Article

Impact of Globalisation on Family Law and Human Rights in Taiwan

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CONTENTS

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I. INTRODUCTION

Globalisation orthodoxy considers the phenomenon as the rapid increase in cross-border social, cultural, political, economic and technological exchange under conditions of capitalism. It has taken off as a concept in the wake of the collapse of the Soviet Union and of socialism and thus an undeniably capitalist process spreading over the democratic world. *Anthony Giddens* defines globalisation as a decoupling of space and time, emphasising that with instantaneous communications, knowledge and culture can be shared around the world simultaneously and thus creates a phenomenon of "globality" (Giddens, 2001). It has been critically observed that the consequences of globalisation may be the end of cultural diversity, and the triumph of a uni-polar (American) system of liberal constitutionalism serving the needs of capitalist penetration from the core to its periphery.[1]

Critical theories begot from reviews of the impact of capitalist globalisation on "the periphery" inspect Taiwan as a legal transplant and US dependent despite Taiwan's label as an NIC with sustained economic growth and stable democratic systems. Issues of state sovereignty and social justice have become popular areas of academic study in socio-political sciences in Taiwan.[2] I have no objection to the inclusion of Taiwan as belonging to the periphery of a capitalist globe, though with two doubts. First, if universalism is to be denounced, why should we announce a broad-spectrum account of "the periphery"? And this leads to the second question that if particularism is to be urged, why does Taiwan not deserve a specifically charted analytical framework for individuality? I therefore urge the readers' indulgence, in this inspection of the uniqueness of Taiwan Family Law.[3]

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1. *See* for example, R. J. Antonio & A. Bonanno, "*A New Global Capitalism? From 'Americanism and Fordism' to 'Americanisation-Globalisation'*", 41(2/3) AM. STU. 33-77 (2002). Some like P. J. Spiro, however, argues that it is the "global norms" that USA is busy coping with, *see* P. J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L. J. 649 (2002).

2. For books widely cited by Taiwan scholars, *see* G. BROOK & D. MOELLENDORF, CURRENT DEBATES IN GLOBAL JUSTICE (UK: Kluwer Academic, 2005); L. CABRERA, POLITICAL THEORY OF GLOBAL JUSTICE (New York: Routledge, 2006); S. CANEY, JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY (Oxford University Press, 2005); A. FOLLESDAL & T. POGGE, REAL WORLD JUSTICE: GROUNDS, PRINCIPLES, HUMAN RIGHTS, AND SOCIAL INSTITUTIONS (STUDIES IN GLOBAL JUSTICE) (UK: Kluwer Academic Publishers, 2005); F. THOMAS, ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY (New York: Doubleday, 2000); R. MISHRA, GLOBALISATION AND THE WELFARE STATE (UK: Edward Elgar, 1999); D. HELD & A. MCGREW, GOVERNING GLOBALISATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE (Cambridge: Polity, 2002); R. ROBERTSON, GLOBALISATION: SOCIAL THEORY AND GLOBAL CULTURE (California/London: Sage, 1992).

3. Laws enforced in Taiwan officially bear the title of the Republic of China (ROC) such as ROC Civil Code. For the purpose of this paper with an attempt to argue for a unique developmental model of law and practice situated in a locality, "Taiwan Family Law" is adopted to denote general and specific laws governing family relations in Taiwan.

As a child rights advocate, I would like to share my sentiments for the developmental right of a juvenile labeled "delinquent." We are so accustomed to theorise and analyse such adolescents as belonging to the periphery of a normative society. So the parents are either abusive or neglecting. Their children are both deprived and unpromising. However, I am constantly reminded that a serving professional must learn to listen and to admire. It is my belief that before due appreciation is bestowed to the identity and integrity of every single "self," no human rights discourse can qualify to judge. Delinquency may just be an essence of being young in the modern world where variable self-identities and living styles spring out everyday to confront the normative and cause chaos. When adults in authority are fully occupied with ordering over the contemporary chaos, other adults are urging for another normative society to promise better future for an emancipated generation. With all the noble passions and endeavours, we might have deprived a child the developmental right to participate and to choose. Maybe a delinquent can take the lead to purge normative deficiencies if we could learn to set aside the paradigm or paradigms and observe carefully with both our broad minds and open hearts.

We need critical theories to forward human civilisation, but individual development requires respect and encouragement. Instead of getting caught among the left, the right, the new right, the new left, or "the third way" (Giddens, 2000) for criticisms, or of proudly placing Taiwan as a NIC together with the reflexive First World to work towards "socialist globalisation" (Sklair, 2002), this paper is an effort to observe Taiwan as a unique case of development in family law and human rights.[4] In this effort, I am not to upgrade the "marginal," "peripheral," or "recipient" status of Taiwan or to overvalue the modernity of our law.[5] Instead, fact sheets will be presented to demonstrate that Taiwan has enjoyed autonomy and creativity in its evolution with distinctive cultural traits and social reflections. If the audience could join me to review the Taiwan experiences as a developmental[6] entity like how we may examine the

4. *See* D. Goulet for a general discussion on debates over the evolving nature of development in the light of globalisation, D. Goulet, *Changing Development Debates Under Globalization: The Evolving Nature of Development in the Light of Globalization*, 6 J.L. & SOC. CHALLENGES 1 (2004). Equally detailed account is offered in R. E. Gordon & J. H. Sylvester, 2004 with a good contrast to argue, "to accept the necessity for development, one must first accept one's relative inferiority and inadequacy and the need to evolve and advance towards something else"; *see* R. E. Gordon & J. H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 2004.

5. The discussions on modernity in this paper generally refer to A. GIDDENS, THE CONSEQUENCES OF MODERNITY (Cambridge: Polity, 1990); A. GIDDENS, RUNAWAY WORLD—HOW GLOBALIZATION IS RESHAPING OUR LIVES (New York: Routledge, 2000), & B. DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, GLOBALISATION, AND EMANCIPATION (New York: Routledge, 2002).

6. In this paper I borrow the concept of "developmental" from M. ROBINSON & G. WHITE

difficult times of developed countries,[7] the impact of globalisation on the shaping and transformation of Taiwan family legislation may show an image worthy of a retailored analytical framework.

Let's return to a neutral statement that "globalisation" or "global law" is a controversial term and thus multiple choices are available on the roundabout of definitions. We may begin with characterising globalisation as "cross-border development of legal norms." It involves "processes of international, transnational, and subnational norm development and interpenetration with little regard for the fixed geographical boundaries of the nation-state system" (Berman, 2005:485), or "an emerging transnational legal culture in which a customary law of communities transcends national boundaries" (Bederman, 2005:53). The idea of law and globalisation is thus taken to provide an instrumental lens for viewing the plural ways in which legal norms are disseminated in global society. And as such, it may also be "a useful theoretical insight as to the global pluralism of social systems and its implications for norm generation and application" (Wai, 2005: 471).

In the area of Taiwan Family Law, the impact of modernisation, internationalisation and globalization has since the beginning of the 20th century refurbished both the legislation and later the Taiwan society with western ideologies of monogamy and the conjugal family (nuclear family) as well as their corresponding legislative principles of sexual/gender equality and the best interests of the child. The climate of social justice and human rights formulated by social revolution and political reforms in the past twenty years (since the lift of the martial law in 1987) has also

(eds.), THE DEMOCRATIC DEVELOPMENTAL STATE: POLITICS AND INSTITUTIONAL DESIGN (London: Oxford University, 1998).

7. For example, H. W. Arthurs on the development of Canadian administrative law based on a global model; D. Borrillo on the legal recognition of same-sex partnership in France; M. Langer on the Americanisation effect on the Italian criminal procedure; P. Newell 1993 on the UK experience of realising the UN Convention on the Rights of the Child. In contrast, M. U. Killon, M. Mushkat & R. Mushkat discuss the resistance of Chinese culturalism and nationalism against globalisation in terms of Constitutionalism, democracy and the rule of law. Besides, B. Oppermann offers an interesting comparison among marriage laws in Egypt, South Africa, and the United States as to the impact of legal pluralism on women's status. *See* H. W. Arthurs, *Adminstrative Law Today: Culture, Ideas, Institutions, Processes, Values*, 55 UNIV. OF TORONTO L.J. 797 (2005); D. Borrillo, *Who is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity*, 17 YALE J.L. & FEMINISM 89 (2005); M. Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004); P. NEWELL, THE UN CONVENTION AND CHILDREN'S RIGHT IN THE UK (UK: the National Children's Bureau, 1993); M. U. Killon, *Three Represents and China's Constitution: Presaging Cultural Relativistic Asian Regionalism*, 13 CURRENTS INT'L TRADE L.J. 23 (2004); M. Mushkat & R. Mushkat, *Economic Growth, Democracy, the Rule of Law, and China's Future*, 29 FORDHAM INT'L L.J. 229 (2005); B. Oppermann, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L.J. 65 (2006).

transformed the rhetoric and context of law and practice. However, traditional Chinese ethics and family values, just like the western religious traditions,[8] remain secure at the foundation of law. In short, traditional teachings, contemporary social practices and modern rights discourses have negotiated their paths to transform the family/families through law and push forward an evolving legal culture of Taiwan.

For a country like Taiwan, to follow the currents of modernisation and globalisation is an inevitable destiny for survival in both political and economic spheres. Local elites of all disciplines have jumped onto the bandwagon to secure their competence and privilege to lead in their chosen fields. Globalised interdisciplinary has been shared with pride among the new generation of family law academics. In view of such a landscape, I will attempt to map out the footprints of two globalised principles, viz. sexual/gender equality and the best interests of the child, which are the paramount pillars of the monogamous nuclear family to be preserved and protected by modern law.[9]

Irrespective of criticisms of capitalist globalisation promoting political, economic and cultural hegemony or of the instrumentality of rule of law and Constitutionalism, or of "forced" elements or undue influences from the US and other hegemonies, this paper suggests that Taiwan has been engaged in an autonomous learning process. It has been involved in "a dynamic of selective adaptation"[10] aiming to make Taiwan

8. *See* M. E. Marty, for a review on the religious foundations of law in western societies. Literature like M. B. Brooks, D. A. Crane, A. L. Estin, C. J. Reid, on the evolving institution of the Christian oriented heterosexual monogamous marriage and its conjugal family in the past, present and future is of great value to this paper in the formation of a time-space vacuum of the family system that Taiwan family legislation has modeled from. Of the same importance are those concerned with polygamy, concubinage and other multicultural considerations of marriage regulation, family autonomy and children's rights such as C. Calhoun, E. Stein, 2004. *See* M. E. Marty, *The Foundations of Law: The Religious Foundations of Law*, 54 EMORY L.J. 291 (2005); M. B. Brooks, *The Biblical View Of Marriage: Covenant Relationship*, 12 REGENT U.L. REV. 125 (1999/2000); D. A. Crane, *Abolishing Civil Marriage: A "Judeo-Christian" Argument For Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006); A. L. Estin, *Xi. Marriage And The Law: Marriage And Belonging Public Vows: A History Of Marriage And The Nation*. By Nancy F. Cott., 100 MICH. L. REV. 1690 (2002b); C. J. Reid Jr., *The Unavoidable Influence Of Religion Upon The Law Of Marriage*, 23 QUINNIPIAC L. REV. 493 (2004); C. Calhoun, *The Meaning Of Marriage: Who's Afraid Of Polygamous Marriage? Lessons For Same-Sex Marriage Advocacy From The History Of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005); E. Stein, *Past And Present Proposed Amendments To The United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611 (2004).

9. The Christian marriage is taken "as the essential seedbed of republican virtue" (L. D. Wardle, *Conference On Marriage, Families, And Democracy: The Bonds Of Matrimony And The Bonds Of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003)). Marriage is the foundation of the family (J. C. Dobson, 2004) and the marital family is where virtue is "nurtured first and best" for children (L. D. Wardle, 2005). *See* J. C. Dobson, *Symposium On Marriage And The Law: Foreword: Marriage Is The Foundation Of The Family*, 18 ND J. L. ETHICS & PUB POL'Y 1 (2004); L. D. Wardle, *Children And The Future Of Marriage*, 17 REGENT U.L. REV. 279 (2004/2005).

10. I borrow this concept from P. B. Potter where the Chinese legal system (PRC) is viewed

a fit member of the global village. Instead of being labeled a "transplant" loaded with imposed foreign laws or otherwise praised as a "miracle" of modenisation and economic growth, I will rather present Taiwan's endeavours in family law, as a unique model of human rights development in the context of globalisation.

As a law professional and human rights activist who has been heavily involved in this development process, I may have frequently criticised Taiwanese developments in order to provoke or accelerate reform.[11] Yet in this paper, which shares experiences with an international audience from all corners of the globe, I would like to tell our story in a positive connotation with Taiwan sentiments and family values, though I still cannot avoid bearing the rational mind cultivated by western education under the brand of Warwick tradition. This paper is thus to be shared by those who are concerned with global justice under the light of a sensitive perception and due respect for the individuality and integrity of a legal culture at the periphery.[12]

II. IMPACT OF GLOBALISATION ON FAMILY LAW AND ITS RELEVANCE TO TAIWAN

A. *Transnationalisation of Family Matters*

Globalisation has brought about transnational family matters to be dealt with by law professions; wives escaping from domestic violence can seek asylum as refugees; husbands leaving their families behind for work in foreign lands may establish new families as a result; and children in divorce face an increasing threat of child abduction by their contesting parents of different nationalities. Therefore, it is concluded that "globalisation is transforming family law" (Stark, 2005:1). Family law problems extend beyond sovereign boundaries involving legal elements of foreign countries such as the recognition of marriage and divorce,[13]

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as a complex interaction of norms, process and performance and thus the modern legal reform is examined against its institutional capacity and legal culture. *See* P. B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC. INQUIRY 465 (2004).

11. *See* Amy H. L. Shee, LEGAL PROTECTION AGAINST SEXUAL EXPLOITATION OF CHILDREN IN TAIWAN: A SOCIO-LEGAL STUDY (UK:Dartmouth, 1998) and her two collections of Chinese essays published in 2001 on "*Family, Law and Welfare State*" and in 2004 on "*Sociology of Family Law*."

12. Here I will like to share the views taken in J. K. Krishnan on the observation of changing concepts of rights and justice in South Asia. *See* J. K. Krishnan, "*Book Review: Perceptions And Interpretations Of Law From Past To Present In The Subcontinent: Changing Concepts Of Rights and Justice in South Asia*", M. R. Anderson & S. Guha (eds.), 34 GEO. WASH. INT'L L. REV. 639 (2002).

13. *See* S. Starr & L. Brilmayer, for a review on the French immigration policy concerning the admission and treatment of polygamous families. S. Starr & L. Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003).

domestic violence,[14] child custody jurisdiction,[15] international adoptions,[16] and so forth. The extraterritorial expansion of family law poses new challenges not only to judicial practices but also to analytical theories (Bainham, 2005; Bradley, et al., 2004; Murphy, 2006).

Family law and corresponding measures are also being influenced by global human rights discourse (Cahn & Goldstein, 2004; Satterthwaite, 2005) and extra-judicial dispute settlement such as reconciliation, conciliation, mediation or arbitration mechanisms for the extra-judicial settlement of transnational family disputes (Anderson, 2005; Sullivan, 2005; Walker, 2003). Cultural pluralism encounters the western courts with unfamiliar ethnic, religious, and legal traditions.[17] The claims for human rights emphasising the "autonomy of self"[18] and individual free choice have called for plural considerations in marriage and family forms across religions and cultures (Cox, 2005). They argue for the legal recognition of same-sex union and their adoptive family (Ao Rfd, 2005; Cooper, 2004; Crane, 2006; Finnis, 1997; Hong, 2003; Katharina, 2000; Stark, 2001), extra-marital cohabitation (Boele-Woelki, 2000) and individual choice in the constitution and dissolution of family relationships (Krause & Meyer, 2002; Spaht, 1998). Human rights are pushing forward their visions of a good global society. Non-state actors and transnational networks are now playing a demanding role in the promotion and protection of human rights in local, regional and international arenas (Mertus, 1999; Abu-Odeh, 2004; Weissman, 2004).

The training for knowledge and skills for "cross-cultural

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14. *See* S. E. Merry, for a general account of constructing violence against women as a global human right issue. *See also* M. H. Weiner, for a feminist concern on the protection of domestic violence victims under the Hague Convention in view of a case heard at the California Court of Appeal. S. E. Merry, *Symposium on Violence between Intimates, Globalization, and the State: Constructing a Global-Violence against Women and the Human Rights System*, 28 L. & SOC. INQUIRY 941 (2003); M. H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad*, 11 AM. U.J. GENDER SOC. POL'Y & L. 749 (2003).

15. *See* B. Stark, on the US application of the UN Convention principles for the protection of children in divorce. B. Stark, *Rhetoric, Divorce and International Human Rights: The Limits of Divorce Reform for the Protection of Children*, 65 LA. L. REV. 1433 (2005).

16. *See* C. E. Kimball, 2005 on the issues of intercountry adoptions in the light of the Hague Convention. *See* C. E. Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561 (2005).

17. *See* N. Mezey for cultural considerations in American family courts and jurisprudence. N. Mezey & M. C. Niles, *Screening The Law: Ideology And Law In American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005).

18. In discussing quasi-global social norms to be applied in modern courts, it is argued "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *See* R. D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79 (2005). For more elaboration on the interaction of social norms and law, *see* S. V. Flynn, *A Complex Portrayal Of Social Norms And The Expressive Function Of Law*, 36 U. WEST. L.A. L. REV. 145 (2005).

negotiation"[19] and plural ethnic and religious aspects[20] is now deemed necessary for legal professionals (Lee, 2005; Legomsky, 2002; Reid, 2006; Soto, 2005; Terry, 2005). Because the practice of family law has become globalised, the recent development of "international family law" is justified in professional training curricula[21] (Dyer, 1997; Estin, 2002; Reynolds, 1995; Sliberman, 2005). International family law is to be taught as opposed to "comparative" family law (Morris, 2005; Morosini, 2005). Here "international" denotes to "shared or agreed upon rules and norms among a group of states," while "comparative" refers to "the respective rules and norms applicable in two or more particular countries" (Stark, 2005:2). In other words, those rules and norms marked as "shared and agreed upon" are to be applied in every family of the global village (Vale, 1995).

It is also valuable to take inspiration from cultural studies of law. As opposed to "the instrumentalists" who "view law in primarily pragmatic instrumental terms, as a tool to be judged by its successes or failures in achieving stated ends," "the culturalists generally treat law as the embodiment of norms, the outcome of political compromises, and the repository of social meanings. For them, the task of legal scholarship should be to provide an account of the content of legal norms, the meaning of legal texts, or the place of law in culture" (Riles, 2005). Taiwan Law may have been evidentially analysed or criticised as a state tool to achieve economic growth or political survival; however, its contexts of and effects on the family shall qualify for a separate study. Foreign legal discourses such as monogamy, sexual/gender equality and the best interests of the child may have been translated and adopted in law books, but they have been applied and interpreted in ways which preserve the original principles of Taiwan marriages and family forms.[22]

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19. The subject of "cross-cultural negotiation" refers to negotiations that occur between parties of different cultures who do not necessarily share "the same ways of thinking, feeling, and behaviour," quotation from N. J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANISATIONAL BEHAVIOUR 181-182, cited by I. Lee, *In the Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375 (2005).

20. For example, L. A. Oden presents a case study of Egypt on the modernisation of Muslim family law; J. H. Torok, 2005 discuss Asian American jurisprudence to be taught at the US universities. *See* L. A. Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004); J. H. Torok, *Asian American Jurisprudence: On Curriculum*, 2005 MICH. ST. L. REV. 635 (2005).

21. This newly developed field of study is entitled "international", but I prefer to recognise it as sociological studies of the family in transnational law. For relevant ideas, *see* L. M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J INT'L L. 65 (1996).

22. Similar research was also taken on in both eastern and western worlds to show the counteraction of traditional culture on modern law and human rights, *see* for example, P. K. Chew, "*The Rule of Law: China's Skepticism and the Rule of People*", 20 OHIO ST. J. ON DISP. RESOL. 43 (2005); N. Zhu, "*A Case Study of Legal Transplant: The Possibility of Efficient Breach in China*", 36 GEO. J. INT'L L. 1145 (2005).

B. *Viewing Taiwan Family in the Global Setting*

A case study of Taiwan family law and human rights will show the inter-communicating cross-boarding progresses among and in-between law, culture, ideas, values, institutions and processes during which foreign elements interact with local conditions to reproduce and transform the domestic law and society. This image may qualify what *Anthony Giddens* marked as "social reflexivity" as opposed to "simple modernisation" (Giddens, 1991:5-9). The "reflective project" has in turn pushed forward a process of "remoralisation" while also resulting in "unintended consequences" (Giddens & Pierson, 1998). The dynamics of legal reforms concerning marriage and the family on the one hand and socio-cultural transition consequent upon certain "leap forward" have also witnessed *Giddens*' proposal of "disembedded" and "re-embedded" social arrangements and family relations in the time-space distanciation of modernity (Giddens, 1984:181). In the globalised time-space networks of "disembedding" and "reembedding" cycles, such impact is reinforced by accelerated advance of biological and information technologies (Giddens, 1990:79). The ideologies of romantic love, sexual emancipation, gender equality and preservation of the conjugal family have interwovenly redressed various human right debates between the traditional and the modern leading to postmodern (Giddens, 1992; Giddens, 2000: 56-69).

The contribution of an integrative jurisprudence to accommodate the contrasting perspectives of positivism, natural law theory and the historical school is also worthy of attention (Berman, 2005). Taiwan is basically a positivist society in which law is essentially a political and social control instrument, a body of rules promulgated and enforced by official authorities representing the will of lawmakers, but in the field of marriages and the family, law is also a moral manifesto, an embodiment of principles of reason and conscience implicit in the human nature cultivated in Confucianism. Child right discourses have in all spheres challenged parental authority, though children are still legally subjected to parental discipline and obliged to pay their filial piety to parents. A review of recent reforms on marriage law will also show that monogamy has become a unique institution disembedded and re-embedded within the ethos of the core and the periphery.

The impact of globalisation on law has taken two forms catogorised by *Boaventura de Sousa Santos* as "globalised localism (the globalisation of culturally specific practices, often without regard for their socio-cultural relativity)" and "localised globalism (the impact of transnational practices and imperatives on local conditions)" (de Sousa Santos, 2002:177-182) or by a leading Chinese (PRC) scholar in this field 朱景文 as "the internationalisation of local law 国内法的国际化" and

"the localisation of international law 国际法的国内化" (朱景文, 2001:567-570). The former signifies the modernisation climate in which the models of Constitutionalism and democracy of certain political or economic hegemonies, mainly Germany, France and the US, have been taken to reform the legal systems of less-developed countries or their ex-colonies.[23] The latter conception denotes to the adoption by or adaptation into national legislation of international laws, mainly treaties.

It is convenient to borrow such categories to trace back the evolution of Taiwan Family law, though at this stage criticisms will remain at their origins. In the sense of "globalised localism," the ROC Family Law was first a production of the German school with heavy Japanese ingredients. Its development in Taiwan has further taken up US components. Taiwan legislation has long been called a "legal transplant"[24] both to be praised under the modernisation theory and to receive critiques from the schools of political economy of law[25] or cultural studies of law.[26] On the other hand, "localised globalism" may be well demonstrated by the sincere realisation of the UN Convention on the Rights of the Child in policy and law by administrative, legislative and judicial organs.

Over the years towards modernisation and democratisation, Taiwan may have undergone tremendous political transformation and thus possesses a complex legacy.[27] However, the calls for internationalisation

23. The first time happened during mid-19th and early 20th century, the French Civil Code and the German Civil Code were taken as models in a trend of law codification first among European countries then penetrating to the whole world. The second took place after WWII when the European and US Constitutional Courts and judicial review systems were replicated widely among African, Latin American and Asian countries. *See* M. GLENDON, M. GORDEN & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS (West Publishing Co., St/ Paul, 1994). Besides, the law and development movement during the 50s and 60s in which the US and ex-colonisers such as France, Britain and Belgian sent out expert teams to the third world to help with legal reforms and education. The more recent development of market-oriented transnational law and global law have also been categorised as such. *See* 朱景文,《比较法社会学的框架和方法——法制化、本土化和全球化》,中國人民大學出版社,2001,PP. 569-570。

24. For a general discussion on the transplant effect, *see* D. Berkowitz, K. Pistor & J. F. Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); E. E. Galinou, *Legal Borrowing: Why Some Legal Transplants Take Root and Others Fail*, 25 COMP. LAB. L. & POL'Y J. 391 (2004); J. M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003).

25. For relevant case studies concerning Taiwan, *see* Ph.D. theses by Hsiao-Tan Wang, *Gendering Law in a Post Authoritarian State: Feminist Struggles and Family Law Reform in Taiwan*, Ph.D. Thesis, School of Law, University of Warwick, UK, 2003. An interesting observation to examine Taiwan economic globalisation under the WTO system is also available at S. Y. Peng, "*The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*", 1 ASIAN-PACIFIC LAW & POL'Y J. 13 (2000).

26. For relevant case studies concerning Taiwan, *see* SJD dissertations by Hung-En Liu, *Custody Decisions in Social and Cultural Contexts—The Best Interests of the Child Standard and Judges' Custody Decisions in Taiwan*, Doctor Dissertation, School of Law, Stanford University, USA, 2002 and Grace S-C Kuo, *Gender and Discipline in Law*, J.S.D. Dissertation, School of Law, Northwest University, USA, 2003.

27. For a detailed account of legal development of Taiwan since its modernisation, *see*

followed by globalisation have been a secure policy for economic growth and survival. Facilitated by the prompt and divertive dissemination of information through high-Tec communication devices as well as the taking up of western ideologies and knowledge through all levels and sites of education, to live in a "global village" has become a popular slogan and for many it has become a way of life. It is based on this background understanding that my story of Taiwan Family Law will be told.

III. ORIGIN AND EVOLUTION OF THE TAIWAN FAMILY LAW[28]

A. *From Tradition to Modern*

The ideal traditional Chinese family is patrilineal and patriarchal. The family is a primary social unit of all social organisations. Helped by the teachings of Confucius, the family has been consciously cultivated in China perhaps more than in any other country in the world (Lang, 1946:9). It thus earned the name of being one of the world's most ancient and stable cultural artifacts[29] (Wong, 1979:256). Being supported by the state and its laws, the Chinese family system remained stable and relatively unchanged as an institution for nearly 2,000 years. According to the Confucian school, "the root of the empire is in the state, the root of the state is in the family, and the root of the family is in the individual."[30] If the individual is properly brought up and educated to respect and obey authority within his family, he will also become an obedient subject of the ruler.

Tay-sheng Wang, "*The Legal Development of Taiwan in the 20th Century: Toward A Liberal and Democratic Country*" 11(3) PACIFIC RIM LAW AND POLICY JOURNAL (2002).

28. The English version of Taiwan laws mentioned in this paper is *available at* http://www.6Law.idv.tw [S-link E-book of the R.O.C Law]; http://Law.moj.gov.tw/Eng/Fnews/FNmore.asp?LawType=all [Laws And Regulations Database of The Republic of China]. Relevant information on policy-making, legislation and enforcement is *available at* http://www.moj.gov.tw/mp.asp?mp=001 [Ministry of Justice, R.O.C]; http://www.ly.gov.tw/index.jsp [The Legislative of Yuan, R.O.C]; http://www.president.gov.tw/ [Office of The President, Republic of China (Taiwan)]; http://www.cbi.gov.tw/english_version/dispatch.do?def=site.englishIndex&publishWeb=1&publis [Children's Bureau Ministry of the Interior R.O.C].

29. That it was able to remain so was due to a set of social-cultural, economic and political factors. Economically speaking, traditional China was largely an agricultural country with the family farm as the most basic unit of cultivation. This provided for the economic self-sufficiency of the peasant household, but at the subsistence level, and made a large family valuable in itself because of the available labour. Politically speaking, China had very rarely been able to establish effective political control from the central administration, so that local communities had always enjoyed a large measure of autonomy. Thus, the village community consisting of clans came to have much political control over its constituent families and the individuals. Of far greater significance than either of these factors were the cultural-religious tenets of Confucianism.

30. Said Mencius, the greatest philosopher of the Confucian school. *See* J. Legge, (trans.) -- CHINESE CLASSICS, BOOK II: THE WORKS OF MENCIUS, part 2, P. 171, quoted at O. Lang, CHINESE FAMILY AND SOCIETY 9 (New Haven: Yale University Press, 1946).

It is out of this conviction that the Confucian school stresses the importance of the family and its socialisation function (Lang, 1946:9). Marriages were arranged by parents and romantic love was not encouraged between husband and wife. Concubinage and prostitution offered alternatives for men to satisfy their desire for love and companionship. Confucianism proclaimed filial piety to be the main human virtue and made a strong effort to put parental authority on the basis of genuine respect and love and to eliminate fear and compulsion from the relations of children to their parents. Parents' love for their children was also stressed,[31] but parents' obligations toward their children were considered less important than children's obligation toward their parents (Levy, 1949).

The solidarity and stability of the family institution were challenged by modernising (westernising) forces around the turn of the 20th century. Before 1949, a modern family based on principles of emancipation of the young, free marriage, economic independence and sexual equality was emerging in the urban centres of the mainland as a result of modern western education, which also brought about feminist movements (Wang, S. H., 1977; Wong, 1979:257-258). On moving to Taiwan, the ROC government also brought the uncompleted family revolution and its modern family law to impose on the then islanders. Apart from the ROC Civil Code 1931, the family revolution was also accelerated by rapid industrialisation and urbanisation of the island (Thornton, et al., 1984). In addition, under a series of state development plans based on the ideology of westernisation and internationalisation, the form and inter-relationship of the child-centered nuclear family in western societies has become the ideal model for the newly established families to resemble (Spear, 1974).

However, Confucianism[32] was announced as a state ideology (Chen,

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31. Although Confucian teachings concentrated on regulating the father-son relationship with the family, Chinese parents gave preference to the children of the sex different from their own. The warmest relations in the family were those not mentioned by Confucius as being the most important: the relations of mother and son and of father and daughter. For detailed information, *see* O. Lang, CHINESE FAMILY AND SOCIETY 324-31 (New Haven: Yale University Press, 1946).

32. It should be noted that the so-called Confucianism has undergone an evolution for more than two thousand years and that different Confucius schools always have conflicting thoughts and ideas. I do not want to be entangled in such a complicated argument of which should be the orthodox thinking. There are certain concepts, which are central to the building of Confucianism. They are, among others, royalty (to the ruler), filial piety (to senior family members), trust (to friends), a hierarchy of five relationships (ruler-official, father-son, husband-wife, elder brother-younger brother and friendship), and a "generation-age-sex" hierarchy in the family. Unfortunately, the education regarding Confucius in Taiwan, obviously too little in comparison with other social science subjects, cannot help students to grasp even a vague structure of its thinking. It appears to be a deliberate selection of certain "masterpieces" approved by the government. Needless to say, it was used as an instrument to safeguard and endorse state ideology. *See* R. Martin, "*The Socialisation of Children in China and on Taiwan: An Analysis of Elementary School Textbooks*", 62 CHINA QUARTERLY 242-262 (1975); J. E. Meyer, "*Teaching*

et al., 1990). Family ties based on filial piety were emphasised in family, school as well as in social education (Meyer, 1988). Family obligation of socialisation of children to become a "good Chinese citizen" was especially stressed among other family functions. On the other hand, the modernisation process has brought about changes in family relationships since the 1950s. The western ideology of welfare of the child alone being one of the major concerns of the family as well as society started to prevail in practice as well as in law making. A series of feminist movements also enhanced the status of young girls.

When the ROC Civil Code was promulgated in 1931 as a means for modernisation, it was a very advanced law compared with the then social conditions (Buxbaum, 1978abc). At that time, free marriages, sexual equality, and the Western concepts of parental rights as duty-rights shared between two parents, which might finally be deprived through Court proceedings, were foreign to the Chinese patriarchal family. Helped by the family revolutions started on the Chinese mainland since the 1920s and continued in Taiwan after 1949, family relationships have been reshaped to a very large extent towards imported legal norms against the customary practice of arranged marriage, female suppression, and abuse of parental power (Spear, 1974). However, during the forty years in which the Civil Code was applied to Taiwanese society, the family system had undergone tremendous evolution, thus the law was no longer able to cope with the new situation. On the contrary, the law in practice started to be reshaped by the modernised family/families (Cohen, M. L., 1976; Wang, 1985).

B. *From Law in Books to Law in Society*

In 1985, it was finally realised that the old 1931 law could no longer cope with new social conditions and an amendment was called upon. However, as the Civil Code was the basic law for family relations, there was also a strong moral commitment that the Chinese culture and historical heritage should not be abandoned and certain "good custom" (such as the extended family support system) and "Chinese ethics" (such as filial piety) should be further strengthened. Consequently, amendments were introduced to provide a compromise to maintain Chinese traditional ethics.[33] It was commonly agreed that the Chinese extended family had declined and its traditional power over the nuclear units was on the

Morality in Taiwan Schools: The Message of the Textbooks", 114 THE CHINA QUARTERLY 267-284 (1988).

33. For example, the original CVC: 1084 provides, "[p]arents have the right and the duty to protect, educate and maintain their minor children." And when the law was amended in 1985, there was a strong feeling among the legislators that the "good" Chinese traditional ethic of filial piety is waning among the Chinese society in Taiwan, so a new section I was added to CVC: 1084 which reads, "[a] child shall be filial and respectful to his parents."

wane.[34] Many expected that, by the amendment, the supervision and monitoring functions of the extended family would be handed over to welfare authorities in cooperation with the Court.

The rise of the welfare state in the West also made its impact on the ROC social welfare planning. It has been a state policy to emphasise the significant value of the Chinese family in the provision of welfare services, and it is officially urged that "any welfare system, if it is to be successful, must be based on and must strengthen the family" (Li, 1988:4). Therefore, welfare services in Taiwan have been designed not to displace the traditional family support system, but to reinforce it. It can be expected that as the amendment proceeds, more and more traditional power of the extended family will be taken over by the Court together with the welfare authorities in the name of child welfare and protection.

Article 156 of the ROC Constitution states, "(t)he State, in order to consolidate the foundation of national existence and development, shall protect motherhood and carry out a policy for the promotion of the welfare of women and children."[35] Over the years, children have been portrayed in governmental propaganda as "the future master of the nation." Consequently, corresponding laws and measures were successively put into practice including population policy[36] and family planning programmes,[37] compulsory education regulations,[38] sanitation and medical

34. *See* the specific reports on "The structure and nature of families in Taiwan are changing," by *Ms Chang, Chuen Hua*. The four reports were originally published by *The China Times*. *The Central Daily* (international edition) collected the reports and published them with further comments. *See The Central Daily* on Feb. 1, 1994, at 7.

35. This concern for children under the ROC welfare policy may be allied to what the western theorists Dingwall, Eekelaar and Murray called a "national investment" view of children. *See* R. DINGWALL, J. EEKELAAR & T. MURRAY (eds.), THE PROTECTION OF CHILDREN: STATE INTERVENTION AND FAMILY LIFE 217-221 (Oxford: Blackwell, 1983); R. Dingwall, J. Eekelaar & T. Murray, "*Childhood as a Social Problem: A Survey of the History of Legal Regulation*", 1984 JO. L. & SOC. 207-32, 106-107 (1984).

36. Here the term population policy refers to government regulations and programmes designed to change the growth rate of the population. Family Planning, as the major policy instrument, is used interchangeably with population policy. *See* K. T. Lee, "*Population Policy and Family Planning*", *in* THE EVALUATION OF POLICY BEHIND TAIWAN'S DEVELOPMENT SUCCESS 68 (Yale University Press, 1988).

37. The first unofficial family planning programme emerged in 1963, which was officially adopted in 1968 by promulgation of the Regulations Governing the Implementation of Family Planning in Taiwan. Under the programme, every married couple is encouraged to have not more than two children, and in achieving that, birth control services are offered at low prices. For more information on the family planning programmes and practices in Taiwan, *see* M. C. Chang, R. Freedman, & T. H. Sun, "*Trends in Fertility, Family Size Preferences, and Family Planning Practice: Taiwan, 1961-1980*", 12(5) STU. IN FAM. PLANNING 211-228 (1981); K. T. Lee, "*Population Policy and Family Planning*", *in* THE EVALUATION OF POLICY BEHIND TAIWAN'S DEVELOPMENT SUCCESS 66-82 (Yale University Press, 1988).

38. The national compulsory education in *Taiwan* under the Nationalist government had been six years in the elementary school until 1967 when the Executive Yuan passed and announced a "Principles for the Implementation of Nine-Year National Education". This administrative law was further ratified by the 1979 National Education Law to the effect that, starting from 1968 in

care services for pregnant women and children, financial support for poor families with children, and so on, all of which were based on the same ideology to ensure that every child would develop into a "healthy and well-cultivated good citizen of the nation."

C. *The Page for Children's Right*

When the Declaration of the Rights of the Child was adopted by the United Nations in 1959, ROC was one of the original signatories. The Declaration was then brought back to initiate social welfare legislation. The 1973 Child Welfare Act was made to convince international society that the ROC legislation had complied with the UN Declaration and that the Taiwan government was willing to carry out certain child and juvenile development programmes financially supported by the UNICEF. It did not signal a real recognition by the ROC decision-makers themselves that the rights of the child had to be materialised in law or that the protection of children from abuse and neglect had become so important as to deserve a specific law. The effects of the Law on providing welfare for children were marginal.

Helped by the adoption of the UN Convention on the Rights of the Child in 1989, the Taiwan government was again motivated to make a law in line with "world trends."[39] Again, the law was based on foreign models taken from Japan, Korea, the USA, England, Germany, France, and so on. Some principles of the UN Convention were also emphasized and taken as guidelines. Only this time, civil groups took the lead over the lobby process. Armed with Western welfare laws in hands, child protection professionals made a statement that the traditional functions of the Chinese family are withering and all Western developed modern legislation has extended state intervention into family lives for the purpose of child protection. At the same time, western ideas of "childhood" were introduced to justify a separate sphere of children in law and society[40] (Shee, 1999:109-114).

Generally speaking, the 1993 Child Welfare Act was a hybrid of

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Taiwan and *Kingmon* (another island which is under the physical control of ROC) areas, children aged between 6 and 15 shall receive compulsory education for six years in the elementary/primary school and three years in the junior high school.

39. Although the ROC cannot sign or ratify any UN Convention, the government still makes national laws to respond to UN legislation in order to show its determination to rejoin international society.

40. The works of P. Aries, 1973, Dingwall et al., 1984, C. Jenks, 1997 were translated and introduced to the local academy and students, and the idea of childhood has become widely quoted for the support of child right movement and legislation. *See* P. ARIES, CENTURIES OF CHILDHOOD, London: Jonathan Cape, 1973; R. Dingwall, J. Eekelaar & T. Murray, "*Childhood as a Social Problem: A Survey of the History of Legal Regulation*", 1984 JO. L. & SOC. 207-32 (1984); C. JENKS, CHILDHOOD (New York: Routledge, 1997).

idealist measures derived from several foreign welfare systems balanced by solutions to local problems. The scale of provision of welfare services was also adjusted by the practical concerns of tight governmental budgets on social welfare. Although the names of the UN Declaration and Convention have been highlighted in the ROC child welfare legislation, the state's regulation of parental rights and childcare is still legally expressed in terms of child-saving language rather than children's rights statements. Such discourses were reconfirmed in the 1989 Juvenile Welfare Act, which was to deal with delinquency problems with welfare-oriented programmes.

An innovative legal principle was adopted in the 1993 Child Welfare Act — the parameter of the first and paramount consideration of the best interests of the child. Article 4 of the Law states, "[w]hen child related matters are dealt with by governments of all levels and governmental as well as non-governmental institutions or organisations, the first consideration should be the best interest of the child; in addition, cases concerning children's protection, rescue and assistance shall be preferentially admitted and attended to." Although this is only a moral principle, it is significant in terms of law as an instrument of education. In 2003, a Child and Juvenile Welfare Law was promulgated to promote the right of the child under 18 in a unified law.[41] Many of the UN Convention principles were reinforced in black letters and under the guard of the Child Welfare Bureau hand-in-hand with a booming civil society; child right has become a fashion in practice, though not equally shared among social classes and cultural divisions.

With regard to the law-making process, it used to be a legislative tradition to translate foreign laws and distribute among law-makers to ensure the progressiveness of law. This tradition has prevailed over the civil society. Both lobbying groups for women and children's rights are functionalists who worship the power of law to eliminate discrimination and protect rights. Legislative bills are proposed with reference to international instruments and laws of developed countries, although some room was made to accommodate local solutions. In short, NGOs were instituted on the initiatives of concerns over local problems, but then the problem owners invoked their knowledge and expertise begot from western trainings to make definitions, explain causes and locate solutions. It is noticeable that with an ever-growing body and power, the civil society has acted as a horn to propagate for the adoption of western (mainly US) family ideologies and disciplinary expertise.

41. As a result the Child Welfare Law and the Juvenile welfare Law were repealed.

IV. MODERNITY OF TAIWAN FAMILY LAW

A. *The Taiwan-Tailored Modernity*

Viewing the above transplanting process, many will not hesitate to question the "modernity" of Taiwan family law, thus to set an agenda for its reform. I was very much attracted to *Santos'* dream of a just world with a good society in which each enslaved, discriminated, ugly ducklings may all turn into free, equal, beautiful swans of a happy postmodern family. I would count on such a magic mirror if Taiwan could be converted into a qualified beauty. But in the realistic world I hesitated. In my observation as an insider, Taiwan actually looks all right with the present reflection in the modern world and feels confident with the moves towards globalisation. In the new mirror for the Utopia, Taiwan might not even see a true face of herself.

Santos observed that the prevailing paradigm of modernity is in crisis because, evidence by an enormous amount of empirical data, there is a growing gap between the "reality" of human struggles for freedom and the "aspirations" such as peace, justice and equality which justified modernity. And thus he proposes a counter-hegemonic model toward a new legal common sense to outline the structure of a new, more just social paradigm (de Sousa Santos, 2002). My basic doubts lie with the logic of breaking the concrete present by establishing an obscure new to guarantee a promise of no tenable expectation. Actually any "paradigm" shall scare a semi-peripheral country like Taiwan that has secured notable stability in both economic growth and democracy and keeps fighting for more liberty with the space to be rendered in globalisation.

Instead of employing *Santos'* negative checklist of "expectations exceed experiences" and his sad narrative underlying the nation-state to observe Taiwan which is virtually not a qualified nation-state, I will reconceptulise the spirit of "liberty" in light of "regulation" versus "emancipation,"[42] then check two of *Santos'* premises: "law has become separated from the quest for a good society," and "marginalised groups may experience law as an order of power rather than an order of meaning"[43] (de Sousa Santos, 2002:2-3). On the other hand, the presence of progressive social movements and transnational NGOs in Taiwan seems to have carried out the unfinished modernisation rather than to realise *Santos'* vision of counter-hegemonic globalisation (de Sousa Santos, 2002:458), thus it could be another overhead agenda to entrust

42. *See* DE SOUSA SANTOS 2002: Chapter 1 "*The Tension Between Regulation and Emancipation in Western Modernity and Its Demise*."

43. *Santos* makes distinction between "order" and "good order," "society" and "good society."

Taiwan for this paradigmatic transition into the postmodern.

Santos defines "regulation" as "the norms, institutions, and practices that stabilise the relationship between experience and expectations"; and on the other hand, "emancipation" being the critical disruption and questioning of the relationship between experience and expectations in light of human aspirations and ideals.[44] We shall see in the experience of Taiwan Family Law that the seesaw levelled between regulation and emancipation have in fact, may they be accidental and contingent, hacked down good timbers for state buildings and culture decorations. In the habitual practice of the Confucius principle of mediocre (中庸之道), emancipatory queries may just play a constitutive role in the formation and reformation of expectations.

Modernity's failures may be witnessed in *Santos'* study by the crisis of the widening gap of the history written by colonialism, poverty, inequality, genocide, warfare, exploitation and other human violations vis-a-vis the promises of peace, justice, equality and liberty (de Sousa Santos, 2002:8-9). Taiwan cannot be singled out from such history, but somehow the hegemonic power has not imposed more notable harm than create a "miracle." Maybe an old Chinese trait helps to explain why: "to pursue good fortune and shun the course of calamity (趨吉避凶)." Instead of sharing the imposed capitalism that may have caused disasters elsewhere and the introduction of globalisation to accelerate the deterioration, Taiwan has fought its way through the Japanese colonisation, the cold war, the domestic social revolution and the peaceful coups to enter democracy with a self-defined Constitutionalism under the rule of law for better protection of human rights.[45]

The perception of law and justice in Chinese civilisation is not clear-cut between right and wrong. "When the wind blows, the grasses bend (風吹草偃)." Only when all are regulated, each may enjoy emancipation — this ideology of ours for the state to impose may lead more to what we are today than the universal penetration of capitalism through modernisation or globalisation. If the liberty begot from the Enlightenment was to serve for personal realisation and happiness, the failure of modernisation may be caused by the very human essence of power manipulation. To initiate a new order of things may benefit the "have-nots," but to join the venture is risky for the "semi-haves." As to Taiwan, I would rather show you our present image and tell you how we

44. Quotations from H. Libesman, *Between Modernity and Postmodernity: Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 16 YALE J.L. & HUMAN. 413 (2004).

45. For discussion on the relationship of human rights in connection to the rule of law, *see* R. Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809 (2005).

have come to this appearance, and yet, we are not to be judged by this appearance only, for we are entitled to a self-confident integrity.

B. *The Modernisation of Taiwan Family Law*

Taiwan law belongs to the Continental legal system and the basic pieces of law governing family relations are Book Four and Five of the Civil Code entitled "Relatives" and "Succession." Legislative principles such as monogamy and sexual equality were taken from German and Japanese law for the 1931 Code as part of the modernisation effort of the newly established ROC. However, "Chinese traditional ethics" of patriarchal origin were empowered to enunciate, if not to prevail, where individual western provision needed to be moderated to cope with historical customs or social realities. The 1931 ROC Code is thus a law to "follow the mainstream of the world while maintaining traditional Chinese ethics and family values."[46]

In the 1931 Code, monogamy was to be adopted with practical tolerance to concubinage, thus the effect of bigamy is only revocable upon petition to the court instead of null and void by law.[47] Besides, for those concubines not taken by marriage, the law also includes her as a "family/household member" to be economically maintained by the head of the family-household,[48] and her child is to be legitimised by the father's recognition or maintenance.[49] On the death of the man, a concubine may also require from his family council a reasonable share of the estate for her ongoing maintenance.[50]

Sexual equality has been guaranteed under Article 7 of the ROC Constitution.[51] However, provisions governing conjugal and parent-child relations that can qualify as violations to sexual equality could be easily

46. For a brief but authoritative account of the legislative development of ROC Code on Relatives, *see* 戴東雄, 親屬法, 2002. The author has been the leader of relevant official reform committees, a Grand Justice responsible for family law cases and a leading academic in this field.

47. Article 992 provides, "Where a marriage is concluded contrary to the provision of Article 985 (prohibition to bigamy), the interested party may apply to the court for its annulment."

48. Article 1223, section 3 provides, "Persons who are not relatives but who live in the same household with the object of maintaining the common living permanently are deemed to be the members of the house." Article 1114 provides, "The following relatives are under a mutual obligation to maintain one another:(1) Lineal relatives by blood; (2) One of the husband and the wife and the parents of the other party living in the same household; (3) Brothers and sisters; (4) The head and the members of a house."

49. Article 1065, Section 1 provides, "A child born out of wedlock who has been acknowledge by the natural father is deemed to be legitimate; where he has been maintained by the natural father, acknowledgment is deemed to have been established."

50. Article 1149 provides, "A person continuously supported by the deceased before death may apply to the family council for a share of the estate on succession considering the degree of the support and other involved relationships."

51. Article 7 of the Constitution provides, "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law."

located in the 1931 Code. Such laws were however not given a chance to test their validity in the China Mainland and instead were brought by the ROC government to be applied to Taiwan in 1949.[52] When the Code was finally amended in 1985, it was officially stated that monogamy and sexual equality were to be reaffirmed in pursuant to international trends (practically the German law), while the incentive of the reform originated from social realities and needs.[53] It was noticed that internationalisation has brought about social evolution and resulted in the share of believers in monogamy, economic independence of wives, protection of illegitimate and adoptive children and benefits of minors (under the year of 20) as a whole.

The success of feminist and child right movement since the early 1980s further pushed forward waves of legal reforms. A group of legal positivists, predominantly female professionals in the fields of law and/or social work, constituted allies among social movements, University academy and the Legislature. This "triple alliance" has in the past twenty years guaranteed the articulation of sexual/gender equality in law books and in social activities. Influential western literature of all feminist disciplines have been translated, disseminated and taught, mainly among middle-class white-collar women and students. The efforts accumulated not only to affect the recent reforms of relevant provisions of the Civil Code in 1996 (exercise of parental rights and child custody), 1998 (marital domicile and marital name) and 2002 (matrimonial property), but also lead to make specific laws including Domestic Violence Prevention and Treatment Act 1998, Sexual Assault Crime Prevention and Treatment Act 2002, Gender Equality in Employment Act 2002, Gender Equity Education Act 2004 and Sexual Harassment Prevention and Treatment Act 2005. Most important of all, a provision was added to the Additional Articles of the Constitution[54] to guarantee women's right to gender equality.

Among the specific laws concerning gender equality, the Domestic Violence Prevention and Treatment Act[55] and the Gender Equality in

52. For detailed (and excellent) observations on the legislation process of sexual/gender equality, *see* the doctorate theses of C. J. Chen, *Gendered Lives Under Neutral Laws: Women, The Family, And Feminist Legal Reform in Taiwan*, Doctor Dissertation, Science of Law, University of Michigan Law School, USA, 2003 & H. T. Wang, *Gendering Law in a Post Authoritarian State: Feminist Struggles and Family Law Reform in Taiwan*, Ph.D. Thesis, School of Law, University of Warwick, UK, 2003.

53. For relevant officially published accounts of this reform and the following ones, *see* 戴東雄，親屬法, 2002, PP. 16-23.

54. Article 10, Section 6 of the Additional Articles of the Constitution provides, "The State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality."

55. For a good account on the legislation and practice of this law, *see* the J.S.D. Dissertation of Y. H. D. Lin, *Suggestions for the Reformation of Domestic Violence Prevention Act in Taiwan:*

Employment Act 2002[56] are relevant to the conjugal family. Article 15 of the latter provides for maternity leave of a female employee in cases of both childbirth and miscarriage. And the former has been made "to promote domestic harmony and control; to prevent domestic violence; and to protect the interest of the victim of domestic violence" (Article 1). Under the Act, a spouse, ex-wife/husband or one who has or has had on-going marital, or de-facto marital, or dependent relationship is to be protected equally under Article 3 of the law. By setting up the Domestic Violence Control & Prevention Committee (Article 4), it becomes a firm policy to protect the physical safety of women in the family. With the shield of the "civil protective order," which is an adapted injunction from the US laws, wives may now legally apply for a judicial separation and at the same time remain in the family house and keep the custody of children.[57]

The first wave of child right movement started in early 1990s when a Child Welfare League was founded under the leadership of a legislator in collaboration with high-profile academics, practitioners and lawyers to lobby for the amendment of 1973 Child Welfare Act. The second wave initiated in the end of 1994 by a coalition of child right voluntary groups under the slogan of "Ratify the UN Convention on the Right of the Child." It was of course a rather political statement, but the aim was to make the government realise the Convention in local laws. With the support of a few prominent legislators of all political parties, the government finally made an official statement on September 23, 1995, to abide itself to the realisation of the Convention, and the statement was later distributed among international governmental and non governmental organs.[58]

Based on U.S. Legislation and Experiences, J.S.D. Dissertation, School of Law, University of California, Berkeley, USA, 2004.

56. Article 15 of the Gender Equality in Employment Act provides, "(1) Employers shall stop female employees from working and grant them a maternity leave before and after childbirth for a combined period of eight weeks. In the case of a miscarriage after being pregnant for more than three months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for four weeks. In the case of a miscarriage after being pregnant for over two months and less than three months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for one week. In the case of a miscarriage after being pregnant for less than two months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for five days. (2) The computation of wage during maternity period shall be made pursuant to the related statutes and administrative regulations."

57. It is argued by *Diana Lin* that the adopted standard to evaluate the care needs of a child witnessing marital violence between the parents must be examined under the context of social and cultural realities if it is for the better protection of the mother and the child. *See* Y. H. D. Lin, "*Children Who Witness Domestic Violence: How to Better Protect and Support Battered Mothers and Their Children*", 8 CROSS-STRAIT L. REV. 18-39 (2005/2006).

58. For a detailed account of this movement including the following impact, *see* Amy H. L. Shee, "*Developments of Children's Rights Legislation in Taiwan: Abstract*", 14 NATIONAL CHUNG CHENG UNIVERSITY L. J.: ABSTRACT 35 (2004).

At the wake of this century, Child Bureau, the state authority of child right policy and enforcement, further decided to appeal to all governments in the world for the equal protection of children in Taiwan despite political consideration of the United Nations. The "Official Statement for The Realization of the United Nations Convention on the Rights of the Child,"[59] published in both English and Chinese, was thus formally presented to all governments. It is celebrated as a child right manifesto in the stream of globalisation in this new era and we quote:

> "The 1989 United Nations Convention on the Rights of the Child (hereinafter the Convention) is the basic source of international human rights law for the protection of children. The Convention consolidates the achievements of international society working on children's livelihood and development since the beginning of the 20th century. The basic spirits of the Convention are to call on the human society to pay attention to the needs of the child, and that children should be taken care and respected by the State and the family… Accordingly, it is the purpose of the Convention to have as many contracting States as possible, so as to fulfill the requirement of Article 2, Section 1 of the Convention, which states that State Parties shall respect the rights of each child within their jurisdiction without discrimination of any kind, irrespective of the child's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status… Nevertheless, certain international political reasons have barred the Republic of China on Taiwan (hereinafter Taiwan) from becoming a member of the United Nations. As a result, Taiwan is not allowed to sign and join the Convention. And in order to express our determination for realizing the Convention, the government of the Taiwan made an official announcement on September 27, 1995 that it should respect the spirits and principles of the Convention. Yet, such a unilateral declaration does not automatically give the children in Taiwan equal protection under the international human rights law, not to mention fulfilling the constitutional requirement of promoting international cooperation and advancing international justice…. Since the lifting of martial rule in 1987, various kinds of human rights movements can be found in Taiwanese society. Improper treatments of child (such as abuse and exploitation etc) are no longer permitted and are seriously condemned. The

59. *See* Child Bureau, Official Statement for the Realisation of the United Nations Convention on the Rights of the Child, Ministry of the Interior, ROC, 2001.

> legislative organ, under the pressure of society and government's self-consciousness, has thus passed different kinds of law for the protection of children. For this purpose, special administrative organ, with independent budget are also established to train experts, implement relevant measures, and subsidize non-governmental organizations. In addition, facing the adverse international situation, the Taiwan government and the non-governmental organizations have worked together to participate in international activities regarding child protection. Our Ministry of Foreign Affairs, as mentioned above, has formally declared Taiwan's determination to observe the Convention. All these evidence Taiwan's determination and efforts… As a mature democracy and an active participant in internationalization and globalization, Taiwan being excluded from the Convention is not only a loss of international society, but also reflects the lack of courage on the part of international society to fight for justice. Therefore, we urge every State in the world to accept Taiwan as a member of the Convention, so as to let our government effectively protect the basic rights of the child. This has nothing to do with international politics or power struggle. Our concern is simply to realize what the Charter of the United Nations requires every State to do: respect human rights and take special care of the child'. The Statement was then delivered to relevant governmental and non-governmental organs to further highlight the determination of Taiwan to become a qualified member of the global society for children's rights."[60]

Such determination is politically oriented in discourses, while it gave the civil society an effective warrant in the making and enforcement of law. The Child and Juvenile Welfare Act 2003 has not only combined the existing Child Welfare Act and Juvenile Welfare Act which had governed children under 12 and juvenile under 18 separately, but also taken on most legislative principles of the Convention considered applicable in Taiwan. With the auspices of child right movements, children became a legal subject in the family law first to challenge parental authority and now to supercede parental rights with the claim for the best interests of the child. When the Convention is celebrating the honour of being the most popular human right commitment shared in the global village, Taiwan is still not in the official map. But it does not make too much difference now, at least

60. The drafters of this official Statement are the authours of this paper who were appointed by the Child Bureau to conduct a thorough research on the topic and the draft Statement was part of the research report available both in English and in Chinese.

in theory. Under Article 2 of the Convention, a Taiwan child is to be equally protected when he walks into the global village and vise versa if a child of another identity comes to Taiwan.

V. A GLOCALISATION VIEW OF TAIWAN EXPERIENCE

A. *The Global at the Taiwan Local*

Globalisation has provoked impeachments in all aspects and arguments for its justification may prove to be in vain. Yet an observation in view of "glocalisation,"[61] one may at least give globalisation another chance of a fair trial in the Taiwan case. The idea of "glocalisation" was posed by *Roland Robertson* with statements such as "globality is the condition of divergent modernist" and "universalism is the condition of growing particularlisation" (Robertson, 1995). It is this "global outlook adapted to local condition" as found in the Japanese development experiences that this paper will avail of to check on the Taiwan case (K. M. Clermont, 2004; Kanda & Milhaupt, 2003; Stack, 2000). A primary observation shows that, though Taiwan cannot avoid being subjected to "cultural imperialism" (Tomlinson, 1999:80), the impact of globalisation has actually brought us to a new era of plural society within which the global and the local have been "telescoping" and thus "synthesised" to make the two "complementary" and "interpenetrative" (Robertson, 1995:28, 40).

The success of Taiwan in the second half of the last century was so distinctive as to be called a "miracle" and a possible model of modenisation for the Third World (Robinson & White, 1998), though under the "political economy of law" analyses, its dependence on western hegemonies, especially the USA, has hindered the autonomy of legislative development (Kao, 2000). Globalisation is of course adopted first by policy makers to facilitate the cross-border exchange of commodities and technologies, but as time goes by, it has become a popular slogan and

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61. For accounts and debates on "glocalisation" regarding Taiwan experiences, *see* K. Chao, "*Against Neoliberal Globalization, Why and How*", 44 TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES 50 (2001); W. W. Chu, "*What Does Anti-Globalization Mean? Comment on 'Against Neoliberal Globalization, Why and How'*", 45 TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES: ABSTRACT 248 (2002); Y. C. Chou, "*Globalization? Localization? Glocalization? Critical Perspective on Disability Welfare in Taiwan: Abstract*", 10 SOOCHOW J. OF SOCIAL WORK 117 (2004); W. C. S. Hsu, "*Glocalization as a Way to Think About Globalization: Abstract*", 41(1) THOUGHT AND WORDS: J. OF THE HUMANITIES AND SOCIAL SCIENCE 18 (2003); C. N. Huang, "*Globalization and Global Social Movement: Research in Anti-Globalization Movement: Abstract*", 1 HSUAN CHANG J. OF SOCIAL SCIENCES 392 (2003); W. G. Liou, "*The Connection Relationship between Global Culture and Local Culture: on the 'Everyday Life'-Oriented Study of Cultural Globalization: Abstract*", 28 NATIONAL TAIWAN UNIVERSITY J. OF SOCIOLOGY: ABSTRACT 228 (June 2000).

gradually a way of life and an internalised ideology. The analyses of the Taiwan case must go beyond the "Cosmopolitanism vs Fundamentalism" dichotomy. As *Anthony Giddens* and others observed, globalisation does not affect the developing world only, it has substantial impact on the EU as well as the USA (Giddens, 1990).

Penetration of capitalism and American values is not a new phenomenon for Taiwan. In fact, over the decades of mixture and syndication, we may hardly distinguish now what is Taiwanese, Japanese, Chinese, American or whatever. Taiwan *MacDonald* is selling rice products while Chinese foods are take-away sweet-and-sours in the west. The local *Kentucky Fried Chicken* is advertising for its Mexican, Japanese, and Peking specialties made to attract local appetites. People of different age, sex, race, social or career or income groups are leading a variety of lives disregarding the claimed universalism of globalisation. On the other hand, the Grand Justices, who are empowered to interpret the essence of Constitution and national laws, have put substantial emphases on Chinese traditional ethics in recent years. Development of Taiwan family law (especially the law of monogamy) has thus got 'the sense of self' with western ideologies leveled by local values.

Globalisation may have brought about the unification of a capitalist ideology, but all sorts of human rights issues and cultural flows have guaranteed the diversification of social values and activities. In the stream of globalisation, Taiwan finds multiple ways to join the global world, which emphasise the lift of boundaries. The erosion of sovereignty has also removed the political blockades Taiwan has to face vis-à-vis the PRC.[62] With vigorous efforts, Taiwan has been allowed access to some sub-UN organisations. In other cases, Taiwan claims itself to have been abided by international treaties and to act as a responsible member of the global society despite its political disability. Voluntary groups of the civil society have responded to all global activities. Global universalism may have resulted in Taiwan pluralism, though in some "law and order" commentators' view, such plurality can be defined as "chaos."

B. *A Portrait of the Global Local*

The so-called "chaos (亂象)" of Taiwan society may just be an inevitable stage of development. In order to clear this point, I propose to look at Taiwan as a juvenile who is determined to dress up beautifully to resemble those models in beauty magazines. Let's name the portrait Amy,

62. There are also theories proposed to abolish the notion of the sovereignty in international law, *see* G. A. Hoffman, *International Legal Affairs: Critique, Culture and Commitment: The Dangerous and Counterproductive Paths of International Legal Discourse*, 29 NOVA L. REV. 211 (2005).

a Chinese girl brought up in a family looking up to the west for learning models. With money in pocket given by her bourgeois parents, Amy gets into a global shopping mall. She looks for fashionable products with recognised foreign brands. When Amy is not sure, she fights through a crowd to get goods on sale. As time goes by, Amy proudly puts on her shopping trophies one piece after another: *Levis* jeans, *Madonna* bra vest, *Nike* sport shoes, cowboy hat, and finally a *Marlboro* cigarette to go with. She also takes the advice of a fashionable beauty parlour and dyes her hair blonde to match the outfit.

Some of us may worry for *Amy* to have lost her identity; others refer to her as a delinquent. An old grandma would simply call *Amy* a mess. Yet such antagonist attitudes do not serve better than expressing moral judgments. Instead I will appreciate a neutral reflection upon which *Amy* can see and judge the outfit for herself. Maybe *Amy* will finally realise the fact that she does not have the long legs for jeans or the D cup for a sexy vest. Or, she may decide to pick up the new identity of a delinquent mess. In both ways the global shopping mall has offered *Amy* a learning opportunity to choose and decide for her self-identity and visible ways of life. May it be weird or untidy in our orthodox judgment, *Amy* has added a new style of fashion to the global society of pluralism.

Now, say, Amy is finally tired and hungry, so she stops at a *McDonald* to buy a set meal of coca cola, French fries and a hamburger, then sits down to watch *CNN* while eating. The ongoing programme reports that, in the west, Chinese take-away is getting more popular than quick foods and the "*cheongsam* (旗袍)"[63] has become a focus in lady's fashion. So *Amy* decided to return to the Chinese way of eating and dressing. But then, what makes her look Chinese now? How will *Amy* identify herself and lead her life as a Chinese? A review of recent Interpretations of the Taiwan Grand Justices[64] may help to clarify the questions. For the purpose of this paper, we will concentrate on those regarding monogamy, sexual/gender equality and the best interests of the child.

C. *The Grand Justice Interpretation of the Global Local*

By Interpretation No. 242 (1989), No. 362 (1994) and No. 552 (2002),[65] the Taiwan Grand Justices have come to the conclusion that two

63. Cheongsam is a close fitting Manchurian style women's gown with a slit skirt.

64. Under the ROC Constitution, the Judicial Yuan is the highest judicial organ of the state; apart from being in charge of civil, criminal, and administrative cases, it is legally empowered to render unified interpretation of the Constitution, laws and orders (Articles 77 & 78). The Council of Grand Justices is responsible for the interpretation of the Constitution and is legally empowered to render a uniform interpretation of laws, statutes or regulations.

65. The English version of the Interpretations of Grand Justices Council cited or quoted in this paper are *available at* http://www.judiciaLawgov.tw/constitutionalcourt/EN/p03.asp [Grand

exceptions for bigamy should be made to protect the true happiness of each bigamous union of a *bona fide* no-fault couple, but then the monogamous order shall be restored by dissolving the first marriage. It was first affirmed in No. 242[66] that the Civil Code provision of "Any person who has a spouse shall not marry again" is "to reaffirm the genuine institution of monogamy," but an exception can be justified because the bigamous marriage had had "long time of actual cohabitation" and if the law was applied to nullify such marriage, "it would significantly disrupt the family life and human relations and might lead to social disorder. And this would be in conflict with Article 22 of the Constitution which provides that people's freedoms and rights shall be protected." The Grand Justices further clarify No. 362[67] that "special" bigamous marriages "differ from general bigamy, and thus, according to the principle of legitimate expectation, the validity of the latter marriage should be maintained," only by No. 552[68] such "special circumstances" are limited

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Justices of the Constitutional Court, Judicial Yuan, R.O.C.].

66. The holding: "Article 985 of the Chapter on the Family in the Civil Code before the revision of June 3, 1985, provides that 'Any person who has a spouse shall not marry again.' Article 992 provides that 'for any marriage in violation of Article 985, interested parties may bring action asking the court to invalidate the marriage. But once the relationship of an earlier marriage has ended, this request will be denied.' These two articles are necessary for maintaining a monogamous society. They are not in conflict with the Constitution. However, those later marriages arising from the circumstances of significant changes in the nation, which caused earlier spouses to be separated and prevented their reunion inherently are different from normal ones. For these later marriages having long time of actual cohabitation, if the above-mentioned Article 992 were applied to these later marriages, it would significantly disrupt the family life and human relations and might lead to social disorder. This would be in conflict with Article 22 of the Constitution which provides that people's freedoms and rights shall be protected."

67. The holding: "Article 988, Subparagraph 2, of the Civil Code stipulates that a bigamous marriage is void. This stipulation seeks to maintain the social order of the monogamous system. Under general circumstances, this stipulation does not conflict with the Constitution. However, where a person's first marriage is dissolved by a final court decision, and a third party, in good faith and without negligence, trusting in the validity of such final court decision, enters into marriage with a party of the previous marriage, and subsequently such final and binding judgments reversed, the latter marriage (between that person and the third party), thus becomes bigamous. This situation differs from general bigamy, and thus, according to the principle of legitimate expectation, the validity of the latter marriage should be maintained. Since the said stipulation does not adequately consider the above-mentioned situation, it does not conform with the right to freedom of marriage contained in the Constitution. This Law shall be discussed and amended accordingly. During the period prior to the Law being amended however, the above stipulation regarding a marriage entered into with trust in a final and binding judgment should not apply. In a situation where a previous marriage and a latter marriage coexist due to the abovementioned situation, the third party may sue for divorce."

68. The holding: "It has been held by this Yuan's Interpretation No. 362 that 'the provision of Article 988, Subparagraph 2, of the Civil Code, whereby a bigamous marriage is null and void, is intended to maintain the social order based on the monogamous system, and is generally speaking consistent with the Constitution. However, where a prior marriage is dissolved in consequence of an irrevocable judgment and a third person, in good faith and without negligence, contracts a marriage with one of the parties to the prior marriage in reliance of such judgment, which is subsequently reversed, making the subsequent marriage bigamous, the situation is distinguishable from bigamy in its ordinary sense, and the validity of the subsequent marriage must be

in cases where both parties to the bigamous marriage are "in good faith and without fault" for they have trusted the validity of a court divorce decision or a divorce registration to dissolve the first marriage, which was subsequently reversed for legal reasons.

On the issue of penalty imposed against adultery, it is held in Interpretation No. 554 (2002)[69] that "(m)arriage and family serve as the

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maintained on the principle of reliance protection (Vertrauenschutzprinzip). The aforesaid provision of the Civil Code is inadequate in dealing with such a special circumstance as described above and is thus inconsistent with the intent of the Constitution to protect the freedom of marriage, and must be reviewed for the purpose of revision.' The so-called 'special circumstance' includes bigamous marriages in consequence of divorce by agreement. Nevertheless, as marriage involves change in the relation of personal status, which has to do with the public interest, the parties to the second marriage must be required to meet more stringent tests in respect of their reliance on the dissolution of the prior marriage rather than relying on mere good faith and lack of negligence on the part of the person with whom he or she contracts the second marriage. In order to retain the validity of the second marriage, both parties to such marriage must be found to be in good faith and without fault. Interpretation No. 362 is hereby appended. If it results in such a circumstance that both the first and the second marriages exist in force at the same time, the question of which one of the two marriages should be dissolved so as to maintain the monogamous system and the issues with respect to what protection must be accorded to the party whose marriage is dissolved and his/her children must be answered by the lawmakers upon making the earliest possible review of and revision to Article 988, Subparagraph 2, of the Civil Code by taking into consideration such factors as the principle of reliance protection (Vertrauenschutzprinzip), the nature of the relation of personal status, the satisfaction of matrimonial cohabitation, and the protection of the interests of the children. Before the law is so amended, however, the validity of the second marriage consummated in conformity with the essence of our holding in this Interpretation must be upheld, and the relevant part of the provision of Article 988, Subparagraph 2, of the Civil Code must cease to be operative. A bigamous marriage contracted before the date of this Interpretation will remain valid after the issuance of this Interpretation only if the person to whom the actor was married was found to be in good faith and without fault, although the actor might have acted otherwise. Incidentally, if it so happens that both the first and the second marriages exist simultaneously, the other party to the bigamous marriage may sue for divorce."

69. The holding: "Marriage and family serve as the foundation on which our society takes its shape and develops and is thus institutionally protected by the Constitution (*See* Interpretations Nos. 362 and 552). The root of our marriage system lies in the freedom of personality, with such social functions as the maintenance of the order of human relationships and gender equality, and the raising of children. To insure an enduring and unimpaired system of marriage, the state may of course enact relevant rules to require the husband and the wife to be mutually bound to each other by the duty of faithfulness. The freedom of sexual behavior is inseparably related with the personality of individuals, and every person is free to decide whether or not and with whom to have sexual affairs. Such freedom is, however, legally protected only if it is not detrimental to the social order or public interest as it is so provided in Article 22 of the Constitution. Thus, the freedom of sexual behavior is subject to the restriction put on it by marriage and the family system. What type of restriction, if any, must be imposed on sexual affairs between a married person and a third party during the subsistence of a marriage and whether or not an act in violation of such restriction should be made punishable as a crime are problems that must be weighed and determined by the legislature by taking into consideration the customs of the country, which vary between nations. While the Criminal Code, by providing in Article 239 that a person who commits adultery and the other party to the adultery are punishable with imprisonment for not more than one year, imposes a restriction on the freedom of sexual behavior, such restriction is essential in order to safeguard marriage, the family system, and the social order. To avoid overly severe restrictions, however, the Code establishes certain ancillary conditions on the prosecution of the offense of adultery by setting forth in Article 245, Paragraph

foundation on which our society takes its shape and develops and are thus institutionally protected by the Constitution (Interpretations Nos. 362 and 552). The root of our marriage system lies in the freedom of personality, with such social functions as the maintenance of the order of human relationships and gender equality, and the raising of children. To insure an enduring and unimpaired system of marriage, the state may of course enact relevant rules to require the husband and the wife to be mutually bound to each other by the duty of faithfulness." The Grand Justices thus reassured current social norms of Taiwan society disregarding the global trend of decriminalisation.

On sexual/gender equality, the triumph of feminist movements[70] is witnessed first in Interpretation No. 365 (1994)[71] to set up even share of parental rights between father and mother by observing that "(w)ith widespread education, and equal access to education granted to both sexes, favorable changes in employment conditions, and women having greater career opportunities, conditions are virtually indistinguishable for both men and women." It is also noticeable that in the reasoning, the Grand Justices for the first time mentioned the best interests of the child. The suggested guideline for amending the present law was "(t)his problem should be resolved based on the premises of the principle of gender equality and the best interest(s) of minors."[72]

1, that the offense is indictable only upon complaint, and in Paragraph 2 of the same Article that no complaint may be instituted if the spouse has connived at or forgiven his wife or her husband for the offense. These statutes are reflective of the value judgment made by the lawmakers to balance the preservation of the systems of marriage and family against the freedom of sexual behavior, and do not go beyond the sphere of discretion of the legislative power nor are they in conflict with the principle of proportionality embodied in Article 23 of the Constitution."

70. For a thorough and critical account of the extent to which feminist legal movements in Taiwan have achieved gender justice and improved women's lives, *see* H. T. Wang, *What Can Legal Feminism Do? – The Theoretical Reflections on Gender, Law and Social Transformation*, 34(4) EURAMERICA 627-673 (2004).

71. The holding: "Article 1089 of the Civil Code, which stipulates that in situations of parental disagreement in exercising parental rights over that of a minor the father shall have the right of final decision, is incompatible with Article 7 of the Constitution, which proclaims that both sexes are equal under the law, as does Article 9, Paragraph 5, to the Amendment in eliminating sexual discrimination. This Article should be examined and amended. This Article shall be void within two years from the day of this Interpretation."

72. As described above, the law of parental rights was revised in 1996 under the best interests of the child principle. However, has the law in books coincided with the law in action? Do the judges make child custody decisions pertaining to the child's best interests? How does the law adapt or survive in the Taiwan social and cultural contexts? Hung-En Liu has contributed to examine such questions with substantial field studies, *see* H. E. Liu, "*Mother or Father: Who Received Custody? The Best Interests of The Child Standard and Judges'Custody Decisions in Taiwan*", 15 INTERNATIONAL J. OF LAW, POLICY AND THE FAMILY 185-225 (2001); *Custody Decisions in Social and Cultural Contexts: In-depth and Focus Group Interviews With Nineteen Judges in Taiwan*, 17 (2) COLUMBIA J. OF ASIAN LAW 224-305 (2004a); "*Postdivorce Single-Mother Families in Difficulties and the Need to Reform the Current Policy — Reflections on Two Empirical Socio-Legal Studies of Taiwanese Child Custody Law*", 5 CROSS-STRAIT L. REV. 85-103 (2004b).

Interpretation No. 372 (1995)[73] is taken by many as a landmark to protect gender equality in the case of wife battery. The holding commences beautifully as "(t)he maintenance of personal dignity and the protection of personal safety are two of the fundamental concepts underlying the constitutional protection of the people's freedoms and rights. Our society expects that the institution of marriage should be protected by preventing domestic violence and by improving mutual respect between spouses." However, the Grand Justice cannot help to add "unbearable mistreatment in cohabitation as provided in Article 1052, Paragraph 1, Subparagraph 3, of the Civil Code,[74] the courts should, case by case, take into account the degree of the mistreatment suffered by the injured party, the levels of education of both parties, their social status, and so on, and determine whether the continuity of the marriage is threatened…." Again the Grand Justices switch the parameter back to social values as to what constitute a sustainable marriage.[75] And thus it is criticised for being gender-blinded in finding the patriarchal nature of marital violence.[76]

On the consideration of children as the legal subject, Interpretations No. 502 (2000) and No. 587 (2004) is a good pair of interesting contrast. The term "Chinese family ethics" was highlighted in No. 502[77] to support

73. The holding: "the maintenance of personal dignity and the protection of personal safety are two of the fundamental concepts underlying the constitutional protection of the people's freedoms and rights. Our society expects that the institution of marriage should be protected by preventing domestic violence and by improving mutual respect between spouses. To determine what constitutes 'unbearable mistreatment in cohabitation' as provided in Article 1052, Paragraph 1, Subparagraph 3, of the Civil Code, the courts should, case by case, take into account the degree of the mistreatment suffered by the injured party, the levels of education of both parties, their social status, and so on, and determine whether the continuity of the marriage is threatened. If the degree of mistreatment suffered by the injured party goes beyond the encroachments on personal dignity and security that would be tolerated by most spouses, this should be seen as unbearable mistreatment in cohabitation. The Supreme Court's Precedent S.T. 4554 (Supreme Court, 1934) held that: 'although a spouse who has suffered unbearable mistreatment in cohabitation is entitled to ask for a divorce, this does not include cases where the other party temporarily loses control and overreacts to the spouse's misconduct.' This Precedent, which does not exclude the operation of the abovementioned fundamental ideas and social expectations if the other party's overreactions threaten the continuity of the marriage, is not in violation of the Constitution."

74. It provides, "Where either the husband or the wife is found in one of the following conditions, the other party may apply to the court for a [juridical decree of] divorce: (1) Where he or she has committed bigamy; (2) Where he or she has sexual intercourse with another person; (3) Where he or she has been such abused by the other party as to render it intolerable to live together; (4)…and so on."

75. It is worth referring to the research findings of April Shen regarding factors affecting marital satisfaction in Taiwan based on quantitative data collected from 226 Taiwanese couples. *See* A. C. T. Shen, 2004a and 2004b.

76. This point is owed to the reviewer of this Article.

77. The holding: "Article 1073 of the Civil Code stipulates that the adopter should be twenty or more years older than the adoptee, and Article 1079-1 stipulates that adoption in violation of Article 1073 is null and void. The provisions are not only in harmony with Chinese family ethics but also essential for the maintenance of the social order and the improvement of public interest.

a legal age difference between the adopter and the adoptee though the reasonableness of such age difference is a matter of legislative discretion. And "in order to uphold family harmony and to protect the adoptee's right, the above stipulations should be amended to offer flexibility in the arrangement of the practical needs of social subsistence, especially in cases where two spouses co-adopt or one spouse adopts the other's child/children." No. 587,[78] on the other hand, launches its child right statement through the auspices of the UN Convention on the Rights of the Child. It first holds that the present law to establish paternity "is intended to balance the maintenance of a stable status order and the protection of a child's interests." However, "the law has inappropriately restricted the right of a child to litigation, and is thus insufficient in defending the right to personality. Within this ambit, such law is inconsistent with the Constitutional principle of protecting the right to personality and the right

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Hence, such laws are not in contravention with the intent of the Constitution to protect the people's right to freedom. However, though the reasonableness of the age difference between the adopter and the adoptee is a matter of legislative discretion, in order to uphold family harmony and to protect the adoptee's right, the above stipulations should be amended to offer flexibility in the arrangement of the practical needs of social subsistence, especially in cases where two spouses co-adopt or one spouse adopts the other's child/children. Accordingly, the relevant authorities shall examine and amend such laws."

78. The holding: "A child's right to identify blood filiations and to ascertain paternity is concerned with the right to personality and shall be protected by the Constitution. Article 1063 of the Civil Code stipulates, 'Where a woman's conception takes place during the continuance of a marriage relationship, the child so born is presumed to be legitimate. In regard to presumption of legitimacy provided in the preceding paragraph, either the husband or the wife may bring an action for disavowal if he or she can prove that the conception of the wife is not from the husband; but such disavowal shall be effected within one year after the knowledge of the child's birth.' Such law is intended to balance the maintenance of a stable status order and the protection of a child's interests. However, such right may only be exercised by either of the spouses, while the child is not entitled to bring an action for disavowal. Nor does the provision consider the reasonableness of extinctive prescription for a child's petition. Therefore, the law has inappropriately restricted the right of a child to litigation, and is thus insufficient in defending the right to personality. Within this ambit, such law is inconsistent with the Constitutional principle of protecting the right to personality and the right to litigation. The relevant holdings of the Supreme Court Precedents Year23-No. 3473 (1934) and Year75-No. 2071 (1986) should cease to apply. In response, concerned legislative authorities shall take to amend relevant laws regarding the legal subject and the extinctive prescription of disavowal of paternity in line with the discussed Constitutional principles. According to J. Y. Interpretations NO. 177 and NO. 178, when a statute or a precedent invoked by a finalized judgment is declared unconstitutional by this Yuan as a result of people's application for a judicial interpretation, the disadvantaged party of the judgment may, basing the petition on that interpretation, apply for relieves according to the law of litigation procedure. If the party of such case is not entitled to a retrial, he shall be allowed, within a year after this Interpretation is announced, to bring an action for disavowal against the legally presumed father. In such case, relevant provisions on the disavowal of paternity in the Code of Civil Procedure shall apply *mutatis matandis*. When a statutory agent initiates an action, it should be brought for the child's interests.

The law which disqualifies a natural father to bring an action for the disavowal of his child presumed to be born in the legitimate father's wedlock is intended to avoid the hindrance of marriage stability, family harmony and the right of a child to education and nurture, and is thus not against the Constitution. As to whether the law is to be amended to loosen the restrictions for such litigation to certain extent, it is a matter of legislative discretion."

to litigation."

It is then elaborated in the reasoning that "(a) child's right to identify blood filiations is declared by Article 7, Section 1 of the UN Convention on the Rights of the Child validated on September 2, 1990. The right to establish paternity is concerned with a child's right to personality and shall be protected under Article 22 of the Constitution." To link it to the developed world, the Grand Justice further pointed out that "(i)n order to realise the Constitutional rule, it shall be certified that the establishment of paternity is the natural right of a child. It was stipulated in the former German Civil Code that a child could bring an action for disavowal at a supplementary position (when both parents had failed to do it). The law is now amended according to the UN Convention and allows a child to initiate a legal suit to deny presumed paternity (Articles 1600, 1600a, 1600b of German Civil Code). There are also similar stipulations in Articles 256 and 256c of the Swiss Civil Code." Therefore, it was recommended that the law be amended to protect "the best interests of the child that the Civil Code governing parent-child relationship has been abided by."[79]

Under the UN Convention, it is a globally recognised right of a child to establish paternity with his natural father, which is part of a child's right to be born to and raised in preferably the natural family. It is also a patriarchal ideology that a child belongs to the presumed natural father (husband of the mother) and his family/clan only the child then was treated as an object. The Grand Justice mentioned the Convention without further amplification of the spirit or substance of a child's right to the natural family. A similar case can be found in the aforementioned No. 362, No. 552 and No. 554 where the family is referred to as a basic social institution to be protected by the Constitution. Does it mean every individual has a Constitutional right to belong to a family, to live in a family, and to establish a family? Even if so, how many invisible traditional values and social norms are to be imbedded in their reconceptulisation to moderate, if not transform, their substantial contexts of origin?[80]

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79. A study done by Wen-Mei Rei entitled "Regulating Sex Selection in a Patriarchal Society" may be used as a contrasting example of Taiwan, in which the selection of child sex is rested in the hands of parents. It seems the choice of becoming a parent or not may be totally decided by the parent(s). *See* W. M. REI, *Regulating Sex Selection in a Patriarchal Society – Lessons From Taiwan*, *in* The Family, Medical Decision-Making, and Biotechnology: Critical Reflections on Asian Moral Perspectives (Shui Chuen Lee ed., Kluwer Publisher, 2006).

80. Li-Ju Lee has used Taiwan Family Law to examine the influence of social norms on human behaviour and the interaction between social norms and the legal system, thus check on the circumstances in which law may recognise, depart or overrides social norms. *See* L. J. Lee, *Law and Social Norms in a Changing Society: A Case Study of Taiwanese Family Law*, 8 S. CAL. REV. LAW & WOMEN'S STUD. 413 (1999).

D. *The Family Law Scholarship of the Global Local*

The legal right of an individual vis-à-vis the family has become an issue widely discussed by law academics of interdisciplinary perspectives and training. The emphases on cultural pluralism and third world human rights within the schools of law and development studies or cultural studies of law have tremendous influences on Taiwan Family Law scholarship. A new generation of university family and gender law teachers have chosen to conduct Taiwan case studies for their doctorate dissertations and theses completed in the USA or England. Their professional trainings of a diversity of disciplines in connection to family law matters have contributed to introduce new research methodologies and teaching pedagogies, which has in turn synthesise with the old ones.[81] The interdisciplinary study of law encompasses facets of sociology of law, transnational law (international family law), law and development, cultural study of law,[82] feminist jurisprudence, postmodernism,[83] biological technology of law, social work and law, psychology of law or even economic analyses of law.[84]

VI. CONCLUSION

Bearing the tradition of a continental legal system while adopting

81. Grace Kuo has conducted an interesting case study of Taiwan to review the status of female legal professionals and their gendered life under a "masculine legal culture" of a patriarchal system. *See* S. C. G. Kuo, "*A Case Study of Female Legal Professionals and Their Gendered Life in Taiwan*", 13 AM. U.J. GENDER SOC. POL'Y & L. 25 (2005).

82. The case studies of Taiwan cited in this paper have all shared this perspective. It is worth noticing that in China (PRC), movements are also conducted to devote efforts to strengthen the local legal culture in the face of pressure to conform to international legal norms and the rule of law. *See* P. N. Phan, "*Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*", 8 YALE H.R. & DEV. L.J. 117 (2005).

83. The works of M. Foucault, 1977, 1980, 1981 are widely introduced together with feminist works of C. Gilligan, 1982, C. Smart, 1989 in particular and the work of McKinnon. *See* M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF PRISON (A. Sheridan trans., Harmondsworth: Penguin, 1977); POWER/KNOWLEDGE (Harvester Wheatsheaf, 1980); THE HISTORY OF SEXUALITY, VOL. I (Harmondsworth: Penguin, 1981); C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Cambridge, Mass.: Harvard University, 1982); C. SMART, FEMINISM AND THE POWER OF LAW (New York: Routledge, 1989).

84. For relevant information of this trend, *see* an on-print paper by Amy Shee entitled "The Present and Future of Teaching Family Law," which is a condensed account of a four-year research outcome concerning the reform of family law education in Taiwan universities. Based on field findings, it is argued that the teaching in family law courses, though based on Book IV of the Civil Code entitled Relatives, shall go beyond the Code to trace upward to the Constitution for its jurisprudential origin in human rights. The family law shall be aimed to protect an individual's right to the family and family life. Thus the ideal is to commence the course with the birth of a person into a nuclear family within which the best interests of the child is the first and paramount legal consideration. The course then moves into the stage of marriage between two persons in which sexual/gender equality is the guiding principle for he constitution, continuance, alteration, and dissolution of the matrimonial relationships.

legislative principles from case-law countries, Taiwan Family Law has been widely criticised as a "hybrid transplant." Judging by lessons learnt from the codification, interpretation and enforcement of Taiwan Family Law, it is my proposition that legal jargons and discourses are not to be understood by their literary appearances. My story tells that if law in books is to coincide with law in action, it has to be culturally and socially situated.[85] The best interests of the child articulate a universal legislative principle. It is actually a globally imposed ideology for the family to be governed,[86] just as monogamy and sexual/gender equality are for marriages. When such principles are adopted, they have to be redefined within the Taiwan law order and reconceptulised by local variables. The question as to what family right of which individual or group of individuals is to supercede others will then be decided by the authoritative organs empowered by the people through the Taiwan democratic system guarded by Constitutionalism.[87]

The family rights[88] involving homosexuality,[89] for example, are fashionable topics. Marriage ceremonies of gays or lesbians unions are witnessed by public figures and social leaders. Such marriages make no legal effects but are widely reported by the press.[90] Voluntary groups of the civil society have shouted loud and clear for the recognition and legislation of homosexual rights to marry and to adopt. Such efforts have been accumulated to shape the state policy on human right. In 2004, the Human Rights Commission under the Office of the President (總統府人權委員會) officially announced "Three Human Rights Bills (人權三法草案)," one being for the equal protection of homosexual marriages and families.[91] Based on studies of comparative laws of European or US

85. The Doctor Dissertation by Li-Ju Lee on legal culture and social change of Taiwan family law has reached similar conclusions. *See* L. J. Lee *Legal Culture and Social Change-The Case of Taiwanese Family Law Development*., Doctor Dissertation, School of Law, Stanford University, USA, 2002.

86. Here I borrow the idea from N. PARTON, GOVERNING THE FAMILY: CHILD CARE, CHILD PROTECTION AND THE STATE (London: Macmillan, 1991). An interesting comparison may be made with J. DONZELOT, THE POLICING OF FAMILIES: WELFARE VERSUS THE STATE (London: Hutchinson, 1980).

87. The practice of this Taiwan style of legal pluralism is also found in the study of Grace Tsai in her study on elderly maintenance in Taiwan. *See* Y. F. G. Tsai, *Elderly Maintenance in Taiwan: A Legally Pluralistic Perspective, Law, Social Justice & Global Development* (AN ELECTRONIC L.J.), Ph.D. Thesis, School of Law, University of Warwick, UK, 2005.

88. They may include the right to marry or to be recognised as a form of legal cohabitation, and as such the couple will enjoy the right to adopt children like legally married couples.

89. For a good conversation among academics of different background and philosophies, *see* H. Eastwood & J. J. Smith, *Do Same-Sex Couples Have a Right to Marry? The State of the Conversation Today*, 17 YALE J.L. & FEMINISM 65 ff (2005).

90. A legal marriage is to be entered into by a man and a woman. Homosexual marriages as such do not involve any legal consequences.

91. Relevant information is *available at* http://www.president.gov.tw/ [Office of The President, Republic of China (Taiwan)].

origin, it is now widely argued that homosexual marriages and families should be recognised by the law. The global success of the recent movie "Brokeback Mountain" has also brought in a new tide of pro-homosexuality. The free flow of information to and from every corner of the global village may have more impact on local family reconstruction than the black-letter law itself.

It is all too easy to criticise modernity if you are situated at the core and enjoy the qualified modernisation. When one living in the North cares for the South, his passion tends to exceed his sight, thus his rationale may turn to imagination. *Arnold Toynbee* reminds us that on looking at order of things in history, beliefs in rational analyses may lead to authoritative assumption and allow one to judge easily, thus to avail of all power to control the nature, the lands and the individuals[92] (Toynbee, 1953, 1987). *Santos*, *Giddens* and others have posed convincing theories to censor modernity and the globalisation process.[93] I followed their stream of discussion with much comfort when I acted as an academic to question global justice and humanity. I applauded for their analytical insights and critical reflection. But as I accumulate my own observations on Taiwan society and people, and learn to become culturally sensitive to my own motherland, I started to feel like a fish jumping up onto shore to get fresh air. Maybe it is time for us to develop from the accumulated intellectual resources another analytical framework for Taiwan to see from inside how the people have expected for a good society.

The delinquent *Amy* we met at the global shopping mall may also be a decent girl, a filial daughter, a diligent student, and a whale saver. No matter how modernisation and globalisation are to be criticised upon the resulting crises at most corners of the underdeveloped, we shall not forget that human civilisation has taken us to the point that a free person is not to be judged against one's own judgment and a developmental country like Taiwan shall not be framed against its own framework. For some of the semi-modernised or developmental countries at the periphery, globalisation offers an easier path to the light of prosperity. To divulge that the light is simply a myth or to cover up the false light may constitute an infringement on freedom of choice. If it is the Chinese wisdom that one

92. *Friedrich Nietzsche* also warned that such rational judgments had lead to the "slave morality" in modern world. *See* F. NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE (Walter Kaufmann trans., New York: Vintage Books, 1966); HUMAN, ALL TOO HUMAN (Richard Schacht trans., New York: Cambridge University, 1996); DAYBREAK: THOUGHTS ON THE PREJUDICES OF MORALITY (R. J. Hollingdale trans., New York: Cambridge University, 1997).

93. Some other middle ground theories may also be found at J. Purdy, *A World of Passions: How to Think About Globalization Now*, 11 IND. J. GLOBAL LEG. STUD. 1 (2004); R. Starkar, *Critical Essay: Theoretical Foundations in Development Law: A Reconciliation of Opposites?*, 33 DENV. J. INT'L L. & POL'Y 367 (2005).

may only be emancipated when all are regulated, then "rule of law" have to be culturally reconceptulised. Even if the light sheds no hope to change for the better, please allow us to reach it and find out what it worth for ourselves. You may hear quarrels, see divergence or sense revolt within us, but throughout the history we have made orders within chaos.

The Taiwan Family Law at stage may look or sound bizarre as contradictions and inconsistencies appear everywhere in ideologies, in laws and in practice. The impact of globalisation is multiple folded, and to unfold it needs much more endeavours. This paper is simply a stone to throw in the well and test its possible depth. We need to find appropriate ladders and tools to explore further. At this stage, I can only say that our passions to move forward to a better stage both in terms of human rights and social justice will not fail to keep Taiwan a unique development model in human civilisation. And such endeavours to envisage the individuality and integrity of a country in world capitalism may secure the last man in the end of the history.[94]

94. *Francis Fukuyama* in his famous book "THE END OF HISTORY AND THE LAST MAN" (USA: Harper Perennial, 1993) predicts the global dominance of capitalist ideology shall mark the end of human civilisation.

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