	Bachelor	Paiwanese	civilian	Vusam
R30	M	75	Diploma of Senior High School	Paiwanese	noble	younger sibling
R31	F	66	Diploma of Senior High School	Paiwanese	noble	Vusam
R32	M	44	Ph.D.	Paiwanese	civilian	younger sibling
R33	F	62	Diploma of Senior High School	Paiwanese	noble	Vusam
R34	M	60	Diploma of Primary School	Paiwanese	chief	Vusam
R35	F	36	Associate	Paiwanese	noble	younger sibling
R36	F	70	Diploma of Primary School	Paiwanese	civilian	younger sibling
R37	F	54	Diploma of Junior High School	Paiwanese	noble	Vusam
R38	M	70	Diploma of Senior High School	Paiwanese	noble	Vusam

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# 排灣族部落的繼承糾紛排解

蔡 穎 芳

## 摘 要

這篇文章的目標在於探討與排灣部落繼承議題有關的多元法律規範及其間之互動，以及排灣族人於此規範架構之下的處境。本文收集並分析各地方法院之相關裁判書，並針對身為排灣族人之鄉鎮調解委員會委員、曾協助處理排灣族繼承相關糾紛之律師們，以及排灣族人進行深度訪談。本文發現，法官們、律師們以及地方調解委員們曾以各種方式嘗試抵抗具有支配霸權的國家制定法以保留「長嗣繼承」的社區律法。然而，根據民法第一條的規定，整體上國家制定法還是享有較社區律法更為優越的法源地位。因此，排灣族原住民的法律地位並未獲得改善。此外，多數身為家中長嗣的受訪者相信「長嗣繼承」的習慣法應予以成文化，但多數身為家中餘嗣的受訪者對於此一習慣法之成文化則傾向於抱持較為保留的態度。而且，此一習慣法的拘束力已受到漢人父系社會文化、主流社會對原住民文化之污名化、以及西方基督教文化的逐漸破壞。本文亦發現，在排灣部落裡所踐行的「家庭會議」糾紛排解機制可能是一個能夠協助解決排灣族人繼承糾紛的一個極佳的替代性糾紛解決機制。依據法律多元主義的論述，以及根源於公民與政治權利國際公約第一條，還有經濟社會文化權利公約第一條的民族自決概念，本文主張，是否以及應透過何種方式將長嗣繼承的習慣法予以成文化，應由排灣族人全體（包括長嗣與餘嗣）來決定。

**關鍵詞：**排灣族、法律多元主義、繼承、民法、民族自決、原住民