

Legalization of Societal Customs in Taiwan

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Abstract

The attitude of Taiwan's state law toward societal customs came from Meiji Japan, the first country who tried to modernize its legal system in East Asia. In Meiji Japan, because the statute basically adopted Continental European law, societal customs were not parts of the state law unless they were recognized as "customary law" or "factual customs" in the positive law, although few of customs had been incorporated into the Japanese Civil Code. Such an attitude toward customs was received by China during the late Qing and Republican era, and then came Taiwan, a former Japanese colony, after the end of the World War II. It is difficult for customs to meet the needs of clarity and predictability required by the modern law, but customs indeed influence human behaviors in a society. Partly because of lacking knowledge about legal development of Taiwan in the past hundred year, Taiwanese legal scholars pay little attention to what kind of role custom has played in the state law of Taiwan.

During the former period of Japanese administration, Taiwanese civil matters and land relationship in Taiwan were determined by customary law, rather than Japanese modern-style Civil Code. Those old customs of Han Chinese in Taiwan were thus interpreted by legal terminology of Continental European law and selected to be rules in the customary law mentioned above. This kind of combination of customs and modern law in Taiwan was different from that in Meiji Japan or in Republican China. On the other hand, it was not required to rule mountain indigenous peoples by law during the Japanese period, and therefore their customs were not necessarily interpreted as rules in the customary law. The policemen who were in charge of dealing with legal affairs

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of mountain indigenous peoples actually took customs into considerations when they made judgment on the cases involving with mountain indigenous peoples. During the latter period of Japanese administration, due to Japanese nationalism, the policy of “extension of homeland” prevailed in colonial Taiwan; not surprisingly, those drafts specifically designed for civil law in Taiwan were never approved by the authorities in metropolitan Japan. Since 1923, the customary law was applicable merely for Taiwanese family and succession matters and ancestor worship. In fact, the colonial court frequently revised Taiwanese customary law, but brought only a few modern elements to Taiwanese law. The succession system in the Japanese modern-style Civil Code was far different from that of Han Chinese so that this code was not suitable for the Taiwanese. The first generation Taiwanese legal professionals discussed the role of customs in the state law from the viewpoint of the Taiwanese; however, they did not reach the consensus and could not promote legislation in a colonial parliament.

In post-war Taiwan, the KMT regime ignored the uniqueness of Taiwan on the basis of Chinese nationalism, and did not allow customary law to be governing law in civil and commercial matters in Taiwan. The societal custom relating to the membership of ancestor worship was the only one which was recognized as “customary law” in the state law. A few customs were regarded as “factual customs” and therefore became parts of agreement of parties. By contrast, the customs of indigenous peoples were never recognized as “customary law” or “factual customs” in the post-war state law. Nevertheless, since the democratization of Taiwan in the 1990s, those legislators who are elected by people in Taiwan have been happy to codify local customs so that the customary legislation has re-emerged in Taiwan again after its failure in the 1910s. The current legislature in Taiwan is more confident in overthrowing Han Chinese legal traditions which have become out of date, although it does not completely invalidate the custom relating to the membership of ancestor worship. More importantly, the state law has changed its attitude toward the customs of indigenous peoples. There has been a special legislation to allow indigenous peoples to name themselves by their own customs, and indigenous people could

be exempted from criminal sanction on the ground of their customs. East Asian countries have always tried to establish a nation-state with a single legal system for a single value, modernity. It is a possible for Taiwan, however, to shape a state law with legal pluralism now.

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