The Application and Proof of Traditional "Customs" of Indigenous People in Civil Litigation

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Abstract

The "traditional law of indigenous people" in Taiwan has been playing a marginal role in civil litigations at latest since 1945, where Civil Code of ROC came into effect. Under this Code, the existing "traditional law" could theoretically become legal norms being applied by courts when it constitutes "customary law" or "factual customs". However, it is hardly to find court decisions recognizing this possibility actively, either due to the difficulty to prove such traditional usages, or because of the legal qualification of "customary law" as secondary source of law against statutory law. It must be criticized that this practice couldn't come in line with art. 10 para. 11 of Additional Articles of the Constitution of ROC, art. 1, 27 of ICCPR and art. 30 of Indigenous Peoples Basic Law, becoming part of Taiwanese legal system over the past two decades, all of which emphasize the protection of traditional culture of indigenous people. In order to ameliorate the unsatisfying situation, this article follows an appeal in literature to "make customs as well as customary law more jurisprudential". It tries to indicate in which extent the "traditional law of indigenous people" could affect civil adjudication on one hand and explain how courts should collect information in this regard on the other hand.

Keywords: customary law, ICCPR, traditional usages, principle of ex officio investigation, freely admissible evidence

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