



Article

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

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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*



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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).

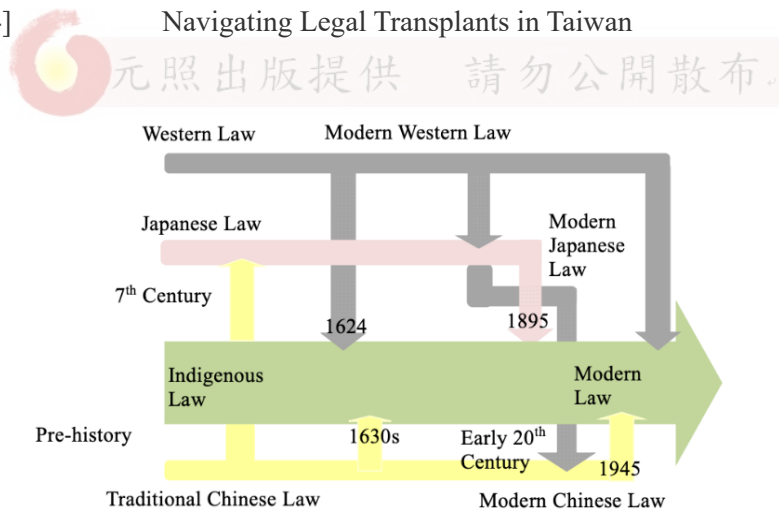


Figure 1. Successive Legal Transplants in Taiwan History

(From Tay-Sheng Wang.² Revised by Yun-Ru Chen³)

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 Tongjihijhe* (帶入西方法律的荷蘭統治者) [*The Dutch Rulers who Introduced Western Legal Systems*], in DUOYUAN FALYU ZAIDI HUIHE (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 Zhongguo “(Fei) Fa” Jhihsyu: Yutse Lun, Chian Gueize yu Dansin Dangan Zhong 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” Zhong 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-examining 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 YANJIU (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), *Chingjih 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 YANJIU (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?: ChingJih Taiwan FenJia Jhong jih 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 YANJIU (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) [*Tracing 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 (李佩縈), *DIFANG DE SHIHJIAO-CHINGMO TIAOYUEH TUHJH 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 Fajih 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

24. For mediation of civil disputes (民事爭訟調停), see generally Wang Tay-Sheng (王泰升), *Zaifang Taiwan De Tiaojieh Jihdu :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 JHIIH 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 Chosŏn 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 Aborigines, 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 Jhuayi 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 YANJIU 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

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 SIHBAIANIAN (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

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 LIU KONG-JHONG (劉孔中), GUOJI BIJIAO SIA WOGUO JHUZUOCHYUANFA JHII 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 RIJHONG JIHSHIH DE HUEJHENG (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

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*]], *Taiyuu 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://tcera.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://tcera.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

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 "Tsuma 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 Example 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 Jijih De Yunzuo-Yi "Dan Sin Dang'an" Wei Zhongsin (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 JHONGYANGYANJIUYUAN LISHIH YUAN YANJIUSUO 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 Zihliaoiku (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 YANJIU (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://tcra.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

62. Tay-Sheng Wang & Sandy I-Hsun Chou, *The Emergence of Modern Constitutional Culture in Taiwan*, 5 NTUL 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), *Rihjih 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: DAFU 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 (MCDV) 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

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

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 FANGJHIIH FA JHIIH FALYU GAIGE YU SIHFA SHIHJIAN: YIGE FALYU YIJHIIH 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 Yijih Yu Falyu Shihying-Hunyin Shou Bao Fu'nyu Shengching Minshih Tongchang Baohu Ling Tsaiding Jihfen 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.

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

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 Jihmin Guandian Lun Yuanjuminzu Chuantong Jihhuei 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 Jiechi Zhi Lu-Yuanzhu Minzu De Zhuquan Xushi Chonggou Yu Falu Duoyuan Zhuaxiang (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

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" Jhieh Falyu "Kongjian"-Yi Minshih Fenjheng Jiehjyueh Zhong 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

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 Yijih Zuowei Fa Shehui Yanjiou Gainian Gongyi* (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