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Article

Navigating Legal Transplants in Taiwan: Historical Layers, Case Studies, and Theoretical Implications

Yun-Ru Chen*

ABSTRACT

This article explores the complex process of legal transplants in Taiwan, examining how the legal system has been influenced by external forces and shaped by local responses such as selective adoption, adaptation, and (semi-)autonomous interpretation by various actors. The analysis begins with the historical progression of Taiwan's legal landscape, tracing changes from Dutch colonization in the 17th century, through Sinicization under the Zheng and Qing dynasties, to the modernizations during Japanese rule, and the American influences in the post-war era. Key case studies, including women's access to courts, democratization efforts, domestic violence legislation, human rights advancements, and the legalization of same-sex marriage, underscore Taiwan's ability to integrate and at times contribute to global legal principles. Legal transplants go beyond mere imposition, serving as processes that reshape local customs and merge various legal traditions. Strategically utilized by a spectrum of actors, from rulers and the powerful to the subordinated and marginalized, Legal transplants function as mechanisms to sustain

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hegemony and, simultaneously, to resist it. The article concludes by advocating for future research that adopts a long-term, locally grounded perspective to fully grasp the transformative potential of legal transplants.

Keywords: *Legal Transplants, Taiwan, Colonial Legal Systems, Legal Reform, Local Autonomy*

CONTENTS

I. INTRODUCTION

The history of Taiwan's legal system is a rich fabric woven from various strands of legal traditions, brought together by centuries of colonization and international influence. The concept of legal transplants, which refers to the process by which legal systems adopt or are compelled to integrate laws, principles, institutions, or more generally, ways of thinking about law and its relation to the government or the daily lives of ordinary people from other legal systems, is central to understanding Taiwan's legal development. Like in many other countries, legal transplants in Taiwan have gone beyond mere passive reception, involving complex processes of adaptation, negotiation, and hybridization. This dynamic approach is crucial for analyzing nearly any legal system that continuously interacts with others. However, Taiwan's experience remains uniquely characterized when considering its specific geopolitical context on a global scale over a long-term perspective.

Starting from the next section, this article will explore the progression of legal transplants in Taiwan, beginning with Dutch colonization in the 17th century and continuing through post-war influences. It will examine pivotal case studies, including the adoption or rejection of liberal constitutionalism from more than a century ago and the recent legalization of same-sex marriage, before addressing broader theoretical implications towards the conclusion.

II. THE TRAJECTORY OF TAIWAN'S LEGAL TRANSPLANTS

Since the 17th century, Taiwan has undergone multiple waves of legal transplants, each influenced by various political and ethnic authorities, as well as immigrant populations. Beyond direct imposition through dominant power, some transplants were motivated by the global prestige and admiration of certain legal systems, while others fall somewhere in between. These successive waves have culminated in the development of a complex legal tradition in Taiwan, wherein elements from diverse legal systems coexist--sometimes in harmony, yet at other times in tension.[1]

1. For how Taiwanese laws are diverse due to multiple sources of legal transplant (多源而多元), *see* WANG TAY-SHENG (王泰升), JYUYOU LISHI HSIHWEI DE FASYUE: JIEHE TAIWAN FALYU SHEHUEISHIH YU FALYU LUN JHENG DE FASYUE (具有歷史思維的法學：結合台灣法律社會史與法律論證的法學) [JURISPRUDENCE WITH HISTORICAL THINKING: COMBINATION OF TAIWANESE SOCIAL HISTORY OF LAW AND LEGAL REASONING] 39-93 (2010).

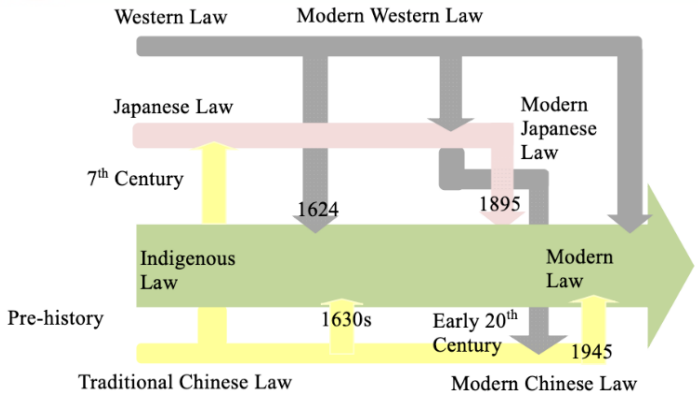

Figure 1. Successive Legal Transplants in Taiwan History
(From Tay-Sheng Wang.[2] Revised by Yun-Ru Chen[3])

This section explores the foundational structures and geopolitical contexts of major waves of legal transplants in Taiwan's history: the Dutch, Zheng, Qing, Japanese, and postwar periods. While these conventional periodizations are useful, they can be misleading. The territorial scope of the aforementioned regimes changed significantly over time, and many people on the island were not actually under their rule. For instance, before Japanese colonization, foreign regimes such as the Dutch and Zheng did not govern the entire island, making these divisions less applicable to Indigenous peoples in eastern Taiwan compared to Han Chinese settlers.[4] Furthermore, although legal transplants were often introduced by foreign regimes and their migrants, many, like the Dutch and Japanese, departed after their regimes ended. By the postwar period, Taiwanese society was primarily composed of Indigenous peoples and Han Chinese/Taiwanese groups, including local-born Han Taiwanese and mainlanders who arrived after World War II, forming the basis of Taiwan's contemporary population distribution.

A. *Early Colonial Influences: Dutch Rule and Roman-Dutch Law*

Before Dutch colonization, Taiwan was inhabited by various Indigenous groups, referred to in this paper as the "Indigenous Taiwanese" or "Taiwanese Aborigines." These primarily Austronesian groups, with cultural and linguistic ties to Southeast Asia, each maintained distinct social and

2. WANG TAY-SHENG (王泰升), TAIWAN FALYU SHIH GAILUN (台灣法律史概論) [INTRODUCTION TO TAIWANESE LEGAL HISTORY] 9 (6th ed. 2020).
3. Yun-Ru Chen & Sieh-Chuen Huang, *Family Law in Taiwan Historical Legacies and Current Issues*, 14 NTU L. REV. 157, 163 (2019).
4. WAN-YAO CHOU, A NEW ILLUSTRATED HISTORY OF TAIWAN 15-17 (2020).

legal systems. Despite the diversity among these groups, their legal traditions shared certain common characteristics. These included unwritten, orally transmitted laws preserved across generations, a profound veneration of ancestral spirits and teachings, and a deeply ingrained belief in spiritual retribution for transgressions. Additionally, their legal systems typically emphasized communal ownership of land, collective decision-making processes, and the resolution of disputes through mediation rather than formal adjudication.[5] These Indigenous legal frameworks, which existed long before Dutch rule and continued to persist thereafter, were integral to the social fabric of these communities.

The first significant wave of legal transplants in Taiwan began in the 17th century with the arrival of the Dutch East India Company, a latecomer in European overseas expansion.[6] In 1624, as the Dutch established a colonial administration in southwestern Taiwan, marking the onset of a period characterized by legal pluralism that would echo throughout Taiwan's history. The Dutch initially invoked the international law principle of "terra nullius" (res nullius), developed in Europe, to justify their occupation of what they deemed "unclaimed land," despite it being inhabited by the Taiwanese Aborigines. Over time, the Dutch expanded their control by ostensibly "purchasing" land from Indigenous peoples and through military conquests to subdue both Indigenous groups and Spanish rivals who had occupied northern Taiwan and established trading ports.[7]

Roman-Dutch law, which evolved in the Netherlands during the 16th and 17th centuries through the integration of Roman law with Dutch customary law, served as the legal framework for Dutch colonies, such as Sri Lanka and South Africa. Dutch Taiwan was no exception. In Dutch-Taiwan, this legal framework was adapted to accommodate the local customs and legal practices respectively observed by Indigenous Taiwanese and Han Chinese settlers from China (hereafter referred to as "Han Taiwanese"). The Dutch administration tolerated native customs as long as they did not interfere with its primary focus on trade and economic exploitation, rather than cultural assimilation. Consequently, the Indigenous Taiwanese, about half of whom were under Dutch rule (while the rest remained largely autonomous), were largely able to govern themselves according to their own legal traditions, such as communal land ownership and collective decision-making within an indirect colonial governance structure. Similarly, Han Taiwanese settlers were permitted to serve as adjudicators in mixed

5. *See* WANG, *supra* note 2, at 19-23.

6. Prior to the Dutch, the Spanish colonized northern Taiwan from 1626 to 1642, primarily establishing trading bases. However, their brief rule was arguably too short to leave a significant impact on the island's legal system.

7. *See* WANG, *supra* note 2, at 23-24.

courts and retain certain legal practices within their communities.[8] This legal pluralism was a defining feature of the Dutch colonial period in Taiwan and set the stage for future waves of legal transplants.

B. *Legal Sinicization under the Zheng Kingdom and Qing Empire*

The Dutch period in Taiwan ended in 1661 when the island was seized by Zheng Chenggong, also known as Koxinga, a pirate turned loyalist of the Ming dynasty in China, which had been supplanted by the Qing-Manchu regime. The Zheng family sought to resist the Qing dynasty's expansion and strategically positioned Taiwan as a bastion for launching efforts to reclaim the mainland. They governed Taiwan from 1661 to 1683, during which the island underwent a more profound process of Sinicization.[9]

If legal Sinicization had begun during Dutch rule by incorporating Chinese customs into the legal system, under the Zheng Kingdom, Chinese political and legal traditions were more thoroughly imported to Taiwan. The Zheng regime implemented the central and local administrative structures of Ming China in Taiwan, while also integrating certain aspects of the previous Dutch system, such as the head tax. However, the administration was distinctly Han-centric, with pronounced discriminatory practices against Indigenous peoples, who were derogatorily referred to as "fan" (barbarians) in contrast to Han Chinese, who were recognized as "min" (ordinary people). In contrast, during Dutch rule in Taiwan, the Taiwanese Aborigines were considered the primary subjects of the VOC's rule and were not viewed as inferior to the Chinese settlers and merchants residing in Taiwan by the Dutch authorities. Due to the limited historical resources and research, it is difficult to provide a comprehensive account of the actual operations in Cheng-Taiwan beyond its official political and legal structures. However, it is known that Zheng's governance was marked by military rule and severe punishments, including the frequent use of the death penalty on both Han Taiwanese and Indigenous populations.[10]

The process of Sinicization continued under the Qing Empire, which conquered Taiwan in 1683, incorporating the island into its territorial domain

8. Cheng Wei-Chung (鄭維中), *Dairu Sifang Falyu de Helan Tongjhihjhe* (*帶入西方法律的荷蘭統治者*) [*The Dutch Rulers who Introduced Western Legal Systems*], *in* DUOYUAN FALYU ZAIDI HUEIHE (多元法律在地匯合) [THE CONVERGENCE OF DIVERSE LEGAL SYSTEMS IN TAIWAN] 29, 29-56 (Wang Tay-Sheng (王泰升) ed., 2019).

9. For more on the Zheng family and their activities in trade, military, and politics across the East Asian seas during the 17th century, *see* CHENG WEI-CHUNG (鄭維中), HAISHANG YONGBING: SHIHCHISHIHJI DONGYA HAIYU DE JHANJHENG、MAOYI YU HAISHANGJIEHLYUEH (海上傭兵：十七世紀東亞海域的戰爭、貿易與海上劫掠) [WAR, TRADE AND PIRACY IN THE CHINA SEAS] 1622-83 (2021).

10. *See* WANG, *supra* note 2, at 29-31.

and ruling it for more than two centuries until 1895. The Qing administration instituted the imperial Chinese legal system in Taiwan, which was grounded in Confucian principles of justice and morality. This system was fundamentally anchored in the maintenance of social order through a well-defined hierarchical structure and the use of punishment as a principal instrument of governance, with comparatively limited regulation of civil matters, such as contracts or commercial transactions. Consistent with Chinese legal traditions, the Qing legal system emphasized key principles such as a family-centered framework, the supremacy of imperial authority, and a strong focus on collective responsibility. In this context, collective responsibility involved holding all members of a group--such as a family--accountable for the actions of any individual within that group.[11]

In Chinese legal culture, the law was not viewed as an absolute rule; rather, it was understood within a broader context where moral sentiment and specific circumstances (情), reason (理), and legal norms (法) were all integral to the adjudication of cases. While the Qing Code was by no means merely a paper law--many serious cases were adjudicated strictly in accordance with its provisions--the prevailing legal thinking and practice afforded local officials considerable discretion in the application of the law. This discretion often allowed them to set aside formal statutes when addressing so-called "minor cases" (細事), such as commercial disputes, contract formation, or minor injuries, in contrast to "heavy cases" (重案) like murder and sedition. It was also exercised when they deemed it more appropriate to pursue reconciliation rather than formal adjudication, or simply when they chose to overlook certain cases.[12]

Thanks to the abundant historical archives in Qing-Taiwan, including litigant records and deeds, we can observe the practical operation of Chinese legal traditions in Taiwan beyond the "law in the books."[13] As previously mentioned, local officials often used the law merely as a reference when adjudicating lawsuits, and due to limited enforcement capacity, many provisions of the Qing Code were not strictly implemented. For instance, adultery was seldom prosecuted.[14] Although the law prohibited adopting

11. WANG, *supra* note 2, at 35-41, 44.

12. *See generally* Chen Yun-Ru (陳韻如), *"Diao Fu/Min" de Chuantong Jhongguo "(Fei) Fa" Jhihsyu: Yutse Lun, Chian Gueize yu Dansin Dangan Jhong De Jian Guai Gushih* (*「刁婦/民」的傳統中國「(非)法」秩序：預測論、潛規則與淡新檔案中的姦拐故事*) [*Bad (Wo-)man's Theory of Traditional Chinese Law: From the Vantage Points of Adultery and Abduction Cases in Tan-Hsin Archives*], (Special Issue) 1 JHONG YAN YUAN FA SYUEH CHI KAN (中研院法學期刊) [ACADEMIA SINICA L. J.] 371 (2019).

13. *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

14. *See generally* Chen Yun-Ru (陳韻如), *"Dan Sin Dang'an" Jhong Jianguai Anjian: Falyu Chuantong De Chongsin Jianshih* (*《淡新檔案》中姦拐案件：法律傳統的重新檢視*) [*Cases of Adultery and Abduction in Tan-Hsin Archives: Re-examinimg Legal Traditions in Qing Taiwan*], 25(4)

children with different surnames, this practice was common.[15] In litigation, women were required to have a male representative act as their litigation proxy and were prohibited from appearing in court themselves. Despite these restrictions, many women still personally presented their cases.[16] Moreover, while Confucian teachings expected women to be obedient to their husbands or sons (after their husbands' deaths), it was not uncommon for senior women to oversee the division of family property or select heirs for their deceased sons or grandsons. In other words, even within the so-called Chinese legal tradition, there existed a significant disparity between official law and local customs in Taiwan, despite both being transplanted and subsequently adapted to the island's context.[17]

During the two-century Qing period, the significant migration from China deepened the Sinicization of the island's legal system. By the end of the Qing era, Han Taiwanese constituted 94% of Taiwan's population, and Chinese legal norms had largely supplanted indigenous systems, marginalizing the latter. This socio-political Sinicization entrenched Chinese legal traditions, which persist even after more than a century of systematic legal modernization. Elements such as gender inequality and a legal consciousness prioritizing moral sentiment (情) and reason (理) over legal norms (法) remain evident in contemporary Taiwan.[18]

TAIWAN SHIH YANJIOU (臺灣史研究) [TAIWAN HISTORICAL RESEARCH] 21 (2018).

15. For the discussion on the various "unorthodox" customs regarding adoption in Qing-era Taiwan, *see generally* Chu Keng-Yu (朱耿佑) & Chen Yun-Ru (陳韻如), *Chingjhih Taiwan Yu Lyuli Jhengtong de Jyuli: Yi Sihhou Lisih Jichi Zaidi Duoyangsing Weili* (*清治臺灣與律例正統的距離：以死後立嗣及其在地多樣性為例*) [*Gap between Law and Practices in Qing-Taiwan: Local Diversity of Posthumous Adoption*], 29 TAIWAN SHIH YANJIOU (臺灣史研究) [TAIWAN HISTORICAL RESEARCH] 71 (2022).

16. *See generally* Shao Ya-Ling (邵雅玲), *ChingDai DiFang SuSong GueiFan Yu NyuSing-Yi DanXin DangAn WeiLi* (*清代地方訴訟規範與女性—以淡新檔案為例*) [*District Lawsuit Regulations and Females-An Example of DanXin Archive*], 2 GUISHIHGUAN SYUEHSHU JIKAN (國史館學術集刊) [BULLETIN OF ACADEMIA HISTORICA] 23 (2002). For further discussion on women's access to litigation, *see* Section 3.1 of this article.

17. For the discussion of mothers' wills in division of family property, *see generally* Chen Yun-Ru (陳韻如) & Lin Ying-Yi (林映伊), *Fu/MuMing NanWei?: ChingJhih TaiWan FenJia Jhong jhih JiaoLing yu YiJhu* (*父／母命難違？：清治臺灣分家中之教令與遺囑*) [*In the Name of the Father/Mother?: Wills in Division of Family Property in Qing-Taiwan*], 27 TAIWAN SHIH YANJIOU (臺灣史研究) [TAIWAN HISTORICAL RESEARCH] 1 (2020). For the discussion of mothers' wills in selecting heirs for their deceased sons or grandsons, *see generally* Chu & Chen, *supra* note 15.

18. For the reflection of sentiment, reason and legal norms in the contemporary era, *see* Huang Chin-Tang (黃琴唐), *Ching Li Fa de Rong Guan: ChuanTong TsaiPan LiNian De DangDai SihBian* (*情理法的融貫：傳統裁判理念的當代思辨*) [*The Coherence of "Sentiment, Rationality, and Law": The Reflection of Traditional Judiciary Judgments in the Contemporary Era*], *in* FALYU YOU GUANSI: FALYU SHIH SHENME? ZEN ME BIAN? RUHE YINGSIANG WOMEN SHENGHUO? (法律有關係：法律是什麼？怎麼變？如何影響我們生活？) [HOW DOES LAW MATTER] 375 (Hsiao-Tan Wang (王曉丹) ed., 2023).

C. *Japanese Colonial Rule: Systematic Legal Modernization*

The most significant and systematic transplant of modern Western law to Taiwan occurred during the Japanese colonial period (1895-1945). While the Dutch introduced Western laws developed in the 16th and 17th centuries to Taiwan, these laws lacked essential features of modern legal systems, such as judicial independence and the broader concept of the separation of powers. Additionally, between the "opening" of China (around 1860) and the end of Qing rule in Taiwan, the island became increasingly exposed to modern Western commercial and legal practices, such as company law and insurance law, mainly through the cooperation of local merchants with Western businesses and international trade. However, this Western legal influence was limited and mostly confined to commercial law.[19] It was during Japan's colonial rule (1895-1945) that a comprehensive set of modern laws, shaped by Japan's own rapid legal modernization under Western influence, was fully extended to Taiwan.

Japan's legal modernization began during the Meiji period (1868-1912), driven by the government's ambition to align its legal system with Western standards. This effort was motivated by Japan's desire to renegotiate the unequal treaties imposed by Western powers and to establish its sovereignty on the international stage. In pursuit of these goals, Japan integrated elements of French and German legal codes, creating a hybrid system that fused Western legal principles with (neo-)traditional Japanese customs, which were themselves partly influenced by Chinese legal traditions.[20]

After Japan's unexpected victory in the Sino-Japanese War, it acquired Taiwan as its first colony through the Treaty of Shimonoseki (1895). This marked the beginning of a systematic effort to transplant Japan's newly modernized legal system to Taiwan. While aiming to extend its legal system to Taiwan, the Japanese colonial administration also adopted a pluralistic approach to political and legal governance, which bore similarities to the Dutch methods used during their rule in the 17th century. Under this system, Japanese citizens residing in Taiwan were subject to Japanese law, while Han

19. Wang Tay-Sheng (王泰升) & Chen Yun-Ru (陳韻如), *Kaigang Tongshang* (*開港通商*) [*Opening of Ports for Trade*], *in* Jhueisyun Taiwan Falyu De Zuji-Shihjian Baisyuan Yu Falyushih Yanjiou (追尋臺灣法律的足跡—事件百選與法律史研究) [T*racing the Footsteps of Taiwanese Law: 100 Selected Cases and Legal History Research*] 68 (Wang Tay-Sheng (王泰升) et al. eds., 3rd ed. 2016); For a detailed analysis of Taiwanese merchants' business and legal strategies in late Qing Taiwan following the opening of international trade, *see* PEI-CHEN LI (李佩蓁), DIFANG DE SHIHJIAO-CHINGMO TIAOYUEH TIJHIH SIA TAIWAN SHANGREN DE DUEITSE (地方的視角—清末條約體制下臺灣商人的對策) [A LOCAL PERSPECTIVE: THE STRATEGIES OF TAIWANESE MERCHANTS UNDER THE TREATY SYSTEM IN LATE QING DYNASTY] (2020).

20. Tay-Sheng Wang, *Translation, Codification, and Transplantation of Foreign Laws in Taiwan*, 25 WASH. INT'L L.J. 307, 311-12 (2016).

Taiwanese subjects were governed by a combination of Japanese law and local customs, varying by the specific legal matter and the phase of colonial rule.[21] For the Indigenous Taiwanese, except for those deemed sufficiently "Sinicized" to be governed as Han-Taiwanese, the legal affairs of other indigenous groups were primarily managed by police stationed in remote or mountainous areas. These officers exercised significant discretion, often referencing indigenous customs, applying Japanese criminal law, and making decisions based on political considerations when handling cases.[22]

During the early stages of Japanese colonial rule, the administration placed significant emphasis on implementing legal codes deemed essential for maintaining colonial control, such as criminal law and judicial procedures, which were critical for upholding order and authority within the colony. In contrast, legal areas less directly tied to the immediate interests of colonial control, including civil and commercial law, were allowed to retain elements of local customs and practices. In the early 1920s, as Japan entered the latter half of its colonial rule in Taiwan, colonial policy shifted from the so-called "gradual assimilation," which involved a degree of respect for local customs, toward the so-called "full assimilation" in response to the global movement for self-determination in colonies. Consequently, the Japanese Civil Code was extended to the Taiwanese population, with the notable exception of family law, which continued to be governed by customary practices until the very end of Japanese rule.[23]

Another significant aspect of legal transplantation during the Japanese colonial period was the establishment of a modern judiciary that underscored judicial independence and the rule of law. In contrast to the more flexible and situational application of legal norms in Qing-era Taiwan, the modern courts under Japanese rule emphasized the supremacy of legal rules in adjudicating cases and bolstered individuals' claims to rights. However, it is important to note that the colonial government also implemented a system for mediating civil disputes through local administrative officials, as well as a summary judgment process that permitted minor criminal offenses to be swiftly resolved by police or administrative officials. While these practices might have been justified as aligning with pre-colonial legal traditions or reducing government expenses, they curtailed procedural rights and blurred

21. *Id*. at 313-14.

22. Wang Tay-Sheng (王泰升), *Yuanjhu Minzu Siangguan Fajhih De Hueigu Ji Singsih* (*原住民族相關法制的回顧及省思*) [*Review and Reflections on Indigenous Peoples' Legal Framework*], *in* DUOYUAN FALYU ZAIDI HUEIHE (多元法律在地匯合) [THE CONVERGENCE OF DIVERSE LEGAL SYSTEMS IN TAIWAN] 427, 456-58 (Wang Tay-Sheng (王泰升) ed., 2019).

23. *See* Wang, *supra* note 20, at 312-16; Chen & Huang, *supra* note 3, at 165. For a legal-political analysis of how family law was left in the customary in Japan-colonized Taiwan, *see generally* Yun-Ru Chen, *Family Law and Politics in the Oriental Empire: Colonial Governance and its Discourses in Japan-Ruled Taiwan (1895-1945)*, 14 NTU L. REV. 1 (2019).

the lines between the judiciary and administration.[24]

As Michele Graziadei astutely observed, foreign legal elements are often "disguised by dressing them in familiar clothes."[25] In Japan-colonized Taiwan, legal transplants did not simply involve the direct adoption of foreign laws but also the selective reinterpretation and transformation of local customs. The so-called "customary law" under colonial rule was, in truth, an "invention of tradition," a subtle form of legal transplantation.[26] To implement this across Taiwan, the colonial government and judiciary carefully reinterpreted local laws, frequently drawing on German legal concepts and the Meiji Civil Code (1898). For example, the Japanese administration redefined Han Taiwanese property ownership, molding it into modern-western capitalist property rights--an approach aptly described as "new wine in old bottles."[27] Another instance was the incorporation of individual rights, such as a wife's right to divorce, a concept Japan had recently adopted from the West.[28]

This period also saw the emergence of the first generation of Taiwanese

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24. For mediation of civil disputes (民事爭訟調停), *see generally* Wang Tay-Sheng (王泰升), *Zaifang Taiwan De Tiaojieh Jhihdu :Duei Chuantong De Siandai Hua Jhuanyi* (*再訪臺灣的調解制度：對傳統的現代化轉譯*) *[Mediation Practice in Taiwan Revisited: Modern Translation of Traditions*], 25 TAIWANSHI YANJIU (臺灣史研究) [TAIWAN HISTORICAL RESEARCH] 101 (2018); For polices and summary judgment process Japan-Colonized Taiwan, *see generally* WU CHUN-YING (吳俊瑩), RIH JHIH TAIWAN JINGCHA YU SIANDAI SHENGHUO JHIHSYU DE SING SU: YI WEIJING ZUEI DE JI JYUEH WEIJHONGSIN (日治台灣警察與現代生活秩序的形塑：以違警罪的即決為中心) [POLICE AND EVERYDAY-LIFE ORDER IN COLONIAL TAIWAN: ON THE SUMMARY JUDGEMENT FOR POLICE OFFENCES] (2020) (Unpublished Ph.D. dissertation, National Taiwan University) (on file with National Taiwan University Library).

25. Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 441, 462 (Mathias Reimann & Reinhard Zimmermann eds., 2012).

26. Terence Ranger, *The Invention of Tradition in Colonial Africa*, *in* THE INVENTION OF TRADITION 211 (Eric Hobsbaum & Terence Ranger eds., 2012). For the invention and operation of customs (laws) in Asian colonies, *see* Dirk H. A. Kolff, *The Indian and the British Law Machines: Some Remarks on Law and Society in British India*, *in* EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH-AND 20TH-CENTURY AFRICA AND ASIA 201 (W. J. Mommsen & J. A. De Moor eds., 1992); Daniel S. Lev, *Colonial Law and the Genesis of the Indonesian State*, *in* LEGAL EVOLUTION AND POLITICAL AUTHORITY IN INDONESIA: SELECTED ESSAYS 13 (Daniel S. Lev ed., 2000); *see generally* Marie Seong-Hak Kim, *Law and Custom in the Chsôn Dynasty and Colonial Korea: A Comparative Perspective*, 66 J. ASIAN STUD. 1067 (2007); Marie Seong-Hak Kim, *Customary Law and Colonial Jurisprudence in Korea*, 57 AM. J. COMP. L. 205 (2009); Francis G. Snyder, *Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 49 (1981).

27. TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895-1945): THE RECEPTION OF WESTERN LAW 150-60 (2000).

28. *See* Chen & Huang, *supra* note 3, at 170. For a more comprehensive analysis of the transformation of Taiwanese family customs by the Japanese colonial courts in Taiwan, *see* Tseng Wen-Liang (曾文亮), *Chyuansinde "Jiou Guan": Zongdufu Fayuan Duei Taiwan Renjia Zu Siguan de Gaizao (1898- 1943)* (*全新的「舊慣」：總督府法院對臺灣人家族習慣的改造 (1898- 1943)*) [*Old Customs Made New: Transformation of Kazoku Customs in Colonial Taiwan (1898-1943)*], 17 TAIWANSHI YANJIU (臺灣史研究) [TAIWAN HISTORICAL RESEARCH] 125 (2010).

legal professionals, most of whom were educated in Japan, particularly in Tokyo. Armed with modern legal and political knowledge, they were capable to articulate their views, sometimes welcoming and at other times resisting the imposition of Japanese law. Given their training, it was not surprising that they advocated for the full implementation of the Meiji Constitution in Taiwan and demanded voting rights. Some of these legal professionals viewed the Japanese civil and commercial laws as tools for Taiwan's economic development and thus supported their adoption. However, more than often, they viewed Japanese family law as a potential threat to Taiwanese identity and argued against its full application in Taiwan.[29]

The colonial context limited the full implementation of Western-style law, particularly in politically sensitive areas like the modern constitution and democratic system discussed in Section 3. Additionally, the primary motivation for importing Japanese legal systems was colonial control, tailored to the interests of the rulers rather than the people. Despite these constraints and mixed motives, the Japanese colonial period introduced legal institutions and concepts that profoundly shaped Taiwan's legal system, providing, somewhat unintentionally, a platform for some of the oppressed to claim their rights and laying the groundwork for modern developments that have endured beyond colonial rule.[30]

D. *Post-War Legal Transplants: The Rise of Legal Americanization and Voluntary Adoption*

Following Japan's defeat in World War II, Taiwan was ceded to the Republic of China (ROC), marking the beginning of another Chinese regime and also a new phase of legal transplantation. The ROC government had already adopted a legal system primarily influenced by German and Japanese law, along with elements from other European legal systems such as French and Swiss law. Similar to the Japanese Meiji Civil Code, the Civil Code of the ROC, drafted in the late 1920s and early 1930s, also drew inspiration from the drafts of German Civil Code, the Bürgerliches Gesetzbuch (BGB). This similarity was by no means coincidental. Like Japan, China, as an emerging Asian nation at the turn of the 19th and 20th centuries and facing Western imperialism, aimed to abolish extraterritorial

29. Chen Yun-Ru (陳韻如), *Ji Shou Yu Chuangzaosing Beili: Rih Jhih Taiwan "Jiating Fali Wai Lun" De Chyuanchiou Falyu Shih Sipu Kaocha* (*繼受與創造性背離：日治台灣「家庭法例外論」的全球法律史系譜考察*) [*Reception and Creative Deviation: A Global Legal Historical Genealogy Study of Family Law Exceptionalism in Colonial Taiwan*], TAIDA FAXUE LUNCONG (臺大法學論叢) [NATIONAL TAIWAN UNIVERSITY LAW JOURNAL] (forthcoming).

30. For more on how the colonized and marginalized populations utilized the colonial legal system, refer to Section 3 and 4 of this article.

rights and strengthen its state through modern legal reforms, drawing on the world's most esteemed legal models of the time. Moreover, in drafting its legal codes, the ROC drew directly from Japan's experience, employing Japanese law professors to assist, much like the Meiji government's use of French expertise.[31] Both Western and Meiji Japanese legal principles heavily influenced the development of the ROC codes.

In 1945, following Japan's defeat in World War II, Taiwan came under the rule of the Kuomintang (KMT or the Chinese Nationalist Party), the ruling party of the ROC. Despite ongoing civil conflict with the Chinese Communist Party (CCP), Taiwan initially became a province of the ROC, governed by the KMT. By 1949, after losing mainland China to the CCP, the KMT retreated to Taiwan, establishing it as the ROC's primary, and arguably only, territory. Similarly, one might say the ROC system was born in China, extended to Taiwan after WWII, and then evolved and adapted exclusively in Taiwan after 1949.

Unlike the Dutch or Japanese rulers, who upheld a pluralistic legal structure, the ROC government established a uniform legal system across Taiwan. This standardized approach was applied to everyone: the new Chinese ruling class and immigrants who arrived with the KMT after 1949, the Han-Taiwanese who had long resided there, and even the Taiwanese aboriginal people. This ostensibly uniform legal policy, driven by Han chauvinism and aimed at reintegrating Taiwan with China, sought to cultivate a singular Chinese identity through Sinicization, often at the expense of diverse cultures and ethnic groups.[32] Throughout this process, customs--whether of Han-Taiwanese, Taiwanese Aboriginals, or those with specific local characteristics--were further marginalized in the postwar wave of legal transplantation.

As previously noted, pre-war Japanese law and ROC law shared foundational elements, rooted in their Continental European and Japanese origins. Consequently, the postwar ROC legal system was not entirely unfamiliar to those who had lived under Japanese colonial rule in Taiwan, given their exposure to similar adaptations of modern Western legal principles over the previous half-century. Significantly, ROC laws, which had limited efficacy in pre-war China due to the absence of essential legal infrastructure and wartime disruptions, flourished in Taiwan. This success

31. *See* Wang, *supra* note 20, at 316-17.

32. For how indigenous law operated under assimilationism in the post-war era, *see* Wang, *supra* note 22, at 459-71. For how ROC laws were extended to Taiwan in the early post-war period, *see* Wang Tay-Sheng (王泰升), *Jhanhou ChuCi Sinneidi De Zaiyanchang Yu Falyu Siandaihua* (*戰後初期新內地的再延長與法律現代化*) [*The Extension of the New Mainland and Legal Modernization in the Early Post-War Period*], *in* DUOYUAN FALYU ZAIDI HUEIHE (多元法律在地匯合) [THE CONVERGENCE OF DIVERSE LEGAL SYSTEMS IN TAIWAN] 341 (Wang Tay-Sheng (王泰升) ed., 2019).

was facilitated by colonial legacies, such as established courts and land registration systems, coupled with postwar social stability.[33]

Family law, encompassing aspects of marriage and inheritance within the ROC Civil Code, represented a significant transformation, advancing the adoption of modern Western legal principles. This shift was stark compared to the colonial era in Taiwan, where family affairs were primarily regulated by Taiwanese customary law regimes that still permitted concubinage and denied daughters an equal right to inheritance.[34] In alignment with its progressive nationalist principles, the KMT, during the drafting of the civil code in the 1920s, shifted the legal emphasis from collective family interests to individual equal rights, particularly for women. This reform dismantled the traditional Chinese practice of "lineage succession," which had emphasized male-dominated and patrilineal inheritance of ancestor lines and hence family property.[35] Subsequently, the redefined family law centered on monogamy and the heterosexual nuclear family structure--comprising a man, a woman, and their children. Within this marriage-centric legal framework, spouses became statutory heirs to each other. Furthermore, both daughters and sons were uniformly recognized as "direct blood relatives", each afforded equal theoretical rights to succession.[36]

Certainly, hierarchical Chinese traditions were still evident in the 1930s ROC family law. It was the husband, not the wife, who had the authority to determine the marital domicile. Child custody after divorce primarily belonged to the father unless otherwise agreed. However, it is important to note that some of these discriminatory rules might not be remnants of tradition but rather newly transplanted ones. For example, while the ROC Civil Code permitted individuals, including married women, to own property, it simultaneously adopted Swiss marital property laws that entitled the husband to manage the wife's property. Additionally, property acquired during the marriage (excluding gifts, such as dowries or inheritances) was presumed to belong to the husband. In other words, while the previous household property regime was abolished, legally entitling married women to own personal property like men, new marital rules simultaneously introduced the concept of coverture, thereby effectively allowing the

33. *See* Wang, *supra* note 20, at 317.

34. *See* Chen & Huang, *supra* note 3, at 166.

35. For how lineage succession was abolished and transformed into an individual and gender equal succession system in the pre-war ROC era, *see* KATHRYN BERNHARDT, WOMEN AND PROPERTY IN CHINA, 960-1949, 101-16 (1999); Chen Chao-Ju (陳昭如), *Falyu Dongfang Jhuyi Yinying Sia de Jindaihua: Shihlun Taiwan Jicheng Fashi De Xingbie Zhengzhi* (*法律東方主義陰影下的近代化：試論台灣繼承法史的性別政治*) [*Modernization under the Shadow of Legal Orientalism: A Feminist Critique of the History of Succession Law in Taiwan*], 72 TAIWAN SHEHUEI YANJIOU JIKAN (台灣社會研究季刊) [TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES] 93, 116-19 (2008).

36. *See* Chen & Huang, *supra* note 3, at 171-72.

husband to control his wife's property. Legal imports from the West do not necessarily signify emancipation; they can also represent a modern, sophisticated form of oppression that transforms and "preserve" traditional practices.[37]

Another key postwar development in Taiwan's legal transplantation was the strong addition of American influences. This trend can be seen as part of a broader global phenomenon that emerged after World War II. As Duncan Kennedy described in the so-called "third wave of legal globalization," the United States, which replaced Germany and France, became the new center for the diffusion of legal ideas worldwide.[38] Like many other nations, Taiwan underwent a process of legal Americanization and was perhaps especially susceptible due to its strong political and economic ties with the United States.

U.S. aid was instrumental in embedding American law into Taiwan's legal framework. In the wake of the Korean War and against the backdrop of the Cold War, the United States launched over a decade (1951-1967) of economic support to the KMT government in Taiwan, aiming to stem the tide of communist expansion. During this period, the U.S. also promoted the adoption of American-style economic laws in Taiwan, such as the "Personal Property Secured Transactions Act" (1962), which introduced the American concept of "chattel mortgage" to facilitate business and agricultural loans. This can be seen as part of the broader "law and development" initiative aimed at refining legal structures to foster economic growth.[39] Additionally, significant legal reforms in Taiwan, such as the drafting of the Securities and Exchange Act, which began in 1962 and was implemented in 1968, and the major revision of the Company Law in 1966, were also modeled after American law. [40]

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37. For how a new form of oppression can be introduced in the transplantation and reception process of Western law, such as legal orientalism under colonial rule in Taiwan, *see* Chao-Ju Chen, *Producing Lack as Tradition: A Feminist Critique of Legal Orientalism in Colonial Taiwan*, 1 COMP. LEGAL HISTORY 186 (2013); for how oppression can be preserved through transformation in different forms across various periods, *see* Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

38. The dominant position of U.S. law is related to its military and economic hegemony. For the characteristics and development of the third wave of legal globalization, *see* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 63-71 (David M. Trubek & Alvaro Santos eds., 2006).

39. For the introduction of law and development studies, *see* David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1-18 (David M. Trubek & Alvaro Santos eds., 2006); for studies on the transplantation of legal institutions and economic development, *see* Graziadei, *supra* note 25, at 459-61.

40. For the imposition of the U.S. legal system and jurisdiction on third world countries through financial aid by the United States Agency for International Development and other financial institutions, *see* Kennedy, *supra* note 38, at 68; For the purpose, scheme details, and implementation process of U.S. aid in Taiwan, *see* Wu TSONG-MIN (吳聰敏), TAIWAN JINGJI SIHBAINIAN (台灣經濟

The close political and economic ties between Taiwan and the U.S. persisted long after the end of the U.S. aid. This enduring relationship became particularly apparent during the 1980s, as trade tensions intensified due to Taiwan's increasing trade surplus with the United States. These tensions culminated when Taiwan was placed on the so-called "Special 301" list, highlighting U.S. concerns over intellectual property rights and other trade-related issues. In response to the looming threat of severe U.S. trade sanctions, Taiwan took significant measures, including the introduction of stringent punitive damages for copyright infringement in 1989.[41]

Certainly, the impetus for incorporating American law in Taiwan extended beyond the constraints of U.S. aid conditions or the pressures of trade negotiations and sanctions. Much of this influence stemmed from the global reach and prestige of American law. The process of legal Americanization was characterized primarily by voluntary adoption rather than by imposition from an authoritarian regime, particularly evident after Taiwan's democratization in the 1980s. The examples of legal transplantation discussed in Section 3--including the implementation of a liberal constitution, the adoption of international human rights covenants, domestic violence legislation, and the recent legalization of same-sex marriage--underscore the significant impact of American legal frameworks, judicial rulings, and jurisprudence.

Interestingly, just as Taiwan historically absorbed German law through the filter of Japanese influence, the integration of American legal principles in recent years has similarly been channeled through the prism of Japanese law. Since 2003, Taiwan has undertaken significant efforts to align its criminal justice system more closely with that of the United States, adopting features like the adversarial system and elements of the jury system. Yet, Japan has played an even more pivotal and direct role in this legal transformation. Having already incorporated and adapted various aspects of the U.S. criminal justice system, Japanese law became a key reference point for Taiwan. This made Japan an invaluable intermediary, allowing Taiwan to

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四百年) [A 400-YEAR HISTORY OF TAIWANESE ECONOMY] 338-51 (2023); HUA-YUAN HSUEH (薛化元), TAIWAN KAIFA SHIH (臺灣開發史) [HISTORY OF TAIWAN'S DEVELOPMENT] 236-37 (7th ed. 2022).

41. For the amendment process of Taiwan's copyright law since the 1970s and the role of the United States, *see* Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67 (1998). Partly due to prolonged influence from Taiwan-U.S. trade negotiations and U.S. pressure, Taiwan's intellectual property legislation and reforms have been shaped by the frameworks and priorities set by administrative agencies. This has led to a lack of systematic coherence, with a bias toward favoring rights holders at the expense of public interests, such as access to information. For further criticism on this issue, *see* LIOU KONG-JHONG (劉孔中), GUOJI BIJIAO SIA WOGUO JHUZUOCHYUANFA JHIH ZONG JIANTAO (SHANG) (國際比較下我國著作權法之總檢討（上）) [A COMPREHENSIVE REVIEW OF ROC'S COPYRIGHT LAW IN INTERNATIONAL COMPARISON (VOLUME 1)] at i-ii, v (2014).

contextualize and refine American legal concepts within its own legal and cultural framework.[42]

Taiwanese legal scholars in postwar Taiwan have played a pivotal and innovative role in shaping how the country has received and integrated legal transplants. What sets them apart from many of their global counterparts is their diverse training backgrounds across various jurisprudential traditions.[43] Typically, these scholars would first earn their bachelor's, and sometimes master's, degrees in law in Taiwan before pursuing doctoral studies abroad in various countries. This international academic journey enabled them to infuse Taiwan's legal discourse with diverse global perspectives, enriching the legal system with a blend of international influences and methodologies. Initially grounded in the teachings of Taiwan's law schools, many of these scholars have furthered their expertise in the field by undertaking doctoral studies abroad. In this way, many of Taiwan's legal scholars have become conduits for the exchange and integration of diverse legal principles. The law faculty at National Taiwan University (NTU), arguably the country's leading legal educational institution, epitomizes the practice of legal transplantation. In 2024, 41 of the 46 full-time faculty members earned their doctorates abroad: 18 in Germany, 13 in the United States, 7 in Japan, and 5 in the United Kingdom. This distribution reflects Taiwan's historical ties and its ongoing engagement with global legal discourses. This composition reflects Taiwan's historical geopolitical ties and its active participation in global legal discourses. Taiwanese legal scholars consistently evaluate and adapt foreign legal principles and methods to advocate for and implement reforms within Taiwan's legal system.

III. CASES STUDIES: ADOPTING, ADAPTING, AND CONTRIBUTING TO GLOBAL LEGAL THOUGHT

This section highlights several key cases, including women's access to courts, democratization efforts, domestic violence legislation, human rights advancements, and the legalization of same-sex marriage, underscoring Taiwan's ability to integrate and at times contribute to global legal

42. For the development process of criminal court reform in Taiwan, *see* Kai-Ping Su, *Criminal Court Reform in Taiwan: A Case of Fragmented Reform in a Not-Fragmented Court System*, 27 WASH. INT'L L.J. 203 (2017).

43. Although some Taiwanese began receiving modern legal education during the Japanese colonial period, few became legal scholars. It was only after the World War II that a significant number of Taiwanese legal scholars emerged. For the emergence of Taiwanese legal scholars and their historical context, *see* WANG TAY-SHENG (王泰升), JIANGOU TAIWAN FASYUE: OUMEI RIHJHONG JHIHSHIH DE HUEIJHENG (建構台灣法學：歐美日中知識的彙整) [CONSTRUCTING LEGAL SCIENCE IN TAIWAN: THE INTEGRATION OF KNOWLEDGE IN EUROPE, THE UNITED STATES, JAPAN AND CHINA] 77-82, 127-29 (2023).

principles. These examples illustrate the strategic reinterpretation and incorporation of foreign legal ideas by a spectrum of actors, from rulers and the powerful to the subordinated and marginalized within society.

A. *From Yamen to Court: Women's Access to Litigation*

In 1896, shortly after the beginning of Japanese colonial rule in Taiwan, a widow named Hsieh sued her late husband's business partner and successfully reclaimed her husband's investment.[44] Similarly, in 1908, a woman named Jiang sued her husband for abuse and violence, successfully obtaining a divorce. [45] As previously mentioned, under Qing rule, women seeking justice in the *yamen*, the Qing government offices, required a male, usually a family member such as an uncle, elder brother, or even a son, to act as their litigation proxy. However, the Japanese colonial government introduced Western-style courts that recognized women's legal standing, allowing them to file lawsuits independently--a practice that continues today. How did the introduction of modern courts affect women's legal status, and how did their experiences compare to men's? Examining records from both Qing *yamen* and Japanese-era courts offers insights into the evolution of women's legal agency.

In terms of property litigation during Qing rule, widows served as temporary custodians of their deceased husbands' estates until their sons reached adulthood. While wives in the Japanese era were still not considered heirs but only temporary guardians of family property, the law allowed Widow Hsieh to pursue litigation in her own name without the need for a litigation proxy. Regarding divorce litigation, as previously mentioned, while the Japanese courts nominally applied Taiwanese customs in adjudicating family disputes, they referred to the Japanese Meiji Civil Code to grant Taiwanese women the right to file for divorce. Woman Jiang thus exercised this right, suing for divorce on the grounds of unbearable abuse by her husband, thereby freeing herself from an unfortunate marriage.

Although men overwhelmingly outnumbered women as plaintiffs in

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44. Nihon no shokuminchi saibansho akaibudetabēsu (日本の植民地裁判所アーカイブデータベース) [Taiwan Colonial Court Records Archives [hereinafter *TCCRA*]], *Taityuu tihou houin, Meiji nijūkyū nen gomin dai 5 go* (台中地方裁判所、独立判決原文、第1巻、42 ページ、第5号、明治29年) [TAICHUNG DISTRICT COURT, ORIGINAL RECORD OF CIVIL JUDGMENT IN THE TWENTY-NINTH YEAR OF THE MEIJI ERA] vol. 1, no. 5, at 42 (1896), http://tccra.lib.ntu.edu.tw/tccra_ develop/record.php? searchClass=all&id=tc101010000021&now=42 (last visited Sept.14, 2024). In order to get access to sources in the TCCRA on this and other URLs, one has to apply for an ID and password from National Taiwan University Library.

45. In fact, the husband was imprisoned as a convict at that time. *See id.* TCCRA, vol. 36, no. 324, at 36 (1908), http://tccra.lib.ntu.edu.tw/tccra_develop/record.php?searchClass=all&id=tc0036&now=35 (last visited Sept. 14, 2024).

civil cases, a significant number of women actively engaged in litigation.[46] Unsurprisingly, among women initiating lawsuits, the percentage related to family affairs, such as divorces, was significantly higher than that of men.[47] This suggests that the establishment of modern courts provided women, who were often disadvantaged in domestic matters, with an external platform for empowerment and change. In contrast, men, who held more authority within patriarchal family structures, rarely needed to rely on the legal system to exercise their power in family matters. Meanwhile, the gender ratio in land-related cases between male and female plaintiffs remained relatively balanced.[48]

Interestingly, Japanese women in colonial Taiwan did not fully enjoy the right to initiate lawsuits compared to Taiwanese women. The Japanese Civil Code, influenced by neo-traditionalism and the French Civil Code's provisions on legal incapacity, classified wives alongside minors and individuals under guardianship, thereby limiting their legal capacity. While unmarried women and widows had full legal rights, married women were deemed "quasi-incapacitated," requiring their husband's consent for legal actions, including property transactions and lawsuits.[49] Meiji lawmakers justified this requirement as "protection" for vulnerable individuals rather than a restriction. As a result, married Japanese women, both in metropolitan Japan and colonial Taiwan, generally needed their husband's permission to file lawsuits.[50] However, under Taiwan's customary law regime, Taiwanese

46. In TCCRA, among the 48,338 civil litigation cases spanning from 1915 to 1945 decided in the Taipei District Court, there were 39,181 cases where the plaintiff was male. This number far exceeds the combined total of cases where "the plaintiff was female" (4,172) and cases where the "plaintiff or legal representative was female" (794), which together amount to 4,966 cases. The reason for combining the case where "the plaintiff or legal representative is female" with the situation where "the plaintiff is female" is that, in the former case, it is often practically the situation where the mother acts as the legal representative for her young children in the lawsuit. Since in such instances, a widow often also manages the property and thus gains substantive control over the assets and benefits, the lawsuit, in a broader sense, is conducted for her own benefit as well. *See* WANG TAY-SHENG (王泰升), CHYU FAYUAN SIANGGAO: RIHJHIH TAIWAN SIHFA JHENGYI GUAN DE JHUANSING (去法院相告：日治台灣司法正義觀的轉型) [GOING TO COURT: THE TRANSFORMATION OF "JUDICIAL CONSCIOUSNESS" IN TAIWAN UNDER JAPANESE RULE] 95-96, 140 (3rd ed. 2022).

47. In cases where "the plaintiff is female" and where "the plaintiff or legal representative is female," the proportions of personnel lawsuits filed are 35% and 10.7%, respectively. In contrast, the proportion of personnel lawsuits filed in cases where "the plaintiff is male" is only 2.79%. *See id*. at 141.

48. In cases where the plaintiff is male, the proportion of land-related cases is 5.7%. On the other side, when the plaintiff is female, the proportion of land-related cases is 5.0%. In cases where "one of the plaintiffs or legal representatives is female," the proportion of land-related cases is as high as 15.3%. *See* WANG, *supra* note 46, at 141.

49. Meiji minpo ten (民治民法典) [Meiji Civil Code] § 14 & § 12 (Japan).

50. However, the courts in metropolitan Japan have also attempted to limit the necessity of the husband's permission in their rulings. They have held that when a wife is involved in a lawsuit, there is no need for the husband's permission at every level of the court proceedings, even if there are multiple levels of appeals. Furthermore, when the wife acts as a legal representative (usually for underage children), the husband's permission is not required for her to proceed with the lawsuit. In

wives were exempt from this requirement and could sue without their husband's consent. In this regard, one might argue that modern Western civil law did not necessarily give women more agency than customary law.

Yet, when assessing the impact of modern courts on women's status, it is important to first consider their capacity in pre-modern courts (*yamen*). Qing-era Taiwan litigation records reveal the complexities of women's court activities beyond official laws. As noted earlier, regulations required women to use a male proxy in court to protect their reputations, as public appearances were seen as improper for women. This was viewed as a means of safeguarding women's chastity.[51] Additionally, Qing law mandated that if a woman had an adult son, he must file lawsuits on her behalf, further restricting women's ability to represent themselves.[52] However, the discovery of litigation records, such as the Dan-Xin Archives, reveals that actual court proceedings were more nuanced than what the legal codes suggested.[53] Women, particularly widows, frequently initiated lawsuits, challenging the prevailing view of them as passive participants. Although the regulation requiring women to use male litigation proxies remained in effect, it was often a nominal requirement. Many female plaintiffs simply listed a male relative's name, while they themselves appeared in court. County magistrates also adopted a pragmatic approach, summoning women when

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addition, upon examining the legislative drafts of the Meiji Civil Code, it should be interpreted that when a wife files for annulment of marriage or divorce against her husband, the husband's permission is not necessary. *See* Okuyama Kyouko (奥山恭子), *Meiji Minpou No "Tzuma No Munouryoku" Zyoukou To Syougyou Touki Taru "Sai touki": Meiji Rippoukimin・Syouhou No Soukansei To Souzyou Sei No Ittan* (*明治民法の「妻の無能力」条項と商業登記たる「妻登記」—明治立法期民・商法の相関性と相乗性の一端—*) [*The "Incapacity of Wife" Provision in the Meiji Civil Code and the "Wife Registration" of the Commercial Law: Correlation of Civil Code and Commercial Law in Meiji Period*], 27 YOKOHAMA HOUGAKU (横浜法学) [YOKOHAMA L. REV.] 35, 39-40, 46-47 (2018).

51. Another legislative consideration is that women who make false accusations can avoid imprisonment by being allowed to "Shou Shu" (redeem themselves) (i.e., by paying a ransom to escape punishment). To address the issue of certain women abusing their ability to pay for favor and thereby making false accusations or frivolous claims, the authorities subsequently enacted a regulation mandating that women must have an adult son or brother as their proxy when filing complaints. If the complaint was found to be false, the male proxy would be punished on their behalf. For more discussion, *see* Shao Ya-Ling, (邵雅玲), *Chingdai Difang Susong Gueifan Yu Nyusing-Yi Dansin Dangan Weili* (*清代地方訴訟規範與女性—以淡新檔案為例*) [*District Lawsuit Regulations and Females-An Exemple of DanXin Archives*], 2 GUOSHIHGUAN SYUEHSHU JIKAN (國史館學術集刊) [BULLETIN OF ACADEMIA HISTORICA] 23, 47-50 (2002).

52. *Id*. at 37.

53. For more details regarding the DanXin Archives, *see* Chen, *supra* note 12, at 379-97; Chen, *supra* note 14, at 26-29; Wang Tay-sheng (王泰升), Tseng Wen-liang (曾文亮) & Wu Chun-ying (吳俊瑩), *Lun Chingchao Difang Yamen Shen'an Jijhih De Yunzuo-Yi "Dan Sin Dang'an" Wei Jhongsin* (*論清朝地方衙門審案機制的運作—以《淡新檔案》為中心*) [*The Administration of Trial in Local Governments of the Qing Dynasty: An Examination of the Tan-hsin Archives*], 86 JHONGYANGYANJIOUYUAN LISHIH YUAN YANJIOUSUO JI KAN (中研院歷史語言研究所集刊) [BULL. OF THE INST. OF HIST. & PHILOL. ACADEMIA SINICA] 421 (2015).

their testimony was deemed relevant to the case.[54] For instance, in an 1893 property dispute involving the Wang family, several widows aged between 30 and 50, with sons aged 16 to 24 serving as nominal proxies, took an active role in presenting their case. Notably, no objections were raised regarding the widows acting as plaintiffs in place of their adult sons. Court records further indicate that these widows personally testified and played a leading role in the litigation, both as narrators and as primary agents driving the legal proceedings.[55]

Court records indicate that the legal status of widows, as senior female figures, underwent nuanced transformations with the advent of modern legal and judicial frameworks. In Qing-ruled Taiwan, widows frequently occupied roles of significant authority within the household, not only managing domestic affairs but also presiding over the allocation of family assets.[56] Additionally, they were often responsible for adopting heirs for their deceased husbands or sons, thereby ensuring the continuation of the family lineage.[57] However, during the period of Japanese colonial rule, the introduction of individual property rights significantly altered these dynamics. Adult sons, including those adopted, began to leverage legal systems to challenge and often curtail the control of widowed mothers over both family and intergenerational properties.[58]

In the domain of criminal offense, the introduction of modern judicial systems and state apparatus in Taiwan had a profound impact on women, with the crime of adultery serving as a notable example. Under Qing governance, official statutes penalized married women for adultery, a practice that was sustained under the Japanese Penal Code, which further criminalized extramarital relations. Although the legal provisions of the two periods were largely similar, court records reveal stark disparities in the enforcement of these laws: whereas penalties for adultery were infrequent

54. SHAO YA-LING (邵雅玲), YOU DANXIN DANG'AN KAN WANCHING BEI TAI NYUSING DE SONG'AN (由淡新檔案看晚清北臺女性的訟案) [EXAMINING LATE QING NORTHERN TAIWAN WOMEN'S LITIGATION CASES THROUGH THE DANXIN ARCHIVES] 13, 164-65, 167-68 (2001) (Unpublished master thesis, National Taiwan University) (on file with National Central Library, Taiwan); Shao, *supra* note 51, at 37.

55. Taiwanlishih Shuwei Tushuguan Dan Sin Dang'an Zihliaoku (台灣歷史數位圖書館淡新檔案資料庫) [Taiwan History Digital Library the Danxin Archives] No. 22614, https://thdl.ntu.edu.tw/THDL/RetrieveDocs.php?in_corpus=DanXinFiles&text_query={Lab303_DanXin-22614_047.html}&viewing_option=Details&single_doc=1&no_update_query_history=1 (last visited Sept. 16, 2024).

56. *see* Chen & Lin, *supra* note 17, at 22-23, 39.

57. For more discussion of adopting heirs for their deceased husbands or sons and the relation to the continuation of the family lineage; Chu & Chen, *supra* note 15.

58. *See generally* Wang Chi-ming (王麒銘), *Banchiao Linjia Lin Song Shou De Kong Mu An Yu Bianhushih Jioushan Yi Lang*, 1918-1921 (*板橋林家林松壽的控母案與辯護士鳩山一郎，1918-1921*) [*Lawsuits of Lin Sung-shou of Banqiao against His Mother and Lawyer Ichiro Hatoyama during 1918-1921*], 28 TAIWAN SHIH YANJIOU (臺灣史研究) [TAIWAN HIST. RSCH.] 163 (2021).

during the Qing era, due to limited enforcement capabilities, the Japanese period witnessed a significant rise in the incarceration of women for such offenses.[59] For example, in 1932, a woman named Wu was prosecuted by her husband for adultery and subsequently sentenced to three months of penal servitude.[60]

This increase in legal actions against women for adultery under Japanese rule suggests that the implementation of modern laws with stronger enforcement power may have inadvertently bolstered husbands' control over women's bodies and sexual autonomy.[61] This scenario underscores the nuanced implications of legal transplants, demonstrating that the true impacts of such legal imports are more discernible in their enforcement rather than solely through the examination of statutory texts.

B. *Liberal Constitutionalism and Democracy: A Century-Long Journey from Nominal Existence to Partial and Full Implementation*

Taiwan's democratic system has drawn significant international attention, particularly for challenging the prevailing belief that Chinese Confucian culture is inherently incompatible with democracy. Although often perceived as a recent development, Taiwan's liberal constitutionalism has a history extending over a century since its introduction. Its evolution from a nominal to a substantive democracy reflects adaptations to Taiwan's unique socio-political conditions across different historical periods.

During the Japanese colonial period, the Japanese government selectively introduced elements of the 1889 Meiji Constitution--the country's first modern constitution--to Taiwan. Although its full application remained a subject of debate among Japanese politicians and constitutional scholars throughout the colonial era, key constitutional principles--such as the separation of powers, democratic governance, and individual rights--were nonetheless partially incorporated. By the 1920s, Taiwan saw the emergence of its first generation of modern legal professionals, trained in the constitutional principles selectively introduced by Japan. Armed with legal expertise, they began advocating for a broader application of constitutional rights, directly challenging Japan's selective approach. Responding to the global momentum of self-determination after World War I, these legal professionals, alongside intellectuals, pushed for the establishment of a

59. For more discussion of the room to determine the district lawsuit, the female plaintiffs, and the limited enforcement capabilities, *see* Chen, *supra* note 14, at 411-24.

60. *See* TCCRA, *supra* note 44, Original Record in the Eighth Year of the Showa Era no.4220 (日治法院檔案, 司訓所, 昭和8年判決原本第1冊, 昭和7年第4220號), at 89 (1930), http://tccra.lib.ntu.edu.tw/tccra_develop/record.php?searchClass=all&id=sc0264&now=89 (last visited Sept. 16, 2024).

61. *See* Chen, *supra* note 14, at 27, 64.

colonial parliament and demanded political rights such as suffrage. However, these efforts were short-lived. By the 1930s and 1940s, as Japan entered a period of war and shifted toward fascism, these democratic aspirations were suppressed under increasingly authoritarian rule.[62]

Following World War II and the dissolution of the Japanese empire, Taiwan came under the governance of the KMT regime. The 1947 ROC Constitution, like Japan's earlier Meiji Constitution--the first modern constitution applied to Taiwan--was introduced shortly after each regime established control over the island. Both regimes, in fact, were in the process of creating their first constitutions, with the Meiji Constitution issued soon after Japan began its rule and the ROC Constitution issued following the KMT's consolidation of power in China. Unlike the debates during the Japanese colonial period about the selective application of the Meiji Constitution, there was no such contention regarding the ROC Constitution's applicability to Taiwan. However, despite its introduction, the ROC Constitution was not fully implemented on the island due to political factors.

When the KMT retreated to Taiwan after losing the Civil War to Chinese Community Party in 1949, the island became the primary jurisdiction where the ROC Constitution had any practical effect. While the Constitution was intended to establish a democratic republic, its full implementation was significantly delayed due to the imposition of martial law (1949-1987) and the enactment of "temporary" provisions (1948-1991) under the authoritarian governance of the Kuomintang (KMT).[63] These measures effectively suspended or severely weakened several constitutional provisions essential to the proper functioning of a democratic system. For over four decades, fundamental aspects of governance, including the separation of powers, protection of civil liberties, democratic processes, and regular local and national elections, were either curtailed or rendered ineffective.[64]

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62. Tay-Sheng Wang & Sandy I-Hsun Chou, *The Emergence of Modern Constitutional Culture in Taiwan*, 5 NTU L. REV. 1, 9-13 (2010). The shrinking space for political participation in the 1930s and 40s can be exemplified by the activities of lawyers. With the introduction of the attorney system in colonial Taiwan, lawyers in the 1930s organized a bar association and published a journal advocating for the protection of human rights. However, by the end of 1935, as tensions leading up to war escalated, the association was disbanded following a conflict with the Japanese military. At the end of 1935, as the atmosphere of war intensified, the association was disbanded due to a conflict with Japanese military. For further discussions on the transplantation, development and the reception of Western legal concepts of the attorney community in colonial Taiwan, *see* Tseng Wen-Liang (曾文亮), *Rihjhih Shihci Taiwan De Bianhushih Shecyun* (*日治時期台灣的辯護士社群*) [*The Attorney Community in Japanese Colonial Taiwan*], in DUOYUAN FALYU ZAIDI HUEIHE (多元法律在地匯合) [THE CONVERGENCE OF DIVERSE LEGAL SYSTEMS IN TAIWAN] 233 (Wang Tay-Sheng (王泰升) ed., 2019).

63. The full name of the provision is "Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion" (動員戡亂時期臨時條款).

64. Wang & Chou, *supra* note 62, at 28-29.

Following decades of dormant constitutional governance, Taiwan's democratic movement gained significant momentum during the mid- to late-1980s. A prominent cohort of national elites, particularly lawyers, advocated for the restoration and enforcement of constitutional rights. This wave of democratization and liberalization culminated in the lifting of martial law in 1987 and the abolition of the Temporary Provisions in 1991, marking the beginning of the substantive application of the ROC Constitution.

Although Taiwan's democracy is relatively young, it is widely regarded as one of the most robust and resilient democratic systems in the world. The Constitutional Court, once a "rubber stamp" for authoritarian rule during martial law, has evolved into a strong defender of rights and advocate for progressive reforms. Seizing the opportunity during democratization, the Justices pushed forward the realization of the Constitution, attuned to the shifting political landscape.[65] Its role now encompasses advancing international human rights standards and supporting significant changes, such as the legalization of same-sex marriage. As discussed later, these developments underscore the Court's increasing significance in Taiwan's legal and democratic evolution, particularly in promoting global human rights standards and addressing landmark issues like same-sex marriage.

The narrative of Taiwan's democratic "miracle" often highlights the feasibility of democratic governance in a Chinese cultural context. However, a closer look at the centuries-long process behind the establishment of a liberal constitution in Taiwan suggests that the success of such a transplant depends more on alignment with political dynamics than on cultural factors. Taiwan's experience demonstrates how foundational laws, such as the ROC Constitution--once imposed and largely dormant--can become tools for the oppressed to challenge authoritarian rule. Initially existing only as "law in books," these transplants laid the groundwork for future growth, becoming "law in action" when political conditions allowed.[66]

65. For further discussions on the role that Grand Justices played under the authoritarian rule and how they seized opportunities during democratization, such as the ending of the lifelong Parliament in Judicial Yuan Interpretation No. 261, *see* LIN CHIEN-CHIH (林建志) ET AL., FONGMING SHIHFA: DAFA GUAN YU JHUANSING JHENGYI (奉命釋法：大法官與轉型正義) [INTERPRETING LAW UNDER ORDER: GRAND JUSTICE AND TRANSITIONAL JUSTICE] (2021).

66. *See* Pound, *supra* note 13.

C. *Adopting through Adaptation of US Feminist Legislation: Anti-Domestic Violence Measures*

Modeled on two key U.S. legislations--the Model Code on Domestic and Family Violence (MCDFV) of 1994 and the Violence Against Women Act (VAWA) of 1995--Taiwan's Domestic Violence Prevention and Treatment Act (DVPTA) was enacted at the turn of the 20th and 21st centuries, making Taiwan the first country in Asia to implement legal measures against domestic abuse.

The introduction of these U.S. feminist legal frameworks occurred at the intersection of the globalization of U.S. law and Taiwan's democratization. As previously mentioned, U.S. legal influence began to permeate Taiwan's predominantly civil law system in the post-WWII period. However, unlike the earlier, more forced acceptance of legal Americanization--driven by political and economic ties and government negotiations--this legal transplant was a voluntary and bottom-up effort. It closely aligned with Taiwan's democratization and the women's movement's push for legal reform. Following the lifting of martial law and the removal of restrictions on freedom of association, numerous foundations and organizations emerged to promote women's rights and advocate for legislative reforms. Many leaders of the women's movement, highly educated, urban-based, and from middle- and upper-class backgrounds--almost all of them female--had studied in the United States during the 1970s and 1980s.[67]

Initially, like in the 1970s United States, domestic violence was considered too trivial for legislation in Taiwan until the early 1990s.[68] However, with the gradual influence of Western, especially U.S., feminist thought since the 1970s, wife-battering and other gender inequality issues became central to Taiwan's women's movement. Triggered by the high-profile 1994 Ru-Wen Deng case, involving a wife's lethal self-defense, the act was drafted in 1995, proposed in 1997, and enacted in 1998.[69]

In contrast to the prolonged struggles faced by American feminists in developing domestic violence legislation, the legislative process of Taiwan's DVPTA--completed in less than four years--was remarkably swift. Several

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67. Fan Yun (范雲), *JhengJhih JhuanSing GuoChengJhong De FuNyu YunDong: Yi YunDongJhe JiCi ShengMing JhuanJi BeiJing Wei HeSin De FenSi CyuSiang* (*政治轉型過程中的婦女運動：以運動者及其生命傳記背景為核心的分析取向*) [*The Women's Movement in Taiwan's Political Transition: An Approach Focused on the Biographical Backgrounds of Activists*], 5 TAIWAN SHEHUEI SYUEH (台灣社會學) [TAIWANESE SOCIO.] 133, 148-52 (2003).

68. To understand the history of how U.S. feminists developed their legal mechanisms to combat domestic violence, *see* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 13 (2002).

69. For the legislative process of the DVPTA, *see* Elaine Chao, *A Study in Social Change: The Domestic Violence Prevention Movement in Taiwan*, 37(1) CRITICAL ASIAN STUDIES 29 (2005).

factors contributed to this expedited process. Public opinion, shaped by the Deng case, created a favorable environment for legislative action. Additionally, the use of comparative law, specifically borrowing from the newly enacted U.S. laws allowed Taiwan to bypass the need for entirely new legal frameworks. After the Deng case, Judge Feng-Xian Gao, who had been sent by the government to pursue an LL.M. at UC Berkeley, used her knowledge of U.S. domestic violence law to quickly draft the DVPTA based on the MCDFV.[70] In fact, before Gao's initiative, shortly after Deng's case, the government also commissioned a research project on legal mechanisms, including protection orders, to combat domestic violence. The resulting report featured translations of domestic violence statutes from the United States, along with anti-domestic violence legal measures from the United Kingdom and Hong Kong.[71]

Lastly, and deserving of deeper analysis, is the legislative strategy. Led by Wei-Gang Pan, a female legislator from the conservative ruling party (KMT) and president of a women's rights NGO that provided shelter for abused wives and pushed several legal bills protecting women's safety, such as the Sexual Assault Prevention Act (1995), the campaign supporting the DVPTA effectively mitigated conservative opposition by framing domestic violence as a threat to "family harmony" rather than an infringement on women's rights.[72] The 1998 DVPTA explicitly lists "promoting family harmony" alongside "preventing domestic violence" and "protecting the rights and interest of the victims" at the beginning of the bill (Article 1).[73] This strategy seems to echo Sally Engle Merry's suggestion that international human rights law must be framed to local concept in order to be

70. Interestingly, when Judge Gao was sent by the government to the U.S. for further studies, her original research focused on the use of anonymous witnesses in American criminal law, not domestic violence legislation. However, during her time in the U.S., she became aware of the growing domestic violence movement in the 1980s. She noted that the issue was "hot" at the time, prompting her to include domestic violence in her research alongside her original work. This encounter sparked Gao's long-standing interest in domestic violence. Interview with Feng-Xian Gao (Aug. 26, 2002) is in the appendix of LIN ZHI-LI (林芝立), GUOJIA YU SHEHUE DE HUDONG: JIATING BAOLI FANGZHI FA LIFA GUOCHENG YANJIU (國家與社會的互動—家庭暴力防治法立法過程研究) [THE INTERACTION BETWEEN STATE AND SOCIETY: THE STUDY OF THE LEGISLATIVE PROCESS OF THE DOMESTIC VIOLENCE PREVENTION AND TREATMENT ACT] 51 (Unpublished master thesis, National Zhengzhi University, 2004) (on file with National Taiwan University Library).

71. *See* GAO FENG-XIAN (高鳳仙), JIATING BAOLI FANGZHI FAGUI ZHUANLUN (家庭暴力防治法規專論) [DOMESTIC VIOLENCE PROTECTION ACT] 74-75 (1998). However, the project was halted due to the project leader's health challenges and the discontinuation of financial support from the government.

72. This women's NGO is named Modern Women's Foundation (現代婦女基金會), which was funded in 1987 by Wei-Gang Pan (潘維剛).

73. Article 1: "This Act is enacted with the purpose of promoting family harmony, preventing acts of domestic violence and to protecting the rights and interest of the victims." Translated by the author.

accepted.[74]

However, by adopting the "family and love" strategy, which aligned with mainstream values, the gender equality principles central to the VAWA and MCDFV were inevitably overshadowed. In a way, the campaign strategy of local feminists in introducing foreign feminist lawmaking transforms its substance, altering its meaning through reframing. This transformation also brought unexpected consequences after the act's rapid enactment. By incorporating "promoting family harmony" as the primary purpose in the first article of the act, some judges, who relatively adhered to traditional family values and gender roles, were reluctant to issue injunctions for fear of disrupting "family harmony."

This transformation might initially appear to be a failure, or at least a mistranslation, in the process of legal transplantation. However, over time, the 2007 amendment to the DVPA removed the phrase "promotion of family harmony," aligning the law more closely with U.S. feminist principles, such as gender equality and victim dignity.[75] This change prevented the earlier phenomenon of judges prioritizing reconciliation in domestic violence cases. The protection of cohabiting couples, which was sacrificed in 2007, was reinstated in later amendments.[76] In this light, the initial compromise in Taiwan's anti-domestic violence lawmaking can also be seen as a pragmatic approach, prioritizing initial progress with the potential for intentional improvements and fine-tuning later. In fact, over just a decade, eight amendments to the DVPA expanded its scope to include non-cohabiting partners and same-sex marriages. Additionally, protections for foreign spouses, particularly from Southeast Asia--who were especially vulnerable due to their migrant status--were strengthened, focusing on residency and naturalization rights after domestic violence-related divorces.

As this demonstrates, legal transplantation is often not a one-time event but an iterative, adaptive process. Taiwan's legislative proponents skillfully demonstrated flexibility, calculation, and compromise in their approach, balancing both Americanization and localization in the process of transplanting and amending the domestic violence laws.[77]

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74. For the "vernacularization" of human rights into a local context, *see* SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 134-78 (2006).

75. Article 1, *supra* note 73: "This Act is established in order to prevent acts of domestic violence and to protect the interest of the victims."

76. Chen Yun-Ru (陳韻如), *Domesuthikku Baiorensu* (*ドメスティック・バイオレンス*) [*Domestic Violence*], *in* TAIWAN ZYOSEI SI NYUUMON (台湾女性史入門) [INTRODUCTION TO TAIWANESE WOMEN'S HISTORY] 26-27 (Taiwan Zyosei Si Nyuumon Hensan Iinkai (台湾女性史入門編纂委員会) ed., 2008).

77. For further discussions on the transplantation and practice of Taiwan's Anti-Domestic Violence Law, *see* CHENG LI-CHEN (鄭麗珍), TAIWAN JIATINGBAOLI FANGJHIH FA JHIH FALYU GAIGE YU SIHFA SHIHJIAN: YIGE FALYU YIJHIH DE LILUN YU SHIHJHENG KAOCHA (臺灣家庭暴力

D. *Human Rights: Self-Compliance with International Norms in an Isolated yet Globally Engaged State*

In 1971, Taiwan, under the ROC, lost its seat in the United Nations as the representative of "China," which led to its exclusion from participating in all UN-affiliated mechanisms, including the United Nations human-rights framework. Despite this international isolation, almost four decades later, Taiwan took proactive steps to align itself with global human rights norms by ratifying several major UN human-rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).[78] This transplantation of international human rights standards into Taiwan's legal and political framework was largely the result of grassroots efforts, driven by sustained policy advocacy from human rights activists and the collective mobilization of Taiwanese citizens. Together, they pushed for reforms in the context of Taiwan's emerging democracy, even in the face of Taiwan's continued exclusion from formal participation in the global arena.

The intermediaries between international human rights norms and Taiwan, which remained internationally isolated, were a small but influential group of civic actors. Many of these individuals had gone abroad to study subjects such as law, political science, and human rights. Upon returning, they were joined by members of Taiwan's broader NGO community, and together, they lobbied presidential candidates and effectively persuaded competing political parties to engage in what became a "human-rights competition."[79]

防治法之法律改革與司法實踐：一個法律移植的理論與實證考察) [LEGAL REFORM AND JUDICIARY PRACTICE OF DOMESTIC VIOLENCE PREVENTION ACT: A THEROETICAL AND EMPIRICAL STUDY OF LEGAL TRANSPLANT] 55-105 (2021) (Unpublished master thesis, National Taiwan University) (on file with National Central Library, Taiwan); Wang Hsiao-Tan (王曉丹) & Lin San-Yuan (林三元), *Falyu Yijhih Yu Falyu Shihying-Hunyin Shou Bao Fu'nyu Shengching Minshih Tongchang Baohu Ling Tsaiding Jhihfen Si* (*法律移植與法律適應—婚姻受暴婦女聲請民事通常保護令裁定之分析*) [*Legal Transplants and Legal Adaptation: Reflections from the Analysis of Protection Orders*], 47 SIH YU YAN: RENWUN YU SHEHUEIKESYUEH CHIKAN (思與言：人文與社會科學期刊) [THOUGHT AND WORDS: JOURNAL OF THE HUMANITIES AND SOCIAL SCIENCE] 85 (2009).

78. For the detailed social, political and legal processed of advocating international human rights before 2009, *see* Yu-Jie Chen, *Isolated but not Oblivious: Taiwan's Acceptance of the Two Major Human Rights Covenants, in* TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION 207, 207-25 (Jerome A. Cohen et al. eds., 2019).

79. For instance, Peter Wen-Shiung Huang (黃文雄), a well-known Taiwan Independence Movement activist, advocated the incorporation of human rights systems in the late 1990s and 2000s, and impacted the president's inaugural speech in 2000 in affirming the importance of human rights and concrete implementation plans. *See id*. at 209-13, 220-21.

The motivations for this swift engagement in human-rights initiatives were two-fold. Internationally, the political parties sought to raise Taiwan's global profile and strengthen ties with the international civic community through what could be described as "human rights diplomacy." This approach involved expanding the presence of Taiwanese NGOs on the global stage and using informal diplomatic strategies due to Taiwan's unique international position.[80] Domestically, Taiwan's society had increasingly focused on improving social justice and human rights, both as a way to enhance the quality of life at home and to gain positive international recognition for these advancements. By demonstrating their commitment to human-rights issues, political parties and candidates hoped to convince the electorate that they, more than their opponents, could effectively overcome the lingering aftereffects of martial law and Taiwan's ongoing international isolation.[81]

While pursuing the ratification of these UN treaties, Taiwan was fully aware that the United Nations would almost certainly reject its ratification due to Taiwan's pariah status on the international stage--a rejection that materialized when Taiwan submitted the ratification documents to the UN Secretariat. To circumvent this challenge, the Taiwanese legislature, guided by activists' recommendations, ratified both the ICCPR and ICESCR in 2009 and introduced an innovative legal mechanism known as "implementation acts." These acts effectively bound Taiwan to the principles outlined in the UN treaties, even though the instruments of ratification were not deposited with the UN Secretary-General.[82]

Subsequently, the legislature enacted implementation acts for the remaining UN treaties, including the CEDAW (2012), the CRC (2014), and the CRPD (2014). These acts not only gave domestic legal force to the provisions of these treaties but also established the framework for their systematic implementation and enforcement within Taiwan's legal order. A critical element of these laws was the requirement for the government to produce "state reports" assessing Taiwan's compliance with the human rights obligations enshrined in these treaties. Additionally, these reports would be subject to review by independent international experts, particularly those with prior experience in relevant global human rights institutions.[83]

The implementation acts also imposed a mandate for the review and revision of any existing laws, regulations, or administrative practices that

80. Chen, *supra* note 78, at 221.

81. Chen, *supra* note 78, at 220-21.

82. For the functions of the Implementation Acts as a domestic act, *see* Wen-Chen Chang, *Taiwan's Human Rights Implementation Acts: A Model for Successful Incorporation?*, *in* TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION 227, 230-37 (Jerome A. Cohen et al. eds., 2019).

83. For the detailed process of producing state reports, *see* Chang, *supra* note 78, at 234-36.

were found to conflict with the obligations set forth in the treaties. This process ensured that Taiwan's legal and regulatory framework would align progressively with international human rights standards, further integrating these principles into the domestic sphere.[84] The Taiwanese government has, in fact, undertaken significant reforms in criminal procedure, particularly amending provisions related to the detention, arrest, and interrogation of suspects to better align with international human rights standards. In the judicial sphere, the Constitutional Court, along with other adjudicative bodies, has actively invoked these UN treaties in various rulings. For example, the Constitutional Court referred to the ICESCR in J.Y. Interpretation No. 709 (2013), which addressed property rights in the context of urban renewal, and J.Y. Interpretation No. 803 (2021), which deliberated on the hunting rights of indigenous peoples.

Taiwan's grassroots-driven, self-directed incorporation of international treaties serves as a compelling case study in the diffusion of international human rights norms. It exemplifies how a state, despite its exclusion from the UN human-rights system, can advance both its domestic legal framework and its international reputation by aligning with global standards. This effort highlights Taiwan's capacity to innovate within the constraints of its unique geopolitical status, promoting human rights norms through an autonomous and creative legal process. Taiwan's approach not only strengthens its internal commitment to human rights but also positions the country as a proactive participant in the global human-rights discourse, even in the absence of formal recognition within international institutions.

E. *Same-Sex Marriage: Transitioning from a Receiver to a Contributor of Global Legal Ideas*

Since 2001, when the Netherlands became the first country to legalize same-sex marriage, 38 nations across the globe have followed this legal and social trend. Taiwan, distinguishing itself as a regional pioneer, became the first country in Asia to legalize same-sex marriage in 2019. This achievement, can be attributed to Taiwan's vibrant democratic framework, the strength and activism of its LGBT communities, and judicial intervention in favor of marriage equality.[85] Additionally, Taiwan's openness to

84. Chen, *supra* note 78, at 231-33.

85. For the detailed process of same-marriage movement in Taiwan, *see* Hsiao-Wei Kuan, *LGBT Rights in Taiwan--The Interaction between Movements and the Law*, *in* TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION 593 (Jerome A. Cohen et al. eds., 2019); Travis S. K. Kong et al., *LGBT Movements in Taiwan, Hong Kong, and China*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1275 (last visited Sept. 23, 2024).

selectively adopting and adapting legal ideas and expertise from international sources played a significant role in shaping its approach to marriage equality. In doing so, Taiwan not only absorbed progressive global norms but also contributed to the ongoing international discourse on human rights, thereby transitioning from a mere recipient of legal ideas to an active participant and contributor in shaping global legal norms.

The advancement of LGBT rights in Taiwan gained significant momentum after the lifting of martial law in the late 1980s, which opened new avenues for civil activism and legal reform. A central figure in this movement was Chi Chia-wei, a veteran activist who played a key role in prompting the 2017 Constitutional Court ruling, J.Y. Interpretation No. 748. In this landmark decision, the Court declared that excluding same-sex couples from marriage under Taiwan's family law was unconstitutional and required the legislature to amend the law within two years. In response, the legislature passed the Enforcement Act of Judicial Yuan Interpretation No. 748 in 2019.[86] This legislative move fulfilled the court's mandate and positioned Taiwan as a pioneer of LGBT rights in Asia.[87]

Interestingly, though not unexpectedly, both proponents and opponents of the LGBT-rights movement in Taiwan derived inspiration for their strategies, knowledge, and arguments from international sources, particularly from the United States and Germany. Initially, the same-sex marriage movement focused on legislative reforms, drawing upon various legal models of family from other countries. Notably, the German model of civil partnerships significantly influenced Taiwan's early bill drafts, which proposed a spectrum of unions, including marriage, civil partnerships, and non-romantic cohabitation agreements. However, growing opposition, particularly from local anti-LGBT factions, such as Christian groups, began to gain traction. These groups appeared to adopt tactics from international right-wing opposition to LGBT rights, particularly drawing on the strategies of religious conservative movements in the United States. This conservative activism in Taiwan succeeded in creating legislative roadblocks for the diverse families proposal. Consequently, LGBT activists shifted their strategy, opting to focus on constitutional litigation and centering their efforts on the specific goal of achieving same-sex marriage rights.[88]

The influence of foreign legal sources, both progressive and conservative, was also evident in Taiwan's judicial borrowing. In J.Y. Interpretation No. 748, the majority opinion notably cited the 2015 U.S. Supreme Court case Obergefell v. Hodges, in which state bans on same-sex

86. This somewhat awkward title of the act was intended to legalize same-sex unions while deliberately avoiding direct reference to "marriage" and providing a clear definition for these unions.

87. Chen & Huang, *supra* note 3, at 174-78.

88. Kong et al., *supra* note 85, at 8.

marriage were deemed unconstitutional, affirming that marriage is a fundamental right protected under the U.S. Constitution. This reference underscores the Taiwanese Constitutional Court's alignment with broader global trends that view marriage equality as an essential component of human rights.

Conversely, the dissenting opinion in J.Y. Interpretation No. 748 presented a more conservative perspective, emphasizing Taiwan's Confucian moral order as a cornerstone of its legal traditions. In doing so, the dissenters drew upon international human rights agreements to argue that marriage rights should not be universally applicable. They pointed to the fact that only a minority of countries had legalized same-sex marriage at that time, arguing that the global consensus on the matter was far from established.[89] This dual invocation of international sources, both for and against the expansion of marriage rights, illustrates how Taiwan's judiciary navigated complex cultural and legal traditions, while simultaneously engaging with global legal precedents

Similar to its adoption of UN human-rights standards, Taiwan's enactment of same-sex marriage laws was, in part, motivated by a desire for positive global recognition.[90] As the first country in Asia to legalize same-sex marriage, Taiwan occupies a unique and influential position, offering a compelling precedent for marriage equality advocates throughout the region, particularly in countries like Japan and South Korea. This precedent directly challenges the prevailing narrative that same-sex marriage is inherently incompatible with Asian or Confucian values, showcasing Taiwan's role in reshaping regional perceptions on this issue.

In fact, Taiwan's influence extends beyond East Asia. The Supreme Court of Nepal, in a recent decision legalizing same-sex marriage, cited Taiwan's J.Y. Interpretation No. 748 as part of its legal reasoning, demonstrating Taiwan's growing contribution to the global discourse on marriage equality. This evolving role marks a significant shift in Taiwan's legal narrative: once primarily a receiver of international legal innovations, Taiwan has now emerged as an active contributor to the global exchange of legal ideas.

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89. Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官解釋第748號) [Judicial Yuan Grand Justice Interpretation No. 748] (Chen-Huan Wu, dissenting) (2017) (Taiwan). For the countermovement's role in the same-sex marriage debate in Taiwan, *see* Chao-Ju Chen, *Migrating Marriage Equality without Feminism: Obergefell v. Hodges and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L.J. 65, 81-86 (2019).

90. *See* Chen, *supra* note 89, at 102-06. Chen analyzed how the discourse of "First in Asia (亞洲第一)" to legalize same-sex became a symbol of national status recognition.

IV. CONCLUSION: THEORETICAL IMPLICATION OF TAIWAN'S LEGAL TRANSPLANT

What insights does Taiwan's experience with legal transplantation provide? Beyond its unique aspects, does it share commonalities or theoretical perspectives with other nations, particularly those that are non-Western or (post-)colonial? What contemporary implications can we draw from this, especially as current legal reforms often still involve referencing foreign legal sources? To conclude this article, I would like to offer some initial reflections on these broader implications based on the story of Taiwan's legal transplantation outlined earlier, while integrating relevant findings from existing research as it sees fit.

A. *Legal Transplants: Redefining Pre-Existing Customs within New Legal Frameworks and Beyond*

Through a diachronic observation of the waves of legal transplantation in Taiwan, it becomes clear that this process is not limited to straightforward adoption. Sometimes, as foreign national laws penetrate existing legal systems, local laws and cultures engage in resistance, negotiation, or even exert reverse influence.[91] For instance, as previously mentioned, when the U.S. anti-domestic violence law was first introduced in Taiwan, it was adapted to include "family harmony" as a legislative rationale to mitigate resistance, which altered the substance of the transplant law. This modification, however, led to unintended consequences, as judges became hesitant to issue injunctions out of concern that doing so might disrupt "family harmony."

This modification, however, had unintended consequences: judges became reluctant to issue injunctions due to concerns that doing so might disrupt "family harmony," which ultimately altered the implementation of the transplanted law.

Legal transplant can also occur in more nuanced ways, such as integrating and reinterpreting existing laws within a pluralistic legal framework. From the colonial rule of the Dutch to the subsequent governance under the Qing Empire and Japanese Empire, Taiwan's legal landscape has been shaped by successive systems. Each new regime not only

91. *See* Wang Hsiao-Tan (王曉丹) & Chang Shih-Lun (莊士倫), *Falu Duoyuan de Changyu Gonggou yu Shikong Jiaozhi* (*法律多元的場域共構與時空交織*) [*The Co-construction of Pluralistic Legal Arenas and the Interweaving of Time and Space*], *in* FALYU YOU GUANSI: FALYU SHIH SHENME? ZEN ME BIAN? RUHE YINGSIANG WOMEN SHENGHUO? (法律有關係：法律是什麼？怎麼變？如何影響我們生活？) [HOW DOES LAW MATTER] 139, 150 (Wang Hsiao-Tan (王曉丹) ed., 2023).

introduced its own legal system but also selectively incorporated elements of the preceding legal order (e.g., Dutch colonial rule incorporating Han Chinese customs and indigenous laws into their judicial practices, or Japanese colonial Taiwan addressing civil disputes according to Han customs). These legal systems could either become formalized, remain as customs, or, in some cases, disappear altogether. This selective incorporation of pre-existing laws into subsequent official legal frameworks resulted in dual transformations: on one hand, foreign laws were adapted to local customs; on the other, local customary laws were often reinterpreted, translated, and modified within the language and system of the new state's legal structure. This reflects Graziadei's notion that the application of foreign law can sometimes be disguised as the use of customary law, underscoring the subtlety and complexity inherent in the process of legal transplantation.[92] It should be noted that, in this process, state law usually decided the legality of local customs, not the other way around.

In contemporary Taiwan, these dynamics continue to evolve. Recent efforts of "making space" for indigenous law to address the centuries-long injustice often involve incorporating indigenous laws and customs *into* the modern legal system. However, this translating process might bear the danger of further strengthen state's legitimate power to define indigenous law and weaken the autonomy of the indigenous people. This raises critical questions of authenticity and agency: How can indigenous communities retain the power to shape their own narratives and legal identities amidst this ongoing process of legal integration? Instead of striving for an unattainable ideal of "authentic" indigenous law, the focus should be on ensuring that indigenous voices have the authority to interpret and adapt their legal traditions within the broader legal system. Moreover, it is essential to employ innovative legal techniques beyond existing methods and create a more equal and flexible pluralistic legal framework for negotiating *between* indigenous and state law, if we truly aim to decolonize the legal systems on this land.[93]

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92. Graziadei, *supra* note 25, at 462.

93. For example, Hung Chun-chi pointed out that indigenous are able to retain the power to narration and translation through national law (Protection Act for the Traditional Intellectual Creations of Indigenous Peoples) and engage in negotiations with the state. *See* Hung Chun-Chi (洪淳琦), *Zuowei Hunza Sing (Hybridity) De Chuantong: Yi Homi Bhabha De Hou Jhihmin Guandian Lun Yuanjhuminzu Chuantong Jhihhuei Chuangzuo Baohu Tiaoli* (*作為混雜性（Hybridity）的傳統：以 Homi Bhabha的後殖民觀點論原住民族傳統智慧創作保護條例*) [*Tradition as Homi Bhabhaian "Hybridity": A Postcolonial Perspective on Taiwan's Protection Act for the Traditional Intellectual Creations of Indigenous Peoples*], 50 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U. L.J.] 1, 6-42, 57 (2021). For a more comprehensive theoretical critique on the limitations of the "making space" approach and on how to decolonize Indigenous law while fostering a more equitable legal pluralism that integrates Indigenous subjectivity and narratives, *see* Wang Hsiao-Tan (王曉丹), *Falu Jiezhi Zhi Lu-Yuanzhu Minzu De Zhuquan Xushi Chonggou Yu Falu Duoyuan Zhuanxiang* (*法律*

B. *Legal Transplants: The Intermingling and Circulation of Legal Traditions in Taiwan and East Asia*

Taiwan's experience with multiple layers of legal transplantation also reveals that the process is rarely a one-way transfer of legal concepts from one jurisdiction to another. Instead, it often involves the intermingling and circulation of diverse foreign legal concepts and practices.

The reception of Roman law in the Western world is perhaps the most well-known example of legal transplantation. Beyond Europe, its spread often occurred within colonial contexts. In Taiwan, before Dutch colonizers arrived, Dutch legal scholars had already synthesized Roman law principles--acquired under Spanish Habsburg rule in the late 16th century--with the local customs of the Dutch provinces, creating what came to be known as Roman-Dutch law. In Dutch-Taiwan, this Roman-Dutch law indirectly introduced elements of Roman law, along with Dutch customs, into Taiwan's legal landscape.[94]

Taiwan's adoption of German law, mediated by pre-war Japanese and Chinese legal systems, is another striking example of this intermingling. At the turn of the 19th and 20th centuries, German civil law, recognized as the most advanced legal system in Western legal circles at the time, influenced both Japanese and Chinese legal codifications.[95] As previously discussed, Japan during its rule over Taiwan, and the Republic of China in the post-war era, introduced German legal elements to Taiwan. Also, when China referenced the German Civil Code to draft its own civil law, it employed Japanese legal experts and naturally referred to the Japanese Civil Code. This code had already been adapted to better align with Chinese legal culture through its translation into newly created Japanese legal terminology using Kanji (Chinese characters in the Japanese language). This process further complicated the intermingling and circulation of legal traditions.

After World War II, Japanese law continued to act as a bridge for Western legal concepts in Taiwan. As U.S. law grew more influential, its integration into Taiwan's legal system was frequently mediated by Japanese law. As mentioned earlier, since 2003, Taiwan has notably sought to align its criminal justice system with that of the United States, incorporating elements such as the adversarial system and jury procedures. However, Japan played a crucial role in this transformation. Having previously adapted various

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解殖之路—原住民族的主權敘事重構與法律多元轉向) [*The Path to Legal Decolonization: Sovereign Narrative Reconstruction and Legal Pluralism for Indigenous Peoples*], 35 ZHONG YAN YUAN FAXUE QIKAN (中研院法學期刊) [ACADEMIA SINICA L.J.] 1 (2024).

94. Cheng, *supra* note 8, at 43-44.

95. It's the first wave of legal globalization according to Duncan Kennedy's article. *See* Kennedy, *supra* note 38, at 25-37.

aspects of the U.S. criminal justice system, Japanese law served as a key reference point, enabling Taiwan to contextualize and refine American legal principles within its own cultural and legal context. Last but not least, Taiwan's civil procedure law also reflects a unique blend of legal elements from both the United States and Japan, coexisting within the same framework.[96]

While the blending of foreign legal traditions is nearly universal--since it is difficult to imagine a "pure" legal tradition existing in isolation--Taiwan's case has unique features that are also present in broader East Asia. Japan serves as a key example, acting as an intermediary in Taiwan's adoption of Euro-American legal principles. Beyond the direct imposition of Japanese law during its colonial rule in Taiwan, the more voluntary adoption of Japanese legal principles later on was facilitated by Japan's prior Westernization and its shared cultural heritage with Taiwan. This heritage, grounded in the broader Chinese cultural sphere, Asian traditions, and more recent civil law practices from the late nineteenth century, offered Taiwan a model for integrating and transforming Euro-American legal concepts into its own framework. More broadly in Asia, Japan's role as a creative intermediary for legal transplant in countries like Taiwan, Korea, Vietnam, and China provides a valuable lens for understanding legal transplants beyond a Western-centric perspective.[97]

Certainly, this does not suggest that the process of legal transplantation in Taiwan or East Asia is unaffected by global power structures and political forces. Despite the diverse mechanisms of circulation, the dominant political and cultural centers of influence over different periods--such as Roman law, German law, and American law--remain distinct and continue to shape Taiwan and East Asia through various channels. In other words, the unequal power structure within legal globalization not only serves as the driving force behind legal transplants but also creates a repetitive and spiraling trajectory that directly or indirectly responds to the dynamics of the global (e.g., Europe and the United States) and regionally (e.g., pre-war Japan) centers.[98] A key issue in studying legal transplantation is how, while

96. Kuo Shu-Chin (郭書琴), *"De Si Rihguei、Tai Mei Hun Da" Jhih Falyu "Kongjian"-Yi Minshih Fenjheng Jiehjyueh Jhong De Falyu Yu Wunhua Weili* (*「德系日規、台美混搭」之法律「空間」—以民事紛爭解決中的法律與文化為例*) [*German Father, Japanese Mother: The Mix-Match Taiwanese Cultural Legal Practice*], 57 FUREN FASYUEH (輔仁法學) [FU JEN L. REV.] 211, 225-29 (2019).

97. For more comprehensive discussion on the influence of Japanese law on Taiwan, *see* Tay-Sheng Wang, *The influence of Japanese law on Taiwan law*, *in* LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW 233 (John O. Haley & Toshiko Takenaka eds., 2014).

98. For example, drawing on fieldwork in Taiwan, Hsiao-Tan Wang shows that efforts to combat human trafficking through legal transplants--at local, national, and international levels--ultimately align with a global agenda shaped by dominant power centers. She also highlights the legal

addressing global challenges, one can also critically consider the unique characteristics and particularities of Taiwan and East Asia. This dual focus is essential for understanding the complex dynamics of legal integration in the region.

C. *Legal Transplants: Instruments of Hegemony or Pathways to Empowerment?*

Another critical aspect worth exploring is the relationship between legal transplants and hegemony. The relationship between legal transplants and hegemony is crucial. Within Europe, recent resistance to the EU legal framework's homogenization and the broader phenomenon of legal globalization--along with opposition to neoliberalism and legal universalism--highlights the intrinsic link between law and national or local contexts. In non-Western regions, the introduction of modern Western law is deeply intertwined with colonial imperialism. In the postcolonial era, globalization is often criticized as a new form of imperialism disguised under neoliberalism, with legal globalization seen as a tool for perpetuating hegemony.[99]

However, recent research has shifted the focus to the agency of the colonized. Non-Western elites have at times appropriated liberal constitutional concepts from Euro-American legal systems as tools of resistance against colonial rule.[100] Yet, they have also been known to adopt the laws of the colonizers to advance their own interests. For instance, the Indian lawyer class upheld the colonial legal framework to reinforce their social and economic status. Moreover, marginalized individuals in colonial societies, like wives, have strategically used the courts to challenge oppressive powers.[101]

The situation in Taiwan reflects this complexity. Legal transplants can serve as instruments of hegemony while simultaneously providing avenues

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asymmetries embedded in these transnational frameworks. Wang Hsiao-Tan (王曉丹), *Falyu Jishou yu Falyu Duochong Jhitu-Renkou Fanyun Fajhih de Anli* (*法律繼受與法律多重製圖—人口販運法制的案例*) [*Multi-layered Mapping of Law in Taiwan as Manifest in Human Trafficking Cases*], 15 ZHONG YAN YUAN FAXUE QIKAN (中研院法學期刊) [ACADEMIA SINICA L.J.] 77 (2014).

99. PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 212-15 (2001). Recent Taiwanese research on legal transplants also critically examines the unequal power dynamics within legal globalization, especially the dominance of Western legal systems, *see generally* Wang, *id*.

100. *See generally* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 872-74 (1988); MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1986); MARTIN CHANOCK, THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902-1936: FEAR, FAVOUR AND PREJUDICE (2001); NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF (2006).

101. *See generally* MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985); SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980 (1986).

for resistance and empowerment. Both elites and marginalized groups have employed these frameworks to either uphold their status or challenge oppression, highlighting the dual role of legal transplants in shaping social dynamics. As discussed earlier, during both the prewar Japanese rule and the postwar KMT regime, Taiwanese legal elites leveraged the imposed constitutions to push for more authentic constitutional law. Similarly, Taiwanese women under Japanese colonial rule bravely utilized the colonial courts to escape unhappy marriages and defend their property. In the postwar democratization era, although American law was introduced along with aspects of political, economic, and cultural hegemony, Taiwan's adoption of anti-domestic violence laws demonstrates how foreign legal influences can be utilized to protect vulnerable groups.

Even before the implementation of imported laws, during the legislative campaigns to adopt foreign laws, Taiwanese local elites--many of them legal professionals--demonstrated significant autonomy and strategic thinking. Prior to democratization, their adoption of Western legal systems--whether driven by genuine conviction or strategic intent--often mirrored a strategy of "allying with distant powers to challenge the dominance of those closer to home." This approach was aimed at Eastern colonial authorities, such as prewar Japan and the postwar KMT regime.[102] During the legislative process of introducing U.S. anti-domestic violence legislation, Taiwan initially prioritized the concept of family harmony over American gender equality norms to avoid potential societal backlash. This "establish first, refine later" strategy was a deliberate choice. Subsequent amendments to the law have progressively incorporated more advanced principles, thereby addressing the gender equality aspects initially set aside. Furthermore, in incorporating international human rights conventions and advancing same-sex marriage legalization, reform advocates effectively leveraged Taiwan's desire for international engagement to further domestic equality.[103]These instances demonstrate that legal transplants in Taiwan have served not only as tools of empowerment but also as expressions of local autonomy, especially within the context of navigating both Eastern authoritarianism and Western hegemony. Having long faced multiple centers of power, Taiwanese legal professionals--situated in multiple peripheral positions--continue to creatively employ transplanted legal languages as they attempt to devise

102. Chen Yun-Ru (陳韻如), *Bianyuan Yichang Huo Wusuobuzai? Falyu Yijhih Zuowei Fa Shehuei Yanjiou Gainian Gongjyu* (*邊緣異常或無所不在？法律移植作為法社會研究概念工具*) [*Legal Transplant in Society: An Omnipresent Aberrance?*], (Special Issue) JHENGDA FASYUEH PINGLUN (政大法學評論) [CHENGCHI L. REV.] 1, 39 (2022).

103. *See* Wang, *supra* note 98. Moreover, Wang explores the long-term concrete process in which various actors and institutions, including legal professionals, construct, transplant, and reinterpret the Human Trafficking Act within the frameworks of international law and domestic legislation.

their own strategic actions.[104]

Overall, in reviewing the case of Taiwan, we are reminded of the need for a more nuanced observation of legal transplants, particularly in light of their often unintended consequences. The varied experiences and outcomes for different stakeholders underscore the importance of examining these legal processes through a lens that considers historical context and specific local dynamics. A historically informed and context-specific analysis is crucial to understanding the complex interplay between imported legal frameworks and domestic realities.[105] Moving forward, future research in this field must adopt a long-term perspective, deeply rooted in the local socio-political landscape, to fully grasp the transformative power of legal transplants. By carefully navigating these intricacies, scholars and policymakers can better harness legal transplants as instruments for meaningful legal reform and societal progress.

104. For example, although Japanese colonizers long regarded Taiwanese familial customs as symbols of backwardness, Taiwanese legal professionals in 1920s Taiwan strategically employed the globally prevalent "progress-backwardness" binary discourse to highlight the relative egalitarianism of Taiwan's inheritance customs. This approach was specifically aimed at resisting the imposition of the neo-traditionalist primogeniture system enshrined in the Meiji Civil Code. *See* Chen, *supra* note 29.

105. *See* Wang, *supra* note 98, at 107-08. For example, Wang suggests that the evaluation of the practice of legal transplantation must be conducted within specific social and legal contexts.

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法律移植的在地航行：歷史層疊、案例場景與理論意涵

陳 韻 如

摘 要

藉由觀察台灣法律移植的動態往復過程，本文希望超越將法律移植視為單向輸入的簡化圖像，進一步凸顯多重外來法在不同行動者的選擇性採納、在地調適與（半）自主詮釋下所展現出的交織運作。從17世紀荷治時期前近代西方法制對原住民社會的注入、鄭氏與清治時期的漢化法治理、日治時期的法制現代化工程，一直到戰後美援體系所帶來的美式法制影響，外來法在這段動態歷程中層層交疊、持續轉化，逐步形塑出台灣當代的法律地景。

透過數個具代表性的案例——包括女性對法院的近用、自由民主憲政體制的封存與解凍、家庭暴力防治法的迅速引入與修正、作為國際邊緣行動者對國際人權法的積極參與，以及成為亞洲同性婚姻合法化的先鋒——可見台灣不僅有效吸納全球法律原則，更具備主動建構與創造性轉化的經驗與能力。法律移植並非單純的制度移入，而是一種能夠改塑在地習慣、融合多元法律傳統的動態過程。此一現象顯示，法律移植固然可能被統治者與權勢者策略性運用，以鞏固甚至強化既有霸權，同時也為處於弱勢與邊緣位置的行動者提供了介入與抵抗的空間與可能性。

最後主張，未來相關研究應採取長時段且深植在地脈絡的視角，方能更充分理解法律移植作為法制轉化機制所具有的潛力與限制。

關鍵詞：法律移植、台灣、殖民法律體系、法律改革、在地自主性

Article

Parent Maintenance, Interdependent Family and Elder Care in Taiwan

Li-Ju Lee*

ABSTRACT

In Taiwan, elder care is first and foremost a family responsibility. The family has been an important social institution for meeting basic needs of family members, where the duty of mutual support ensures collective survival and prosperity. In the Family Code, legislators transformed such traditional practice into individual obligations/rights and incorporated filial piety into legal provisions, creating the legal interdependent family, a self-sufficient economic unit bonded by blood and marriage. As Taiwanese population fast aging and fewer family members are available to bear maintenance burden, traditional family values and the concept of filial piety are being challenged. The 2010 amendment to the Family Code, allowing some adult children to exempt from their parental support obligations, has opened the floodgates of litigation between elderly parents and their estranged children. It suggests changes in the distribution of elder care between the state and families as well as the shifts in welfare policies. This article discusses the development, enforcement and impact of Taiwan's parent maintenance law, focusing on how the social change challenges the legalization of the interdependent family. The author urges to reconsider the construction of the legalized family and the relationship between family and state responsibility in order to protect the elderly's wellbeing and dignity.

Keywords: *Parent Maintenance Duty, Interdependent Family, Elder Care Law, Taiwanese Family Law, Taiwanese Social Welfare Law*

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CONTENTS

I. INTRODUCTION

Population aging has become a global phenomenon. As the fertility rate remaining low and life expectancy prolonging, Taiwan has been experiencing drastic demographic changes and expected to be a so called super-aged society, where 20 percent of population are over 65, by 2025, according to Taiwan's National Development Council.[1] One of the legal challenges faced by the fast-aging societies is elder care, especially for those who are no longer have sufficient means to support themselves. In Taiwan, elder care is first and foremost a family responsibility. The Civil Code requires certain family members to support one another when necessary. This article argues that such legal obligation, prominent for adult children's parent maintenance, has created a "interdependent family", a self-sufficient economic unit bonded by blood and marriage. With the interdependent family shouldering primary responsibility of elder care, the government conveniently assumes the secondary or the supplementary role, providing assistance and protection to elders only when family members fail to carry out their duties. In fact, many Taiwanese elders do rely on their adult children for financial support. A 2022 national survey indicated that more Taiwanese senior citizens were financially dependent on their adult children or grandchildren, more than relied on pension or social welfare. The same survey showed that more than 60% of the elders whose daily care were provided by their family members, especially their adult children.[2]

However, social and demographic changes have posed serious challenges to the once stable interdependent family and its relationship with the state. For example, the 2010 amendment to the Civil Code allows more adult children

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1. GUOJIA FAZHAN WEIYUANHUI (國家發展委員會) [NAT'L DEV. COUNCIL], Zhonghuaminguo Renkou Tuigu Erlingerernian Zhi Erlingqilingnian (*中華民國人口推估 (2022年至2070年)*) [*Population Projections for the R.O.C (Taiwan): 2022～2070*] 17 (2022), https://data.gov.tw/dataset/151048 (Taiwan became an aging society in 1993, became an aged society in 2018, and is projected to become a super-aged society in 2025. In 2070, 4 out of 10 Taiwanese will be elderly, and 1 out of 4 elderly will be over 85 years old).

2. WEISHENG FULIBU TONGJICHU (衛生福利部統計處) [MINISTRY OF HEALTH AND WELFARE, R.O.C.], *111 Nian Laoren Zhuangkuang Diaocha Baogao* (*111年老人狀況調查報告*) [*Report of the Senior Citizen Condition Survey 2022*] 23 (2024), https://dep.mohw.gov.tw/DOS/cp-5095-77509-113.html (The main source of financial support for the elderly population aged 65 or older in Taiwan is from their children or grandchildren (22.01%), followed by military, civil service, labor, and national insurance (21.95%), and then their own retirement funds, severance pay, or social welfare (6.73%)). The same national survey conducted in 2017 indicated that more (24.34%) Taiwanese senior citizens were financially dependent on their adult children or grandchildren, more than relied on pension (18.77%) or social welfare (15.49%). The same survey showed that more than 67% of the elders whose daily care were provided by their adult children. *See* WEISHENG FULIBU TONGJICHU (衛生福利部統計處) [MINISTRY OF HEALTH AND WELFARE, R.O.C.], *106 Nian Laoren Zhuangkuang Diaocha Baogao* (*106年老人狀況調查報告*) [*Report of The Senior Citizen Condition Survey 2017*] 52 (2018), https://dep.mohw.gov.tw/DOS/lp-5095-113.html.

to be released from their parent maintenance obligation and many elderly people to be left without family support as a result. Such legal development signifies changes in the underpinning values of family law and the premise of elderly welfare laws. Furthermore, in a society where the population continues to age and less family members are available to bear maintenance burden, the increasing and enduring needs for elder care and financial support have raised a profound concern that the family safety net might be no longer capable of taking the primary responsibility of elder support and care.[3]

This article discusses the development, enforcement and impact of Taiwan's family maintenance law, focusing on the adult children's parent maintenance duty. The author examines the legalization and challenge of the interdependent family and calls for legal reform on family maintenance duty and its relationship with the state welfare system.

II. THE LEGALIZATION OF FAMILY MAINTENANCE DUTY

The family maintenance duty is required and regulated in Part IV "Family" of the Civil Code. The legislators of the original version of the Civil Code tried to incorporate the traditional family norm with some modern legal concepts, such as individual rights and a hint of equality. Since the industrialization and urbanization in the 1960s, while the Taiwanese family has become smaller in size and had less control over the individual's economic and social life, the individuals have acquired and demanded more freedom and equality. The traditional family values embodied in the Civil Code, especially those of patriarchalism and paternalism, appeared to be outdated and even unjust. After democratization in the 1990s, the codification of traditional patriarchal family values and practices have been challenged both in the society and the Constitutional Court.[4] Gradually, the imprints of the traditional family in the Civil Code which embody patriarchal norms and practices to discriminate women (as wife and mother), have significantly faded by the end of the 20th century after several rounds of revision to respond to social changes and in line with the Constitutional mandate of gender equality.[5]

Despite social and legal changes, family maintenance duty, the legal arrangement materializing the traditional virtue of family self-help and self-sufficiency, remains. By turning the traditional idea and practice of family maintenance responsibility into an individual legal obligation, the Civil Code

3. Yun-Ju Chen & Sieh-Chuen Huang, *Family law in Taiwan: Historical Legacies and Current Issues*, 14 NTU L. REV. 157, 193-97 (2019).

4. *See* Li-Ju Lee, *The Constitutionalization of Taiwanese Family Law*, 11 NTU L. REV. 273, 273-332 (2016).

5. *Id*.

has created a legally sanctioned "interdependent family", where family members are obligated to provide financial support and care to one another. Such legal construction reflects and reinforces the traditional ideology of self-sufficient family and filial piety. It also provides a solid foundation for the state's supplementary role in social welfare and public assistance.[6]

Not surprisingly, parent maintenance is codified as the principal mission of the interdependent family, since it has been the family's moral responsibility to take good care of their elders. However, as Taiwan's social and demographic change continue, the increasing and enduring needs for elder care and financial support has become unbearable or unjust for many families or individuals.[7] Social change not only brings about the issue of elder care, but also changes people's attitude toward filial piety and family responsibility, which has manifested in the 2010 amendment of the Civil Code. It raises questions on the whether and how the legalization of the interdependent family, especially parent support mandate, would survive these challenges.

A. *Defining the Interdependent Family*

The idea and practice of the interdependent family have been part of the Taiwanese culture. As the traditional family was once the most important social institution to meet every individual's basic needs, thus to construct their identity and livelihood, the essential duty of family members was to help each other in order to secure their collective survival and prosperity.[8] In the 1930 Civil Code, such traditional practice was transformed into a legal right/obligation of the individual rather than a collective responsibility of a clan, to be in line with the modern jurisprudence.[9] Despite most extended families have been breaking into smaller households in the process of industrialization and urbanization,[10] and after the Civil Code's several

6. Chen Yen-Jen (陳燕禎), *Woguo Laoren Zhaogu Ziyuan Bianqian zhi Chutan* (*我國老人照顧資源變遷之初探*) [*A Primary Study of Adultcare Policy Development in Taiwan*], 114 SHEQU FAZHAN JIKAN (社區發展季刊) [COMMUNITY DEVELOPMENT JOURNAL] 239, 242-43 (2006); Shee Huey-Ling (施慧玲), *Lun Woguo Jiatingfa Zhi Fazhan Yu Yanjiu Yige Jiating Falu Shehuixue De Guandian* (*論我國家庭法之發展與研究－一個家庭法律社會學的觀點*) [A *Review on the Development of and Research on Family Law in Taiwan (ROC): An Aspect from the Sociology of Family Law*], *in* JIATING FALU FULIGUOJIA XIANDAI QINSHUFA LUNWENJI (家庭、法律、福利國家－現代親屬法論文集) [FAMILY LAW AND WELFARE STARE-MODERN FAMILY LAW SYMPOSIUM] 37, 74-80 (Shee Huey-Ling (施慧玲) ed., 2001).

7. *See infra* text accompanying notes 42-57, 77-91.

8. CHI-NAN CHEN (陳其南), JIAZU YU SHEHUI TAIWAN YU ZHONGGUO SHEHUI YANJIU DE JICHU LINIAN (家族與社會：台灣與中國社會研究的基礎理念) [FAMILY AND SOCIETY: THE FUNDAMENTAL IDEAS OF TAIWAN AND CHINESE SOCIAL STUDIES] 298-99 (1990).

9. TAY-SHENG WANG (王泰升), TAIWAN FALUSHI DE JIANLI (台灣法律史的建立) [THE ESTABLISHMENT OF TAIWANESE LEGAL HISTORY] 373-74 (1997).

10. CHEN CHAO-NAN (陳肇男) & LIN HUI-LIN (林惠玲), JIATING SHEHUI ZHICHI YU LAOREN

rounds of revisions,[11] the legal duty to maintain one's family members who become unable to support or care for themselves, especially one's parents, has survived.

For this moral duty to be legally enforceable, it is necessary to clearly define the scope of such interdependent family. According to the Civil Code, two criteria were employed by the legislators to identify the members of an interdependent family: those who are close blood relatives and those relative who reside in the same household. The former refers to one's lineal ascendants/descendants and siblings: namely one's parents/children, grandparents/grandchildren, brothers and sisters. The latter include one's parents-in-law, daughter/son-in-law, and other family members who share the same household with the individual.[12] It is obvious that the concept the interdependent family is much broader than the prominent marital family consisting of only the married couple and their children. After all, the traditional wisdom has shown that it would take more than a nuclear family to weave a robust and sustainable safety net.[13]

The law further elucidates when and who is entitled to claim such support and who would be obligated to provide maintenance. Since the interdependent family is meant to create a financial safety net, only those

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XINLI FUZHI ERSHI SHIJIMO DE TAIWAN JINGYAN (家庭、社會支持與老人心理福祉：二十世紀末的臺灣經驗) [FAMILY SOCIAL SUPPORT AND ELDER PSYCHOLOGICAL WELFARE: THE TAIWANESE EXPERIENCE IN THE END OF 20TH CENTURY] 1-14 (2015); Yi Chin-Chun (伊慶春), *Taiwan De Jiating Bianqian Jiating Shehui Xuezhe De Yanjiu Guanhuai* (*臺灣的家庭變遷：家庭社會學者的研究關懷*) [*Changing Taiwanese Families: Research Concerns of Family Sociologists*], 34 JIN DAI ZHONGGUO FU NU SHI YAN JIU (近代中國婦女史研究) [RESEARCH ON WOMEN IN MODERN CHINESE HISTORY] 219, 238-42 (2019).

11. Lee Li-Ju (李立如), *Qinshufa Biange Yu Fayuan Gongneng Zhi Zhuanxing* (*親屬法變革與法院功能之轉型*) [*The New Paradigm of Taiwanese Family Law and the Changing Face of the Family Court*], 41 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U. L.J.] 1639, 1641-42 (2012); Huang Ching-Yu (黃淨愉), *Taiwan Qinshufa Zhong De Chuantong Yaosu Yu Weilai Zhanwang Yu Ribenfa Xiang Bijiao* (*臺灣親屬法中的傳統要素與未來展望－與日本法相比較*) [*The "Tradition" Element And Future of the Taiwanese Family Law-The Japanese Law Comparison*], *in* JIAZUFA XIN KETI CHENGONG QIYAN XIANSHENG JIUSHI JIN WU MINGSHOU JINIAN WENJI (家族法新課題：陳公棋炎先生九十晉五冥壽紀念文集) [THE PROBLEMS OF THE FAMILY AND SUCCESSION LAW ESSAYS IN MEMORY OF PROFESSOR CHI-YEN CHEN] 53, 60-61 (Editorial Committee of Essays Contributed for Professor Chi-Yen Chen's 95th Birthday (陳公棋炎先生九十晉五冥壽紀念文集編輯委員會) ed., 2017).

12. Minfa (民法) [Civil Code] § 1114 (promulgated Dec. 26, 1930, effective May 5, 1931); Minfa (民法) [Civil Code] § 1116-1 (promulgated Dec. 26, 1930, effective May 5, 1931, as amended June 3, 1985) (Taiwan).

13. Chien Liang-Yu (簡良育), *Zinu Fuyang Fumu Fazhi Zhi Tantao* (*子女扶養父母法制之探討*) [*A Study of Parent Maintenance Law*], *in* WENFENGWEN JIAOSHOU LIUZHI WU HUADAN ZHUSHOU LUNWENJI (溫豐文教授六秩五華誕祝壽論文集－民事法學的現代課題與展望) [LAW-ESSAYS IN HONOR OF PROFESSOR WEN FENG-WEN-THE ISSUES AND FUTURE OF CIVIL LAW] 263, 264 (Editorial Committee for Festschrift in Honor of Prof. Wen Feng Wen's 65th Birthday (溫豐文教授六秩五華誕祝壽論文集編輯委員會) ed., 2011).

who are in need (i.e., the dependents) have the legal claim to others' support. According to the Civil Code, in order to be defined as a dependent, one must be found unable to meet their own basic needs and without capacity to earn a living.[14] When one found him/herself in need of support, members of his/her interdependent family are obligated to offer maintenance in the following order: (1) one's direct descendants (children, and then grandchildren) (2) direct ascendants (parents, and then grandparents) (3) head of the household (4) one's brothers and sisters (5) members of the household (6) sons/daughters-in-law in the same household (7) parents-in-law in the same household.[15] On the other hand, should there be more than one dependent to be supported, and the obligator is not able to take care of them all, the Code requires the individual to offer his/her support in the following order: (1) one's direct ascendants (parents, and then grandparents) (2) one's direct descendants (children, and then grandchildren) (3) members of the household (4) one's brothers and sisters (5) head of the household (6) parents-in-law in the same household (7) sons/daughters-in-law in the same household.[16] In other words, adult children's parent maintenance duty is at the heart of the family maintenance scheme. When one fall into dependency, his/her adult children (and then grandchildren) are the first called upon to offer support. Should the dependent have no direct descendants, the burden would fall onto the dependent's parents (and then grandparents). The next in line would be his/her brothers and sisters, and then the other named family members who live with him/her. Such arrangement is in sync with the traditional virtue of filial piety and respecting family elders.

The 1930 Civil Code's family maintenance duty is individualized, need-based and enforceable in court.[17] Anyone intending to seek financial assistance from their families must show the court that they are unable to sustain herself and no capacity to do so.[18] If necessary, the dependent may file a suit against the obligators, one's adult children in most cases, asking the court to rule on the amount of the maintenance and order its

14. Lin Hsiu-Hsiung (林秀雄), *Fuyang Zhi Fangfa Yu Fuyangfei Jifu Zhi Fangfa Ping Zuigao Fayuan Yilingyi Niandu Tai Jian Kang Zi Di Wushihao Minshi Caiding* (*扶養之方法與扶養費給付之方法－評最高法院一〇一年度台簡抗字第五〇號民事裁定*) [*The Means and Payment of Family Maintenance-Comment on the Supreme Court's Civil Judgment 101 Tai Jian Kang Zi No.50*], 23 CAIPAN SHIBAO (裁判時報) [COURT CASE TIMES] 5, 7-8 (2013).

15. Minfa (民法) [Civil Code] § 1115 (promulgated Dec. 26, 1930, effective May 5, 1931) (Taiwan).

16. Minfa (民法) [Civil Code] § 1116 (promulgated Dec. 26, 1930, effective May 5, 1931) (Taiwan).

17. CHEN CHI-YEN (陳棋炎), HUANG TZONG-LEH (黃宗樂) & KUO JEN-KONG (郭振恭), MINFA QINSHU XINLUN (民法親屬新論) [CIVIL LAW: FAMILY] 494-96 (11th ed. 2013); TAI YEN-HUEI (戴炎輝), TAI TONG-SCHUNG (戴東雄) & TAI YU-ZU (戴瑀如), QINSHUFA (親屬法) [FAMILY LAW] 538-39 (2017).

18. *Id.*

enforcement. Such mutual maintenance duty imposed by the Civil Code is meant to make family members responsible to one another in terms of financial support and care. In the eyes of law, family members ought to keep interdependent and self-reliant for better, and more importantly, for worse.[19]

Although the basic concept and structure of the interdependent family is derived from the Taiwanese traditional family virtue and practice, the modern version of the legal maintenance duty has once departed from the idea of family collectivism manifesting in family members' common interests to advance family property and prosperity.[20] For the obligators, the only way to be exempted from the maintenance burden, according to the 1930 Civil Code, was to convince the court that they were in fact struggling to make their own ends meet, and thus incapable of offering any assistance to others, even to the needy family members.[21] This exemption clause suggested that the individual self-sufficiency, not the family duty, remains priority. It indicated a critical difference between the traditional family norms and the adaptation of the 1930 Civil Code in terms of the relationship between the individual and the family: it was the individual's basic rights and survival that the law meant to protect and promote most, while the traditional family virtue placed the interests of family above its individual member's welfare or preference. However, such gap between law and tradition was significantly closed by the legislature in the 1985 amendment.

B. *Strengthening Adult Children's Obligation to Support Elderly Parents*

Traditionally, taking care of the elders is a primary mission, no less significant than raising children, for the family. Accordingly, the Civil Code mandates that the most prominent maintenance duty among family members is the adult children's obligation to support their elderly parents. Such obligation has been commanded by the norms of filial piety, the quintessence

19. Teng Shyue-Ren (鄧學仁), *Laoren Zhi Fuyang Wenti Yu Duice* (*老人之扶養問題與對策*) [*The Problem and Policy Response to Support the Elders*], 286 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 74, 74-76 (2019); Lin Hsiu-Hsiung (林秀雄), *Fuyang Yiwu Zhi Jianqing Yu Mianchu* (*扶養義務之減輕與免除*) [*The Reduction or Exemption of the Maintenance Duty*], 181 TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.] 115, 115-18 (2011).

20. Tai Yu-Zu (戴瑀如), *Taiwan Minfa Jicheng Bian Zhi Xiuding* (*臺灣民法繼承編之修訂*) [*The Amendment of the Inherit Chapter of the Taiwanese Civil Code*], 71 YUEDAN MINSHANGFA ZAZHI (月旦民商法雜誌) [CROSS-STRAIT LAW REVIEW] 93, 94-95 (2021).

21. Minfa (民法) [Civil Code] § 1118 (promulgated Dec. 26, 1930, effective May 5, 1931, as amended June 3, 1985) (Taiwan). For discussion, please *see* Teng Shyue-Ren (鄧學仁), *Qinshufa Zhi Lishi Yu Keti* (*親屬法之歷史與課題*) [*The History and Issues of Relative Law*], 2 ZHONGYANG JINGCHA DAXUE FAXUE LUNJI (中央警察大學法學論集) [CENT. POLICE U. L. REV.] 467, 496-97 (1997).

of traditional family values and social norms in Taiwan.[22] Despite the rapid economic development and social change, many researchers have found that filial piety, albeit transformed in some way, is still very much alive in modern days.[23] If protecting marital family is to assign the child-rearing responsibility to married couples, the most important purpose of creating the interdependent family is to legalize adult children's responsibility of taking care of their elderly parents.

According to the Civil Code, the maintenance duty between children and parents, compared with that among other members of the interdependent family, is foremost and unique. When requesting support from their adult children, the parents do not have to show the court that they are incapable of earning a living, as they must when asking help from other family members, such as their brothers or sisters. It means that once parents find themselves in need of basic support, including food, shelter, and medical care, they are entitled to their adult children's assistance. The law makes sure that no one should avoid parent maintenance duty by arguing that their parents are capable of getting a job to pay their own bills.

In 1985, the amendment of Civil Code was passed in response to rapid economic growth and industrialization. While the amendment was meant to tone down some traditional family practices, such as relaxing certain patriarchal rules, to keep up with the times, the legislators decided that filial piety was so pivotal that it should be written into law.[24] The amendment thus added a new section to article 1084 of the Civil Code, proclaiming that

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22. Yeh Kuang-Hui (葉光輝), *Huaren Xiaodao Shuang Yuan Moxing Yanjiu De Huigu Yu Qianzhan* (*華人孝道雙元模型研究的回顧與前瞻*) [*The Dual Filial Piety Model in Chinese Culture: Retrospect and Prospect*], 32 BEN TUXIN LI XUEYAN JIU (本土心理學研究) [INDIGENOUS PSYCH. RSCH. IN CHINESE SOC'Y] 101, 101-48 (2009).

23. Wu Chih-Wen (吳志文) & Yeh Kuang-Hui (葉光輝), *Chengwei Laonian Fumu De Zhaoguzhe Chengnian Zinu De Xiaodao Xinnian Daijian Duochong Shikong Kuang Jia Jingyan Zhenghe Nengli Ji Daijian Zhaoguzhe Juese Rentong* (*成為老年父母的照顧者：成年子女的孝道信念、代間多重時空框架經驗整合能力及代間照顧者角色認同*) [*Being a Caregiver for Aging Parents: Adult Children's Filial Belief, Capacity of Integrating Intergenerational Cross-time-and-space Experience, and Their Role Identification of Caregiver*], 59 ZHONGHUA FUDAO YU ZISHANG XUEBAO (中華輔導與諮商學報) [CHINESE J. OF GUIDANCE & COUNSELING] 1, 1-33 (2020); Lu Long-Chuan (盧龍泉), Lin Ling-Hua (林凌華) & Lin Tai-An (林泰安), *Laoren Anyang Zhi Daode Juece* (*老人安養之道德決策*) [*Ethical Decision for Gerontological Healthcare*], 4 ZHONGSHAN GUANLI PING LUN (中山管理評論) [SUN YAT SUN MGMT. REV.] 833, 833-74 (2011).

24. The other three goals of the 1985 amendment to the Civil Code were the following: promoting gender equality, revising marital property rules and protecting minors, illegal children and adopted children. *See* LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 74:38, 11, 17-18 (1985). For discussion, please *see* Tai Tong-Schung (戴東雄), *Lun Minfa Qinshubian Xiuzheng Neirong Yu Jiantao* (*論民法親屬編修正內容與檢討*) [*Reviewing the Amendment of the Chapter of Relatives of the Civil Code*], 147 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 5, 5-6 (2007); *See also*, Teng, *supra* note 21, at 475-78.

"the [minor or adult] children shall be filial to and respect their parents".[25] Furthermore, to make this new provision more than a mere statement, the legislators went on to revise the provisions of maintenance duty to ensure that adult children fulfill the filial obligation toward their parents. A new provision was installed to prevent adult children from completely excusing maintenance duty toward their parents on the ground of their own financial difficulties, which was permitted in the original Civil Code of 1930.[26] Under the 1985 amendment, for those who are barely staying afloat, their duty to parents may only be reduced, but not be relieved completely. As a result, all adult children must be responsible, more or less, for their needy parents.[27] This new clause honors the tradition, prioritizing family duty over individual autonomy, since adult children are required to perform certain degree of self-sacrifice to sustain their elderly parents, as taught by the tradition.[28]

C. *The Family/State Division on Elder Care*

A robust family system indeed offers the state an effective and efficient solution for privatizing dependency.[29] Taking advantage of the traditional family values and the legalization of the family maintenance duty, Taiwanese government has been utilizing the idea of "interdependent/self-sufficient family" as a justification, or excurse, to sit back on providing social welfare and services.[30] Since the authoritarian era, Taiwan had been known for practicing the so-called "productivity welfare capitalism",[31] referring to the

25. Minfa (民法) [Civil Code] § 1084 (promulgated Dec. 26, 1930, effective May 5, 1931, as amended June 3, 1985) (Taiwan). Article 1084 of the 1930 Civil Code authorizes parental rights and obligation to their minor children. The 1985 amendment added the filial piety requirement to paragraph 1 of the Article and moved the parental rights/obligations provision to paragraph 2.

26. Civil Code § 1118. Article 1118 of the 1930 Civil Code proscribed: "If a person who can no long support his own living if he assumes the obligation of furnishing maintenance to another, he may be exempted from such an obligation." In 1985, one passage is added to article 1118 ". . . , but his obligation could only be relieved if the person entitled to receive maintenance is the elder lineal relatives by blood of the spouse".

27. One exception is that when the adult children themselves are not able to support themselves due to mentally illness or other incapacitated condition, they could be exempted completely from maintenance duty. Please *see* Zuigao Fayuan (最高法院) [Supreme Court], Minshi (民事) [Civil Division], 91 Tai Shang Zi No. 1798 (91年台上字第1798號民事判決) (2002) (Taiwan).

28. Civil Code § 1118. *See also* Tainan Difang Fayuan (臺南地方法院) [Tainan District Court], Minshi (民事) [Civil Division], 109 Jia Qin Sheng Zi No. 27 (109家親聲字第27號民事裁定) (2020) (Taiwan) (The court rejected the adult children's claim for exemption because he himself was struggling to make ends meet).

29. Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1983-2053 (2018).

30. Joseph Chan, *Giving Priority to the Worst Off: A Confucian Perspective on Social Welfare*, *in* CONFUCIANISM FOR THE MODERN WORLD 236, 236-37 (Daniel A. Bell & Chaibong Hahm eds., 2003).

31. Ian Holliday, *Productivist Welfare Capitalism: Social Policy in East Asia*, 48 POL. STUD. 706, 706-23 (2000); Lee Yih-Jiunn (李易駿) & Ku Yeun-Wen (古允文), *Ling Yi Ge Fuli Shijie? Dongya Fazhanxing Fuli Tizhi Chutan* (*另一個福利世界？東亞發展型福利體制初探*) [*Another Welfare*

fact that the government had been very reluctant to expand social welfare programs, except for mandatory education and occupational insurance programs which were considered "productive" in advancing economic development by upgrading human capital and securing work force.[32] In doing so, the state was able to sustain political/social stability and advance economic development. After democratization, the state has taken on a more active approach in providing social services and public assistance.[33] However, the family continues to be entrusted with the primary responsibly of caregiving and financial security of its members, while the government offers limited assistance and relief for the families which fail to stay afloat to take care of their own.

The presumption of the interdependent/self-sufficient family is apparent in the elderly welfare policies, as the Civil Code provides a legal foundation for making dependency problem a family matter. Since the family members bear the maintenance obligation to take care of most senior citizens (as someone's parent, grandparent, head of household, brother and sister, or even parent-in-law), according to the Civil Code, the state could comfortably assigns itself the task to offer supplementary services when it is necessary. The Senior Citizens Welfare Act states that "those who bear the legal maintenance responsibility should take good care of the elders", which reinforces the "family first" ideology of Taiwan's welfare system.[34] As to the state, the statute authorizes and mandates government assistance programs to be established for the elders and their families. For example, the state shall provide temporary/short-term break care services, or provide trainings, information and consultation to family care providers.[35] In addition, for the elders who "encounter difficulties or danger in life, body,

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World? A Preliminary Examination of the Developmental Welfare Regime in East Asian], 31 TAIWAN SHEHUI XUEKAN (臺灣社會學刊) [TAIWANESE J. OF SOCIO.] 189, 189-241 (2003).

32. *Id*.

33. Lai Ding-Yi (賴定佾), Yeh Chung-Yang (葉崇揚) & Ku Yeun-Wen (古允文), *Shehui Touzi Fuli Guojia De Duoyangxing Shehui Zhichu Jiagou De Jianzheng* (*社會投資福利國家的多樣性社會支出架構的檢證*) [*Varieties of Social Investment Welfare states: The Examination of Disaggregated Social Expenditure*], 21 GUOJIA FAZHAN YANJIU (國家發展研究) [J. NAT'L DEV. STUD.] 43, 43-91 (2021); Huang Hsiao-Wei (黃曉薇), *Hougongye Shehuixia De Ertong Zhaogu Celue Yi Ruidian Yu Xibanya Weili* (*後工業社會下的兒童照顧策略：以瑞典與西班牙為例*) [*Child Care Strategies in Postindustrial Societies: A Case Study of Sweden and Spain*], 15 TAIWAN SHEHUI FULI XUEKAN (臺灣社會福利學刊) [TAIWANESE J. SOC. WELFARE] 109, 109-52 (2019).

34. Laoren Fuli Fa (老人福利法) [SENIOR CITIZENS WELFARE ACT] § 30 (promulgated Jan. 26, 1980, as amended Jan. 31, 2007). For further discussion please *see* Chen Chen-Fen (陳正芬), *Woguo Changqi Zhaogu Zhengce Zhi Guihua Yu Fazhan* (*我國長期照顧政策之規劃與發展*) [*The Development of Longterm Care Policies in Taiwan*], 133 SHE QU FAZHAN JIKAN (社區發展季刊) [CMTY. DEV. J.] 192, 197, 199-202 (2011).

35. Laoren Fuli Fa (老人福利法) [Senior Citizens Welfare Act] § 31 (promulgated Jan. 26, 1980, as amended Jan. 31, 2007).

health or freedom due to mistreatment or desertion by their adult children or caregivers," the government shall render proper protection and placement.[36] Even in cases that the government took action to protect the elders in need, the state was considered to be doing the work *for* the elders' interdependent family, since the law authorized the state to seek reimbursement from the elders' children and/or grandchildren, for the service provided by the government.[37] In 2020, the legislature added the elderly person, who received social services, and his/her spouse to the list, along with the grown children, to foot the bill of elder services. Moreover, should some "special reasons" present, such as financial difficulties or their maintenance duty has been officially relieved by court orders, they may be exempted completely from payment.[38] Nonetheless, the revision does not change the relationship between the family and state regarding to elder welfare. Under the current legal framework, the elder support/care is first and foremost the responsibility of the interdependent family. That is, elder care has been categorized as a private affair, and the state is only to offer temporary and supplementary help when the family fails.

III. THE PARENT MAINTENANCE DUTY AND ITS DISCONTENT

Honoring the traditional virtue of filial piety, the 1985 amendment highlighted and strengthened the adult children's duty to support elderly parents. However, as social change continued, the meaning of filial piety changed as well. The universal and unconditional duty imposed on children has soon become unacceptable to many people. The 2010 amendment to the Civil Code allows children to be exempted from their maintenance duty to support their parents who did not fulfill their parental duty or were abusive. Not only does such reform reflect the family norm change, but also change the relationship between the state and the family in terms of social security and elderly welfare.

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36. Laoren Fuli Fa (老人福利法) [SENIOR CITIZENS WELFARE ACT] § 41(1) (promulgated Jan. 26, 1980, as amended May 27, 2020).

37. Laoren Fuli Fa (老人福利法) [SENIOR CITIZENS WELFARE ACT] § 41(3) (promulgated Jan. 26, 1980, as amended May 27, 2020). For discussion, please *see* Lee Hwai-Tzong (李惠宗), *Cong Tixi Zhengyi Lun Laoren Fulifa Shan Ganzhifeiyong Zhi Qiuchang Jianping Zuigao Xingzheng Fayuan Yilingyi Niandu Panzi Di Wuliuerhao Panjue* (*從體系正義論老人福利法上「安置費用」之求償－兼評最高行政法院101年度判字第562號判決*) [*Redeeming Elder Placement Fee-Comment on the Supreme Administrative Court's Judgment 101 Pan Zi No.562*], 133 CAIPAN SHIBAO (裁判時報) [COURT CASE TIMES] 12, 12-26 (2023).

38. Laoren Fuli Fa (老人福利法) [SENIOR CITIZENS WELFARE ACT] § 41(3), (4) (promulgated Jan. 26, 1980, as amended May 27, 2020). LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 109:37, 4, 9 (2020).

A. *The 2010 Reform: Making the Maintenance Duty Reciprocal*

It should be noted that the family maintenance duty was first designed to be mutual, unconditional, but not necessary reciprocal. The traditional family norms compelled children to respect and support their parents no matter how/whether or not the parents had raised or provide for them, meaning that children should not be excused from their duty even if they have been deserted or mistreated by parents, since "parents could never be wrong", as an old saying goes.[39] Reflecting such traditional norm, the Civil Code ordered that all parents are entitled to children's support. Whether or not had they fulfilled their parental responsibility at the first place was beside the point. All the court needed to issue a parental maintenance order was to verify the fact that the parent was now in need of support. Although some adult children had refused to pay any maintenance to their parent who had walked out on them when they were young,[40] or victimized them with violent acts[41], the "my parent was the one at fault in the first place" defense had not worked well in the courts. In other words, the family maintenance duty was designed as a no-fault system in the 1930 Civil Code, meaning that the family members should support one another, when necessary, regardless how they treated one another or they like it or not. As long as the family relations existed, they owed one another the duty of support. This legalization of family maintenance duty has turned the idea of family responsibility or family bond from a traditional virtue, cultural heritage, or moral expectation into an enforceable legal obligation.

However, as social change continues, family norms and practices evolve as well. Some individuals' doubt on children's unconditional devotion to parents gradually turned into the society's discontent with the maintenance law dwelling on the traditional understanding of filial piety. Changes regarding family values and practices have been going on since Taiwan's rapid economic and social development in the late 1980s. A series of national

39. Huang Yuan-Sheng (黃源盛), *Lixing Zhijian Cong Gongyang Youguan Dao Yiqi Zunqinshu* (*禮刑之間－從供養有關到遺棄尊親屬*) [*Between Li and Xing: From Maintenance Lack to Abandonment of Lineal Ascendant*], 23 FAZHISHI YANJIU ZHONGGUO FAZHISHI XUEHUI HUIKAN (法制史研究：中國法制史學會會刊) [J. LEG. HIST. STUD.] 67, 102-03 (2013).

40. Please *see* Zhanghua Difang Fayuan (彰化地方法院) [Changhua District Court], Minshi (民事) [Civil Division], 96 Jia Su Zi No.12 (96家訴字第12號民事判決) (2007) (Taiwan); *See also*, Taoyuan Difang Fayuan (桃園地方法院) [Taoyuan District Court], Minshi (民事) [Civil Division], 98 Jia Su Zi No.140 (98家訴字第140號民事判決) (2008) (Taiwan).

41. Please *see* Taibei Difang Fayuan (臺北地方法院) [Taipei District Court], Minshi (民事) [Civil Division], 96 Jia Su Zi No. 93 (96家訴字第93號民事判決) (2007) (Taiwan) (Arguing that the father had never supported them and they have been the victim of his abusive behavior and harassment them till this day; *See also* Gaoxiong Difang Fayuan (高雄地方法院) [Kaohsiung District Court], Minshi (民事) [Civil Division], 93 Zhong Jia Su Zi No. 5 (93重家訴字第5號民事判決) (2004) (Taiwan) (Arguing that their father did not provide for the family and they have obtained a restraining order against their father's abuse and harassment).

survey conducted from 1985 to 2005 showed that "family harmony" is still the most cherished family value for Taiwanese people. But the concept of family harmony no longer implies absolute parental authority. Rather, it originates in family members' mutual affection, communication, and sharing resources, with each member's autonomy and dignity well-respected. In addition, the modern idea of "reciprocal filial piety," which emphasizes on mutual support between elderly parents and adult children, has gained preference among Taiwanese people over the traditional teaching of "authoritarian filial piety" that stresses children's moral obligation and obedience.[42] In another empirical study on interaction between adult children and parents, the author finds family intergenerational solidarity remains strong, but the support between elderly parents and adult children is more reciprocal than unilateral. The common family practice is for the young generation to provide financial support while the elderly parents offer certain assistance, such as family chores or child care, in return.[43] As the studies show, the duty to support elderly parents continues to be vital, but it is honored because of the mutual care and help between parents and children, rather than tradition or parental authority. In modern Taiwan, children's respect or support to elderly parents is no longer unconditional nor taken for granted. It should be earned by their parents and sustained by efforts from both sides.

With the family norms and practices gradually leaning toward the reciprocal and mutual support between generations, adult children's legally unconditional and unilateral maintenance duty may appear to be unfair or unreasonable. In 2009, a daughter's refusal to pay maintenance to her estranged mother caught public attention and placed the maintenance law under scrutiny. Ms. Cheng was born without her left hand. She grew up in a child welfare institution with a difficult childhood since her mother had deserted her in her tender years. After more than 30 years, the mother, now ill and lacked means to sustain herself, showed up and asked for Ms. Cheng's aid but found the resentful daughter declined to offer her anything. The mother then filed a suit for parent maintenance. Realizing that she was

42. Yeh Kuang-Hui (葉光輝), Chang Ying-Hwa (章英華) & Tsao Wei-Chun (曹惟純), *Taiwan Minzhong Jiating Jiazhiguan Zhi Bianqian Yu Keneng Xinli Jizhi* (*台灣民眾家庭價值觀之變遷與可能心理機制*) [*The Changing of Family Values and Its Underlying Psychological Mechanism in Contemporary Taiwan*], *in* TAIWAN DE SHEHUI BIANQIAN YIJIUBAWU ZHI ERLINGLINGWU JIATING YU HUNYIN (台灣的社會變遷1985~2005：家庭與婚姻) [SOCIAL CHANGE IN TAIWAN 1989-2005: FAMILY AND MARRIAGE] 29, 29-73 (Yi Chin-Chun (伊慶春) & Chang Ying-Hwa (章英華) eds., 2012).

43. Lin Ju-Ping (林如萍), *Taiwan Jiating De Daijian Guanxi Yu Daijian Hudong Leixing Zhi Bianqian Qushi* (*台灣家庭的代間關係與代間互動類型之變遷趨勢*) [*Intergenerational Relations and a Typology of Intergenerational Interaction between Adult Children and Parents: Trends in Taiwanese Families, The Changing of Family Values and Its Underlying Psychological Mechanism in Contemporary Taiwan*], *in* SOCIAL CHANGE IN TAIWAN, 1989-2005: FAMILY AND MARRIAGE, *id*. at 76, 76-124.

strictly bound for the legal obligation, the aggrieved Ms. Cheng sent petitions to various government branches and went on media to express her resentment to her mother and the law.[44] Cheng's case was widely reported and soon provoked a public outcry. The parent maintenance provisions were fiercely criticized as an outdated and unfair legal arrangement overly protecting the undeserving parents at the expense of children's suffering and distress.[45] The Congress soon took action. Within months, the amendment to the Civil Code was passed in January 2010.[46] This amendment releases the obligated adult children from maintenance or lower the maintenance payment if their parent has abused or deserted them.[47] On the same day, an amendment to the Criminal Code was passed as well, preventing victims of domestic violence or child abandonment from being charged for deserting their abusive parents,[48] a crime punishable for up to seven and half years in jail.[49]

The 2010 amendment allows many resentful adult sons and daughters to rebut parent maintenance claims on the grounds of the parents' abuse or desertion in the past. Despite some scholars' laments that the traditional family virtues are no longer cherished by the society,[50] many adult children

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44. Liu Xin-Kui (劉欣達), *Younian Zao Mu Yiqi Sanshisan Nian Hou Beimu Gao Qiyang* (*幼年遭母遺棄33年後　被母告棄養*) [*Deserted in Her Young Age, Her Mother Now Demands Maintenance*], TVBS XINWEN WANG (TVBS新聞網) [TVBS NEWS WEB] (Mar. 31, 2009), https://news.tvbs.com.tw/local/125761; Siang Cheng-Zheng (項程鎮), *Wufa Yiqi Shuangqin Shei Lian Jiabao Er* (*無「法」遺棄雙親，誰憐家暴兒*) [*A joint press conference held by the Garden of Hope Foundation and the Legal Aid Foundation called for legal reform to release victims of domestic violence from their legal obligation to support their parent/perpetrator*] ZIYOU SHIBAO (自由時報) [LIBERTY TIMES] (June 25, 2009), http://news.ltn.com.tw/news/society/paper/314018.

45. Yang Pei-Hua (楊培華) & Yao Yueh-Hung (姚岳宏), *You Zao Mu Yiqi Sanshisan Nian Hou Beimu Gao Qiyang* (*幼遭母遺棄 33年後　被母告棄養*) [*Left Behind by Mother but Being sued for Desertion after 33 years*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES] (Mar. 31, 2009), https://news.ltn.com.tw/news/focus/paper/291728.

46. LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 99:5, 353-69 (2010).

47. The court may exempt or reduce children's maintenance duty in the case when the parent (or the person entitle to maintenance): (1) "has intentionally maltreated, insulted or committed severe misconduct, physically and/or psychologically, against the obligated child (or the person liable for maintenance), his/her spouse, or his/her lineal relatives" (i.e., parents and children), or (2) "without justifiable reason, the parent (or the person entitle to maintenance) fails to fulfill the obligation to support the obligated children (or the person liable for maintenance)" Minfa (民法) [Civil Code] § 1118-1 (promulgated Dec. 26, 1930, effective May 5, 1931, as amended Jan. 27, 2010) (Taiwan).

48. Zhonghua Minguo Xing Fa (中華民國刑法) [Criminal Code] § 294-1, (promulgated Jan. 1, 1935, effective July 1, 1935, as amended Jan. 27, 2010) (Taiwan). *See, e.g,*. Huang Jung-Chien (黃榮堅), *Erlingyiling Nian Xingshifa Fazhan Huigu Yuwang Niandai Yuwang Xingf*a (*2010年刑事法發展回顧：慾望年代，慾望刑法？*) [*Developments in the Law in 2010: Criminal Law*], 40 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U. L.J.] 1795, 1812-15 (2011); Tseng Shu-Yu (曾淑瑜), *Shishei Yiqi Shei* (*是誰遺棄誰*) [*Who Deserted Whom?*], 178 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L.J.] 288, 296 (2010).

49. Criminal Code § 294 & § 295.

50. Lee Chao-Huan (李兆環), *Minfa Qinshubian Zengding Di Yiqianyibaishibatiao Zhi Yi Jianqing Huo Mianchu Fuyang Yiwu Zhi Xingsi* (*民法親屬編增訂第1118條之1－減輕或免除扶養*

have rushed to courts to ask for exemption from parent maintenance, while some others have successfully rebutted their parents' maintenance requests. Since then, many elderly parents have to live with the consequences of their own abusive behavior or the decision of walking out on their children many years ago.[51] For example, in a New Taipei District Court case, an elderly father sought maintenance from his children. The three adult children rebutted, arguing that the petitioner not only had never provided for the family, but also made them and their mother miserable with his constant violence, harassment and intimidation. Even though the petitioner was obviously in need of support, suffering from cancer and financially broke, the court ruled for the respondents, exempting them from the maintenance duty.[52] In another Tainan District Court case, a son brought his elderly mother to court, asking for exemption from maintenance payment. The son claimed that his mother left home right after his birth. Since his father had been dead, he was raised by his grandmother and aunt. The mother had never contacted him. When he finally got a hold of his mother's address, the then high school boy paid a visit to his mother but only found out that he was introduced as a relative's child to her new family. The heart-broken son had never met with his mother ever since and refused to have anything to do with her. Even though the mother now was seriously ill and placed in a welfare facility by the government, the petitioner pleaded the court for exemption since his mother had never done her part as a parent. The court agreed.[53] There are many cases telling the similar stories that the adult children rejected to fulfill their duty to the estranged and/or abusive parents.[54] Some rebutted their parents' petition in court while others went to court for an exemption even before they were sought out by their parents or the government.[55]

義務之省思) [*Reflection on the Amendment of the Article 1118-1 of the Civil Code*], 6 ZAIYE FACHAO (在野法潮) [DISSENT] 13, 14 (2010).

51. The cases presented and discussed in this part of the article are selected district court decisions citing article 1118-1 of the Civil Code between 2017 and 2022. Judicial Yuan Judicial Decision System, https://judgment.judicial.gov.tw/FJUD/default.aspx (last visited July 17, 2022).

52. Xinbei Difang Fayuan (新北地方法院) [New Taipei District Court], Minshi (民事) [Civil Division], 109 Jia Qin Sheng Zi No. 124 (109家親聲字第124號民事裁定) (2020) (Taiwan) (the father had never supported his children and committed domestic violence even after divorce).

53. Tainan Difang Fayuan (臺南地方法院) [Tainan District Court], Minshi (民事) [Civil Division], 110 Jia Tiao Cai Zi No. 61 (110家調裁字第61號民事裁定) (2021) (Taiwan) (the petition's mother left right after he was born and claimed he was not her child in front of the mother's new husband); *See, e.g.*, Jiayi Difang Fayuan (嘉義地方法院) [Chiayi District Court], Minshi (民事) [Civil Division], 111 Jia Tiao Cai Zi No. 20 (111家調裁字第20號民事裁定) (2022) (Taiwan).

54. *See, e.g.*, Taidong Difang Fayuan (臺東地方法院) [Taitung District Court], Minshi (民事) [Civil Division], 109 Jia Qin Sheng Zi No. 11 (109家親聲字第11號民事裁定) (2020) (Taiwan); *See also* Taizhong Difang Fayuan (臺中地方法院) [Taichung District Court], Minshi (民事) [Civil Division], 111 Jia Qin Sheng Zi No. 510 (111家親聲字第510號民事裁定) (2022) (Taiwan).

55. *See, e.g.*, Xinbei Difang Fayuan (新北地方法院) [New Taipei District Court], Minshi (民事)

Some courts are more reluctant to order a complete exemption from children's maintenance duty, though. In a Taipei District Court case, the respondent refused to support his ailing father (petitioner) had never provided for him after divorce. The court did not grant to a complete exemption and instead ordered a reduced maintenance payment of 5,000 N.T. dollars (approximately 154 U.S. dollars) per month for the father had fulfilled some parental responsibility during his marriage.[56] Another case involved an elderly mother sued her adult daughter for maintenance. The daughter rebutted that her parents were divorced when she was three years old. Her mother had left home and never cared for her ever since. The daughter further claimed that she herself was struggling financially and thus unable to offered any maintenance payment. Nonetheless, the court ordered the adult daughter to pay 2,000 N.T. dollars (approximately 65 U.S. dollars) per month to her mother.[57] Such a small payment in fact was far less than enough to support the elderly. It was more like a token to honor the parent maintenance duty as well as the children's moral responsibility.

B. *The Predicament of the "Undeserving" Parents*

The family maintenance law ensures individuals to be supported by their families and therefore creates a private safety net for those who become vulnerable and dependent. For the elderly people who need financial assistance and care, they are expected to seek a helping hand from their adult children, should they have any, rather than the state welfare system, since the Public Assistance Act makes it clear that cash relief is to help the struggling families/households, not the individuals. As mentioned earlier, only those individuals who have no family or in special circumstances would the social

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[Civil Division], 107 Jia Qin Sheng Zi No. 178 (107家親聲字第178號民事裁定) (2018) (Taiwan) (two adult daughters asked the court to free them from their obligation by claiming that their father had left them and their mother since they were 2 and 5 years old. The court instructed the two daughters to pay a reduced amount of maintenance payment); *See also* Shiling Difang Fayuan (士林地方法院) [Shiling District Court], Minshi (民事) [Civil Division], 106 Jia Qin Sheng Zi No. 310 (106家親聲字第310號民事裁定) (2017) (Taiwan) (the petitioners asked the court to grant an exemption, claiming that their father left home when the petitioners were 2 and not yet to be born. The court freed all the maintenance duty from the petitioners); Hualian Difang Fayuan (花蓮地方法院) [Hualien District Court], Minshi (民事) [Civil Division], 110 Jia Tiao Cai Zi No. 20 (110家調裁字第20號民事裁定) (2021) (Taiwan) (the court order a complete exemption to adult children for the father who were violent to his divorced wife and never paid child support to his young children); Taoyuan Difang Fayuan (桃園地方法院) [Taoyuan District Court], Minshi (民事) [Civil Division], 111 Jia Tiao Cai Zi No. 28 (111家調裁字第28號民事裁定) (2022) (Taiwan) (the parent pleaded no contest to the adult children's accusation for failing to support).

56. Taibei Difang Fayuan (臺北地方法院) [Taipei District Court], Minshi (民事) [Civil Division], 111 Jia Tiao Cai Zi No. 32 (111家調裁字第32號民事裁定) (2022) (Taiwan).

57. Zhanghua Difang Fayuan (彰化地方法院) [Changhua District Court], Minshi (民事) [Civil Division], 106 Jia Qin Sheng Zi No. 77 (106家親聲字第77號民事裁定) (2018) (Taiwan).

welfare system come to their aid. Such family-centered welfare system had been sustained by the traditional norms and the strict parent maintenance duty prescribed by the Civil Code. However, after the concept of "parent's fault" was introduced to the parent maintenance law, adult children may ask the courts to exempt or reduce their obligation as long as their parents are found indeed undeserving of their support. It means that the once durable and faithful private safety net for the elders is no longer unconditional. In the cases where children argued for exemption, very few parents contested the claim that they had failed their parental responsibilities.[58] Although some of the elderly petitioners might hope their children would be compelled to show their respect and perform their duty no matter what happened in the past, many of them did not expect to collect maintenance payments from their adult children at all. Their motivation of suing their children lay elsewhere.

Since the state welfare system assumes that the applicants should be helped by their family members, especially their adult children, first, some elderly applicants were convinced (with or without social workers' encouragement) that it is best for them to have the judicial decree to prove that they did have "special reasons" or under "special circumstances" to bypass the family safety net,[59] even though the Public Assistance Act does not require any judicial involvement in the process of approving welfare applications.[60] In any way, the elderly applicants must make a claim to

58. Taibei Difang Fayuan (臺北地方法院) [Taipei District Court], Minshi (民事) [Civil Division], 106 Jia Qin Sheng Zi No. 389 (106家親聲字第389號民事裁定) (2017) (Taiwan) (four adult children came before the court arguing that their father had constantly abused them when they were young, even though the father denied the accusation, the court ordered that the adult children's duties were all relieved for the father had committed domestic violence against them); *See* Shiling Difang Fayuan (士林地方法院) [Shiling District Court], Minshi (民事) [Civil Division], 110 Jia Qin Sheng Zi No. 230 (110家親聲字第230號民事裁定) (2021) (Taiwan); Taidong Difang Fayuan (臺東地方法院) [Taitung District Court], Minshi (民事) [Civil Division], 109 Jia Qin Sheng Zi No. 11 (109家親聲字第11號民事裁定) (2020) (Taiwan); Taoyuan Difang Fayuan (桃園地方法院) [Taoyuan District Court], Minshi (民事) [Civil Division], 105 Jia Qin Sheng Kang Zi No. 7 (105家親聲抗字第7號民事裁定) (2016) (Taiwan).

59. The possibility that the elders might be encouraged or urged by social welfare agencies to file suits against their estranged children in order to provide the definite evidence to meet the requirement provided by Article 5, Paragraph 3, Subparagraph 9 of the Public Assistance Act, allowing the individuals who have failed to carry out the maintenance duty due to special reasons to be excluded from the applicant's members of the household, has raised concerns and even triggered an official investigation conducted by the Control Yuan. Please *see generally* JIANCHA YUAN (監察院) [THE CONTROL YUAN], WANG YU-LING DIAOCHA BAOGAO (王幼玲調查報告) [INVESTIGATION REPORT OF YU-LING WANG], 108 Neidiao 0081 (108內調0081) (2019).

60. Shiling Difang Fayuan (士林地方法院) [Shiling District Court], Minshi (民事) [Civil Division], 111 Jia Qin Sheng Zi No. 87 (111家親聲字第87號民事裁定) (2022) (Taiwan) (the petitioner brought suit to his adult children under the advisement of the social worker of the Taipei city government in order to qualify cash benefit for low income household); Yunlin Difang Fayuan (雲林地方法院) [Yunlin District Court], Minshi (民事) [Civil Division], 108 Jia Tiao Cai Zi No. 17 (108家調裁字第17號民事裁定) (2019) (Taiwan) (the petitioner pleaded no contest to the adult children's

government authority that they are not worthy of parent maintenance. In other words, these elderly people may not only find themselves in the state of financial and physical vulnerability, they also face another legal predicament. That is, their entitlement of social welfare benefit as a citizen in fact hinges upon the status of their family membership. Only when they are willing to admit their failure of being responsible parents could they be granted the state assistance.

In most cases where children argued for exemption, the parents were obvious failing their parental responsibility. But it is not always easy to clarify who or what to blame for a parent left her children behind, as some elderly mothers tried to explain to the courts why they became absent mothers. In a case where the elderly mother sought maintenance from her son, the petitioner admitted that she had never cared for or visited her son ever since divorce. She did not intend to give up the duty as a mother, she explained. After divorce, her ex-husband refused her visitation or providing child support to her son, and therefore she had no way to participate in her son's life.[61] The court held that despite the mother indeed failed to support her child, she was not intentionally deserted him and thus the court ordered the son to pay a reduced amount of maintenance.[62] In another case, the elderly mother told the court that she did not provide and care for her daughter, because she was prohibited by her ex-mother-in-law from visiting her daughter after divorce. According to the petitioner, her ex-husband's family moved away and tried to hide her baby daughter from her after divorce. On the other hand, the estranged daughter insisted that she had never felt love or been cared by her mother for a single day. She was raised by her uncle and aunt and they were the only family she knew. Unlike the previous case, the court was not sympathized with the mother and relieved the adult daughter from all duties, because the fact indicated that the petitioner "had not carried out the responsibility as a mother".[63]

Until the 1990s, the Taiwanese family law was deeply affected by the

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claim for exemption, saying that the suit was meant to apply public assistance). Lee Li-Ling (李莉苓), *Jianqing Huo Mianchu Fuyang Yiwu Xiangguan Shiwu Wenti Yanxi* (*減輕或免除扶養義務相關實務問題研析*) [*An Analyze of the Parent Maintenance Law: Cases And Problems*], 2112 SIFA ZHOUKAN (司法周刊) [JUD. WKLY.] 35, 35-45 (2022).

61. Xinbei Difang Fayuan (臺北地方法院) [New Taipei District Court], Minshi (民事) [Civil Division], 106 Jia Qin Sheng Zi No. 880 (106家親聲字第880號民事裁定) (2018) (Taiwan).

62. *Id.*

63. Shiling Difang Fayuan (士林地方法院) [Shiling District Court], Minshi (民事) [Civil Division], 106 Jia Qin Sheng Zi No. 141 (106家親聲字第141號民事裁定) (2017) (Taiwan); *See also* Pingdong Difang Fayuan (屏東地方法院) [Pingtung District Court], Minshi (民事) [Civil Division], 107 Jia Qin Sheng Zi No. 85 (107家親聲字第85號民事裁定) (2018) (Taiwan) (the petitioner/mother pleaded that her mother-in-law kept her child away from her after her husband's death, but the court granted the full exemption to her adult child for failing to fulfill her parental duty).

patriarchal ideology and did not care much for the equal right of the divorced wife/mother.[64] According to the Civil Code of 1930, upon parents' consensual divorce, child custody went directly to the father, no court procedure was required for either divorce or custody. Even when the divorce was court-ordered, the father still got an upper hand regarding to child custody, unless he was proved unfit for raising the child.[65] The law reflected the traditional patriarchal norms that children belong to the father's family. As to the mother, once being divorced, was just an outsider of the father's family. Since most divorced mothers could not obtain child custody, they had no option but to leave children to the father. It would appear to be the mother "walk out on them" from the children's perspective. Moreover, the idea of the visitation right was not yet to be introduced in Taiwan's Civil Code and thus it was up to the father's family to decide whether or not the noncustodial mother was allowed to see her child. While the society and the ex-husband's family were not exactly friendly to a divorced woman, she was not entitled or even encouraged to see her own children after divorce. Some divorced mothers might find the children moved away,[66] others might be prohibited from seeing their children by the hostile ex-husband's family, or some mothers might refrain from confrontation or causing any disturbance to children's life. It was not uncommon for a divorced mother did not get to see their children ever since. The law's bias and discrimination against mothers finally ended when the 1996 Civil Code amendment stipulated that the mother has the equal right to child custody[67] and the noncustodial parent is entitled with visitation rights.[68] Sadly, the law reform might come too late for many divorced mothers to resume contact with their alienated children. Now, the law gives these adult children the legal ground to deny parent maintenance because the divorced mother failed to do her part of parenting. As we have seen, many did choose to act on it. For those adult children who grew up without their mothers' company, the pain or the void were very real and not easy to forgive and forget. But are these divorced mothers "at fault"

64. Chen & Huang, *supra* note 3, at 183-89.

65. Minfa (民法) [Civil Code] § 1051 & § 1055 (promulgated Dec. 26, 1930, effective May 5, 1931, as amended Sept. 25, 1996) (Taiwan).

66. Pingtung District Court, Civil Division, 107 Jia Qin Sheng Zi No. 85, *supra* note 63; *See also* Tainan Difang Fayuan (臺南地方法院) [Tainan District Court], Minshi (民事) [Civil Division], 110 Jia Tiao Cai Zi No. 41 (110家調裁字第41號民事裁定) (2020) (Taiwan) (The petitioner/mother pleaded that she had no way of keeping in touch with her children after divorce, since the children's custody went to her divorced husband and they moved away right after the divorce).

67. Minfa (民法) [Civil Code] § 1055 (promulgated Dec. 26, 1930, effective May 5, 1931, as amended Sept. 25, 1996) (Taiwan): "After the husband and the wife effect a divorce, one party or both parties of the parents will exercise the rights or assume the duties in regard to the minor child by mutual agreement".

68. *Id*.: "The court may decide the way and period of meeting or communication with the minor child by the application of the party who could not exercise the right and assume the duties in regard to the minor child, or by its authority . . .".

because they did not insist on finding a way to support their children, despite the legal barrier or the hostility from their former husbands? Or they should have tried to stay in the marriage at all cost for the sake of staying with their children? Should the patriarchal family laws, or the unfriendly father and his family, be the ones "at fault" and deserve to blame?[69]

Though it might seem harsh to some elderly parents, as those divorced mothers mentioned above, the 2010 amendment of the Civil Code has transformed the parent maintenance duty from an inherited and unconditional responsibility toward a reciprocal, and rebuttable obligation.[70] It means that the once robust and ideal family safety net for the elderly parents was no longer thorough and incontrovertible. This legal development not only affects parent-child relationship or family law, but also the state welfare system, for it would have to step up to serve more elderly people without family support.[71]

IV. BETWEEN THE INTERDEPENDENT FAMILY AND THE STATE

As the 2010 amendment provides a possibility for adult children to wave or reduce their parent maintenance duty, it indeed makes the parent maintenance duty less absolute, but it does not change the basic structure of family maintenance law all together or the underpinning ideology of the "interdependent family", which is expected to keep the young, the poor, the ill, and especially the elderly, in family care and financial support.

Piggy-bagging on the web of legalized maintenance responsibility, the state has defined itself as the facilitator for the self-reliant family. It is to provide subsidy and service to the families and to take care of the few individuals who happen to slip through the private safety net. In other words, the family is assigned to take primary responsibility for solving the dependency problem as the state assumes the supplementary role. However, the once stable family/state division is under serious challenge in reality and in norm. It seems that more and more families/households have overwhelmed by such responsibility, as the Taiwanese population being rapidly aging. Moreover, the family first elder welfare policy has raised questions about equality and dignity.

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69. Yang Pei-Shan (楊培珊) & Chen Bo-Ren (陳柏仁), *FuYang Yiwu Xiangduihua Yu laoRen Fuzhi Baozhang Shiwu Fenxi* (*「扶養義務相對化」與老人福祉保障實務分析*) [*From Compulsory to Conditional Filial Support by Adult Children: Implications for the Wellbeing of Aging Parents in Taiwan*], 141 SHEQU FAZHAN JIKAN (社區發展季刊) [CMTY. DEV. J.] 331, 332, 339-40 (2013).

70. Lin, *supra* note 19, at 115-19.

71. Chen & Huang, *supra* note 3, at 193-99.

A. *The Family-Centered Elder Welfare System*

Elderly people are more likely to suffer from poverty.[72] Most of them have stopped working or worked less hours and earn less wages because of health issues or retirement. Thus, many elderly people are "inevitable dependents" as Professor Fineman describes.[73] In Taiwan, many elders do depend on their family members as constructed and encouraged by the legal system. According to a 2022 national survey on Taiwanese elderly people, more than 63% of the respondents lived with their adult children and/or grandchildren, and many of them reported them that their primary income was provided by their adult children or grandchildren.[74] As family members are legally obligated, according to the Civil Code, to depend on one another through a tough time, the state's social welfare system is designed to support and rejuvenate the self-sufficient families. The Public Assistance Act authorizes the government to provides cash benefits and subsidies to low-income and lower middle-income households, to serve those households/families in need, rather than the individuals. To apply for cash benefits, the families/households must satisfy the following requirements: (1) their average divided monthly income among each member in the family/household falls below the minimum living standard; (2) the family members' total assets do not exceed the threshold set up by local governments.[75] In other words, the public assistance is available only when the whole family/household is in trouble financially. The next question is: who counts as members of the "household" in the eyes of the public assistance program? In the earlier version of the Public Assistance Act,[76] the

72. Leu Chao-Hsien (呂朝賢), *Pinqiong Dongtai Ji Qi Chengyin Cong Shengming Zhouqi Dao Shengming Licheng* (*貧窮動態及其成因－從生命週期到生命歷程*) [*The Dynamics of Poverty and Its Causes: From Life Cycle to Life Course*], 14 TAIDA SHEHUI GONGZUO XUEKAN (臺大社會工作學刊) [NTU SOCIAL WORK REVIEW] 167, 174-77 (2007); Wang Yeong-Tsyr (王永慈), *Taiwan De Pinqiong Wenti Xiangguan Yanjiu De Jianshi* (*台灣的貧窮問題：相關研究的檢視*) [*The Phenomenon of Poverty in Taiwan: A Review of Research*], 10 TAIDA SHEHUI GONGZUO XUEKAN (臺大社會工作學刊) [NTU SOCIAL WORK REVIEW] 1, 32-34 (2005).

73. *See generally* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004).

74. MINISTRY OF HEALTH AND WELFARE, *Report of the Senior Citizen Survey of 2022*, *supra* note 2, at 4 & 23. According to the same national survey conducted in 2017, more than 61% of the respondents lived with their adult children and/or grandchildren. 24% of them reported that their primary income was provided by their adult children or grandchildren, while 15% of the elderly relied on public assistance or social welfare. Please *see* MINISTRY OF HEALTH AND WELFARE, *Report of the Senior Citizen Survey of 2017*, *supra* note 2, at 13 & 52.

75. Shehui Jiuzhu fa (社會救助法) [Public Assistance Act] § 4 (promulgated and effective June 14, 1980, as amended Dec. 30, 2015) (Taiwan).

76. Shehui Jiuzhu fa (社會救助法) [Public Assistance Act] § 5 (promulgated and effective June 14, 1980, as amended Nov. 19, 1997) (Taiwan). According to Article 5 of the Public Assistance Act of 1997, the total income and assets of the whole family include income and assets of the applicant and his following family members, the applicant, (grand)parents, (grand)children and those who bear

scope of "household" subject to state cash benefits was almost identical to the interdependent family prescribed in the Civil Code. It means that in order to qualify as the cash relief recipient, all assets and income of the applicant's parents, grown children and the siblings living under the same roof have to be pulled together to meet the requirements. As most extended families have divided into smaller households and many individuals have grown out of their family to obtain financial independence, the legal definition of low-income households disregards the facts that the picture of "interdependent families" described in the Code book had no longer reflected the reality. The Act was widely criticized for its harshness and ignorance of social change.[77]

In response, the lawmakers reviewed and revised the definition of the (middle) low-income households not once, but four times between 1997 to 2010, to downsize the household and allow exemptions.[78] Currently, the essential members of "the household" are the applicant and his/her spouse, parents and children, unless they are qualified as exemptions.[79] Other members include grandparents and grandchildren who are living or registered in the same household, and the one who identifies the applicant as dependent in his/her tax return.[80] Despite such definition departing further from the Civil Code's "interdependent family", the familism ideology remains. The self-sufficient family/household consisted of marriage and parent-child relationship is still expected to provide first line security for every individual, with some exceptions.

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family maintenance duty, according to the Civil Code and registered or lived in the same household.

77. Tsai Wei-In (蔡維音), *Dishouruhu Shencha Zhi Jiating Renkou Rending De Shiwu Guancha Yu Xiufa Jianyi* (*低收入戶審查之家庭人口認定的實務觀察與修法建議*) [*Defining Low Income Family-The Practice and the Future Amendment*], 277 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 200, 200-10 (2018); Chang Tung-Jui (張桐銳), *Lun Xianfa Shang Zhi Zuidi Shengcun Baozhang Qingqiuquan* (*論憲法上之最低生存保障請求權*) [*On the Constitutional Right to Minimum Subsistence Guarantee*], 123 ZHENGDA FAXUE PINGLUN (政大法學評論) [CHENGCHI L. REV.] 121, 163-68 (2011).

78. Sun Chien-Chung (孫健忠), *Qinshu Zeren Yu Shehui Jiuzhu Fuzhu Huo Kongzhi* (*親屬責任與社會救助：扶助或控制？*) [*Family Responsibility and Public Assistant: Assistance or Control?*], 103 SHEQU FAZHAN JIKAN (社區發展季刊) [CMTY. DEV. J.] 184, 187-94 (2003).

79. Shehui Jiuzhu fa (社會救助法) [Public Assistance Act] § 5(1)(2) (promulgated and effective June 14, 1980, as amended Dec. 29, 2010) (Taiwan): "To calculate the number of members living in the household defined in the first paragraph of Article 4, except for the applicant, please also include the following: 1. Spouse.2. First-degree lineal blood relatives." Shehui Jiuzhu fa (社會救助法) [Public Assistance Act] § 4 (promulgated and effective June 14, 1980, as amended Dec. 30, 2015) (Taiwan).

80. Shehui Jiuzhu fa (社會救助法) [Public Assistance Act] § 5(1)3. & 4. (promulgated and effective May 30, 1980, as amended Dec. 29, 2010): "3. Other lineal blood relatives and siblings who live in the same dwelling or who are registered in the same household. 4. Other than the above three, taxation obligees who support their family members financially are not required to include the amount spent in support at the time of reporting their combined income taxes."

B. *The Challenge of Family's Elder Care Responsibility*

By connecting the family maintenance duty to the social welfare system, the interdependent/ self-sufficient family has been regarded as a prerequisite of the state's public assistance programs. Such incorporation has turned the family maintenance, parent maintenance especially, into an unbearable burden for both elders and their estranged grown (grand) children. As discussed earlier, for an elderly person to file for public assistance, one needed to show that his/her family members were financially unable, or legally exempted, to support him/her, according to the Public Assistance Act. The exemption clause did include the "special or harsh circumstances",[81] but did not necessary recognize children's refusal of support as one of such special cases. For those elderly who thus did not qualify for public relief, what they could do was to take his/her children to Family Court to claim maintenance as the Civil Code prescribes. However, not many maintenance cases were filed until the Congress passed the 2010 amendment to Civil Code, freeing the children from supporting their absent or abusive parents. The reform on parent maintenance law not only releases these adult children's legal duty, it also gives their parents a hope for receiving public assistance since it is now possible to exclude these alienated children from his/her household/family. After 2010, many the maintenance cases find their way into family court.[82] While adult children sought to wave legal responsibilities toward their elder parents, elder parents either wished to receive support or to make it official that they are unable to depend on their interdependent family and thus eligible to public assistance. Wherever the petitioners' intentions lay, they the escalation of such cases represented people's discontent with the legalization of the interdependent/self-sufficient family imagined and imposed by the legislature.

For the families dutifully take on the responsibly to support their elderly parents, the maintenance duty has gradually become too much to bear for many. With the birthrate continues to plunge,[83] Taiwanese family becomes

81. Shehui Jiuzhu fa (社會救助法) [Public Assistance Act] § 5(1)9. (promulgated and effective May 30, 1980, as amended Dec. 29, 2010).

82. According to the Judicial Yuan, the district court cases citing article 1118-1 of the Civil Code increased from 226 in 2015 to 433 in 2017. In 2018, there were 492 cases closed by November. Besides, it is reported that, from 2013 to 2017, most family law cases handled or represented by the Legal Aid Foundation involved family maintenance issues, surging from 1,806 in 2013 to 3,164 in 2017, while the divorce cases, another major type of family law cases, increased from 1,510 in 2013 to 1,919 in 2017. Please *see* JIANCHA YUAN, *supra* note 59, at 38-40.

83. GUOJIA FAZHAN WEIYUANHUI (國家發展委員會) [NATIONAL DEVELOPMENT COUNCIL], *Chushenglu Ji Siwanglu Chyushih* (*出生率及死亡率趨勢*) [*Births and Deaths Trend*], https://www.ndc.gov.tw/Content_List.aspx?n=59917AA7A42364B0 (last visited Oct. 31, 2023) (The crude birth rate has been declining since 1980, and from 2020, the number of deaths is higher than the number of births, and the population begin to show a natural decline); ZHONGHUA MINGUO

smaller in size and only fewer family members left to hold onto the interdependent safety net. It means more burden to each individual member. Meanwhile, the fast-aging population presents urgent needs for economic support and care for elderly people. For many elderly people who suffer from chronic illness or disability and thus are not fully independent with basic activities of daily living (ADLs), they are in need of medical and daily care. In Taiwan, many dependent elderly people live with their children,[84] and are cared by family caregivers.[85] To take care elderly parents with ADLs difficulties, family caregivers have to provide care or stand-by around the clock. These family caregivers shoulder the most taxing labor and responsibilities.[86] They are often isolated and even invisible in each household, without compensation or even appreciation, and most of them have no training in taking care of the disabled elders. Some of them have to leave their jobs to become a full-time caregiver for the elderly.[87] Once they

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NEIZHENGBU (中華民國內政部) [MINISTRY OF THE INTERIOR, R.O.C.], *Chu Sheng* (*出生*) [*Birth*], https://www.moi.gov.tw/cl.aspx?n=15370 (last visited Oct. 31, 2023) (The number of births declined 130,000 from 1998 to 2022).

84. According to a national survey on conducted in 2022, over 64% of the senior citizen respondents (When 65 years old or above needed care or assistance in their daily life, 66% of them were mainly taken care of by their family members). MINISTRY OF HEALTH AND WELFARE, *Report of the Senior Citizen Survey of 2022*, *supra* note 2, at 20.

85. These family caregivers are spouses, sons, daughters, daughters-in-law, according to Liu Chien-Chia (劉千嘉), *Yu Fumu Tongzhu De Ernumen Yu Fumu Tongzhu De Chengnian Nuxing De Zhaogu Xieli Fenxi* (*與父母同住的兒「女」們：與父母同住的成年女性的照顧協力分析*) [*Daughters Before Sons: An Analysis of the Role of Female Adults Living With Parents in Collaborative Caregiving*], 62 RENKOU XUEKAN (人口學刊) [J. OF POPULATION STUD.] 139, 139-95 (2021); Liu Chien-Chia (劉千嘉), *Gaoling Jiating Yu Gaoling Zhaoguzhe De Texing Erlingyiling Nian Renkou Yu Zhuzhai Pucha Ziliao De Yingyong* (*高齡家庭與高齡照顧者的特性：2010年人口與住宅普查資料的應用*) [*The Characteristics and Formation of Elderly Families and Elderly Caregivers: Application of 2010 Population and Household Census Data*], 56 RENKOU XUEKAN (人口學刊) [JOURNAL OF POPULATION STUDIES] 81, 81-119 (2018).

86. Wang Tsen-Yung (王增勇), *Jiating Zhaozhe Zuo Wei Yi Zhong Gaige Changqi Zhaogu De Shehui Yundong* (*家庭照顧者做為一種改革長期照顧的社會運動*) [*Reforming Long Term Care through the Movement of Family Caregivers*], 85 TAIWAN SHEHUI YANJIU JIKAN (台灣社會研究季刊) [TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES] 397, 398-404 (2011); Lu Pau-Ching (呂寶靜), *Zhichi Jiating Zhaozhe De Changqi Zhaohu Zhengce Zhi Gousi* (*支持家庭照顧者的長期照護政策之構思*) [*Toward a More Family Caregiver-Responsive Long-Term Care Policy*], 4 GUOJIA ZHENGCE JIKAN (國家政策季刊) [NAT'L POL'Y Q.] 25, 30-31 (2005).

87. MINISTRY OF HEALTH AND WELFARE, *Report Of The Senior Citizen Condition Survey 2017*, *supra* note 2, at 3 (The percentage of women quitting their jobs due to caregiving was 43.93%, higher than that of men at 24.42%); ZHONGHUA MINGUO XINGZHENG YUAN ZHUJI ZONGCHU (中華民國行政院主計總處) [DIRECTORATE GENERAL OF BUDGET, ACCOUNTING AND STATISTICS, EXECUTIVE YUAN], *Yiernian renli yunyong diaocha* (*112年人力運用調查*) [*Report on the Manpower Utilization Survey*] 288 (2023), https://ws.dgbas.gov.tw/001/Upload/463/relfile/11091/232682/a381b840-c68c-42c3-8943-ae66668d696c.pdf (in 2022, the rate of women quitting their jobs due to caregiving was 77.8%, higher than the 22.2% of men); *Id*. at 14 (Another group of people who do not have a job, or do not go to work because they need to take care of their elderly family member); Chen Ching-Ning (陳景寧), *Kanbu Jian De Nuxing Jiating Zhaoguzhe* (*看不見的女性家庭照顧者*) [*The Invisible*

take on the unpaid care work, they might as well turn themselves into the so-called derivative dependents, who become dependent on other family members for economic, emotional, and other resources in order to take on that care work.[88] In line with Taiwanese women's traditional role within and without the family, family caregivers are more likely to be women: the elderly dependent's wife, daughter or daughter-in-law.[89] Women's role as primary family caregivers has been recognized as an important factor contributes to women's subordination. As Joan Williams argues, women's domestic work and responsibly become compulsory and oppressive since caregivers' labor is marginalized by the market/workplace organized around men's experience.[90] Women thus are prone to subject to discrimination in workplace because of their actual or assumption of family responsibility as caregivers. In Taiwan, women are expected to take care of their spouse, children, elder parents and parents-in-law. The domestic care work, the indispensable part for any self-sufficient or interdependent family to operate, is at the expense of the caregiver's (most likely women's) opportunity and development they have in the market/workplace.[91]

In recent years, some tragic incidents raised concerns over the welfare and health conditions of both vulnerable elders and their family caregivers.[92] The government promises to provide more services and assistance to elderly people and support for the family caregivers. Although the government has improved and increased a variety of eldercare services, the public assistance

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Female Caregivers], 77 XINGBIE PINGDEN GJIAOYU JIKAN (性別平等教育季刊) [GENDER EQUITY EDUCATION QUARTERLY] 21, 21-24 (2016); Chiang Chen-Yin (姜貞吟), *Guojia Yu Xingbie Taiwan Zhaogu Zhengce Xingbiehua Tanxi* (*國家與性別：臺灣照顧政策性別化探析*) [*Nation and Gender: An Analysis of the Gendering of Policies Toward Caregivers in Taiwan*], 10 GUOJIA FAZHAN YANJIU (國家發展研究) [J. NAT'L DEV. STUD.] 1, 8-11 (2010).

88. FINEMAN, *supra* note 73.

89. MINISTRY OF HEALTH AND WELFARE, R.O.C., *Report of The Senior Citizen Condition Survey* 2022, *supra* note 2, at 112-15. *See also* WEISHENG FULIBU TONGJICHU (衛生福利部統計處) [MINISTRY OF HEALTH AND WELFARE, R.O.C.], 106 *Nian Laoren Zhuangkuang Diaocha Jiating Zhuyao Zhaoguzhe Diaocha* (*106年老人狀況調查－家庭主要照顧者調查報告*) [*Report of the Senior Citizen Condition Survey: Family Primary Caregiver 2017*] 2-7 (2018), https://dep.mohw.gov.tw/DOS/lp-5095-113.html (last visited Aug. 11, 2025).

90. *See generally* JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2001).

91. Issues regarding gender and care have been extensively discussed by feminist theorists. For example, Martha Fineman for challenges the concept of "autonomous individual", drawing attention to the human conditions of "the inevitable dependency" (children, elderly, and the vulnerable) and the "derivative dependency" (caregivers). *See* FINEMAN, *supra* note 73. Eva Kittay further develops a dependency critique and calls for more stare support to caregivers. *See generally* EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY (2nd ed. 2019).

92. Chen Chen-Fen (陳正芬), Fang Hsiu-Ju (方秀如) & Wang Charlotte (王彥雯), *Cong Sifa Panjueshu Fenxi Jiating Zhaozhe Sharen De Qushi Yu Cheng Yin* (*從司法判決書分析家庭照顧者殺人的趨勢與成因*) [*Analysis of the Tendency and Cause of Care Murder Tragedy from Taiwan Judicial Yuan Law and Regulations Retrieving System*], 27 SHEHUI ZHENGCE YU SHEHUI GONGZUO XUEKAN (社會政策與社會工作學刊) [SOC. POL'Y & SOC. WORK] 47, 47-89 (2023).

is still limited and not available to most families with elders. For example, according to the Senior Citizens Welfare Act, the low or lower middle-income family caregivers may apply for the "special care subsidies".[93] However, not all family caregivers of the financially difficult households would qualify for such subsidies. In fact, the subsidies are available only to the caregivers who are the disabled elders' adult children (which means daughters-in-law would not qualify), who live with the same household with the disabled elderly individual with serious illness or disability, who have to be age 16-65, with no employment, perform care for the disabled elder at least eight hours per day, and the disabled elder has never received any in-home services from the state.[94] It is difficult to meet all the criteria listed above. No wonder some would complain about the special care subsidies are in fact the benefits that "you can see but you can't touch."[95] The bottom line is that as long as the legal framework remains unchanged, the legal responsibility of supporting and taking care of the elderly people is imposed on their family. The state's assistance is more like a lucky break or even an afterthought.

V. CONCLUDING REMARKS-RECONSIDERING FAMILY MAINTENANCE RESPONSIBILITY

As discussed above, the Taiwanese family maintenance law has constructed a family safety net of care and economic security. Such legal arrangement, reflecting and reinforcing the traditional family practices, has been utilized and strengthened by the government's familism welfare policy, where the interdependent family is placed front and center to solve the social problem of dependency. However, these legal arrangements and their ideological underpinning are no longer plausible or justified. The myth of interdependent/self-sufficient family has met serious challenges as the 2010 amendment of the Civil Code, permitting exemptions from parent maintenance duty, opened the floodgate of litigation between elderly parents and their estranged children. Moreover, with the birthrate staying low and the population keeping aging, the social and demographic change has altered

93. Laoren Fuli Fa (老人福利法) [Senior Citizens Welfare Act] § 12 (promulgated & effective Jan. 26, 1980, as amended Dec. 9, 2015) (Taiwan).

94. Zhong Di Shouru Laoren Tebie Zhaogu Jintie Fagei Banfa (中低收入老人特別照顧津貼發給辦法) [Special Care Allowance For Middle or Low-income Senior Citizens] § 3 (promulgated & effective July 9, 2007) (Taiwan).

95. Yen Yun-Tsen (嚴云岑), *Changzhao Erdianling Ni Fangkuan Laoren Tebie Zhaogu Jintie Zhege Danwei Haokaixin* (*長照2.0擬放寬老人特別照顧津貼「這個單位」好開心*) [*Taiwan Association of Family Caregivers called for a friendly policy in family caregiver subsidies*], ETTODAY JIANKANG YUN (ETtoday健康雲) [HEALTH ETTODAY NET] (Jan. 14, 2017), https://health.ettoday.net/news/848722.

the Taiwanese family in size and structure. It is in question whether the legally sanctioned interdependent family is capable of taking up the primary responsibility of supporting and caring all of its members, especially the elderly.

The ideology of the privatization of dependency may have its roots in traditional family ethics, but it is no longer justifiable or feasible for both family caregivers and the elderly people in need of care and financial support. The current legal arrangements reinforce traditional gender stereotype and expectations of women as caregivers at the expense of their career opportunities in workplaces and other inspirations in society. Since the caregiving work, assigned to family members, is mostly undervalued, unpaid, and gendered, those who take on this duty to take care of the elderly people at home are prone to become derivative dependent themselves. On the other hand, as the statistics shows, more and more elderly people live alone[96] and/or in poverty,[97] either because they have no family members to turn to, or the family members, mostly adult children, are unable, refused or legally exempted to undertake the maintenance duty. The elderly individual's welfare should not be depended on their relationship with their family. Instead, their rights to care, to survive and of dignity should be their individual rights as citizens of the state.[98] For the elderly people and their family members, the legalization of interdependent family has turned the self-help virtue into a vicious circle of dependency. It is time to reconsider the premise of family maintenance laws and its relationship with the state welfare system, starting by making state assistance/relief available and accessible to all elderly people who are with or without family support.

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96. ZHONGHUA MINGUO XING ZHENG YUAN ZHUJI ZONGCHU (中華民國行政院主計總處) [DIRECTORATE-GENERAL OF BUDGET, ACCOUNTING AND STATISTICS, EXECUTIVE YUAN, R.O.C.], *Yilingjiunian Renkou Ji Zhuzhai Pucha Zongbaogao Tiyao Fenxi* (*109年人口及住宅普查總報告提要分析*) [*2020 Population and Housing Census Summary report*] 48-49 (2020), https://ws.dgbas.gov.tw/001/Upload/463/relfile/11064/230649/b2ae65e2-86fe-416a-b02c-8376e1f4f73d.pdf (This survey has been conducted three times, and the living arrangement of the resident population aged 65 years or over is 15.9%, 14.3% and 15.6%.).

97. Leu, *supra* note 72; Wang, *supra* note 72.

98. U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 6: The economic, social and cultural rights of older persons*, ¶ 5, U.N. Doc. E/1996/22 (Dec. 8, 1995). In 1991, the General Assembly adopted the United Nations Principles for Older Persons…. The Principles are divided into five sections which correlate closely to the rights recognized in the Covenant. The section entitled "Independence" . . . . Under "Participation" . . . . The section headed "Care" . . . . With regard to "Self-fulfilment" . . . . Lastly, the section entitled "Dignity" states that older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse, should be treated fairly, regardless of age, gender, racial or ethnic background, disability or other status, and should be valued independently of their economic contribution.

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扶養義務、互助自立家庭與長者照顧責任

李 立 如

摘 要

照顧長者的責任在我國主要由家庭承擔，傳統以來，家庭作為滿足人們基本生理與心理需求的重要社會制度，其延續有賴成員互助共生共榮。1930年民法的立法者以孝道及家庭互助傳統的精神轉化為個人之間的扶養義務，建立了一個以血緣和婚姻為連結的家庭，使其成為在經濟上和照顧責任上互助自立的法律單元。隨著少子化、高齡化及家庭結構的轉變，對於長者照顧負擔加重，傳統孝道觀念也受到挑戰。2010年民法親屬編扶養規定進行修正，增訂子女免除扶養義務的規定，引發大量高齡父母與成年子女之間的訴訟，也意味著國家與家庭照顧責任的分配以及長者照顧與福利政策的變化。本文探討我國父母扶養制度的發展，尤其著重於國家與家庭間關於長者照顧責任的互動與關聯。有鑒於社會變遷與法制的發展，互助自立家庭的觀念及規定面臨嚴峻的挑戰，本文建議反思國家與家庭之間照顧責任的分工，使我國長者能夠享有充分的照顧、支持與尊嚴。

關鍵詞：扶養義務、互助自立家庭、長者照顧法制、臺灣家庭法、國家照顧責任

Article

Punishing Passengers of Drunk Drivers: Mens Rea, Burden of Proof, and Legislative--Judicial Tensions in Taiwan

Jianlin Chen*

ABSTRACT

In 2019, Taiwan introduced an offence that punishes passengers of a vehicle driven by a drunk driver. The offence was introduced under a deliberate legislative decision to omit any mens rea requirement vis-à-vis the passenger. I comprehensively survey how the Taiwanese courts have applied this new offence, and document the disparate judicial approach towards the burden of proof of mens rea. I further situate this offence with the earlier reform of the administrative penalty regime, and argue that the otherwise undesirable disparate judicial interpretations are the inevitable consequence of unresolved legislative tension between the lofty rule of law ideals and practicalities of enforcement expediency. More broadly, this case study adds to the literature on legislature-judiciary dynamic that has thus far focused on Taiwan's polarized political landscape. I highlight how overwhelming political consensus can produce legislations that are as equally fraught for the courts to handle.

Keywords: *Driving under Influence, Mens Reas, Burden of Proof, Administrative Penalty Act, Strict Liability, Statutory Ambiguity, Law Reform*

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CONTENTS

I. INTRODUCTION

In 2019, Taiwan amended its Road Traffic Management and Penalty Act to create a new traffic offence to combat the scourge of drunk driving.

The new section 35(8) provides that:

> Should a driver take the test, and the alcohol level exceeding 0.25mg/L of exhalation or 0.05 in blood, the passenger over 18 years old shall be fined NT$600 to NT$3,000 [approximately US$20 to US$100]. Passengers who is older than 70 years old, has mental disorder or who are passengers of commercial transportation vehicles are excluded.[1]

From the ostensible language of this provision [herein after "Punish Passenger Offence"], an adult passenger will be punished simply by virtue of being in the same vehicle as the drunk driver. The punishment is not conditioned on the passenger encouraging, aiding or otherwise abetting in the drunk driving. Indeed, there is no requirement on the passenger to be aware of the driver's intoxication or prior alcohol consumption. This omission of *mens rea* is not an accident. The initial proposed amendment did stipulate the passenger's knowledge as an element of the offence. However, that stipulation was removed after extensive legislative discussion.[2]

This otherwise minor traffic offence has in turn generated a series of litigations over the issue of *mens rea*. Tellingly, notwithstanding the apparently straightforward statutory language and legislative history, the four court judgments adopted four different approaches to the issue. All four judgments rejected the government's contention that the provision is a strict liability offence [無過失責任].[3] However, the four judgments differed as to who should bear the burden of proof regarding the passenger's knowledge of the driver's drunkenness. The first judgment held that the regulatory authority has to prove the passenger's knowledge. The second judgment

1. Daolu Jiaotong Guanli Chufa Tiaoli (道路交通管理處罰條例) [Road Traffic Management and Penalty Act] § 35(8) (promulgated Feb. 5, 1968, effective May 1, 1968, as amended Apr. 17, 2019, effective June 1, 2019) (Taiwan).

2. *Infra* II.B.

3. Strict liability refers to imposing liability without the prosecution (or regulatory enforcer) having to prove culpable *mens rea*. There is a subset of strict liability offences, namely absolute liability, where the defendant does not have the means of avoiding liability by showing that the defendant have taken reasonable care or otherwise is without fault: David Prendergast, *The Constitutionality of Strict Liability in Criminal Law*, 33 DUBLIN U. L.J. 285, 286-87 (2011). *See* Michael Hor Yew Meng, *Strict Liability in Criminal Law: A Re-Examination*, SING. J. LEGAL STUD. 312, 312-14 (1996) (noting that the "strictness" of an offence can be subjected more refined definition as to whether intention or negligence is required, and who bears the burden of proof). *See also* Kiron Reid, *Strict Liability: Some Principles for Parliament*, 29 STATUTE L. REV. 173, 175 n.14 (2008) (documenting the disparate terminologies used by scholars).

adopted an essentially neutral position, namely that the court should exercise its investigative obligation to determine the passenger's knowledge.[4] The remaining two courts held that there is a presumption of fault, but via different reasoning. The third judgment essentially created a "no knowledge" defense that can raised by the passenger: the regulatory authority did not need to ascertain the passenger's knowledge when issuing the fine, and the fine would be upheld in court unless the court is satisfied that the passenger did not know of the drunkenness. The fourth judgment relied on an accompanying statutory provision to justify the presumption of fault.

The disparate judicial approaches reflect the unresolved controversies surrounding the Administrative Penalty Act. The Administrative Penalty Act was enacted in 2005. It was modeled on the German continental model,[5] with many provisions explicitly referencing the German Order Infringing Law.[6] The official proclaimed purpose is to ensure that the administrative sanctions in Taiwan conform to the values modern democratic rule of law state [現代民主法治國家].[7] In terms of *mens rea*, article 7 of the Administrative Penalty Act provides that "[a]n act in breach of duty under administrative law is not punishable unless committed intentionally or negligently."[8] The legislative discussion is explicit about the human right considerations that underpins this *mens reas* requirement.[9] Yet this and other similar provisions of the Administrative Penalty Act is--by virtue of article of 1 of the Administrative Penalty Act--can be legislatively side-stepped by

4. As a civil law jurisdiction, Taiwan courts are inquisitorial in orientation. Judges have obligation (and corresponding investigative power) to assess all relevant facts: *See* Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 666-67 (2009) (discussing the Taiwan criminal justice system retains its inquisitorial nature despite reform purportedly modelled on the adversarial system).

5. For outline of legislative consultation process, *see* LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 92:56, 197 (2003) (Taiwan).

6. Out of the 46 articles (including administrative provisions), 20 articles are explicitly based on the German law: *e.g.*, art. 10 (liability for omission); art. 12 (defense of emergency); art. 20 (compensatory liability of beneficiary); art. 25 (liability for several acts): Xingzheng Fafa (行政罰法) [Administrative Penalty Act] (promulgated Feb. 5, 2005, effective Feb. 5, 2006) (Taiwan).

7. Xingzheng Fafa Caoan Zongshuoming (行政罰法草案總說明) [Administrative Penalty Act Draft Explanation], in Lifayuan Diwu Jie Disi Huiqi Disanci Huiyi Yian Guanxi Wenshu (立法院第五屆第四會期第三次會議議案關係文書) [Relevant Documents of the 3rd Meeting of 4th Meeting Period of the 5th Legislative Yuan] at 392 (2003) (Taiwan).

8. Administrative Penalty Act § 7.

9. Legilative reasons for Administrative Penalty Act § 7: In a modern democratic state governed by the rule of law, when the authorities seek to impose sanctions on an individual for violating administrative obligations, the state bears the burden of proving that the individual acted with intent or negligence; only in this way can such progressive legislation safeguard human rights. ("現代民主法治國家對於行為人違反行政法上義務欲加以處罰時，應由國家負證明行為人有故意或過失之舉證責任，方為保障人權之進步立法").
https://mojlaw.moj.gov.tw/LawContentReason.aspx?LSID=FL034026&LawNo=7 (last visited: Aug. 24, 2025).

other statutes.[10] This has in turn resulted the divergent scholarly opinions as to the impact of the Administrative Penalty Act on the issue of *mens rea*.[11]

In this Article, I critically examine the legislative enactment and judicial interpretation of the Punish Passenger Offence as a case study of the law reform process in Taiwan. I situate the legislative process of the Punish Passenger Offence with that of the Administrative Penalty Act in 2005. I identify the two interconnected themes that run through both processes. First, there is the tension between the lofty rule of law ideals and practicalities of enforcement expediency that is recognized but ultimately side-stepped. Second, to side-step the unresolved tension, the legislature deliberately draft ambiguous statutory provisions with the explicit expectation that courts should resolve the ambiguities. The key takeaway is that while the lack of consistent and coherent interpretation by the courts is not desirable, fault does not lie with the judiciary. It is an impossible task to begin with.

More broadly, this case study highlights a previously overlooked dynamic between the legislature and the judiciary. Given the perceived partisan chasm between the pan-blue and the pan-green political parties in Taiwan,[12] current literature on Taiwanese courts unsurprisingly have focused on how courts have to delicately navigate the polarized political landscape to preserve its legitimacy.[13] However, this case study reveals that not only there can be occasional overwhelming political consensus in the legislature, those overwhelming political consensus can produce legislations that are equally fraught for the courts to handle.

This Article is organized into six parts. Part II sets out the statutory framework and legislative debate of the Punish Passenger Offence. Part III surveys the courts' interpretation vis-à-vis the issue of subjective fault. Part IV situates the courts' disparate interpretations with the legislative process and scholarly discourse of the Administrative Penalty Act. Part V addresses the implications on law reform and legislative-judicial dynamics. Part VI concludes.

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10. Administrative Penalty Act § 1.

11. *Infra* IV.C.

12. John F. Cooper, *Taiwan's 2016 Presidential/Vice Presidential and Legislative Election: Reflections on the Nature of Taiwan's Politics and Shifts Therein*, 1 MD. SER. CONTEMP. ASIAN STUD. 5, 5-12 (2016); Jinhyeok Jang, *The Dimensional Structure of Legislative Politics in Taiwan: An Exploratory Analysis of Bill Cosponsorship Networks, 1992-2012*, 51 ISSUES & STUDIES 119, 136-38 (2015). Political observers typically classify the ideological divide in Taiwan into "pan-green" and "pan-blue": *see* Austin Horng-En Wang, *The Myth of Polarization Among Taiwanese Voters: The Missing Middle*, 19 J. EAST ASIAN STUD. 275, 275-76 (2019). "Pan-green" refers to political parties, supporters and/or ideology that align with that of the Democratic Progressive Party, in particular the advocacy for Taiwan independence over Chinese unification. This is in contrast with the "pan-blue" coalition lead by the Kuomintang.

13. *Infra* V.B.

II. PUNISH PASSENGER OFFENCE IN CONTEXT

This Part begins the analysis by examining the general statutory framework and specific legislative debate surrounding Punish Passenger Offence.

A. *Background and Framework*

Drunk driving is a serious problem in Taiwan. According to the statistics from the National Police Agency, Ministry of Interior, accidents involving drunk driving killed about 300 and injured about 11,000 people annually between 2017 and 2021.[14] Even though the current figures represent a substantial decline compared to just a decade ago, the human toll adjusted to population is still high by international standards.[15]

Drunk driving was traditionally a low priority for the police given that it was only punishable by administration penalty.[16] It was elevated to a criminal offence in 1999.[17] Since then, a series of legislative amendments have progressively increased the severity of the sanctions while at the same time lowering the legal blood alcohol limit.[18]

The Punish Passenger Offence was introduced in 2019. The 2019 reform of drunk driving laws included the usual enhancement in the penalty (i.e., increase in fines and imprisonment). The 2019 reform also included provisions that mandate an alcohol ignition lock for drunk drivers.[19]

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14. National Police Agency Statistical Inquiry Portal（警政署統計查詢網）, *Dao Lu jiao Tong An Jian Jiou Hou Jia Che* (*道路交通案件酒後駕車*) [*Drunk-driving Case Under Road Traffic Law*], https://ba.npa.gov.tw/statis/webMain.aspx?k=defjsp (last visited Jan. 31, 2025) (between 2017 to 2021, there is a total of 1542 deaths and 58936 injuries, with 331 death and 10891 injuries in 2021.). This statistic for death toll here includes any death within 30 days of injuries sustained in the accident. This government statistic database stop publishing this statistic from March 2022 on account of data standardization.

15. Yun-Shan Chan & Wei-Der Tsai, *Drunk Driving Policies and Breath Test Refusal in Taiwan*, 24 TRAFFIC INJURY PREVENTION 543, 545 (2023); Hi-An Lin et al., *Evaluating the Effect of Drunk Driving on Fatal Injuries Among Vulnerable Road Users in Taiwan: A Population-based Study*, 22 BMC PUBLIC HEALTH 2059, at 1-2 (2021). For a critical survey of newspaper coverage of drunk driving in Taiwan, *see generally* Kuang-Kuo Chang, *Framing Health Determinants of Drunken Driving: How Taiwan's Three Major Newspapers Have Not Adopted an Integrative Approach in Covering This Social Problem*, 22 JOURNALISM STUDIES 379 (2021).

16. Yun-Shan Chan et al., *Sanctions Changes and Drunk-Driving Injuries/Deaths in Taiwan*, 107 ACCIDENT ANALYSIS & PREVENTION 102, 103-04 (2017). For discussion about the significance of administrative penalty in the civil law jurisdiction, *see infra* IV.A.

17. Hsu Tze-Tien (許澤天), *Lun 2019 Nian Chunji De Jiujia Zhizai Xiufa* (*論2019年春季的酒駕制裁修法*) [*Discussing Issues of the Law Revision of Drunk Driving Sanctions in Spring 2019*], 201 YUEDAN FAXUE JIAOSHI (月旦法學教室) [TAIWAN JURIST] 58, 58 (2019).

18. For an overview, *see* Chan & Tsai, *supra* note 15, at 544-46; Chan et al., *supra* note 16, at 103-04.

19. The provision authorizes the regulatory authority to implement the details in due course: Road Traffic Management and Penalty Act § 35-1. For an overview analysis of the 2019 reform, *see*

Notably, the idea of punishing passengers was first given serious legislative consideration in 2012.[20] The idea was then raised by the mayor of Taichung, and it received preliminary support from the Transportation and Communications Minister [毛治國].[21] However, the Ministry of Transportation and Communications later backtracked from the proposal. The main reason proffered is that the National Police Agency of the Ministry of the Interior objected to the proposal, citing issues of enforcement. The enforcement issues are twofold: 1) if the driver's blood alcohol level exceeds the legal limit but the driver is not visibly or olfactorily drunk, there would be "troubles" [困擾] in actual enforcement;[22] 2) if there is a requirement that the passenger must "know" [明知] and did not "dissuade" [勸導] as is the required in Japan, there will be evidential difficulties.[23]

The proposal was raised again in 2014 by a bipartisan group of 21 legislators.[24] This proposal was rejected on the grounds that a similar proposal had been considered but rejected in 2012.[25] After the change of

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Hsu, *supra* note 17, at 59-71.

20. Japan and China have similar provisions in their laws that punishes the passenger. However, the provisions always explicitly require *mens rea* on the part of the passenger. In Japan, the Road Traffic Act was amended in 2007 to enable punishing the passenger of a drunk driver if the passenger knows of that the driver is drunk: MARK D. WEST, DRUNK JAPAN: LAW AND ALCOHOL IN JAPANESE SOCIETY 94 (2020); Tang Ru-Yen (湯儒彥), *Daolu Jiaotong Fagui Zhong Lianzuo Falv Zeren Zhi Yanjiu* (*道路交通法規中連坐法律責任之研究*) [*The Collateral Penalty in Taiwanese Traffic Laws*], 22 YUNSHU XUEKAN (運輸學刊) [J. CHINESE INST. TRANSP.] 75, 81 (2010). In China, there have been regulations at the provincial levels to punish the passengers after the proposed amendments at the national level was rejected in 2009, *see Dingge Chufa, Wuhan Chutai Baxiang Cuoshi Yanda Jiujia Zuijia* (*顶格处罚，武汉出台八项措施严打酒驾醉驾*) [*Top Punishment, Wuhan Introduces Eight Measures to Crack Down on Drink Driving and Drunk Driving*], HUBEI RIBAO (湖北日报) [HUBEI DAILY], Feb. 9, 2018 (China); Li Yan, *Jiujia "Lianzuo Chufa", Shifou You Fa Keyi?* (*酒驾"连坐处罚"，是否有法可依？*) [*Drink Driving "guilt by association", Is there a Legal Basis?*], XIAN WANBAO (西安晚报) [XI'AN EVENING NEWS], July 14, 2017 (China). For critical academic discussion, *see* Ma Xiao-Xu & Sun Wen-Guan (马晓旭 & 孙文广), *Cong Lianzuo Guanxiren Jiaodu Tantao Woguo Zuijia Lianzuo Zhidu Goujian* (*从连坐关系人角度探讨我国醉驾连坐制度构建*) [*Discussion on the Construction of Drink Driving Guilt by Association System in China from the Perspective of Guilt-by-Association Relationship*], 13 FAZHI BOLAN (法制博览) [LEGALITY VISION] 53, 53 (2015); Shen Yu-Zhong (沈玉忠), *Cong Lianzuo Guannian Fenxi Jiuho Jiashi Xingzheng Chufa Kuodahua De Zhengdangxing-Jianping "Yu Zuijia Siji Tongcheng Yiche De Chengke Ye Ying Jinxing Chufa"* (*从连坐观念分析酒后驾驶行政处罚扩大化的正当性－兼评"与醉驾司机同乘一车的乘客也应进行处罚"*) [*The Analysis on Legitimacy of the Magnify of the Administrative Punishment for Driving After Drinking from the Concept of "LianZuo"-on the Idea that "Passengers Who are in the Same Car Driven by the Drunk Driver Should Also Be Punished"*], 4 JIANGSU SHEHUI KEXUE (江苏社会科学) [JIANGSU SOC. SCI.] 145, 149-51 (2010).

21. LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 102:3, 131-32 (2012) (Taiwan).

22. *Id*. at 73.

23. *Id*. at 132.

24. LIFAYUAN GUANXI WENSHU (立法院關係文書) [LEGISLATIVE YUAN RELEVANT DOCUMENT], Yuan General Directory No. 756, Motion No. 1031203070300100, at 44 (2014) (Taiwan).

25. *Id*. at 51.

government in 2016, various legislators across the political spectrum again separately made similar proposals in 2017.[26] This was again rejected on account of objections on grounds of enforcement issues raised by the National Police Agency of the Ministry of the Interior.[27]

In finally accepting the legislative proposal to punish the passenger in 2019, the Transportation and Communications Minister [林佳龍] agreed that from the social psychological perspective, an additional source of dissuading can help reduce possibility of accident.[28]

B. *Debate over Wording of Provision*

The then new section 35(8) provided that:

> Should a driver take the test, and the alcohol level exceeding 0.25mg/L of exhalation or 0.05 in blood, the passenger over 18 years old shall be fined NT$600 to NT$3,000. Passengers who is older than 70 years old, has mental disorder or who are passengers of commercial transportation vehicles are excluded.[29]

As noted in the Introduction, there is no stipulation vis-à-vis the passenger's conduct (e.g., abetting the drunk driving) or mental state (e.g., knowledge of the driver's drunkenness). This was a conscious legislative decision. In the 2019 reform, there were 14 legislative proposals submitted for consideration.[30] Five involved creating a punishment for the passengers. While there were variations in the proposed wording of the provisions among the five proposals, all the proposed provisions explicitly stipulated that the passenger has to know [明知] of the driver's drunkenness.[31] Two proposals, including the one which the final provision is most closely based on,[32] further specified the type of knowledge that is necessary for punishment (i.e., the passenger recognizes that the driver is visibly or olfactorily drunk or the passenger is aware that the driver has been drinking alcohol).[33]

In addition, the initial draft agreed upon during the party negotiation

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26. *Id*. at 6-12 .
27. *Id*. at 16-17.
28. LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 108:32, 16 (2019) (Taiwan).
29. Road Traffic Management and Penalty Act § 35(8).
30. LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 108:26, 183 (2019) (Taiwan).
31. *Id*. at 183-224.
32. *Id*. at 220-21 (i.e., the version by New Power Party).
33. *Id*. at 205 & 220.

mechanism[34] stipulated that persons who provided evidence that they had tried to discourage or did not know about the driver's drunkenness are excluded from punishment.[35] However, this was removed in the final version. The lead legislator of the ruling party explained that the removal of this exemption is to facilitate ease of police enforcement by removing a point of contention (i.e., whether the passenger knew or did attempt to discourage) and sidestep the otherwise problematic issue of reversing the evidential burden [舉證責任逆轉].[36] The lead legislator also explained that according to article 10 of the Administrative Penalty Act, a person can only be punished for omission if there is a legal obligation to act. The proposed provision does not specify what the legal obligation of the passenger is. Instead, the provision only imposes a "constructive obligation" on the passenger.[37] The lead legislator acknowledged that this "constructive obligation" departs from the requirement of article 10[38] and may be subject

34. The legislative enactments of laws in Taiwan usually entails two legislature procedures. The first is technical/professional review by the committees, divided into various legislative areas (e.g., internal administration, economics, transportation): Lifayuan Zuzhi Fa (立法院組織法) [Organic Law of the Legislative Yuan] § 10 (promulgated and effective Mar. 31, 1947, as amended Dec. 17, 2023) (Taiwan). Each committees are made up of 13 to 15 legislators, proportionally allocated based on a political party representation in parliament: Lifayuan Ge Weiyuanhui Zuzhi Fa (立法院各委員會組織法) [Organic Law of Committees of the Legislative Yuan] § 3-3 (promulgated and effective Dec. 25, 1947, as amended Jan. 23, 2009) (Taiwan). The other is the party caucuses negotiation mechanism [黨團協商]. This is pursuant to Lifayuan Zhiquan Xingshi Fa (立法院職權行使法) [Law Governing the Legislative Yuan's Power] § 68-74 (promulgated and effective Jan. 25, 1999, as amended Nov. 21, 2018) (Taiwan). The party negotiation mechanism was formally introduced in 1999 to facilitate political compromise between the political parties: *see* Cheng Jen-Wen & Feng Mei-Yeu (鄭任汶 & 馮美瑜), *Woguo Lifayuan Chaoye Dangtuan Xieshang Zhidu-Lixing Xuanze Zhidu Zhuyi De Chubu Fenxi* (*我國立法院朝野黨團協商制度－理性選擇制度主義的初步分析*) [*China's Legislative Consultation System Governing and Opposition Parties: Rational Choice Institutionalism Preliminary Analysis*], 7 BEITAIWAN KEJI XUEYUAN TONGSHI XUEBAO (北臺灣科技學院通識學報) [N. TAIWAN SCI. & TECH. INST. J. GENERAL EDU.] 219, 223-26 (2021). (discussing the origin and evolution of this legislative procedure). This procedure is not mandatory, though in practice is a core element for effective passage of legislature. For empirical surveys and critical discussions of the operation of this party negotiation mechanism in practice over the years, *see* Ting Tin (丁鼎), *Woguo Lifayuan Dangtuan Xieshang De Zhidu Bianqian Yu Zhidu Hua* (*我國立法院黨團協商的制度變遷與制度化*) [*The Institutional Changes and Institutionalization of the Party Negotiation Mechanism in the Legislative Yuan in Taiwan*], 88 ZHENGZHI KEXUE LUNCONG (政治科學論叢) [TAIWANESE J. POL. SCI.] 1, 20-40 (2021); Sheng Shing-Yuan & Huang Shih-Hao (盛杏湲 & 黃士豪), *Dangtuan Xieshang Jizhi: Cong Zhidu Hua Guandian Fenxi* (*黨團協商機制：從制度化觀點分析*) [*Party Negotiation Mechanism: An Analysis through the Lens of Institutionalization*], 35 DONGWU ZHENGZHI XUEBAO (東吳政治學報) [SOOCHOW J. POL. SCI] 37, 50-78 (2017); Hawang Shiow-Duan & Ho Song-Ting (黃秀端 & 何嵩婷), *Dangtuan Xieshang Yu Guohui Lifa: Diwu Jie Lifayuan De Fenxi* (*黨團協商與國會立法：第五屆立法院的分析*) [*Party Caucuses Negotiation and Legislation Process: Analysis of the Fifth Legislative Body in Taiwan*], 34 ZHENGZHI KEXUE LUNCONG (政治科學論叢) [TAIWANESE J. POL. SCI.] 1, 12-35 (2007).

35. LEGISLATIVE YUAN GAZETTE, *supra* note 30, at 425-27.

36. *Id*. at 426 & 430-31.

37. *Id*. at 426.

38. *Id*. at 430: The second point is the principle of obligation. This departs from both the principle

to constitutional challenge in the future.[39]

C. *Further Amendments*

This provision was amended in 2022 (Jan. 24). In response to yet another set of high-profile tragic road fatalities (a family of four being killed), the fine was raised five-fold.[40] It is now NT$6,000 to NT$15,000.

D. *Summary*

There are four notable takeaways from this contextual examination of the Punish Passenger Offence.

First, there was overwhelming political support for the Punish Passenger Offence. Legislators across the political spectrum have been united in their support for the creation of such an offence. The five proposals were led by legislators from, respectively, 1) the ruling party (i.e., Democratic Progressive Party [民主進步黨]), 2) the main opposition party (i.e., Kuomintang [中國國民黨]), 3) a pan-green[41] minor party (i.e., New Power

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of liability and the principle of obligation, amounting instead to a constructive obligation. Naturally, this deviates from the provision of Article 10 of the Administrative Penalty Act. It is acceptable for us to adopt it, as it at least carries educational significance. ("第二個就是義務原則，這個是跳脫責任原則和義務原則，就是擬制義務了，當然就是跳脫行政罰法第十條規定，我們要接受也沒有關係，至少有教育的意義").

39. *Id*. at 432: Regarding the issue of joint punishment under Article 35, I would like to emphasize one concept. First, the Administrative Penalty Act requires that liability must be clearly defined. Second, punishment may only be imposed where there is a corresponding obligation. However, in this case no such obligation is prescribed; instead, there is only constructive obligation, and punishment is imposed accordingly. In the future, if someone were to petition for a constitutional interpretation on this matter, problems might arise. Should this be explicitly noted in the explanatory column? ("有關第三十五條連坐處罰的問題，我要講一個觀念，行政罰法就是規定責任明確，此其一。第二個則是有義務性才能予以處罰，但是，我們沒有規定其義務性，只是擬制義務，就予以處罰，未來這部分若有人聲請釋憲時，可能會發生問題，是否在說明欄中註明清楚？").

40. LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 111:33:5004, 7 (2022) (Taiwan). In that amendment, section 35(9) is also amended to such that if a driver is convicted of drunk driving, among other serious traffic offences, the vehicle license plates shall be suspended for 2 years. There is a potential overlap of this provision with the existing section 35(7), which provides that the vehicle license plates may be suspended if the vehicle owner know that the driver is drunk but still allow the driver to operate the vehicle. The absence of the knowledge requirement on the vehicle owner had rendered the increased use of section 35(9) to suspend the vehicle license plates (which effectively punished the car vehicle by depriving the vehicle owner of the vehicle usage during the suspension period). This had led to numerous administrative litigations, with the Administrative High Courts split as to whether section 35(9) should be interpreted to be applicable only where the vehicle driver is the vehicle owner. The case have been referred to Administrative Supreme Court for resolution: Taibei Gaodeng Xingzheng Fayuan (臺北高等行政法院) [Taipei High Administrative Court], Caiding (裁定) [Ruling], 112 Jiao Shang Zi No. 409 (112年度交上字第409號裁定) (2023) (Taiwan).

41. Political observers typically classify the ideological divide in Taiwan into "pan-green" and "pan-blue": Wang, *supra* note 12, at 275-76. "Pan-green" refers to political parties, supporters and/or ideology that align with that of the Democratic Progressive Party, in particular the advocacy for

Party [時代力量]), 4) a pan-blue minor party (i.e., People First Party [親民黨]) and 5) an independent. Such consensus is a rarity in a polity that is otherwise deeply divided on various social and political issues.[42]

Second, it is abundantly clear that the complete omission of stipulations vis-à-vis subjective fault in article 35(8) was a deliberate legislative decision. There was unanimity among the various draft proposals vis-à-vis predicating the punishment of the passenger on the explicit requirement of the passenger's knowledge of the driver's drunkenness. However, the requirement was rejected by the high-level decision makers of the government (i.e., the legislative leader of the ruling party and the Ministers of the relevant portfolio, who were also from the same party). In addition, the government also rejected a proviso that would provide the passenger with possible defenses of reasonable care (i.e., the passenger tried to dissuade drunk driving) and honest mistake (i.e., the passenger did not know of driver's drunkenness).

Third, the government was very mindful about the ease of enforcement. The removal of both the knowledge requirement and availability of defenses were driven by the impetus to reduce the evidential burden on the police. Indeed, the rejections by the government of the prior proposals were primarily based on enforcement difficulty arising from the statutory proviso vis-à-vis subjective fault.

Fourth, the government had a two-faced approach towards the applicable legal constraints. On one hand, the government gave explicit--arguably even grandstanding--recognition of the applicable legal principles. The Deputy Minister of the Ministry of Justice was keen to clarify that the Ministry of Justice never advocated for any reversal of the evidential burden given that the Administrative Penalty Act prescribes that the evidential burden is to be borne by the enforcing regulatory authority.[43] Similarly, a lead legislator made a precise citation to article 10 of the Administrative Penalty Act and opined that article 10 "very clearly" requires the stipulation of an obligation first before punishment is possible.[44] On the other hand, and notwithstanding the seemingly steadfast recognition of these legal constraints, the government was almost cavalier when actually addressing those legal constraints. For the Deputy Minister of the Ministry of Justice, if the provision does not make any mention of subjective fault, then ease of police enforcement can be achieved without a reversal of the

Taiwan independence over Chinese unification. This is in contrast with the "pan-blue" coalition lead by the Kuomintang.

42. Cooper, *supra* note 12, at 5-12; Jang, *supra* note 12, at 136-38.
43. LEGISLATIVE YUAN GAZETTE, *supra* note 30, at 429.
44. *Id*. at 426.

evidential burden.[45] Essentially, the argument is that there is no reversal of the evidential burden if there is nothing to prove.[46] Likewise, the "constructive obligation" relied upon by the lead legislator to satisfy the article 10 requirement of the Administrative Penalty Act is--to put it mildly--a legal invention.[47] As per the Taiwan court judgment database, the phrase has never been used or referred to in any court judgment.[48] There is also only scant usage in the Taiwan journal database, and not in the context of administrative punishment.[49]

As will be further elaborated below V.A., this Article argues that the legislative intent underpinning this Punish Passenger Offence is essentially a form of legislative deferral. The Taiwanese legislators, under the overwhelming political pressure to appear bold and decisive, want to ensure the Punish Passenger Offence that they *drafted* can be readily enforced--hence the removal of subjective intent). However, they are at the same time conscious of the potential legal impediments, and the need to be seen to uphold these highbrow principles--hence the loud allusion and surreptitiously casual dismal of those principles. Thus, the legislators are deliberately punting the resolution of this dilemma to the courts. The next Part shall examine how the courts respond to this interpretation hot potato.

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45. *Id*. at 429.

46. This is also how the chairperson (i.e., President of the Legislative Yuan) framed the issue, namely "the Transportation Department's proposal is to simply remove all the evidential burden, and enable punishing the passenger as long as the passenger is in the same vehicle. The fine will be lowered, but there will no longer be the issue of evidential burden, since the evidential burden is procedurally difficult": *id*. at 430 ("這一個爭點就是交通部把所謂的舉證責任全部取消，反正只要是同車就全部都罰，但是把罰款降低，不要再有所謂的舉證，因為舉證的程序就是很困難，但是罰鍰不要那麼多。").

47. The lead legislator did acknowledge that this "constructive obligation" may expose the Punish Passenger Offence to constitutional challenge: *id*. at 432.

48. *Sih Fa Yuan Cai Pan Shu Si Tong* (*司法院裁判書系統*) [*Judicial Yuan Judgment Database*], https://law.judicial.gov.tw/FJUD/default.aspx (last visited Aug. 1, 2024). Since the enactment, three judgments have referred to the term. All three judgments are part of the litigation vis-à-vis the Punish Passenger Offence, as will be discussed below.

49. There are two relevant results with the search term of Nizhi Yiwu [constructive obligation] [擬制義務] in the Taiwan Electronic Periodical Services "Airiti Library": https://www-airitilibrary-com.eu1.proxy.openathens.net/ (last visited Aug. 1, 2024). Both articles were written by Sheng-Chen Tseng in the context of civil liability vis-à-vis breaches of restraint of trade obligations: Tseng Shen-Chen & Lai Yu-Tang (曾勝珍 & 賴昱棠), *Shouguren Jingye Jin zhi Zhi Falv Shiyongxing Yu Anli Tantao* (*受僱人競業禁止之法律適用性與案例探討*) [*A Discussion for the Applicability of Employee's Non-Competition & Cases*], 39 LINGTONG XUEBAO (嶺東學報) [LING TUNG JOURNAL] 169, 198 (2016); Tseng Shen-Chen (曾勝珍), *Yingye Mimi Anli Xin Tantao* (*營業秘密案例新探討*) [*A Discussion on New Trade Secret Cases*], 6 LINGTONG CAIJING FAXUE (嶺東財經法學) [LING TUNG FIN. & ECON. L. REV.] 1, 29 (2013).

III. MIXED JUDICIAL INTERPRETATION

The previous Part explained the pitfalls legislatively built into the Punish Passenger Offence: a deliberate omission of subjective fault amidst recognition that subjective fault is legally required, and that the regulatory enforcement authority bears the burden of proof. This Part continues the analysis by examining how the Taiwanese court grappled with interpreting and applying the Punish Passenger Offence.

A. *Overview of Judicial Engagement with Section 35(8)*

I sourced for all court judgments that refer to this new provision. I used the official Taiwan judiciary website for judgments--the Judicial Yuan Law and Regulations Retrieving System ["司法院法學資料檢索系統"]--which provides an accessible and authoritative source of Taiwanese court decisions.[50] With January 1, 2024 as a cut-off point, there were 15 judgments.

For the purpose of this Article, four judgments are salient and directly addressed the issue of *mens rea* and/or the evidential burden of article 35(8). These four judgments will be discussed in turn. For completeness, the remaining judgments can be classified into three categories. First, judgments that mention section 35(8) in the course of citing article 35 of Road Traffic Management and Penalty Act.[51] Second, judgments where the passenger is also the vehicle owner, thus involving the interaction of sections 35(8) and 35(7) (which punishes a vehicle owner who knowingly allows drunk driving).[52] There is only case in the third category, which is an interesting tort case. In this case, the victim's family tried to seek civil compensation against the passengers as joint tortfeasors using section 35(8) as the basis of the duty of care.[53] The argument was rejected by the court.

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50. *Sih Fa Yuan Cai Pan Shu Si Tong* (*司法院裁判書系統*) [*Judicial Yuan Judgment Database*], *supra* note 48.

51. *E.g.*, Zhanghua Difang Fayuan (彰化地方法院) [Changhua District Court], Minshi (民事) [Civil Division], 110 Baoxian Zi No. 2 (110年度保險字第2號民事判決) (2021) (Taiwan).

52. *E.g.*, Yilan Difang Fayuan (宜蘭地方法院) [Yilan District Court], 109 Jiao Zi No.47 (109年度交字第47號判決) (2020) (Taiwan); Yunlin Difang Fayuan (雲林地方法院) [Yunlin District Court], 109 Jiao Zi No. 61 (109年度交字第61號判決) (2020) (Taiwan).

53. The plaintiffs also sought compensation against the operator of the campsite which supplied the alcohol to the driver. The court dismissed this claim, holding that given the common knowledge of the harms and illegality of drunk driving, the alcohol supplier does not owe any legal obligation to the consumers to warn or dissuade them from drunk driving. Xinzhu Difang Fayuan (新竹地方法院) [Hsinchu District Court], Minshi (民事) [Civil Division], 107 Chong Su Zi No. 223 (107年度重訴字第223號民事判決) (2018) (Taiwan).

B. *Finding*

The first three judgments are a series of litigation by *Yang Minzhe [楊明哲]*: 1) the initial administrative trial where Yang, the passenger, won; 2) the administrative appeal that ordered a retrial; and 3) the retrial where the government won. The fourth judgment involved a separate incident with another defendant and took place a year after the retrial of Yang Minzhe.

1. *Yang Minzhe [楊明哲] Trial*[54]

The *Yang Minzhe [楊明哲]* case began on April 27, 2021. The time was 8:00AM. The traffic police stopped a van when the police noticed the driver did not have his seatbelt fastened. After the stop, the police noticed that the driver reeked of alcohol. The police administered a breathalyzer test, which returned a finding of 0.67mg/L alcohol level (which is almost three times the legal limit). The police issued an infringement notice to the passenger, Yang Minzhe. Yang was fined NT$1,800.

Yang instituted an administrative litigation to challenge this fine. Yang claimed that he was not aware of the driver's drunkenness as he did not live together with the driver, did not smell any alcohol on the driver, and did not know what the driver consumed on the prior night. The government, as defendant, argued that based on the party negotiation mechanism in the legislative process, passenger liability is based on "constructive obligation" [擬制義務], which is distinct from the principle of liability" [責任原則] and the liability of obligations [義務原則], and requires only satisfaction of the stipulated requirements.

The District Court judge, Shen Peijin [沈培錚], rejected the government's position and dismissed Yang's punishment. The reasoning is two-fold. The first is constitutional. Judge Shen started by observing that in the absence of a specific legal provision, general principles of administrative penalty (as set out in the Administrative Penalty Act) should be applied. Article 7 of the Administrative Penalty Act provides that there should be no punishment if the violation of an administrative obligation is not intentional or negligent. This provision is based on the principle that "responsibility must precede punishment" [有責任始有處罰] which is a bedrock principle of the modern state. Thus, subjective culpability is a precondition to imposing administrative liability. While the state may impose obligations on private individuals to maintain a certain condition (e.g., the driver is not drunk), this must be premised on the targeted individual having factual

54. Hualian Difang Fayuan (花蓮地方法院) [Hualien District Court], 110 Jiao Zi No. 36 (110年度交字第36號判決) (2021) (Taiwan).

control over the condition. The passenger did not have such control, thus the minimum starting point of subjective culpability is intention or negligence. Further, a car owner, who has greater control over vehicle usage, requires "actual knowledge" [明知] before being subjected to punishment for a driver's drunkenness under article 35(7). Thus, a passenger should have a lower obligation. Therefore, Judge Shen applied the interpretative principle of "purposive reading down" [合目的性限縮] to exclude passengers, who have no knowledge and are not negligent, from being liable under article 35(8). This is to ensure there is no unconstitutional disproportionality.

The second is evidential. Judge Shen held that unless there is specific legal stipulation, the burden of proof in administrative proceedings cannot be readily transferred to the individual. The presumption of innocence under criminal procedures is not applicable in the current context of administrative penalties for traffic violations. Nonetheless, given that the government did not adduce evidence on Yang knowingly or negligently riding in a vehicle driven by a drunk driver, the benefit of doubt should go to Yang. This is especially so since Yang did not live with the driver (hence likely had no knowledge of the driver's prior activities) and it is doubtful whether Yang could smell the alcohol when both he and the driver were required to wear a mask under prevailing COVID regulations.

2. *Yang Minzhe [楊明哲] Appeal*[55]

The government appealed the decision by Judge Shen. The government repeated its position in the trial judgment, with further elaboration that legislative intent was to create a strict liability offence in the absolute sense (i.e., absolute liability) for the passenger. In the alternative, the government also argued that by not investigating whether Yang made any inquiries with the driver and wrongly assuming that Yang and the driver were wearing mask, Judge Shen did not adequately fulfill the judge's obligation of fact finding (and thus the judgment should be vacated for illegality).

The appellate court rejected the first ground of appeal. The appellate court observed that based on the constitutional principle of no punishment, if there no responsibility, a person cannot be punished for another's violation. However, from the legislative record, the legislators thought that passengers have obligation as social members to dissuade and prevent drunk driving. In turn, the legislature imposed on the passenger a guarantor status with a supervisory obligation. The appellate court explicitly rejected the government's position that article 35(8) was meant to be an absolute liability

55. Taipei Gaodeng Xingzheng Fayuan (臺北高等行政法院) [Taipei High Administrative Court], 111 Jiao Shang Zi No. 53 (111年度交上字第53號判決) (2022) (Taiwan).

offence given that it contravened the aforementioned constitutional principle. In addition, the removal of the exclusion of "the passenger proven to knew or did attempt to discourage" from the provision is purely meant to facilitate enforcement by removing the need to investigate the passenger's knowledge and/or any discouraging of drunk driving. It does not provide a basis for creating an absolute liability offence.

The appellate court accepted the second ground of appeal. The appellate court found that Judge Shen had indeed wrongly assumed that Yang and the driver were each wearing a mask. There was no evidence on file that the two individuals wore a mask during the car ride. Tellingly, the appellate court held that while the government did not ask the court to review the police video recording, the police video recording (which showed that Yang and the driver were unmasked at the material time) was part of the litigation material. As the judge of a fact-finding court, Judge Shen had an obligation to investigate and evaluate evidence when making the necessary fact-finding, and should have reviewed the video recording even if not raised by the parties. Thus, in light of the deficiencies in fact-finding, the trial judgment had to be vacated for retrial.

3. *Yang Minzhe [楊明哲] Retrial*[56]

The retrial was heard by Judge Zhong Zhixiong [鍾志雄]. The government no longer directly argued for an absolute liability interpretation of article 35(8). Instead, the government argued that as long as the requirements stipulated in article 35(8) were satisfied, the passenger could be punished.

Judge Zhong framed the issue as whether the infringement notice was illegally issued. He held that from the police video recordings, Yang and the driver were not wearing masks at the material time, and the driver's alcohol level was as high as the detected 0.67mg/L. Relying on common sense ["衡諸常情"], it is difficult to find that Yang could not have detected the driver's alcohol smell. As for Yang's claims that there was good ventilation with the car's window down and that Yang had olfactory diseases, there had been no evidence to support either claim, and thus the court could not find that Yang was unaware of the driver's drunk driving. Finally, the issuing of the infringement notice was legal because all the stipulated requirements of article 35(8) were present.

56. Hualian Difang Fayuan (花蓮地方法院) [Hualien District Court], 110 Jiao Zi No. 36 (110年度交字第36號判決) (2021) (Taiwan).

4. *Zeng Xiancong [鄭憲聰]* [57]

On the morning (7.17AM) of September 18, 2022, a driver was detected with an alcohol level of 0.26ml/L. Zeng Xiancong was the passenger. Zheng claimed that he did not know the driver (who was his brother but lived in a different household) had drunk alcohol the previous night. Zeng also claimed that he could not detect the smell of alcohol because of his illness induced olfactory problems.

Judge Xie Wanping [謝琬萍] held that it is for the court to exercise its investigative power and obligation to determine the truth, with the party bearing the burden of proof to suffer the adverse consequences of non-determination. The judge noted that the regulatory authority typically bears the burden of proof. However, due to express provisions under article 85(3), there is a presumption of fault/negligence. Article 85(3) provides that where there is simultaneous punishment of others, there is a presumption of negligence for those others.[58] Zeng did produce a hospital diagnosis of his illness. The judge further summoned written evidence from the hospital to directly inquire whether the illness and corresponding treatment had adversely impacted Zeng's sense of smell, which the hospital did confirm. Thus, the judge held that the presumption of fault under article 85(3) had been rebutted, and that Zeng could not be punished without subjective fault.

C. *Summary: Four Judgements, Four Approaches*

In a 2024 journal article, Hung Chia-Yin [洪家殷] discussed the application of the responsibility principle vis-à-vis the Road Traffic Management Penalty Regulations.[59] In his discussion of the Punish Passenger Offence, he cited the retrial of the *Yang Minzhe* case as the only case available, and proceeded to analyze the court's approach.[60] The *Zeng Xiancong* case was only decided in September 2023, so it is understandable that it was not included in Hung's analysis. Nonetheless, it is unfortunate that Hung only examined the retrial of the *Yang Minzhe* case. There are

57. Gaoxiong Gaodeng Xingzheng Fayuan Difang Xingzheng Susong Ting (高雄高等行政法院地方行政訴訟庭) [Kaohsiung District Administrative Litigation Division of High Administrative Court], 112 Jiao Zi No. 50 (112年度交字第50號判決) (2023) (Taiwan).

58. *See* Tang, *supra* note 20, at 85-86 (observing that this provision is not applicable where the punishment of the "other" requires intention as an integral element).

59. Hung Chia-Yin (洪家殷), *Xingzheng Fa Shang Zhi Youzexing Yuanze Shiyong Yu Daolu Jiaotong Guanli Chufa Tiaoli Zhi Tantao* (*行政罰上之有責性原則適用於道路交通管理處罰條例之探討*) [*Discussion on the Application of the Principle of Responsibility in Administrative Penalties to Road Traffic Management Penalty Regulations*], 346 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 21 (2024).

60. *Id*. at 31.

important, if at times subtle, distinctions in the approach undertaken in the three judgments of *Yang Minzhe* (i.e., trial, appeal, retrial).

In the first judgment, Judge Shen takes the most restrictive view of article 35(8). She rejected the government's argument that article 35(8) was meant to be an absolute liability offence. Instead, she held that there is an implicit requirement of fault (i.e., either actual knowledge or negligence) in article 35(8). Furthermore, the government (i.e., the administrative authority) bears the evidential burden of proving this element, with any benefits of doubts in evidence going towards the private individual.

In the second judgment, the appellate court similarly rejected the government's argument that article 35(8) is an absolute liability offence and agreed that the requirement of subjective fault is constitutionally required. However, unlike Judge Shen, the appellate court did not place the burden of proof on the administrative authority. Instead, the appellate court side-stepped the issue by directly holding that the trial court failed in its obligation to investigate and review evidence when the court did not proactively review a piece of relevant evidence that was not relied upon by the parties.

In the third judgment, Judge Zhong in the retrial did not directly address the issue of whether fault is required under article 35(8) or who bears the burden of proof. However, the actual resolution of the case indicates a two-stage approach. At the first stage, and reflecting the government's advocated position, if all the explicit requirements in the provision are satisfied, the administrative decision to punish is prima facie legal and valid. Thus, if the provision does not provide for subjective fault, the enforcing regulatory authority does not need to be concerned with subjective fault when issuing the fine. At the second stage, insofar as the fine is challenged in court, the judge may--upon urging by the punished passenger--proceed to assess whether the passenger had no knowledge or was not negligent.

The approach differed again in the *Zeng Xiancong* case. Judge Xie acknowledged the investigative power and obligation of the courts and also that the burden of proof is prima facie on the enforcing regulatory authority. However, the court relied on a separate provision of the statute to find that the burden of proof is on the defendant for the Punish Passenger Offence.

This divergence in approaches resembles the legislative process behind the Punish Passenger Offence, in particular the tension between esteemed rule of law ideals and the pragmatics of enforcement. The first judgment took a clear stance that favors the individual over the regulatory state. In the second judgment, the appellate court wanted to facilitate enforcement by the regulatory enforcement authority. However, the appellate court in the second judgment could neither directly deny nor ignore the principles raised in the trial court. Thus, it ordered a retrial that essentially shifted the burden on the

Table: A Sets Out the Differences in Approach

	Requires Fault	**Burden of Proof on Fault**	
		When Issuing Fines	**When Challenged in Court**
*Yang Minzh*e Trial	Yes	Enforcing regulatory authority	Enforcing regulatory authority
*Yang Minzh*e Appeal	Yes	[not discussed]	Inquisitorial judge
*Yang Minzh*e Retrial	Yes	No proof needed	Inquisitorial judge
Zeng Xiancong	Yes	Defendant [implicit]	Defendant

judge (and away from the enforcing regulatory authority). This trend of surreptitiously moving the burden away from the enforcing regulatory authority continued in the third judgment's two-step approach. Without explicitly holding that the burden of showing a lack of fault is on the defendant, the third judgment empowered the enforcing regulatory authority to issue fines without the need to inquire about subjective fault. The fourth judgment in turn is more explicit about the presumption of fault. Nonetheless, this court's reliance of an existing statutory provision that predates the Punish Passenger Offence is arguably novel and off-the-cuff. This basis for finding presumption of fault is absent in the legislative debate and the prior three judgments.

IV. THE INCOMPLETE AND IMPOSSIBLE(?) REFORM: ADMINISTRATIVE PENALTY ACT

The previous Part explained how the varied approaches of the courts in interpreting the Punish Passenger Offence reflects the uneasy tension between ease of enforcement versus rule of law principles. The source of this tension can be traced back to the Administrative Penalty Act, as frequently referred to in the legislative debate and court judgments. This Part turns the spotlight on the Administrative Penalty Act, in particular article 7 which stipulates the fault requirement. I examine the legislative history and scholarly debates to demonstrate the muddled approach underpinning the Administrative Penalty Act.

A. *General Background: Regulatory Offence in Common Law and Civil Law*

The emergence and expansion of the regulatory state post-industrial revolution has led to a new type of offence. This new type of offence has different names in different places (e.g., regulatory offence, public welfare

offence, administrative sanctions).[61] Yet they share the same feature. These offences are less about upholding morality or securing just retribution, concerns which otherwise underpin traditional criminal law.[62] Instead, these offences are designed to ensure people's compliance with an increasingly complex social and economic order. Thus, ease of enforcement is the paramount consideration, no less given the numerosity and relative triviality of these various behavior-regulating offences.[63] The jurisdictions in the West have developed two approaches towards accommodating this new type of offence in the legal regime.

For common law jurisdictions, the accommodation is straightforward with the judicial concession that proof of fault is not an inherently necessary requirement for criminal liability.[64] Thus, these new offences--many of them strict liability offences to facilitate enforcement--are treated as any other crimes.[65] Common law courts in more recent times have sought to draw a distinction between different types of offences as it sought to manage the constitutional and normative concerns of strict liability. For example, the Canadian courts distinguished offences that are "criminal" and "public welfare offences" (also "regulatory offences") as it sought to limit strict liability to the latter on constitutional grounds of presumption of innocence.[66] However, an explicit and systematic conceptual delineation has been considered but thus far rejected by the Law Commission of England and Wales on grounds of vagueness.[67]

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61. *Infra* text accompanying notes 85-95.

62. MARKUS D. DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH 4-5 (2014). *See* Michael S. Moore, *The Strictness of Strict Liability*, 12 CRIM. L. & PHIL. 513, 521-22 (2018) (discussing how purported public welfare justifications of strict liability regulatory offences is "very unpersuasive" for criminal law scholars).

63. Terry Skolnik, *The Regulatory Offence Revolution in Criminal Justice: The Expansive Role of Regulatory Offences*, 61 ALBERTA L. REV. 777, 780-82 (2024); Matthew Dyson & Benjamin Vogel, *Administrative Sanctions Compared: The Limits of Executive Enforcement*, *in* THE LIMITS OF CRIMINAL LAW: ANGLO-GERMAN CONCEPTS AND PRINCIPLES 333, 337-38 (Matthew Dyson & Benjamin Vogel eds., 2018).

64. Moore, *supra* note 62, at 521-22; G. R. Sullivan, *Strict Liability for Criminal Offences in England and Wales Following Incorporation into English of the European Convention on Human Rights*, *in* APPRAISING STRICT LIABILITY 195, 197 (Andrew Peter Simester ed., 2005). For discussion of the historical evolution of the principle, *see* Andrzej Lewna, *The Construct of Strict Liability in Criminal Law of England and Wales in the Context of Polish Legal Regulations on the Subjective Element in the Structure of a Prohibited Act*, 32 STUDIA IURIDICA LUBLINENSIA 203, 210-13 (2023). *See also* Michael Serota, *Strict Liability Abolition*, 98 NYU L. REV. 112, 123-27 (2023) (discussing the logical and social pressures underpinning the rise of strict liability offences in the U.S.).

65. Rebecca Williams, *Criminal Law in England and Wales: Just Another Form of Regulatory Tool?*, *supra* note 63, at 207, 207 ("English law does not draw sharp distinctions between 'crimes' and other 'regulatory offences.'").

66. *R. v. Wholesale Travel Group Inc. and Chedore*, 3 S.C.R. 154 (1991). For academic discussion *see*: John Keefe, *The Due Diligence Defence: A Wholesale Review*, 35 CRIM. L.Q. 480, 481-91 (1993); N. J. Strantz, *Beyond R. v. Sault Ste. Marie: The Creation and Expansion of Strict Liability and the Due Diligence Defence*, 30 ALBERTA L. REV. 1233, 1237-39 (1992).

67. Williams, *supra* note 65, at 207.

For civil law jurisdictions, there is usually formal differentiation categorization of this new type of offence as compared to traditional criminal offences.[68] This can be incorporated and provided for in the Penal Code. For example, in France, the Penal Code differentiated the offences into three categories, with strict liability and reverse burden of proof being permitted for the less severe category (i.e., contraventions or petty offence).[69] Alternatively, these new offences may be stipulated in a separate statute. The representative example is Germany, where the Order Infringing Law [*Ordnungswidrigkeit*] provides for important procedural and substantive distinctions from the basic principles of criminal procedure.[70] Other examples include Austria,[71] Italy[72] and Portugal.[73]

Taiwan recognizes the distinctness of the administrative penalty (as compared to criminal offences) like in Germany. However, while the Taiwanese courts acknowledge that different and possibly lower procedural and substantive standards apply to administrative penalties, there is no specific statutory prescription for this category of offence.[74]

The enactment of the Administrative Penalty Act in 2005 was designed to finally ratify the situation. As per the explanation accompanying the introduction of the bill, the central theme is to ensure that the administrative sanctions in Taiwan conform to the values modern democratic rule of law state [現代民主法治國家].[75] In particular, it ratified the then situation of diverse and inconsistent approaches/interpretations by providing a uniform set of governing principles that protect citizen's rights and promote

68. For a comparative survey of how administrative sanctions are legally prescribed in the European Union, *see* Carlo Enrico Paliero, *The Definition of Administrative Sanctions-General Report*, *in* ADMINISTRATIVE SANCTIONS IN THE EUROPEAN UNION 1, 8-31 (Oswald Jansen ed., 2013).

69. John R. Spence & Antjie Pedain, *Approaches to Strict and Constructive Liability in Continental Criminal Law*, *supra* note 64, at 237, 259. *See also* Emmanuel Breen, *Country Analysis-France*, *supra* note 68, at 195, 201-10 (discussing the administrative sanctions prescribed for in various statutory and regulatory instruments, and the generally less onerous procedural and substantive requirements imposed by the Conseil d'Etat during judicial review).

70. Ulrich Siber, *Administrative Sanction Law in Germany*, *supra* note 63, at 301, 316-18. For a critical discussion of the social, economic and political circumstances surrounding the enactment, *see* Daniel Ohana, *Administrative Penalties in the Rechtsstaat: On the Emergence of the Ordnungswidrigkeit Sanctioning System in Post-War Germany*, 64 U. TORONTO L.J. 243, 262-88 (2014).

71. Frank Höpfel & Robert Kert, *Country Analysis-Austria*, *supra* note 68, at 35, 44-45 (Verwaltungsstrafgesetz VStG [Administrative Penal Code]).

72. Alessandro Bernardi, Ciro Grandi & Ilaria Zoda, *Country Analysis-Italy*, *supra* note 68, at 289, 291 & 310-12 (law no. 689/1981 "Modifiche al sistema penale" [The Evolution of the Penal System]).

73. Pedro Caiero & Miguel Ãngelo Lemos, *Country Analysis-Portugal*, *supra* note 68, at 467, 470-71 (DL No. 232/79 "Direito de Mera Ordenacao Social" [Right of Mere Social Order]).

74. CHEN XIN-MIN (陳新民), XING ZHENG FA ZONG LUN (行政法學總論) [ADMINISTRATIVE LAW] 380-88 (10th ed. 2020).

75. Xingzheng Fafa Caoan Zongshuoming (行政罰法草案總說明) [Administrative Penalty Act Draft Explanation], *supra* note 7.

administrative efficiency.[76] This objective of unifying the codification of administrative penalties [行政罰法典化] is reiterated again when the Minister of Justice introduced the bill in parliament.[77] The Administrative Penalty Act is modeled on the German continental model,[78] with many provisions explicitly referencing the German Order Infringing Law.[79]

B. *Article 7 of the New Administrative Penalty Act: Requirement of Fault*

The issue of whether fault is required for administrative punishment has evolved considerably since the formation of the modern administrative state after the end of dynastic imperial rule. During the Republican era in China and its continuation in Taiwan post-1949, the courts have consistently held that fault (whether intention or negligence) is not required for administrative sanctions.[80] This position was moderated in 1991. Amidst the broader democratization transition,[81] the Council of Grand Justice (*i.e.*, Taiwan Constitutional Court) held that where the administrative penalty provision is silent on the requirement of fault, a minimum of negligence will still be an essential condition for the offender's liability under the principle that a person can only be punished for one's attributable fault. However, to facilitate regulatory objectives, there will be a presumption of fault whereby the offender will be liable if the offender cannot prove the lack of fault.[82] Essentially, absolute liability is prohibited, but strict liability is permitted.

It is in this context that the enactment of the Administrative Penalty Act is supposed to be watershed moment in the evolution of this issue.

Article 7 of the Administrative Penalty Act provides that "[a]n act in breach of duty under administrative law is not punishable unless committed intentionally or negligently."[83] The accompanying legislative reason for article 7 further states that "[i]n a modern democratic rule-of-law state, when imposing penalties on persons for breaching administrative legal obligations,

76. *Id.*

77. Legislative Yuan Gazette, *supra* note 5, at 197.

78. For outline of legislative consultation process, *see id.*

79. Out of the 46 articles (including administrative provisions), 20 articles are explicitly based on the German law: *e.g.*, art. 10 (liability for omission); art. 12 (defense of emergency); art. 20 (compensatory liability of beneficiary), art. 25 (liability for several acts): Administrative Penalty Act.

80. LIN MIN-QIANG (林明鏘), XING ZHENG FA JIANG YI (行政法講義) [ADMINISTRATIVE LAW LECTURES] 280 (6th ed. 2021); MIN CHEN (陳敏), XING ZHENG FA ZONG LUN (行政法總論) [ADMINISTRATIVE LAW] 768 (10th ed. 2019). *See* LI HUI-ZHONG (李惠宗), XING ZHENG FA YAO YI (行政法要義) [ESSENCE OF ADMINISTRATIVE LAW] 533-34 (7th ed. 2016) (associating this legal position with the authoritarian impetus of maintaining order under the declared martial law, and noting pre-1950s courts judgments that are more receptive to the requirement of fault).

81. LIN, *supra* note 80, at 280-81; LI, *supra* note 80, at 533-35.

82. Sifa Yuan Dafaguan Jieshi No. 275 (司法院大法官解釋第275號) [Judicial Yuan Interpretations No. 275] (1991) (Taiwan).

83. Administrative Penalty Act § 7.

the burden of proof of whether the person acted intentionally or negligently shall rest with the state, thereby advancing legislation aimed at safeguarding human rights."[84] The legislative reason reflects the legislative debate. The Deputy Minister of Justice was keen to refer to a new fault requirement to clarify that the Administrative Penalty Act is not simply for operationalizing administrative law, but also to set up a comprehensive framework, most of which is devoted to protecting human rights.[85]

Burden of proof was an issue specifically raised and debated.[86] However, the response by the Deputy Minister is intriguing. Instead of giving a direct answer as to who bears the burden of proof, the Deputy Minister began by characterizing the question as a "deeply profound jurisprudential question" [这个问题的确是一个十分深奥的法理]. He then stated that the enforcing regulatory authority, when issuing a disciplinary citation [处分书], should "very seriously consider" [非常认真的考虑] whether there is subjective fault.[87] A legislator pushed back on the fallacy of rights protections when the enforcing regulatory authority is simultaneously being the enforcer and adjudicator of the issue of fault.[88] However, the Deputy Minister's responded that the concern can be addressed through educating the civil servant to ensure proper execution and the courts to police any deficiency.[89]

Two inherent contradictions in the Administrative Penalty Act can be discerned.

The first is specific to article 7. The legislative reason and the legislative debate clearly articulated the legislative intention that the burden of proof should be borne by the enforcing regulatory authority on the grounds of human rights. One would assume that article 7 is drafted to reflect this intention, especially given that there are no discernable obstacles or opposition to putting down the phrase "burden of proof shall be borne by the

84. Art. 7, Administrative Penalty Act § 6: In modern democratic rule-of-law states, when the government seeks to impose sanctions on an individual for violating administrative obligations, the burden of proof should rest with the state to demonstrate that the individual acted with intent or negligence; only then can it be regarded as progressive legislation for the protection of human rights ("現代民主法治國家對於行為人違反行政法上義務欲加以處罰時，應由國家負證明行為人有故意或過失之舉證責任，方為保障人權之進步立法").

85. LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 93:3, 182 (2003) (Taiwan).

86. *Id*. at 147-48 & 154-56.

87. *Id*. at 147. Austria, together with Germany, were the two jurisdictions which was explicitly mentioned as being referred to in the drafting process: *id*. at 197. Verwaltungsstrafgesetz VStG [Austria's Administrative Penal Code] § 5 explicitly provides for the presumption of negligence for administrative offence that does not require an effect or a danger to occur: Höpfel & Kert, *supra* note 71, at 55 (the ECtHR and Austrian Constitutional courts have confirmed the constitutionality of this provision in the early 1990s).

88. LEGISLATIVE YUAN GAZETTE, *supra* note 85, at 147-48 & 155.

89. *Id*. at 154.

enforcing regulatory authority". Yet, notwithstanding the gravity of the rationale/implication, article 7 did not make any stipulations on burden of proof. The end result is a disconnect between the enacted legislative provision and articulated the legislative intention.

The second relates to the fundamental nature of the Administrative Penalty Act. A core legislative objective--as articulated and emphasized in the legislative reason and legislative debate--of the Administrative Penalty Act is to provide unifying codification. However, the very first article provides that the various statutory requirements prescribed by the Administrative Penalty Act can be superseded by specific stipulations. This is notwithstanding the fact that many of the statutory requirements (including article 7) are purported driven by core human rights.[90] In any event, this possibility of statutory override will dilute the unifying effect. The contradiction is perhaps exemplified by the Ministry of Justice when he noted that while the new law has many provisions, these provisions are not meant to replace the various existing stipulations, they are merely to provide a unified standard when future administrative penalties are prescribed by the various regulatory authorities.[91]

C. *Scholarly Debate: No Consensus on Presumption of Fault*

It is no surprise then that the scholarly debate reflects the inherent inconsistencies in the legislative provision.

Relying on the 1991 Constitutional Court decision and the enactment of the Administrative Penalty Act, the consensus of Taiwanese scholars is that fault is always required for the issuing of an administrative penalty. However, scholars differ as to whether the presumption of fault (i.e., the accused bears the burden of proving the lack of negligence) is allowed.

Citing the legislative reasons accompanying article 7 of the Administrative Penalty Act, Lin Tengyao [林騰鷂],[92] and Lin Minqiang [林明鏘][93] opined that the presumption of fault is now prohibited. Li Huizhong further justified the position with allusion to the spirit of the rule of law.[94] Li Huizhong [李惠宗][95] adopts some sort of a middle ground. She acknowledges that the presumption of fault may be statutorily enshrined, however, this statutory presumption must adhere to principles of experience

90. Insofar as a provision of a generally applicable statute is meant to protect human rights, one would generally not expect that provision to be superseded by specific statute.

91. Legislative Yuan Gazette, *supra* note 5, at 208.

92. LIN TENG-YAO (林騰鷂), XING ZHENG FA ZONG LUN (行政法總論) [ADMINISTRATIVE LAW] 573-74 (4th ed. 2020).

93. LIN, *supra* note 80, at 280.

94. *Id*. at 537.

95. *Id*. at 536-37.

[经验法则]. Other scholars simply assumed the prosecuting regulatory authority bears the burden of proving fault upon enactment of article 7.[96]

On the other hand, Chen Min [陳敏],[97] Zhuang Guorong [莊國榮],[98] and Lin Wen-Tsun [林文村][99] opined that specific legislation may still explicitly provide for the presumption of fault.[100] Chen Min and Zhuang Guorong based their argument on the existence of specific legislation that provides for presumption of fault.[101] Lin Wen-Tsun further pointed to article 1 of the Administrative Penalty Law and a Supreme Administrative Court judgement [最高行政法院101年度判字第954號判決] to argue that the Administrative Penalty Law is only meant to provide general principles without precluding specific legislation from making alternative stipulations.[102]

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96. *E.g.*, Wu Ming-Hsiao (吳明孝), *Fazhan Guanguang Tiaoli Di 53 Tiao zhi Hexianxing Yanjiu-Jianping Taibei Gaodeng Xingzheng Fayuan 96 Niandu Jian Zi Di 85 Hao Panjue* (*發展觀光條例第53條之合憲性研究－簡評台北高等行政法院96年度簡字第85號判決*) [*The Study of Constitutionality for "Article 53 of Statute for the Development of Tourism": The Review in Taipei High Administration Courts Judgment 96 Chien Zi No.85*], 1 FAZHI YU GONGGONG ZHILI XUEBAO (法治與公共治理學報) [J. L. & PUB. GOVERNANCE] 1, 16-17 (2013) (arguing the prosecuting regulatory authority bears the burden of proving subjective fault--i.e., intention or negligence vis-à-vis harming national image--for violation involving article 53 of the Statute for the Development of Tourism that is otherwise silence on intention); Huang Shih-Chou (黃士洲), *Liangshui Heyi yu Shuijuan Guibi-Yi Xingzheng Fayuan Panjue wei Hexin* (*兩稅合一與稅捐規避－以行政法院判決為核心*) [*Share Transfer and Tax Evasion-A Case Study on Tax Court Decisions*], 34 DONGHAI DAXUE FAXUE YANJIU (東海大學法學研究) [TUNGHAI U. L. REV.] 137, 185-86 (2011) (in the context of administrative punishment for tax evasion).

97. CHEN, *supra* note 80, at 770.

98. ZHUANG GUO-RONG (莊國榮), XING ZHENG FA (行政法) [ADMINISTRATIVE LAW] 256-57 (7th ed. 2021).

99. Lin Wen-Cun (林文村), *Xianyi Junren Weishi Xingwei zhi Zeren Tiaojian-Yi Tuiding Guoshi Zeren, Zhuangtai Zeren, Liansuo Zeren wei Zhongxin* (*現役軍人違失行為之責任條件－以推定過失責任、狀態責任、連坐責任為中心*) [*Wilfulness and Negligence of Wrongful Acts by Active Service Men: Focus on Presumption of Negligence Liability, Status Liability and Collateral Penalty*], 66 JUNFA ZHUANKAN (軍法專刊) [MILITARY L.J.] 58, 80-82 (2020).

100. *See also* Wei Wen-Chin (魏文欽), *Lun Shuijuan Zhixu Fa Xingweiren zhi Zeren Yaojian: Yi Deguo Fa wei Zhongxin* (*論稅捐秩序罰行為人之責任要件：以德國法為中心*) [*The Responsibility Requirements of Tax Return Behaviors in the Context of German Law*], 46 DEMING XUEBAO (德明學報) [TAKMING U. J.] 1, 8 (2023). (conceding without discussion that presumption of fault is possible via specific legislation).

101. Interestingly, both of them cited the same article 85(4) of the Road Traffic Management and Penalty Act: ZHUANG, *supra* note 98, at 257; CHEN, *supra* note 80, at 770 n.30.

102. Lin, *supra* note 99, at 71. *See also* Chen Cheng-Ken (陳正根), *Chuang Hongdeng Weigui zhi Jufa yu Zeren Yuanze-Jianping Taiyi Difang Fayuan Yi Ling Er Niandu Jiao Zi Di Disishiwu Hao Xingzheng Susong Panjue* (*闖紅燈違規之舉發與責任原則－兼評臺已地方法院一〇二年度交字第四十五號行政訴訟判決*) [*Reporting of Running through a Red Light and Responsibility Principle: With Comments on Administrative Judgments of Taipei District Court No. 45 in the Year of 102*], 45 CHUNGCHEN DAXUE FAXUE JIKAN (中正大學法學集刊) [NAT'L CHUNG CHENG U. L.J.] 139, 159-60 (2014) (arguing that while the status of Administrative Penalty Law as only normal law meant that presumption of fault is possible in practice, this should be limited moving forward).

Hung Chia-Yin [洪家殷][103] and Tang Ru-Yen [湯儒彥][104] have separately written on the applicability of article 7 of the Administrative Penalty Law vis-à-vis the specific context of the Road Traffic Management and Penalty Act (i.e., the statute prescribing the Punish Passenger Offence). Both acts referred to article 7 of the Administrative Penalty Law as requiring the enforcing regulatory authority to bear the burden of proving fault, though this requirement may be statutorily varied.[105] Notably, they did not acknowledge or mention that the burden of proof stipulation is only contained in the legislative reason and not the legislative provision itself.

D. *Summary: Unresolved Disputes about the Administrative Penalty Act*

In terms of aligning the articulated legislative intention with the actual statutory provision, the Administrative Penalty Act is riddled with ostensibly avoidable mishaps. The legislature could have put the material phrase on burden of proof in the legislative provision itself, and not just in the legislative explanation. The legislature could also have been more circumspect about how the Administrative Penalty Act may be varied by other statutes. The legislature did neither. The end result, much like the disparate approaches by the courts vis-à-vis the Punish Passenger Offence, is the irreconcilable divergence of scholarly opinions.

V. ANALYSIS AND IMPLICATIONS

This Part connects the Punish Passenger Offence with the Administrative Penalty Act. I identify the two interconnected themes that is ever present in both processes. I explain that the inconsistent judicial interpretation, while undesirable, is an inevitable consequence of the legislature setting up the courts for failure. I then situate this case study with the literature on judicial-legislature dynamic (including legislative deferral) and highlight the implications.

A. *Analysis: The Long Shadow of Unresolved Tension*

When put in context, the divergences in judicial interpretations of the Punish Passenger Offence are arguably understandable and inevitable given the ambiguity and inherent contradictions of the Administrative Penalty Law. The trial judgment of *Yang Minzhe* embraced the proudly proclaimed principles of rule of law and protections of individual rights that ostensibly

103. Hung, *supra* note 59, at 21-24.
104. Tang, *supra* note 20, at 85-86.
105. Hung, *supra* note 59, at 21-24; Tang, *supra* note 20, at 85-86.

underpin the Administrative Penalty Law. This is similar to scholars who argue that the presumption of fault has been categorically prohibited by the enactment of article 7 of the Administrative Penalty Law.[106]

The appeal and retrial judgments of *Yang Minzhe* recognized that those principles are far from ironclad and did not want to upset the status quo of regulatory enforcement practices. At the same time, the judgments did not want to be seen to ostensibly challenge/rebut those principles. Thus, the courts effectively but surreptitiously shifted the burden of proof. Again, this is similar to how the burden of proof was dealt with during the legislative process of article 7. There is official recognition of the laudable principle (i.e., the burden of proof is on the enforcing regulatory authority) in both the legislative debate and the legislative reason. However, it is not included in the actual statutory wording.

From this perspective, the judgment in the *Zeng Xiancong* case is quite straightforward in its reasoning: statutory exception is possible for the burden of proof, and statutory exception is present for the Punish Passenger Offence. From the discussion in this Part, this is arguably the correct doctrinal position based on the express wording of the Administrative Penalty Act (i.e., article 1's provision of exception and article 7's failure to require burden of proof) and the Road Traffic Management and Penalty Act (article 85(3)'s reverse burden of proof). The intriguing aspect is the conspicuous omission of this seemingly elegant and straightforward legal avenue in the legislature debate where the government (including the Ministry of Justice) was adamant that the Punish Passenger Offence does not involve a reversal of the burden because that is prohibited by the Administrative Penalty Act.[107]

What is to be made of this?

I argue that the Punish Passenger Offence is a snapshot of the purgatory (limbo?) state between two conflicting political consensuses vis-à-vis the ideal administrative state.

Taiwan has achieved international acclaim for successfully transitioning into a vibrant constitutional democracy after martial law was formally ended in 1987.[108] The Administrative Penalty Act is part of a series of administrative law reforms beginning with the Administrative Procedure Act that seeks to modernize the bureaucracy vis-à-vis the rule of law ideals (i.e., less corrupt or beholden to existing vested interests, more responsive to

106. *See generally* LIN, *supra* note 92-95; Wu, *supra* note 96; Huang, *supra* note 96 and accompanying text.

107. text accompany notes 34 to 39 and 43 to 49.

108. Thomas Wei-Sheng Huang, *Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan*, 19 TEMP. INT'L & COMP L.J. 1, 1-4 (2005); Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 535-39 (2002).

public interests, protection of individual's rights/interests).[109] In particular, there is political incentive/pressure across otherwise rival political parties since the late 1990s to be seen as reformist in orientation.[110] This momentum persist for other reform,[111] including the Administrative Penalty Act.[112]

However, the otherwise conspicuous enactment of milestone legislation belies another persistent political consensus. The overwhelming bipartisan support for the Punish Passenger Offence[113] may be unusual in Taiwanese politics as a general matter but is actually common when it comes to punitive responses to perceived serious social problems. The concept of 治亂世用重典 [troubled times require severe measures] has a longstanding history in Chinese culture[114] and remains embedded in the popular psyche. This is well documented in the empirical analysis of national opinion survey by Charles Hou and Fu-Sheng Shu.[115] Notably, while the survey by Hou and Shu was conducted in the mid-1990s, more recent studies in the late 2010s do not

109. For in-depth discussion of the political dynamics underpinning the Administrative Procedure Act reform, *see* Jeeyang Rhee Baum, *Breaking Authoritarian Bonds: The Political Origins of the Taiwan Administrative Procedure Act*, 5 J. E. ASIAN STUD. 365, 377-92 (2005). *See also* Jiunn-Rong Yeh, *Globalization, Government Reform and the Paradigm Shift of Administrative Law*, 5 NTU L. REV. 113, 120 (2010) (noting the transitional justice issue that may underpins government reform in new democracies such as Taiwan); Tak-Wing Ngo & Yi-Chi Chen, *The Genesis of Responsible Government under Authoritarian Conditions: Taiwan during Martial Law*, 8 CHINA REV. 15, 28-40 (2008) (discussing the internal (i.e., innate technocratic governance model) and external (i.e., pressure/conditions attached to US aid) factors strengthening of administrative accountability and governing capacity during the Taiwan authoritarian regime in the 1950s and 1960s).

110. JEEYANG RHEE BAUM, RESPONSIVE DEMOCRACY: INCREASING STATE ACCOUNTABILITY IN EAST ASIA 62-72 (2011). *See also* Jiunn-Rong Yeh, *Experimenting with Independent Commission in a New Democracy with a Civil Law Tradition: The Case of Taiwan*, *in* COMPARATIVE ADMINISTRATIVE LAW 198, 200-02 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2nd ed. 2017) (noting the political reform impetus of the DPP and manifestation after it won the presidential election in 2000, and how KMT supported the reforms as an avenue to mitigate the regulatory power wield by the executive).

111. *See* Hsin-Hsuan Lin, *Tightwire of National Interests and Publicity in the Evolved Process of Democratization and Constitutional Transformation: Lessons from Taiwan*, 5 CARDOZO INT'L & COMP. L. REV. 327, 341-42 (2022) (discussing the enactment of the Freedom of Government Information Law in 2005 and the Classified National Security Information Protection Act in 2003); Yeh, *supra* note 110, at 200-02 (discussing the political dynamic underpinning the creation of the independent commission, National Communications Commission).

112. There were no concerted opposition to the law: text accompany notes 75 to 79 and 83 to 89.

113. text accompany notes 42.

114. He Hui-Fang (何惠芳), *Zhongguo Gudai Xingfa Shiyong de Fazhi Sixiang* (*中国古代刑法适用的法制思想*) [*Legal Thoughts of the Criminal Law in Ancient China*], 10 FAZHI BOLAN (法制博览) [LEGALITY VISION] 57, 57-58 (2021); Yuan Xin-I. (袁昕仪), *Guanyu Zhongguo Lishi Shang Shiyong Zhongdian de Sikao* (*关于中国历史上使用重典的思考*) [*Reflection of the Use of Harsh Punishment in Chinese History*], 4 FAZHI BOLAN (法制博览) [LEGALITY VISION] 134, 134 (2015).

115. Hou Chong-Wen (侯崇文) & Shu Fu-Sheng (許福生), *Zhi Luanshi Yong Zhongdian Shehui Yixiang zhi Yanjiu* (*治亂世用重典社會意向之研究*) [*Public Support of Criminal Punishment in Taiwan*], 21 FANZUIXUE QIKAN (犯罪學期刊) [J. CRIMINOLOGY] 43, 54-55 (1997).

reflect any wavering of such public support.[116] Indeed, a common complaint by scholars is how governments are often pressured by public opinion to reactively legislate and impose punitive sanctions (including administrative sanctions).[117] The relentless consensus for punitive sanctions may even override important constitutional protections of core human rights (e.g., religious freedom).[118]

The confluence of these two competing political impetuses results in the contradictions we witness in both article 7 of Administrative Penalty Act and the Punish Passenger Offence. Notwithstanding all the lauded lofty premises of "democracy", "rule of law" and "human rights protection" that underpin placing the burden of proof on the enforcing regulatory authority, the requirement is not written into the provision itself of the Administrative Penalty Act and is in any event explicitly circumventable legislatively by virtue of article 1. All the seemingly resolute recognition about the impermissibility of a reversal of the evidential burden and the paramount importance of subjective fault during the legislative debates of the Punish Passengers Offence results in the deliberate removal of any *mens rea* requirements in the actual provision.

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116. Wang Po-Ci (王伯頎), *Luanshi Yong Zhongdian, Xing bu Xing? Xing bu Xing?-Dui Jiujia Fangzhi Celue de Linglei Sikao* (*亂世用重典，行不行？刑不刑？－對酒駕防治策略的另類思考*) [*Heavy Punishment for Chaotic Times, Can? Criminal?-Alternative Thoughts on Prevention Strategy for Drunk Driving*], 21 XINGSHI ZHENGCE YU FANZUI FANGZHI YANJIU ZHUANKAN (刑事政策與犯罪防治研究專刊) [J. CRIM. POL'Y & CRIME PREVENTION] 78, 78 (2019). *See also* Chiu Hsuan-Mien (邱炫綿), *Minzhong Sixing Taidu Yingxiang Yinsu zhi Yanjiu* (*民眾死刑態度影響因素之研究*) [*A Study of the Public Attitude Toward the Death Penalty*], 5 XIUXIAN YU SHEHUI YANJIU (休閒與社會研究) [LEISURE & SOC. RSCH.] 17, 31 (2012) (discussing the survey findings of public support for death penalty).

117. *E.g.*, LIN, *supra* note 80, at 324; Hong Sheng-Ding & Huang Shu-Ru (洪勝鼎 & 黃淑如), *Liangjihua Xingshi Zhengce Xia Woguo Jiashi Zhidu zhi Tantao* (*兩極化刑事政策下我國假釋制度之探討*) [*Taiwan Parole System under Polarized Criminal Policy*], 122 RENQUAN HUIXUN (人權會訊) [HUMAN RIGHTS Q.] 51, 60 (2016). While the concept is often used in the context of arguing for creation of new criminal offence or enhancing the penalty of criminal offence, it is applicable to administrative penalty. As per the interview survey of law enforcement officials (e.g., regulatory authority agents, judicial police, judges) by Tsay Jenn-Rong and Yu Hsiu-Chih, the law enforcement officials consider administrative penalty and criminal sanctions as complementary components of deterrence. The law enforcement officials prioritize the actual magnitude and probability of the sanctions over the formal categorization: Tsay Jenn-Rong & Yu Hsiu-Chih (蔡震榮 & 余修智), *You Gonggong Weihai Gainian Lun Xingwei yu Zhicai zhi Lifa Cailiang ji Fa Shijian* (*由公共危害概念論行為與制裁之立法裁量及法實踐*) [*From the Common Nuisance Discuss Action and Punishment's Legislative Discretion*], 67 JUNFA ZHUANKAN (軍法專刊) [MILITARY L.J.] 45, 67 (2021).

118. The moral panic over perceived religious fraudster sexually exploiting naïve and vulnerable young woman has driven regular prosecutions and convictions of these perceived sexual fraud on the basis of constitutionally questionable assumption that "real" religion will never involve sex: JIANLIN CHEN, LAW AND POLITICS OF RELIGIOUS FRAUD REGULATION: CHINA, TAIWAN AND HONG KONG 205-27 (2023). For media analysis, *see* Jianlin Chen & Shao Yuan Chong, *The Curse of the Lecherous Spiritual Charlatans: Law, Moral Panic and Newspaper Reports of Rape by Religious Fraud in Taiwan*, 17 U. PA. ASIAN L. REV. 89, 123-27 (2022).

Tellingly, these contradictions are not lost on the legislators. Rather, in both cases, courts are expected to resolve the resulting conundrum. For article 7 of the Administrative Penalty Act, the Deputy Minister of Justice used the supervisory functions of courts to deflect the pushback about the illusionary nature of the enforcing regulatory authority bearing the burden of proof when the same authority is also simultaneously the adjudicator. For the Punish Passenger Offence, the lead legislator conjured a new concept (i.e., "constructive obligation") to provide some semblance of legal compliance, and left it to the courts to address the constitutionality of this maneuver down the line.

Faced with this unenviable and impossible task, it is perhaps inevitable that Taiwanese courts have struggled to find a consistent and coherent approach to apply the seemingly straightforward wording of the Punish Passenger Offence. Indeed, at times, the courts--such as the those involved in the appeal and retrial judgments of *Yang Minzhe*--offer themselves as the sacrificial lamb in the tug-of-war of the two competing political impetuses by simply placing the burden of proof on themselves. In any event, the bottom-line is that the fault of this interpretative mess lies squarely with the legislature.

B. *Implications: The Perils of Political Consensus to Judiciary*

In addition to exonerating the Taiwanese courts for their disparate interpretations of the Punish Passenger Offence, this case study also has broader implications on the legislature-judiciary dynamic.

Under the backdrop of Taiwan successful transition into a vibrant constitutional democracy,[119] the Taiwanese judiciary has attracted a considerable scholarly inquiry in the English language literature. This inquiry has two broad temporal focus. There is the historically oriented investigation of the role of courts during the authoritarian martial law period and subsequent transition period.[120] There is also the examination of how

119. Huang, *supra* note 108, at 1-4; Wang, *supra* note 108, at 535-39.

120. *E.g.*, Ching-Fang Hsu, *The Political Origins of Professional Identity: Lawyers, Judges, and Prosecutors in Taiwan's State Transformation*, 6 ASIAN J. L. & SOC'Y 321, 331-36 (2019) (empirical investigation via field interview and archival research to examine how judges understood and shape their professional identity during the democratic transition period); Chien-Chih Lin, *Constitutions and Courts in Chinese Authoritarian Regimes: China and Pre-Democratic Taiwan in Comparison*, 14 INT'L J. CONST. L. 351, 363-73 (2016) (comparing the different role of courts in China and martial-law Taiwan); Jou-Juo Chu, *Global Constitutionalism and Judicial Activism in Taiwan*, 38 J. CONTEMPORARY ASIA 515, 519-29 (2008) (discussing the judicial activism of the Taiwan's constitutional courts in facilitating and consolidating democratization). *See* Jerry McBeath, *Democratization and Taiwan's Constitutional Court*, 11 AM. J. CHINESE STUD. 51, 55-69 (2004) (examining how the Taiwan constitutional courts incrementally facilitate democratization over the authoritarian period and the democratic transition period).

contemporaneous courts navigate the divided and antagonistic political landscape.

Unlike the former historically oriented investigation where there is a general consensus on the positive and active role by the courts,[121] scholars have differing views on the courts' role in more recent times. Ming-Sung Kuo argued the Taiwan constitutional courts have retreated from its activist role after 2000 in the face of what Kuo termed "unconstrained battlefield of unruly partisan politics" vis-à-vis the constitution.[122] Kuo was critical of this retreat, observing "[w]ith judicial constitutionalism displaced by untamed constitutional politics, the [Taiwan Constitutional Court] is reduced to a nominal court while the Constitution withers."[123]

On the other hand, Chien-Chih Lin argued that there has been a "judicialization of politics" in Taiwan whereby political conflicts are increasingly resolved in the courts rather than in the legislature.[124] Moreover, Lin observed that this judicialization of politics in Taiwan occurred within a majoritarian impetus whereby the expansion of judicial role is acquiesced by the politicians and the citizens.[125] This in turn mitigates the harm of politicization of the judiciary (and the consequential diminishing of judiciary legitimacy and neutrality) and the electoral accountability of the government.[126]

Notwithstanding the difference in their positive and normative assessment, both Kuo and Lin shared the same premise regarding the challenging partisan chasm that the courts have to navigate. Kuo observed that the judicial retreat began with "the intensified partisan rivalry between the KMT-dominated Pan Blue group and the DPP-led Pan Green camp [post 2000] . . . whereby the Pan Blue and the Pan Green were engaged in a political zero-sum game" rendering the courts being "a reluctant player in constitutional politics".[127] Lin wrote that "the Court was asked to solve issues regarding constitutional politics" with "ideological conflicts have

121. *See* Lin, *supra* note 120, at 363-73; *See* Chu, *supra* note 120, at 519-29; *See* McBeath, *supra* note 120, at 55-69.

122. Ming-Sung Kuo, *Moving Towards a Nominal Constitutional Court? Critical Reflections on the Swift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics*, 25 WASH. INT'L L.J. 597, 602-03 & 634 (2016). Ming-Sung Kuo wrote another article a couple of years later with Tzu-Ti Lin and Hui-Wen Chen. They continued the argument with reference to cases between 2016 and 2018: Tzu-Ti Lin, Ming-Sung Kuo & Hui-Wen Chen, *Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape*, 48 H.K. L.J. 995, 1018-022 (2018).

123. *See Kuo*, *supra* note 122, at 640.

124. Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 ASIAN J. L. & SOC'Y 299, 304-06 (2016). Lin did observe that from 2008, there has been a slowdown in judicialization of politics *id*. at 312-13.

125. *Id*. at 314-17.

126. *Id*. at 317-23.

127. Kuo, *supra* note 122, at 602-03.

become increasingly intense, especially during the period from 2000 to 2008 when the executive and the legislative powers were held by different parties."[128] The intense partisan rivalry in the political arena certainly put the courts in a thorny position,[129] where judgment either way will be eagerly (if arguably cynically) framed as political bias by the losing party.

It is important to note that Kuo and Lin are writing in the context of the constitutional courts. In Taiwan, the constitutional courts review and issue interpretations of constitutions without directly hearing or adjudicating disputes.[130] On the other hand, the judgments surveyed in this Article are from the administrative courts which generally do not decide on constitutional interpretation. Nonetheless, this distinction in judicial function does not mute concerns about how courts should navigate the divided political landscape and perceived political bias. Non-constitutional courts are important sites for empirical investigation as to judicial behavior in Taiwanese courts.[131] It is telling that while these empirical investigations generally find that courts in the past couple of decades have largely maintained judicial independence and avoid political bias, the public perception of courts being biased persisted.[132]

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128. Lin, *supra* note 111, at 301. *See also* Chung-Li Wu, *Assessing the Effects of Political Factors on Court Decisions in Corruption Litigation in Taiwan*, 59 ASIAN SURV. 295, 297 (2019) ("for some decades now, the judiciary of the Republic of China on Taiwan has been embroiled in political conflict").

129. *See* Chu, *supra* note 120, at 529 ("The political legitimacy of judicial activism depends on public confidence in the judicial review of constitutional decisions conducted by the Grand Justices. The Grand Justices have to be alert to political struggles in case their involvement turns the Council of Grand Justices into a pseudo-parliament and results in the weakening of public confidence in judicial power. The conspicuous involvement of the Grand Justices in politics by means of constitutional interpretations might also lead to the unconstrained expansion of judicial power and grow into a constitutional crisis of some sort, especially if the Grand Justices interpreted new constitutional provisions with an eye towards redefining Taiwan's national identity. This proclivity would normally win plaudits from pro-DPP supporters but could engender disagreement from the pro-KMT faction of the political spectrum. Such disagreement may easily result in suspicions about the motivations of the Grand Justices for judicialisation of identity politics").

130. JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 155-67 (2016). For an overview of the history and evolution, *see* Zhaoxin Jiang, *Once Council Two Constitutional Courts: A Holistic View of the Council of Grand Justices (1948-2021)*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW IN GREATER CHINA 135 (Ngoc Son Bui, Stuart Hargreaves & Ryan Mitchell eds., 2023).

131. *E.g.*, Wu, *supra* note 128, at 309-12 (examining the district court corruption litigation from 2000 to 2015 and finding that there is no systematic favoring of defendants with political advantages); Chung-Li Wu & Xiao-Chen Su, *Taming the Tongue: Political Resource Inequalities and Court Decisions in Defamation Litigation in Taiwan*, 50 ISSUES & STUDIES 157, 165-83 (2014) (examining defamation litigation in district courts, high courts and Supreme Courts between 2000 and 2011 and finding that there is some limited benefit associated with major party affiliation but otherwise there is no evidential support for other perceived political bias).

132. *E.g.*, Wu, *supra* note 128, at 309-12 (examining the district court corruption litigation from 2000 to 2015 and finding that there is no systematic favoring of defendants with political advantages); Wu & Su, *supra* note 131, at 165-83 (examining defamation litigation in all three level of courts between 2000 and 2011 and finding that there is some limited benefit associated with major party affiliation but otherwise there is no evidential support for other perceived political bias).

However, this case study of the Punish Passenger Offence reveals that the opposite--harmonious political consensus--is not only possible in Taiwan, but can also pose difficult adjudication challenges to the courts. Here, the political consensus is that a new category of individuals has to be punished to placate the public pressure of legislative actions targeting drunk driving, and that ease and practicalities of police enforcement is paramount. There is awareness about legal constraints such as the need for subjective fault and the burden of proof, but those are casually addressed in a bid to ensure the political consensus is unimpeded. The end result is a statutory provision that is consciously planted with a constitutional interpretation "time-bomb" (i.e., "constructive obligation"). Similar dynamic is present for article 7 of the Administrative Penalty Act, where the actual statutory wordings contradicted the purported legislative intention to produce an interpretation quagmire on the issue of burden of proof for subjective fault.

This insight contributes to the literature about the dynamic relationship between legislature and courts in Taiwan. It is of course understandable and important to examine how the Taiwanese courts navigate the fractured political landscape, no less with the Taiwan Constitutional Courts thrusted to the front-line in increasingly antagonistic zero-sum political conflict since 2024.[133] Nonetheless, while the ideological divide between the political factions are real and deep,[134] there remains many pockets of political consensus among the various social and economic policies.[135] The legislative activities in these pockets of political consensus are not eye-catching, but can--as demonstrated by the Punish Passenger Offence--produce intractable statutory puzzles for the courts. Incorporating these episodes into the inquiry is crucial to provide a more nuanced understanding of the judicial role in Taiwan politics. For example, the explicit expectation in the legislative debate about courts' role in resolving the legal tension that is deliberately left unresolved in the statutes echoed Lin's argument about political and public acquiesce to the expansion of the

133. You-Hao Lai, *Taiwan's Constitutional Crisis Threatens Its Democracy*, THE DIPLOMAT, (Jan. 5, 2025), https://thediplomat.com/2025/01/taiwans-constitutional-crisis-threatens-its-democracy/; *Court Rules Against Most Legislative Power Reforms Unconstitutional*, TAIPEI TIMES, Oct. 26, 2024. *See generally* Joshua Boston et al., *Political Competition and Judicial Independence: How Courts Fill the Void When Legislatures Are Ineffective*, 12 J.L. & CTS. 165, 166-67 (2024) (arguing that partisan fractionalization of the legislature and the corresponding impeding of legislative effectiveness will led to de facto expansion of judicial power and influence in governance).

134. *See* Wang, *supra* note 12, at 283-85 (noting the increased polarization between KMT and DPP supporters amidst the rise of potentially anti-establishment non-partisan). *C.f.*, Chi Huang & Tzu-Ching Kuo, *Actual and Perceived Polarization on Independence-Unification Views in Taiwan*, 32 ASIAN J. COMM. 75, 84-87 (2022) (empirically finding that social enmity in Taiwan is driven mainly by perceived polarization rather than actual polarization).

135. Jean-François Dupré & Mike Medeiros, *Assessing the Influence of Ideologies on Vote Choice in an Ethnoterritorial Context: The Case of Taiwan*, 70 POL. SCI. 224, 231-34 (2018).

judicial role.[136]

Beyond Taiwan, this case study also provides a novel example of legislative deferral. In the context of the U.S. Supreme Courts, Mark Graber discussed how mainstream politicians in a two-party system may divert difficult and controversial issues to the judiciary for resolution as a means to avoid making tough political decisions and pursue policy goals not possible through open legislative debate.[137] He termed this a "nonmajoritarian difficulty" (in contrast to "countermajoritarian difficulty" where courts maybe unwilling or unable to challenge majority view) where the "real controversy is between different members of the dominant national coalition" and which gave the courts significant room to exercise independent judicial policymaking.[138] George Lovell further the analysis in his monograph that examined the Clayton Act and three other federal labor statutes passed between 1898 to 1935. He argued that when legislators are faced with irreconcilable political demands, the legislators would pass statutes with inbuilt statutory ambiguities which covertly empowered the courts while giving the impression of decisive political actions.[139] Notably, Lovell was circumspect about the statutory ambiguities which would qualify as legislative deferral. While recognizing that the reason legislative deference received limited scholarly attention is the difficulty to objectively identify such an activity, he nevertheless required three conditions to be present:

1. legislators were aware of and drew attention to the precise ambiguities and interpretive questions that judges would later decide;
2. legislators specifically associated those ambiguities with a future role for the courts; and,
3. legislators specifically rejected alternative legislative proposals that were offered to clarify the language and limit the discretion of the courts.[140]

Notably, as candidly conceded by Lovell, only two of his four examples can be considered genuine example of legislative deferrals under his own criteria.[141] Tellingly, the Punish Passenger Offence readily satisfies these three conditions: 1) the Taiwanese legislators extensively discussed the issue

136. Lin, *supra* note 124-126, 304-06 & 314-23.

137. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36-37 (1993).

138. *Id.*

139. GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER AND AMERICAN DEMOCRACY 3-4 (2003).

140. *Id.* at 40-41.

141. *Id.* at 41.

of subjective fault; 2) the legislators envisaged judicial challenges on the issue of subjective fault; 3) the legislators rejected draft provisions which explicitly provide for the passenger's knowledge and burden of proof for possible defense.[142]

As the first clear-cut example of the legislative deferral outside the U.S., this case study enriched this emerging inquiry[143] while also indicate the potential of fruitful comparative research in this area. For example, there is a subtle but important difference in the political context in Taiwan. As argued in the previous Part, this legislative deferral is due to the unresolved tensions between the lofty rule of law ideals and practicalities of enforcement expediency. Yet there is an asymmetry in terms of political salience. The legislators are under public pressure to ensure an effective punitive response to drunk driving, but there is no corresponding political impetus about subjective fault or its burden of proof. Instead, for the legislators, the constraints posed by the rule of law ideals are distinctively legal in nature (i.e., concerns about violating the Administrative Penalty Act and/or the Constitution).[144] This raises potentially interesting analytical and normative questions. For example, why do the legislators feel so compelled to pay lip service to the rule of law ideals? Is it a reflection of pressure within the bureaucracy or aversion to the political cost of judicial reprimand? Does the fact that legislature is punting an inherited legal problem (i.e., the Administrative Penalty Act) mitigate or even justify this legislative deferral? This is outside the scope of this Article, but certainly warrants further investigation.

142. *Supra* II.A.

143. *See* Jonathan F. Parent, *Testing Legislative Deferral*, 6 J.L. & CTS. 25, 26-27 (2018) (Jonathan Parent argued that legislative deferral does not necessarily result from political divisions and lack of public consensus, conditions otherwise identified by Graber and Lovell as conducive to legislative deferrals. He used the example of abortion legislation in New York as a counter-example where legislature did not stay inactive despite political incentives to punt this controversial issue to the judiciary. He argued that a better explanation is path-dependency where the framing the issue as "legal" or "political" drives the predominance of the respective institution). *See also* Cristián Villalonga, *Imperfect Legislative Agreements and Judicial Policymaking: A Theoretical Inquiry*, 12 THEORY & PRAC. LEGIS. 253, 254-56 (2024) (developing a theoretical framework for imperfect legislative agreements--which include deliberate drafting of legislative agreement which are indeterminate or avoiding resolution of conflicts). *C.f.*, Frank M. Johnson Jr., *The Alabama Punting Syndrome*, 18 JS. J. 4, 6-7 (1979) (discussing how state legislature in the Southern states avoided rectifying unconstitutional but popular policies--such as segregation and prison conditions--and instead leaving the federal courts to strike them down).

144. *C.f.*, KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 286-87 (2007) (discussing how it is in the interests of presidents beleaguered by the demands of upholding constitutionality and political orthodoxy to have the judiciary resolved the meaning and implications of the Constitution).

VI. CONCLUSION

The subject matter of this story is almost inconsequential: a minor traffic offence with a maximum penalty of a modest fine. At stake is a seemingly mundane technical issue: is *mens rea* a required element and who bears the burden of proof. However, this story provides an insightful demonstration of the inherent tensions between the aspirations of a human-rights oriented rule of law, and the more pragmatic if darker impetus for efficient punitive measures. This story is also about the legislature-judiciary dynamic. The Taiwanese lawmakers could and should resolve the tension, but in uncommon but ultimately unsurprising political unity, punt it to the courts. The judges are now caught in the middle, and admirably if unenviably trying to make sense of the contradictions built into the statutes. They are not the bad guys in this story.

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酒後駕車乘客處罰之主觀要件、舉證責任與立法：司法之制度性張力

陳 建 霖

摘 要

2019年，臺灣修正《道路交通管理處罰條例》，增訂規定，對於搭乘酒後駕車之成年乘客科以行政罰鍰。立法者刻意選擇不就乘客一方設定任何主觀構成要件，因而在行政責任之成立要件及其舉證責任配置上，引發實務與理論上之爭議。本文檢視相關行政法院裁判，整理司法實務就主觀過失是否為行政罰成立要件，以及行政機關與當事人間舉證責任分配所呈現之歧異見解。本文進一步將該爭議置於《行政罰法》制定及其學說爭論之脈絡中加以分析，指出司法實務之見解分歧，實反映立法者未能妥善調和法治原則與執法效率考量，而刻意以規範不明確性留待司法填補之結構性結果。本文認為，行政法院對該規定之不同詮釋固非理想，然其制度根源主要在於立法設計本身，而非司法適用之恣意。本文並以此案例補充對臺灣立法與司法互動關係之理解。

關鍵詞：酒後駕車、主觀構成要件、舉證責任、行政罰法、無過失責任、法律規範之不明確性、法律改革

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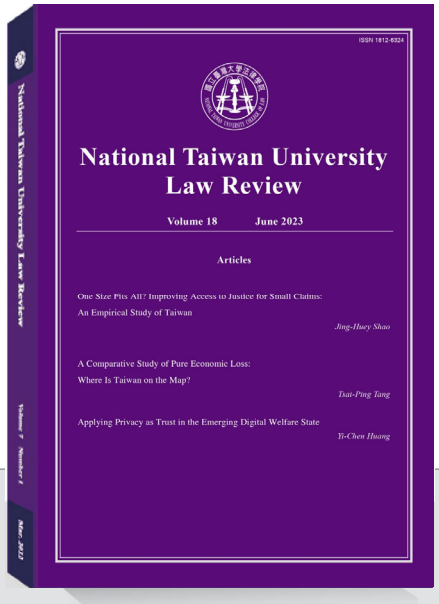

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