

Article

Family Law in Taiwan: Historical Legacies and Current Issues*

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ABSTRACT

This article provides a bird's-eye view of Taiwan family law by highlighting its major historical transformations, special characteristics and current issues. It begins with a historical outline of the successive legal regimes which brought in multiple sources of Taiwan family law, namely the traditional Chinese legal system, the colonial Japanese law and the post-war KMT law. It then examines the transformations of laws on marriage, divorce, parent-children relationship, as well as significant issues, such as same-sex marriage, cross-border marriage, elderly support, and adult guardianship. Overall, the development of Taiwan family law could be seen as local development in the global context. This article offers a tentative analysis of the features which could be understood as the manifestations of global trends as well as their adaption or metamorphosis in specific cultural and local settings. In addition to legal developments, this article also highlights recent scholarly trends in the area of Taiwanese family law in order to provide a starting point for further research.

Keywords: Taiwan, Family Law, Globalization, State, Society, History

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CONTENTS

I. INTRODUCTION.....	159
A. <i>Beyond the “property law =global vs. family=local” dichotomy</i>	159
B. <i>Multiple Sources of Taiwan Family Law: An Historical Outline</i>	162
1. <i>The Imperial Chinese Machine: Family Law as “Minor Matters” (1683-1895)</i>	164
2. <i>The Japanese Colonial Period: Family Law as Customary Law (1895-1945)</i>	165
3. <i>The Post-WWII Regime: The Full-Fledged Globalization and Localization (1945-)</i>	166
II. MARRIAGE AND DIVORCE.....	166
A. <i>Transformations of Law on Marriage and Divorce</i>	166
1. <i>Marriage and Divorce in Han-Taiwanese Legal Traditions</i> ...	166
2. <i>Marriage and Divorce in Japan-Colonized Taiwan</i>	169
3. <i>Marriage Law in Post-War Taiwan</i>	171
B. <i>Current Issues</i>	172
1. <i>Divorce</i>	172
2. <i>Same-Sex Marriage</i>	174
3. <i>International Marriages</i>	178
III. PARENT-CHILD RELATIONSHIPS.....	180
A. <i>Transformations of Laws on Parent-Child Relationships</i>	181
1. <i>Parent-Child in Han-Taiwanese Legal Traditions</i>	181
2. <i>Parent-Child Relationship in Japan-Colonized Taiwan</i>	183
3. <i>Parent-Child Relationship in Postwar Taiwan</i>	183
B. <i>Current Issues</i>	187
1. <i>Establishments of Paternity and its Rebuttal</i>	187
2. <i>Parental Rights and Child Custody</i>	188
3. <i>Elderly/Family Support</i>	193
4. <i>Adult Guardianship</i>	199
IV. CONCLUSION.....	201
REFERENCES.....	204

I. INTRODUCTION

Family law, in this article, mainly refers to Book IV, Family (親屬) and Book V, Succession (繼承), of the ROC Civil Code (hereafter, “the Civil Code”, “the Code” or “Taiwan’s Civil Code”).¹ The reason for this decision is straightforward: in the contexts ranging from law school courses, bar exams, and legal treaties, book IV and V are often lumped together and categorized as status law (身分法) in Taiwan.² Book IV includes chapters on General Provisions, Marriage, Parents and Children, Guardianship, Maintenance, House, and Family Council. Book V consists of three chapters: Heirs to Property, Succession to Property, and Wills.

A. *Beyond the “property law=global vs. family=local” dichotomy*

The property/status distinction serves as a major structure in Taiwan’s private law.

Juxtaposed with status law is property law (財產法), which is composed of Book II, Obligation (or *Right in Personam*債權), and Book III, Property (or *Rights in Rem*物權). Although both property law and status law belong to the category of civil law, they are two distinctive areas. Certainly, it reminds us the conceptual scheme of the modern western legal system. For example, in Friedrich Carl von Savigny’s System of the Modern Roman Law, there is a contrast between family law and “patrimonial law” which includes property and law of obligations.³ The law of the market, or property law, stands as the center of the Code. Book I, General Principle, of the Code is, in principle, meant for property law only.⁴ In contrast, family law presents exceptions. Property law honors individual will and freedom of the contract. Family law is the domain of status. Moreover, in the area of family law, the morality and traditions of a specific society are taken into greater consideration. Again, Savigny’s assertion is illuminating. He claims that since family law has strong moral content which varies from country to country, the rules of

1. Laws currently enforced in Taiwan bear the title of the Republic of China (ROC), the official name of Taiwan.

2. For examples, in National Taiwan University, where both authors teach, minfa shenfenfa (民法身分法) [civil law: status law] is one single course divided into two parts: family and succession. It is worth mentioning that in many other counties, such as the United States and UK, the standard building blocks family law includes marriage/divorce, parent-child relationships but do not include succession.

3. Duncan Kennedy, *Savigny’s Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 811 (2010).

4. The civil codes of German, Swiss and Japan have similar styles (i.e. Pandektensystem). CHI-YEN CHEN (陳棋炎), ZONG-LE HUANG (黃宗樂) & ZHEN-GONG GOU (郭振恭), MINFA QINSHU XINLUN (民法親屬新論) [CIVIL LAW: FAMILY LAW] 30-31 (12th ed. 2014).

family law are also variable among different societies. Instead of the parties, the state sets the terms and consequence of a legal relation within family.⁵ In other words, property law is subject to the wills of the parties involved, while family law is determined by either will of the state or morality of a society.

It is true that the concept of an exceptional and local family, namely “property law=global whereas family=local” dichotomy, is still very much with us today. For instance, Hsiu-Hsiung Lin (林秀雄), one of the leading family law scholars in Taiwan, holds that within civil law, the area which houses most Chinese traditions and customs is family law. When codifying the Civil Code, customs of China were taken into “chief consideration.” Divorce by mutual consent and wives prefix husbands’ surnames, Lin points out, are customs originally from ancient China which were later preserved in the 1928 ROC Code.⁶

However, the “property=global vs. family=local” dichotomy was rather a construction. In his grand theory on legal globalization, Duncan Kennedy describes the way in which three globalizations of law, ranging from the year of 1850 to 2000, successively constructed and maintained the distinction between family and market in modern legal systems.⁷ Arguably, Taiwan has been part of the story of legal globalization, in terms of systematically receiving modern law and legal thought, no later than the Japanese colonial period (1895-1945). Prior to that, a separate category of family law did not exist in traditional Chinese legal system (see section I.B.1). In other words, a distinctive legal category of family law and the idea of associating family with local norms, were itself imported. Although family disputes were said to be adjudicated in accordance with Taiwanese customs, foreign legal concepts and ideas on family matters were introduced to Taiwan through judicial decisions (see section I.B.2).

A similar development happened in the pre-WWII ROC family law, another important source of current Taiwan family law. When the Code was drafted in China in 1920-30s, family law was very much a compromise between neo-traditional Chinese familism and European individualism. Given that Confucian values was embodied in family law, gender equality and independent personality of family member also

5. Kennedy, *supra* note 3, at 818; Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 754 (2010).

6. HSIU-HSIUNG LIN (林秀雄), QINSHUFA JIANGYI (親屬法講義) [THE HANDOUT OF FAMILY LAW] 9-10 (2013).

7. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 23, 34 (David M. Trubek & Alvaro Santos eds., 2006).

served as its essential legislative principles.⁸

Since the Code was brought to Taiwan after World War Two, it has undergone tremendous transformation. Originated from China, Taiwan's family law grew up and transformed in Taiwan in response to both local and global situations.⁹ Especially since the lifting of martial law in 1987, not only a vibrant democracy but also an independent judiciary have been more responsive to citizen-initiated family law reforms. The rapid industrialization and urbanization, along with the rise of women's labor force participation rates, further increase the incentive to follow the global trends. As Hsiu-Hsiung Lin (林秀雄) emphasizes, traditions and customs change and grow with the increase interaction between cultures. The abolition of rule of prefixing husbands' surnames to wives' in 1998, Lin claims, is an example of overcoming outdated and unreasonable tradition.¹⁰

Indeed, the post-war Taiwan family law is again a local development in the context of globalization.¹¹ Legal innovations developed in Euro-American countries and diffused around the world after World War Two, such as non-fault divorce (see section II.B.1) and the doctrine of Best Interest of the Child (see section III.B.2), are adopted by and adapted into Taiwan Family Law. The increase of cross-border marriages in recent years inevitably bring issues regarding international family law (see section II.B.3). Rapidly aging population lead to adopting foreign legal measures, such as a more flexible guardianship (see section III.B.4). Last but not least, the on-going debate on same-sex marriage also exemplifies legal reform responding to both local situation and global inspiration (see section II.B.2).

This article does not seek to provide a throughout introduction of family law in Taiwan.¹² Nor does it purport exhaustively to detail every

8. YAN-HUI TAI (戴焯輝), TUNG-HSIUNG TAI (戴東雄) & YU-ZU TAI (戴瑀如), QINSHUFA (親屬法) [FAMILY LAW] 12-13 (2011). For more on the legal ideology of the ROC Civil Code (1930), see MARGARET KUO, INTOLERABLE CRUELTY, MARRIAGE, LAW, AND SOCIETY IN EARLY TWENTIETH-CENTURY CHINA 3-27 (2012).

9. For a general discussion of how the ROC law is "Taiwanized" after WWII, see Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM. L. & POL'Y J. 531, 531 (2002).

10. LIN, *supra* note 6, at 10.

11. See generally Hui-Ling Shee, *Impact of Globalisation on Family Law and Human Rights in Taiwan*, 2 NTU L. REV. 21 (2007). Shee emphasizes the selective adoption and adaption of globalized family law ideas in Taiwan. Other scholars, such as Hsiao-Tan Wang and Chao-Ju Chen, focus on feminism in both global and local contexts and its (limited) impact in Taiwan's family law.

12. For a general introduction of Taiwanese family law and its relation with feminist, See Hsiao-Tan Wang (王曉丹), *Taiwan Qinshufa de Nuxingzhuyi Faxue Fazhan-Yi Fuqicaichanzhi Weili* (台灣親屬法的女性主義法學發展—以夫妻財產制為例) [Feminism and Family Law in Taiwan—the Change of Matrimonial Property Law as Example], 21 CHUNGCHEN DAXUE FAXUE

current issue. Many topics could be, if not have been, subjects of whole books. The limits of both space and expertise of the authors mean that only a small part of what could be written on various related issues will be discussed in this article. Rather, the article is to sketch an outline of Taiwan's family law from comparative perspectives by highlighting some of its historical transformations (see section I.B), special characteristics and current issues (see section II.B and section III.B), which might be of interest of international readers.

B. Multiple Sources of Taiwan Family Law: An Historical Outline

As mentioned in the very beginning of this article, the family law currently enforced in Taiwan is part of the ROC Civil Code. However, the authors believe that an understanding of contemporary law must be founded upon an understanding of its past. From the seventeenth century onward, several successive political regimes brought Taiwan its laws, among which some were abandoned, some were transformed and preserved, still others were excluded from formal laws but recognized as customs in later regimes. The multiple sources of law from different political and ethnical entities constitute the current Taiwan law and legal culture, including those related to our family lives. This article outlines the trajectory of family law in Taiwan in the following chronological order: (1) the imperial Chinese period (2) the colonial Japan period, and (3) the post-WWII period. (See Figure 1.)

JIKAN (中正大學法學集刊) [NAT'L CHUNG CHEN U. L.J.] 35, 35 (2006); Chen Chao-Ju (陳昭如), *Haishi Bupingdeng-Fuyun Xiufa Gaizao Fuquan Jiating De Kunjing Yu Weijingzhiye* (還是不平等—婦運修法改造父權家庭的困境與未竟之業) [*Still Unequal-The Difficulties and Unfinished Business of Feminist Legal Reform of the Patriarchal Family*], 33 NUXUE XUEZHI: FUNU YU XINGBIE YANJIU (女學學誌：婦女與性別研究) [J. WOMEN'S & GENDER STUD.] 119, 119-70 (2013).

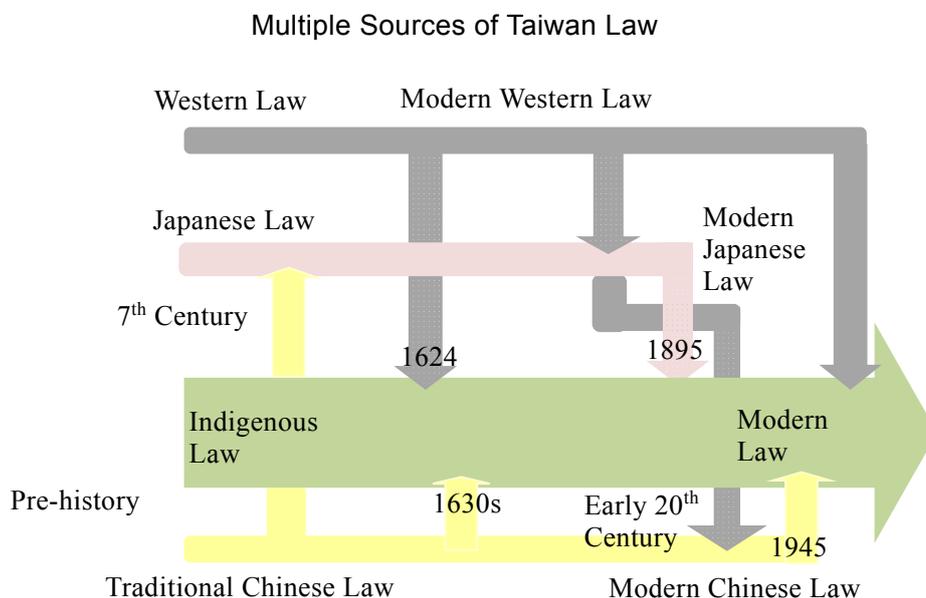


Figure 1: The Trajectory of Family Law in Taiwan

(From Tay-Sheng Wang.¹³ Revised by Yun-Ru Chen)

The reader's attention will be drawn to the fact that the periodization above is of course a viewpoint of legal history from the perspective of Han Taiwanese, who came to Taiwan from China in the seventeenth century and became the ethnical majority in the next century.¹⁴ The aboriginal Taiwanese, linguistically and genetically tied to other Austronesian people in places such as Indonesia and Philippines, have distinctive law and culture from those of the Han-Taiwanese. Unfortunately, due to authors' limited expertise, aboriginal family law and custom could be discussed only sporadically.¹⁵

13. TAY-SHENG WANG, *TAIWAN FALYU SHIH GAILUN* (台灣法律史概論) [Introduction to Taiwanese Legal History] 9 (2017).

14. The continuous migration of Han Chinese began in 1630s when the Dutch East India Company established the first colonial regime in Taiwan and recruited peasants from China to be commercial agricultural laborers. The next was the Cheng rulers, who defeated the Dutch and established the first Han-Chinese regime. For a brief introduction of history of Taiwan, see WAN-YAO ZHOU, *A NEW ILLUSTRATED HISTORY OF TAIWAN* (Carole Plackitt & Tim Casey trans., 2015).

15. See TAY-SHENG WANG, *LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895-1945: THE RECEPTION OF WESTERN LAW* 14-26 (2000). The Dutch East India Company recruited peasants from Mainland China to be commercial agricultural laborers.

1. *The Imperial Chinese Machine: Family Law as “Minor Matters” (1683-1895)*

In 1683, the Qing Chinese Empire incorporated Taiwan and began its two-hundred years’ rein. In the center of Chinese legal system was the Great Qing Code (hereafter, the Qing Code). It is true that the Qing Code was founded on Confucian ideology and patriarchic extended family structure. Minors and women were deemed inferior to elders and men. Punishment of criminal offense among family members were decided according to family relations between the victim and the perpetrator.¹⁶

However, the Qing Code actually said little about family law, at least not as much as most modern civil codes do. Nor did there exist a separate category of family law. Family matters, such as divorce, as well as commercial affairs and contract formation, were under the legal category of “minor matters,” as opposed to “heavy cases,” such as murder and sedition. Moreover, recent archival works show that, more often than not, magistrates acted like mediators when adjudicating family disputes or other “minor matters,” settling cases not directly with in the Qing Code.¹⁷ While there was no collection of uniform case law, an ideal magistrate should learn local customs and practices though experience, which

16. TONG-ZU QU (瞿同祖), *ZHONGGUO FALU YU ZHONGGUO SHEHUI* (中國法律與中國社會) [CHINESE LAW AND CHINESE SOCIETY] 1-114 (1984).

17. SHŪZŌ SHIGA (滋賀秀三), *SHINDAI CHŪGOKU NO HŌ TO SAIBAN* (清代中国の法と裁判) [LAW AND ADJUDICATION IN QING CHINA] 263-65 (1984); However, Philip C.C. Huang disagrees the “mediation” model and argues that in Qing-China, magistrates actually adjudicated “civil cases” in accordance with the rules in the Qing Code. Contra PHILIP C. C. HUANG, *CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING* (1996). For more discussion on this academic debate, see TERADA HIROAKI (寺田浩明), *Qingdai Minshi Shenpan: Xinzhi Ji Yiyi-Rimei Liangguo Zhijian De Zhenlun* (清代民事審判：性質及意義—日美兩國之間的爭論) [*Civil Justice in the Qing: Nature and Significance-The Debate between Japanese and American Scholars*], in QUANLI YU YUANYI: SITIAN HAOMING ZHONGGUO FASHI LUN JI (权利与冤抑：寺田浩明中国法史论集) [RIGHTS AND WRONGFUL JUDGMENT: TERADA HIROAKI ON CHINESE LEGAL HISTORY] 603, 603-17 (Ya-Xin Wang (王亚新) trans., 2012); PEI-LIN WU (吳佩林), *QINGDAI XIANYU MINSHI JIUFEN YU FALU ZHIXU KAOCHA* (清代县域民事纠纷与法律制序考察) [AN INTRODUCTION TO WU PEILIN “CIVIL DISPUTES AND LEGAL ORDER IN COUNTIES IN QING DYNASTY”] 349-52 (2013); Wen-Kai Lin (林文凱), *Qingdai Falushi Yanjiu De Fangfalun Jiantao: “Difang Falu Shehuishi” Yanjiu Tichu De Duihua* (清代法律史研究的方法論檢討：「地方法律社會史」研究提出的對話) [*A Methodological Review on the Study of Legal History in the Qing Period: from a Perspective of Local Legal-Social History*] in SHILIAO YU FASHIXUE (史料與法史學) [HISTORICAL DATA IN THE STUDIES OF LEGAL HISTORY] 311, 311-48 (Liu Li- Yan (柳立言) ed., 2016); Yun-Ru Chen (陳韻如), “Diao Fu/Min” de Chuantong Zhongguo “(Fei) Fa” Jihisyu: 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*], *JHONG YAN YUAN FA SYUEH CHI KAN* (中研院法學期刊) [ACADEMIA SINICA LAW JOURNAL] (forthcoming).

enabled him to offer the best solution on case by case basis. Both customs and the Qing Code regarding family affairs served as reference in both people's daily life and the administration of justice.¹⁸

2. *The Japanese Colonial Period: Family Law as Customary Law (1895-1945)*

In 1895, the Japanese Empire acquired Taiwan as its very first colony. Around this time, Japan promulgated the Meiji Civil Code (1890), which was modeled on European ones. Before that, Japanese legal system was highly influenced by the traditional Chinese laws for centuries. Similar to the Civil Code in contemporary Taiwan, books of family and succession in the Meiji Civil Code were usually lumped together and called “family law” or “personal law”. Through various compromises, Japanese family law was said to be a mixture of modern western ideas and neo-traditionalist Japanese thoughts. For instance, the model of samurai patriarchic “house” was preserved and coexisted with an individualist property regime.¹⁹

During the colonial period, Japan gradually introduced its laws, including the Meiji Civil Code, to Taiwan. However, Japanese family law was made an exception and never been applicable to Taiwanese. Rather, Taiwanese family law remained in the purview of customary law under the so-called “respecting old custom” policy. Yet, it does not mean that Taiwanese family law remained unchanged during the fifty-year colonial rule. Later in this article, the authors will show that the Japanese jurists selectively reconstructed the existing practices and introduced legal innovations in the Japanese family law in the name of Taiwanese customs. In other words, a reception of a mixture of European and Japanese family law was facilitated by colonial authorizes who administrated Taiwanese customary law.²⁰

18. On the role of custom as source of law in Qing China, see SHŪZŌ, *id.* at 328-68; But cf. Jerome Bourgon, *Uncivil Dialogue: Law and Custom did not Merge into Civil Law under the Qing*, 23 LATE IMP. CHINA 50, 50 (2002), where Jerome Bourgon argues that custom did not exist in legal system, or at least not in the way in Europe, in Qing-China.

19. Ken Mukai & Nobuyoshi Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, 1 LAW IN JAPAN AN ANNUL 25, 55 (Dan Fenno Henderson trans., 1967).

20. On Japanese family law and its relation with colonial policy in Japan-rule Taiwan, see Yun-Ru Chen, *Family Law and Politics in the Oriental Empire: Colonial Governance and Its Discourses in Japan-Colonized Taiwan (1895-1945)*, NATIONAL TAIWAN UNIVERSITY LAW REVIEW 1, 1-51 (2019); Yun-Ru Chen, *The Emergence of Family Law in Colonial Taiwan: A Genealogical Perspective 77-133* (2013) (unpublished SJD Dissertation, Harvard Law School) (on file with Harvard Law School Library, Harvard University).

3. *The Post-WWII Regime: The Full-Fledged Globalization and Localization (1945-)*

After WWII, Taiwan was the newly obtained territory of the Republic of China (ROC, 1911-) headed by the Chinese National Party (Kuomintang, the KMT) and later became ROC's only territory when the KMT was defeated by the Chinese Communist Party and retreated from China to this island. Unlike the former colonial government, the KMT did not impose laws selectively. It simply extended the ROC legal system to this island.²¹ The family law in the Code, when compared to the Meiji Civil Code, was more progressive. However, it also contained a compromise between the tradition and modern elements.²² A new and probably stronger wave of legal globalization began in Taiwan.

II. MARRIAGE AND DIVORCE

A. *Transformations of Law on Marriage and Divorce*

1. *Marriage and Divorce in Han-Taiwanese Legal Traditions*

The standard form of marriage in Han-Chinese tradition is monogamous, patrilocal and patrilineal. According to the Qing Code, either polygamy or polyandry was illegal.²³ However, concubine was not prohibited by law, nor was it rare in social practice among people who could afford one. Concubines' status were inferior wives'. A woman was temporary members of her natal family. She entered her husband's family by marriage. She did not assume her husband's surname but prefixed it to her own one.²⁴ In theory, the husband controlled the wife, including her property. However, there exists cases in which wives' control over her own personal property, usually gifts or dowry from the natal family, was respected by the society and the government.²⁵

21. FENG-JIAO HE (何鳳嬌), ZHENGFU JIESHOU TAIWAN SHILIAO HUIBIAN I (政府接收臺灣史料彙編 I) [THE COLLECTION OF THE TAKING-OVER OF TAIWAN I] 1-2 (1990).

22. PHILIPS C. C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED 59-62 (2001).

23. In practice, there existed de facto polyandry for poor families as a surviving strategy when a woman brought in a second husband for his help to support the family. See generally MATTHEW H. SOMMER, POLYANDRY AND WIFE-SELLING IN QING DYNASTY CHINA: SURVIVAL STRATEGIES AND JUDICIAL INTERVENTIONS (2015).

24. For a social-legal analysis of surnames in Taiwan, see Chao-Ju Chen, *Becoming "Outsiders Within": A Feminist Social-Legal Study of Surname Inequality as Sex, Race, and Marital Status Discrimination in Taiwan*, 18 J. KOREAN LAW 1, 1-58 (2018).

25. SANTARO OKAMATSU, PROVISIONAL REPORTS ON INVESTIGATIONS OF LAWS AND CUSTOMS IN THE ISLAND OF FORMOSA, at ix-x (reprint 1971) (1902); SHŪZŌ SHIGA (滋賀秀三),

One exception to the above-mentioned standard form of marriage was uxori-local marriage, in which men were invited as husbands into wives' family. This exception happened usually when the wife's family was lacked of sons. The so-called "marry-in husband" (or "marry-in son-in-law") and might arrange certain sons to be belonged to his wife's family and continued the family line. Sometimes, it was a widow or her late husband's marriage made such arrangement for similar purpose or, additionally, for having an adult man in the family to support children and the elderly.²⁶ Another special practice was *simpua* (adopted daughter-in-law), a mixture of adoption and marriage. *Simpua* refers to a girl who is given out to a boy's family to be raised at early age, with the expectation that she will marry the boy at the stage of puberty. Yet, it was possible that the family would later decide not to take her as a daughter-in-law, return her to her natal home, marry her to someone else, sell her, or make her a household servant.²⁷

From comparative perspectives, it might be quite distinctive that Han-Taiwanese marriage had little to do with religion. Church or other religious institutions, such as temples, were not involved. Seldom did the government actually regulate marriages. Neither license nor registration was needed to get married. Rather, marriage was considered a contract between the parents of the future husband and wife.²⁸

The contractual characteristic seemed to be omnipresent in marriage, if not the entire family law. Moreover, people were not constrained by a single form of marriages and had the freedom to negotiate exceptions to specific form. For instance, when arranging uxori-local marriages, the

CHUGOKU KAZOKUHŌ NO GENRI (中国家族法の原理) [THE PRINCIPLES OF THE CHINESE FAMILY LAW] 437-58, 511-50 (1967).

26. See SANTARO, *supra* note 25, at ix-xii; ARTHUR P. WOLF & CHIEH-SHAN HUANG, MARRIAGE AND ADOPTION IN CHINA 1845-1945, at 94-107 (1980).

27. *Simpua* had been commonly practiced but no longer exists today in Taiwan. In some northern areas, about 65 to 72 percent of 15-year old girls were adopted and 31 to 44 percent of boys were matched with *simpua* between 1891 and 1920. The *simpua* marriages declined in late 1920s and the early 1930s. Nowadays, this kind of marriage no longer exist in Taiwan. Mainly motivated by economic reasons, this practice was transplanted from Mainland China but became more prevalent in Taiwan due to the extremely high proportion of men compared to women resulting from the Qing government's immigration restrictions. See WOLF & HUANG, *supra* note 26, at 305-07; See generally Hsun Chang (張珣), *Funu Shengqian yu Sihou de Diwei: Yi Yangnu yu Yangxi deng Weili* (婦女生前與死後的地位：以養女與養媳等為例) [The Status of Women Before and After Death: The Examples of Adopted Daughter and Adopted Daughter-in-law], 56 GUOLI TAIWANDAXUE KAOGURENLEI XUEKAN (國立臺灣大學考古人類學刊) [J. ARCHAEOLOGY & ANTHROPOLOGY] 15, 15-43 (2000); Chao-Ju Chen, *Sim-Pua under Colonial Gaze: Gender, 'Old Customs' and the Law in Taiwan under Japanese Imperialism*, in GENDER AND LAW IN THE JAPANESE IMPERIUM 189, 189 (Susan Burns & Barbara Brooks eds., 2013).

28. Even in today when marriage is from by the couple themselves, in Taiwanese wedding the parents of the couples are still called "the chief parties in the marriages" (Zhū Hūn Rén, 主婚人).

parents could negotiate on the marriage domicile, the duty of support the husband should provide for his wife's parents, and even, as mentioned earlier, to what extent the children could (or could not) take descents from their fathers.²⁹

In western legal traditions, divorce itself, even the one by mutual consent was difficult or, sometimes, even not allowed.³⁰ This was not the case in Taiwan, at least not in the Han-Taiwanese's legal tradition. Although divorce was regarded as a scandal, the idea of sacred and insoluble marriage did not exist. The Qing Code, for example, gave seven grounds in which a man could divorce his wife and three grounds in which the wife could defend herself from being divorced.³¹ However, these rules were not observed in practices. Husbands could unilaterally divorce his wife by giving her a deed of divorce and were not bounded by the above-mentioned grounds. Divorces by mutual consent, at least in appearance, were more common. Usually, when the husband or his parents demanded a divorce, the wife or her family had little power to reject it.³² In general, children were left with the husbands' families after divorce.³³

Money was essential in the formation as well as dissolution of marriage. The negotiation on the amount of *penkin* (present-money for the bride's family or bride price) and dowry constituted a crucial element in

29. See WOLF & HUANG, *supra* note 26, at 94-95.

30. Harry D. Krause, *Comparative Family Law, Past Traditions Battle Future Trends-and Vice Versa*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1099, 1100, 1113 (Mathias Reimann & Reinhard Zimmermann eds., 2006). In England, for example, only a few wealthy couples could be allowed to end their marriage before 1858. The exclusive way of divorce had been a special act of Parliament. More dramatic came after the end of World War Two. The divorce courts converted strict divorce laws on the books into relatively easy consensus divorce. In France, divorce had been the center of political controversy for almost two centuries until mid-1970s. Prior to that, the regulation had been swung from one extreme to the other. As the product of French revolution, the 1792 divorce law made divorce available in various grounds, including mutual consent. Savigny criticized the draftsmen of the Code of Napoleon for adopting divorce by mutual consent. Then, divorce system in France was entirely abolished 1816. Not until 1884 was divorce reintroduced to France. See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 148-73 (1989); Kennedy, *supra* note 3, at 826. In the United States, many states in the south only had legislative divorces but no judicial divorce by the end of the eighteenth century. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, 204-05 (1985).

31. The grounds for the husband to divorce his wife were the wife was (1) not obedient to the in laws, (2) childless, (3) adultery, (4) jealousy, (5) nasty disease, (6) talkative, and (7) stealing. The grounds in which the wife could defend herself from being divorced are (1) the wife had no family to return to (2) the wife had observed a three-year mourning for her parent-in-law (3) the husband was poor when they married, and is now rich because her parents have passed away. See WILLIAM C. JONES, TIANQUAN CHENG & YONGLING JIANG, THE GREAT QING CODE 133-34 (1994).

32. RINJI TAIWAN KYŪKAN CHŌSAKAI (臨時台湾旧慣調査会) [TEMPORARY TAIWAN OLD CUSTOMS INVESTIGATION ASSOCIATION], 2-2 TAIWAN SHIHŌ (台湾私法 第二卷 下) [TAIWAN PRIVATE LAW VOLUM 2-2] 380 (reprint 1995) (1911).

33. OKAMATSU, *supra* note 25, at x.

the process of the engagement. The commodification of marriage could be even more prominent among the lower class. In case of a divorce, for example, the wife's family usually needed to pay a certain amount of "money of redemption" (ranging from half or entire amount of *penkin*) to the husband.³⁴ Despite being forbidden by the Qing Code, wife-selling existed and were even tolerated by magistrates.³⁵

2. *Marriage and Divorce in Japan-Colonized Taiwan*

As discussed earlier, in Japan-Colonized Taiwan, the existing practices were selectively preserved and transformed under the customary law regime.

Reconstructing customs, the colonial judges, mostly Japanese, ruled that marriage should be based on the agreement between the bride and groom. Yet, parents' consent was necessary.³⁶ Both uxorilocal marriage and *simpua* were recognized.³⁷ The colonial court condemned the practice of concubine as immoral and "violating dignity of the concubine," but nevertheless decided that such practice was not prohibited by law.³⁸

Lastly, by interpreting *penkin* as "present," which could not be returned at divorce, the court mitigated the feature of commodification in marriage.³⁹ Wives' dowry was defined as "separate property" which was free from husbands' control.⁴⁰ In Japan, the Meiji Code stipulated that wives lacked legal capacity. In contrast, the colonial court recognized that married Taiwanese women could independently own debt and made real estate transaction.⁴¹

Divorce by mutual consent remained as the most common practice in

34. RINJI TAIWAN KYÜKAN CHÖSAKAI, *supra* note 32, at 372.

35. *Id.* at 344.

36. JING-PING SHEN (沈靜萍), DUOYUANXIANGQIAN DE TAIWAN RIZHISHIQI JIAZUEFA: CONG RIZHIFAYUAN PANJUE TANTAO GUOJIAFALU DUI TAIWANREN ZHI JIAJI NUXING FALUDIWEI ZHI GAIZAO (多元鑲嵌的臺灣日治時期家族法：從日治法院判決探討國家法律對臺灣人之家及女性法律地位之改造) [THE DIVERSE EMBEDDED TAIWANESE FAMILY LAW UNDER JAPANESE COLONIAL RULE: AN EXAMINATION OF COURT JUDGMENT CONCERNING THE REFORM OF TAIWANESE FAMILY AND LEGAL STATUS OF WOMEN] 135 (2015).

37. The *simpua* marriage had decreased since 1930s during Japanese rule and became an antique in post-war era. WOLF & HUANG, *supra* note 26, at 311.

38. See SHEN, *supra* note 36, at 149. Note that the Meiji Civil Code did not recognize concubine but transformed it into de facto marriage.

39. See *id.* at 137.

40. See *id.* at 140.

41. See *id.* However, SHOHEI ANEHA (姉齒松平), a famous colonial judge in Taiwan, asserted that Taiwanese women's legal capacity were, like Japanese wives, also limited once they got married, See SHOHEI ANEHA (姉齒松平), HONTÖJIN NOMI NIKANSURU SHINZOKUHÖ NARABI NI SÖZOKUHÖ NO TAIYÖ (本島人のみに関する親族法並びに相続法の概要) [OUTLINE OF THE LAWS ON FAMILY AND SUCCESSION REGARDING THE TAIWANESE] 115 (1938).

colonial Taiwan. Husbands could still force their wives to consent on divorce. It is worth pointing out that in homeland Japan when the Meiji Civil Code was drafted in late nineteenth century, family law, especially on the idea of traditional family (House), became the center of political debate. However, divorce was not controversial. The Meiji Civil Code then provided divorce by mutual consent or by judicial decision.⁴² Back in colonial Taiwan, while divorce by mutual consent could be regarded as a continuation of pre-colonial practice, the introduction of litigious divorce was unprecedented. Under the customary law regime, the colonial courts actively developed several grounds for filing a divorce, which were fault-based and similar to those in Article 813 of the Meiji Civil Code.⁴³ Unsurprisingly, the rule was unequal between husbands and wives. For instance, husbands could sue for divorce on the ground that wives had consensual sex with a third party, but not vice versa.⁴⁴ Having a concubine was not regarded as adultery. If no agreement could be reached, husbands in principle would have the custody of the children after divorce.⁴⁵ Nonetheless, husbands' right for divorce were constrained. Moreover, for the first time, Taiwanese wives could seek help from the state to be free from unhappy marriages. In fact, the majority of the plaintiff were women, including wives and concubines. To discourage concubinage, colonial courts imposed little restriction on litigious divorce initiated by either the husband or the concubine.⁴⁶ In spite of unequal treatments, the divorce reform during colonial period expanded the power of the wife and the concubine, and limited the power of the husband.⁴⁷

42. A divorce by mutual consent was effective by merely notification but, like marriage, the consent of the "househead" was required. For a more general discussion on civil code controversy and the idea of "house. See Chen, *supra* note 20, at 47-76.

43. The grounds for divorce including bigamy, wives having consensual sex with a third party, husbands having consensual sex with a third party and therefore was sentenced to imprison, abuse or grossly insult of a spouse or lineal relative, desertion, incurable disease, disappearance, and imprison for a crime. For more general discussion on family law in Japan since 1868, see Petra Schmidt, *Civil Law, Family Law, in HISTORY OF LAW IN JAPAN SINCE 1868*, at 166, 262-305 (Wilhelm Röhl ed., 2005).

44. In similar event, the wife could demand for divorce only if the husband received a sentence for committing adultery with another married woman. See SHEN, *supra* note 36, at 146.

45. See ANEHA (姉齒松平), *supra* note 41, at 126-27.

46. Chao-Ju Chen (陳昭如), *Quanli, Falugaige Yu Bentu Fuyun-Yi Taiwan Lihunquan De Fazhan Weili* (權利·法律改革與本土婦運—以臺灣離婚權的發展為例) [*Rights, Legal Reform and Local Women's Movement-A Case Study of the Development of Women's Rights to Divorce in Taiwan(1985-1999)*], 62 ZHENGDA FAXUE PINGLUN (政大法學評論) [CHENGCHI L. REV.] 25, 33 (1999).

47. For more analysis, see *id.* at 32-33, 44-45, 48

3. *Marriage Law in Post-War Taiwan*

As explained earlier, the contemporary Taiwanese family law is part of the ROC Civil Code, in which customs become merely supplementary. Nuclear family, a monogamous couple composed of a man and a woman and their children, was the archetype.⁴⁸ Instead of the traditional Han-Taiwanese idea of family/house (see Section III.A.1), marriage occupied the center of family law. Concubinage was made illegal. Along with the diminishing role of parents in choosing marital partner went side by side with individualistic marriage, which was formed solely on the consents of the marriage couple. A married woman would retain her legal capacity. A wife became a statutory heir of her husband, just as he became hers.⁴⁹

However, in the 1930 Civil Code, especially in the area of family law, the patriarchal norms coexisted in individualist characteristics. The 1930 family law entitled a husband to manage property (Art. 1018, repealed in 2002). That means a married woman's property in principle was under her husband's control. Also, property acquired during the marriage (except for gifts, such as dowry or inheritances), was presumed to belong to the husband (Art. 1017, repealed 2002). Last but not least, a husband could decide the marital domicile. The exception was the uxorilocal marriage in which a wife could decide the domicile (Article 1002, repealed in 2002).

In addition to individualism, the seminal features of the post-war development of marriage law is equality between the husband and the wife, usually in the gender-neutral fashion. For example, J.Y. Interpretation No. 410 in 1985 ruled the abovementioned rules on marital property unconstitutional. Following that, the new rules allow the parties in marriage to claim separate ownership. Also, the property acquired during marriage would be presumed to be jointly owned, unless that

48. It is worth-mentioning that since two decades ago, childless families and single-parent family in Taiwan have been increasing dramatically. In 1980, childless families presented 15.8% of Taiwanese families. In 1999, the number reached 33.7%. Ching-Li Yang (楊靜利) & Yi-Long Liu (劉一龍), *Taiwan De Jiating Shenghuo Licheng* (臺灣的家庭生活歷程) [*The Family Life Courses in Taiwan*], 27 TAIWAN SHEHUIXUE KAN (臺灣社會學刊) [TAIWANESE JOURNAL OF SOCIOLOGY] 77 (2002). The percentage of single parent family increases from 7.73% (2001) to 10.04 % (2017); The percentage of nuclear family decreases from 47.12% (2001) to 35.71% (2017), data retrieved from XING ZHENG YUAN XING BIE PING DENG HUI (行政院性別平等會) [GENDER EQUALITY COMMITTEE OF THE EXECUTIVE YUAN], ZHONGYAO XINGBIE TONGJI ZILIAOKU (重要性別統計資料庫) [DATABASE OF IMPORTANT GENDER STATISTICS], https://www.gender.gov.tw/gecdb/Stat_Statistics_Query.aspx?sn=MwEtyBleRxJh%2fZApHWboQ%3d%3d&statsn=iGJRpsNX45yniGDj%2bw1ueQ%3d%3d&d=194q2o4%2botzoYO%2b8OAMYew%3d%3d (last visited May. 20, 2019).

49. KATHRYN BERNHARDT, *WOMEN AND PROPERTY IN CHINA 960-1949*, at 118 (1999).

property could be proven to belong to either the husband or the wife.⁵⁰ The lift of martial law in 1987 further speeded the direction of erasing gender differences in the face of social reform movement and constitutional challenges. As discussed earlier, a husband could once determine the marital domicile. In 1998, the Constitutional Court ruled in J.Y. Interpretation No. 452 that such law “violate[d] the principle of equality and proportionality of the Constitution” and made the law void within one year. The related law was then amended.⁵¹ The distinction between patrilocal/normal marriage and uxorilocal/exceptional marriage was cancelled. The marital domicile is now decided upon the couple’s agreement. The feminist organizations has played an essential role in pushing the reform.

B. *Current Issues*

1. *Divorce*

In post-war Taiwan, right for divorce is officially recognized by the Code. Meanwhile, consensus divorce still constitutes the majority of the divorces. For example, in 2017, 84.89% of divorce is by mutual consent.⁵² In the past 25 years, the crude divorce rate increased steadily since 1992, reached its high point of 2.87‰ in 2003, followed by a plateau and a decline in 2007, and decreased to 2.31‰ in 2017.⁵³ In other words, the divorce rate has been decreasing in the past decade. Also, the divorce to marriage rate among couple consists of a Taiwanese and a foreigner (including people from People’s Republic of China, Hong Kong, Macau, Vietnam, and Indonesia) is 21.97‰, about 2.5 times that of domestic couples (8.84‰).⁵⁴

50. For more general discussion on the relation between family law and constitution in Taiwan, see Lee Li-Ju, *The Constitutionalization of Taiwanese Family Law*, 11 NAT’L TAIWAN U. L. REV. 273, 273 (2016).

51. Grace Shu-Chin Kuo, *The Alternative Futures of Marriage: A Socio-legal Analysis of Family Law Reform in Taiwan*, in *WIVES, HUSBANDS, AND LOVERS: MARRIAGE AND SEXUALITY IN HONG KONG, TAIWAN, AND URBAN CHINA* 219, 230-31 (Deborah S. Davis & Sara L. Friedman eds., 2014).

52. The other ways of divorce are litigation (6.09%), mediation in court (6.49) and reconciliation in court (6.72%). Data retrieved from ZHONGHUA MINGUO NEIZHENGBU HUZHENGSU (中華民國內政部戶政司) [DEPT. OF HOUSEHOLD REGISTRATION, MINISTRY OF THE INTERIOR, R.O.C.], RENKOUTONGJI ZILIAO: LIHUNDUISHU AN LIHUNFANGSHI FEN (人口統計資料：離婚對數按離婚方式分) [DEMOGRAPHICS: COUPLES OF DIVORCES BY WAYS OF DIVORCES], <https://www.ris.gov.tw/app/portal/346> (last visited May. 20, 2019).

53. The crude divorce rate is the number of divorces per 1,000 population. See *id.* under the subsection CUJIEHUNLU JI CULIHUNLU (粗結婚率及粗離婚率) [CRUDE MARRIAGE RATE AND CRUDE DIVORCE RATE].

54. ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT

Before 1985, the filing for divorce was purely fault-based. Similar to the colonial customary law, the Code listed ten grounds in Article 1052 for litigious divorce.⁵⁵ The innocent husband or wife could sue for divorce if the other party met one of the criteria. Adopting the spirit of no-fault divorce from Euro-American law, the 1895 reform added a new paragraph to Article 1052 which provided a general ground and loosened the limitation for litigious divorce:

Either the husband or the wife may petition for a juridical decree of divorce upon the occurrence of any *gross event* other than that set forth in the preceding paragraph that renders it *difficult to maintain* the marriage, except if either the husband or the wife is responsible for the event, only the other party may petition for the divorce. [Emphasis added by the authors]

The amendment allowed an additional ground when there is any “gross event” making the marriage “difficult to maintain,” either the husband or the wife can file for a divorce. Despite the inspiration from global trend of divorce reform, the structure of fault marriage remains. If one party is responsible for making the marriage difficult to maintain, only the other party can file for divorce.⁵⁶ Nevertheless, the percentage of divorces granted on the ground of “gross event” among all the cases in the district court has increased from 7% in 1998 to 74.8% in 2016.⁵⁷ In other words, this general provision is now the most popular ground for litigious divorces.⁵⁸ Arguably, the divorce law in Taiwan in practice is moving toward a non-fault system.

With the enlargement of the grounds for litigious divorce, some legal measurements were enacted to protect the economically weaker party in marriage. Alimony was introduced in Taiwan, which stipulates that the innocent party who is reduced to difficulties in livelihood after judicial

OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], NEIZHENG TONGJI TONGBAO 105 NIAN DI 23 ZHOU (內政統計通報—105年第23週) [BULLETIN OF INTERIOR STATISTICS-YEAR 105 WEEK 23] (June 4, 2016),

https://www.moi.gov.tw/files/news_file/week10523.pdf.

55. The ten causes for divorce listed in Article 1052 were: bigamy, adultery, ill-legal treatment by or toward lineal ascendant blood relative, desertion, attempt to murder the other party, incurable disease, psychological illness, dead or alive unknown, and sentenced to imprisonment.

56. Kuo, *supra* note 51, at 224-25.

57. ZHONGHUA MINGUO SI FA YUAN (中華民國司法院) [JUDICIAL YUAN, R.O.C.], 104 JUDICIAL STATISTICS YEARBOOK (2015),

https://www.judicial.gov.tw/juds/year104/contents_table_en.htm (under section District Courts: 27. Divorce Cases Terminated by the District Courts--By Year) (last visited May. 20, 2019).

58. Issues on child custody will be discussed in Section III.B.2.

divorce, the other party, even if he or she is also innocent, shall pay an equitable alimony (Art. 1057). Also, after 1985, upon dissolution of the statutory marital property regime (for instance, divorce), the remainder of the property acquired by the husband or wife in marriage, after deducting the debts incurred during the continuance of the marriage relationship, shall be equally distributed to the wife and the husband (Art. 1030-1). This is the so-called “right to claim for distribution the remainder of the property” (剩餘財產分配請求權). A latest development is related to the pension reform in 2018. A new bill makes it clear that the pension benefit of a retired civil servant should also be equally distributed among the couple upon divorce.^{59, 60} With the expansion of the right to claim for distribution the remainder of the property, questions including: what is the nature or goal of this right? Does it mean to protect economically weaker party, to recognize economical contribution of home-makers, or to compensate the housework? What is its relation with alimony? Also, the Code provides that the husband and the wife may contract a certain amount of money paid by one for the other's free disposition during marriage (Art. 1018-1). This is regarded as a provision based on the spirit of “wages for housework” (家務有給制). Then, what is the relation between Art. 1030-1 and Art. 1018-1? These questions are in fact related to more fundamental questions on the relations between individual property and marriage as well as on the distribution of responsibility of maintenance between the private ((former) spouse maintenance) and the public (social welfare).

2. *Same-Sex Marriage*

In May 24 2019, Taiwan became the first country in Asia to legalize same-sex marriage, which is arguably as one of the most crucial and controversial family law issues in Taiwan. The legalization of same-sex marriage is indeed a milestone for marriage equality. However, this landmark legal reform is not an easy score. It followed two years of political wrangling after the Constitutional Court of Taiwan ruled in May 2017 (J.Y. Interpretation No. 748) that the current family law which does not allow same sex couples to “create a permanent union” is unconstitutional. The Court left the legislators to determine the formality of related legislations but, at the same time, instructed that such legislation should allow the same-sex couple to “create a permanent union

59. Gongwurenyuan Tuixiu Ziqian Fusu Fa Shihang Xize (公務人員退休資遣撫卹法施行細則) [Enforcement Rules of Civil Service Retirement, Severance and Survivor Relief Act] § 121, 122 (promulgated and effective Mar. 21, 2018) (Taiwan).

60. The issue of child custody will be discussed in Section III.B.2.

of intimate and exclusive nature” and be in accordance with freedom of marriage and equal protection guaranteed by the Constitution. The Court also ruled that the authority concerned shall amend or enact relevant laws within two years and if the legislature fails to do so in two years, the current Civil Code would be extended to same-sex couples who wish to get married.⁶¹

Six months later in November 2018, voters passed a referendum initiated mainly by conservative Christian campaigners, asking that marriage in Taiwan civil law be restricted to one man and one woman and that a special law to be enacted for same-sex unions. Although the vote was advisory only, the referendum result as well as the fear for electoral blowback for the current government arguably resulted in a cabinet-drafted bill which could be seen as a compromise version of what same-sex marriage activists had hoped for. Meanwhile, the opponents still opposed the bill, even it was in the format of special law and had relatively limited rights for same-sex couples.⁶² Finally, on May 17, 2019, one week before the two-year deadline was due, the ruling party forced through a marriage-equality law titled *The Enforcement Act of Judicial Yuan Interpretation No. 748* (司法院大法釋字第七四八號施行法) in the face of strong opposition.

Certainly, the existence of same-sex couples and activism long predated the recent controversy in Taiwan. For instance, in 1912 during the Japanese colonial period, one newspaper covered a story that a woman named Chin Hsiao “married” another woman Yeh Ou.⁶³ Another example was a letter to the editor in a major newspaper, in which a woman asked in

61. Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官解釋第748號解釋) [Judicial Yuan Interpretation No. 748] (May. 24, 2017) (Taiwan). It is worth-mentioning that the Code actually does not clearly limit marriage to heterosexual couple. Article 982 provides that “a marriage shall be effected in writing, which requires the signatures of at least two witnesses, and by the registration jointly completed by the both sides at the Household Administration Bureau.”

62. In February 2019 the cabinet unveiled a bill which granted similar legal protections to homosexual couples as heterosexual ones. Meanwhile, marriage in the Civil Code is not to be altered. Some gay-rights activists believed that separate law for homosexual is discriminatory. The conservative groups also opposed the bill. *Taiwan proposes Asia's first draft law on marriage equality*, THE GUARDIAN (Feb. 21, 2019), <https://www.theguardian.com/world/2019/feb/21/taiwan-proposes-asia-first-draft-law-on-lgbt-same-sex-marriage>. The issues in *The Enforcement Act of Judicial Yuan Interpretation No. 748*, compared to the marriage in the Civil Code, will be discussed later.

63. On more discussion on this case, see Shih-Fang Lin (林實芳), *Bainian Shuangshuangduidui, Zhihen Kanbujian: Taiwan Falugafengxia De Nunu Qinniguanxi* (百年雙雙對對，只恨看不見：台灣法律夾縫下的女女親密關係) [The Legal and Historical Denial of Female Same-sex Intimate Relationship in Taiwan History] (2008) (unpublished master thesis, National Taiwan University) (on file with National Taiwan University Library). Retrieved from <https://ndltd.ncl.edu.tw/cgi-bin/gswweb.cgi?o=dnclcdr&s=id=%22096NTU05194061%22.&searchmode=basic>.

1958 if she and her girlfriend could get married.⁶⁴ Also, same sex marriage had been advocated for decades. Chia-Wei Chi, a longtime gay rights activist, was illegally arrested and detained in 1986 after filing a petition to the congress requesting to legalize same sex marriage while Taiwan was still under martial law.⁶⁵ After another attempt to register same-sex marriage was rejected by the local household registration office, Chi brought the case to the Constitutional Court and became one of the two petitioners of J.Y. Interpretation No. 748. In addition to the activism through litigations, there have been a series of legislative attempts since 2000, including one that proposed a more diverse family model.⁶⁶

How did Taiwan make it the first place in Asia to legalize same-sex marriage? One key factor is the changing global attitude toward same-sex marriage. J.Y. Interpretation No. 748, for instance, shows Taiwan's engagement in international precedents. *Obergefell v. Hodges* (2015), the landmark case in which the Supreme Court of the United States rules that marriage is a fundamental right and that states bans on same-sex marriage unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution, is cited in J.Y. Interpretation No. 748.⁶⁷ Local factors in Taiwan could also be considered. Although the above-mentioned referendum in 2018 showed that a large portion of the society had a strong disfavoring position against same-sex marriage, it was not always the case. In fact, prior to the most recent heated controversy and political mobilization, Taiwanese society's attitude toward gay marriage was quite tolerant and progressive, if compared to other Asian countries. A poll conducted in 2001 shows that 23.1% of the Taiwanese people support legal recognition for same-sex marriage. In just ten years, this increases to over 50% in 2013. Throughout the past decade, the supporters has been outnumbered the opponents.⁶⁸ One latest survey in 2018 also shows that 59.6% of the participants agree that same-sex couples should have the right to get

64. *See id.* at 183-84.

65. Calum MacLeod, *Taiwan smashes Asian taboo on gay marriage*, THE TIMES (May 25, 2017), <https://www.thetimes.co.uk/article/taiwan-smashes-asian-taboo-on-gay-marriage-8jjkz67hp>.

66. *See generally* Victoria Hsiu-Wen Hsu, *Colors of Rainbow, Shades of Family: The Road to Marriage Equality and Democratization of Intimacy in Taiwan*, 16 GEO. J. INT'L AFF. 154, 154 (2015).

67. 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. (forthcoming).

68. ZHONGHUA MINGUO FAWUBU (中華民國法務部) [MINISTRY OF JUSTICE OF R.O.C], TONGXING BANLU FAZHI SHISHI ZHI SHEHUIYINGXIANG YU LIFAJIANYI CHENGGUO BAOGAOSHU (同性伴侶法制實施之社會影響與立法建議成果報告書) [REPORT ON THE SOCIAL IMPACT OF THE IMPLEMENTATION OF SAME-SEX PARTNERSHIP LAW AND LEGISLATION SUGGESTIONS] 154 (Feb. 25, 2017), <https://www.moj.gov.tw/cp-60-64618-1dfb8-001.html>.

married.⁶⁹ The relative gay-friendly environment manifests in the fact that Taiwan has been holding Asia's largest gay pride parade for years.⁷⁰ Estimated 137,000 marchers, some of them coming from abroad, are at parade in the year of 2018.⁷¹ Last but not least, a robust and liberal democracy, which has been developed in Taiwan for three decades but not necessary commonly shared in Asia, might be better equipped to respect diverse views and minority.⁷²

While the new marriage equality law is truly groundbreaking, it does not, as mentioned earlier, give same-sex couples the same rights as heterosexual ones do. For instance, while the law allows same-sex couples to adopt each other's biological children, it bars same-sex couples from adopting non-biological children. Also, transnational couples can only register in Taiwan if the foreign spouse is from a jurisdiction where same-sex marriage exists. If one of the party comes from a country where same-sex marriage is illegal, she/he cannot marry her/his Taiwanese partner and obtain spousal dependent residency in Taiwan. In addition to co-adoption and transnational marriages, issues about artificial reproduction needed to be addressed, too.

From the perspective of marriage equality, although the current marriage bill needs to be improved, it could be seen as a significant first step in Taiwan, if not the entire Asia. Meanwhile, the conservative group declared to mobilize its supporters to vote down the current president and legislators who supported the bill in the upcoming presidential and legislative elections in early 2020, an attempt to repeal the new marriage equality law.⁷³ In other words, while the same-sex marriage globalizes,

69. TAIWAN FASHIZHENG ZILIAOKU (台灣法實證資料庫) [TAIWAN DATABASE FOR EMPIRICAL STUDIES], "Taiwan Falu Yu Shehui Bianqian Diaocha" Wanglu Wenjuan Diaocha (「台灣法律與社會調查」網路問卷調查) ["Survey on Taiwan's Law and Society" Internet Survey], <http://tadels.law.ntu.edu.tw/database-society/database04-3.php> (last visited Dec. 20, 2018).

70. *Asia's biggest gay pride parade brings tens of thousands to Taipei*, THE GUARDIAN (Aug. 6, 2018) <https://www.theguardian.com/world/2017/oct/28/asias-biggest-gay-pride-parade-tens-thousands-taipei-taiwan-marriage>.

71. Chris Horton, *Taiwan's Gay Pride Parade Swells as a Vote Nears*, N.Y. TIMES, Oct. 28, 2018, at A15. In contrast, gay sex in India only became legal in 2019 and it is punishable by death in Afghanistan and Brunei.

72. Trevor Sutton & Brian Harding, *Why Taiwan's Gay Marriage Ruling Matters*, THE DIPLOMAT (June, 1, 2017), <https://thediplomat.com/2017/06/why-taiwans-gay-marriage-ruling-matters/>; Ting Shi & Chinmei Sung, *Taiwan Gay Marriage Ruling Widens Political Divide With China*, BLOOMBERG (May. 26, 2017), <https://www.bloomberg.com/news/articles/2017-05-25/taiwan-gay-marriage-ruling-widens-political-divide-with-china>.

73. Lawrence Chung, *Taiwan lawmakers vote to legalise same-sex marriage*, SOUTH CHINA MORNING POST (May 17, 2019), <https://www.scmp.com/news/china/society/article/3010653/taiwan-lawmakers-vote-legalise-same->

the cultural war on it also become transnational.⁷⁴ It might be fair to say that from both the supporters and opponents of same-sex marriage, the new bill is not the end of the fight. The debates over marriage equality will continue and the legal measurements for sex-same marriage will remain an ongoing issues, at least for a little while longer.

3. *International Marriages*

Among the marriages registered in 2016, 13.8% of marriages, are international marriages, in which at least one spouse, more than 90% the wife, originates from China, Southeast Asia, or other foreign countries.⁷⁵ The wave of international marriages in postwar Taiwan begins in the late 70s when Taiwanese men began to seek wives from Southeast Asian countries. The starting point of marriages between Taiwanese and Chinese is more definite. This trend begins in 1987 with the resume of cross-strait interaction after nearly forty-year break. In the beginning the typical cross-strait marriage is formed by a retired veteran who was born in China before 1949 and a divorced or a widowed middle-age Chinese woman. Over time, these marriages increasingly diversified, in terms of ages, educational, and social background.⁷⁶ According to the report on lifestyles of foreign spouses and mainland spouses released by Taiwanese Ministry of Interior Affairs in 2016, among foreign brides, 50.8% are from China, 29.6% are from Vietnam, and 4.8% are from Indonesia.⁷⁷ Due to Taiwan government's stricter policy in regulating international marriages and changes of economic situations in Taiwan, Southeast Asian countries, and China, the number of such marriages is actually decreasing. In 2003, the number of international marriages reached its peak, as one out of three marriages registered in that year was between a Taiwanese and his/her foreign spouse.⁷⁸ Nevertheless, many of these foreign marriages remain.

sex-marriage.

74. Jia Hong (嘉鴻), *Taiwan Xuanju 2018: Gongtou Redian-Tongxing Hunyin he Tongxing Jiaoyu* (台灣選舉2018：公投熱點—同性婚姻和同性教育) [*Taiwan Election 2018: Referendum Hotspot--Same-sex Marriage and Same-sex Education*], BBC CHINESE (Nov. 24, 2018) https://www.bbc.com/zhongwen/trad/chinese-news-46315326?ocid=socialflow_facebook&fbclid=IwAR0YnKOcldNn-vSoFCC-ThLwx1FosnYAP2DMHWrHWnTIU50a6AeWuPqtcG8.

75. Data retrieved from ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], NEIZHENG TONGJI TONGBAO 106 NIAN DI 4 ZHOU (內政統計通報—106年第4週) [BULLETIN OF INTERIOR STATISTICS-YEAR 106 WEEK 4] (Jan. 28, 2017), https://www.moi.gov.tw/files/news_file/week10604.pdf.

76. Sara L. Friedman, *Marital Borders: Gender, Population, and Sovereignty across the Taiwan Strait*, in *WIVES, HUSBANDS, AND LOVERS: MARRIAGE AND SEXUALITY IN HONG KONG, TAIWAN, AND URBAN CHINA*, *supra* note 51, at 285, 287-88.

77. MINISTRY OF THE INTERIOR, *supra* note 75.

78. *See id.*

Also, a considerable proportion of Taiwanese children, roughly one out of seven children between age seven and sixteen, were born in international families.⁷⁹

While international marriages increase the diversity of Taiwan's society, there exist several related issues, such as commercialization of marriage and human trafficking. There is an unbalance relation between the domestic and foreign spouse, due to commodification of foreign brides, their immigrant status, economic dependence, and fear of losing child custody after divorce. Meanwhile, a father's chance of receiving sole custody granted by the courts are improving, especially when he is the only party who actively seeks custody, such as in the case of transnational marriages composed of a Taiwanese husband and a foreign wife who "ran away" from Taiwan (see more in Section III.B.2).⁸⁰ These factors make foreign wives more vulnerable to domestic violence. In addition, due to Taiwan's special relation with China, Chinese marital immigrants from China to Taiwan struggle when seeking acceptance and recognition.⁸¹

The higher divorce rate of international marriages and the following questions on child custody also present challenges to family law in Taiwan.⁸² The amendment of Immigration Law in 2007 addressed some of the abovementioned problems by incorporating anti-discrimination provision and domestic violence prevention provision as well as prohibiting commercial marriage brokerage business. The Nationality Act was also revised in 2016 to open a door for foreign spouses who divorced their Taiwanese spouses due to domestic violence or those whose

79. Data retrieved from JIAOYUBU TONGJICHU (教育部統計處) [DEPARTMENT OF STATISTICS OF MINISTRY OF EDUCATION], JIAOYU TONGJI JIANXUN DI 50 HAO (教育統計簡訊第50號) [EDUCATIONAL STATISTICAL SUMMARIES No.50] (Apr. 27, 2016),

<http://stats.moe.gov.tw/files/brief/104%E5%AD%B8%E5%B9%B4%E6%96%B0%E4%BD%8F%E6%B0%91%E5%AD%90%E5%A5%B3%E5%B0%B1%E8%AE%80%E5%9C%8B%E4%B8%AD%E5%B0%8F%E6%A6%82%E6%B3%81.pdf>. Among them, the percentage of either parent respectively from Vietnam, China, and Indonesia is 40.7%, 38.3%, and 10.6%.

80. More analysis on foreign spouse issue, see Shu-Chin Kuo (郭書琴), *Taojia De Qizi, Quexi De Beigao?-Waiji Peiou Yu Shenfenfa Zhi Faluwenhua Chutan (逃家的妻子·缺席的被告?—外籍配偶與身分法之法律文化初探)* [A Runaway Wife and Absent Defendant?-Initiating a Case Study on Foreign Spouse from the Perspective of Cultural Study of Family Law], 22 CHUNGCHEN DAXUE FAXUE JIKAN (中正大學法學集刊) [NAT'L CHUNG CHEN U. L.J.] 1, 1 (2007).

81. SARA L. FRIEDMAN, EXCEPTIONAL STATES: CHINESE IMMIGRANTS AND TAIWANESE SOVEREIGNTY (2015).

82. In 2016, the divorce rate of international marriage among married population is 20.9%, which is 2.3 times of the divorce rate of domestic marriages (10.13%). Data retrieved from ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], NEIZHENG TONGJI TONGBAO 106 NIAN DI 22 ZHOU (內政統計通報—106年第22週) [BULLETIN OF INTERIOR STATISTICS-YEAR 106 WEEK 22] (June 3, 2017), https://www.moi.gov.tw/files/news_file/week10622.pdf.

Taiwanese spouses had pass away but who still live with and take care of other family members in order to stay and apply for Taiwanese citizenship. These amendments did increase protection of foreign spouses but leave unsolved issues. For example, a divorced foreign spouse cannot stay in Taiwan if she/he is not granted child support.⁸³ Also, the current law seems to strengthen the idea that foreign spouses, mostly wives, need to perform as caregivers at home to be allowed to stay, even after years of living in Taiwan. Last but not least, as discussed in section II.B.2, under the newly-enacted marriage equality law, transnational same-sex couples can register in Taiwan only if the foreign spouse is from a jurisdiction where same-sex marriage is allowed.

III. PARENT-CHILD RELATIONSHIPS

In recent years, parent-child issues seem to occupy the center of family law in Taiwan.⁸⁴ Relatively speaking, the relationship between husbands and wives could be understood as a contract between two independent individuals, in the sense that a marriage could be resolved by mutual consents. In other words, in the area of marriage, the trend of reform is toward family autonomy in decision making. It seems not the case for parent-child relationship, in which the state has great interest in protecting children. Nevertheless, in this area of Taiwan's family law, we can also observe similar trend toward an individualistic and equalitarian family model, including the rules regarding parent-child relationships.

It is worth mentioning that the relationship between adult child and parent, in some western legal systems, is not considered a part of family law. The decision-making support and economical support for vulnerable adults are stipulated in guardianship law and social security law, which some legal professionals integrate into the field "elder law." In contrast, inherited from Qing Code and Japan's Meiji Civil Code, family members owe a prioritized duty to assist vulnerable persons in Taiwan. Since the main supporters are family members and most important of all, the

83. "(...) in the case of transnational marriages, which are mostly composed of Taiwanese husbands and foreign wives, "runaway" foreign wives can easily be divorced and denied custody of the child, see Chao-Ju Chen, *The Chorus of Formal Equality/Feminist Custody Law Reform and Fathers' Rights Advocacy in Taiwan*, 28 CAN. J. WOMEN LAW 116, 149 (2016).

84. Shu-Chin Kuo (郭書琴), *Cong "Banlu" Dao "Fumu" Lun Shenfenfa Guifan Zhongxin Zhi Zhuanian-Jianping Taiwan Taoyuan Difangfayuan 96 Niandu Yangshengzi Di 81 Hao Caiding* (從「伴侶」到「父母」論身分法規範重心之轉變—兼評臺灣桃園地方法院96年度養聲字第81號裁定) [From Partner to Parent-The Change of Family Law & the Critic of Gay Parent Adoption Case in Taiwan], in XIANDAI JIATING SHENGHUO ZHIXU DE ZHONGZHENG YU ZAI SI (現代家庭生活秩序的重整與再思) [RETHINKING AND RECONSTRUCTING THE ORDER OF MODERN FAMILY LIVES] 3, 3-45 (Shu-Chin Kuo (郭書琴) ed., 2016).

obligors in the first order are usually the adult children of the vulnerable persons, both decision making and economical support are prescribed in Part IV (Family) of Taiwan's Civil Code. Therefore, we will examine the changing role of the public vis-à-vis the private family through discussing issues related to elderly support (see section III.B.3) and adult guardianship (see section III.B.4).

A. *Transformations of Laws on Parent-Child Relationships*

1. *Parent-Child in Han-Taiwanese Legal Traditions*

To understand the historical evolution of parent-child relationship, it is imperative to introduce the idea of family (or House) in Han-Taiwanese traditions. The traditional idea of family/House is patriarchal. In the Qing Code, each family had a family head, usually a male, who represented the family. However, internally, the elders, including parents, grandparents, and the family head himself, governed the family.⁸⁵ The family consists of the elders, minors, slaves, and household labors. Except the elders, the rest were family members who shall be obedient to the former. The elders could decide the marriage of the minors and discipline them even after the latter reached adulthood.⁸⁶ As mentioned earlier (section II.A.1), children were left with husbands' families after divorce.

One distinctive feature of parent-child relation in Han-Taiwanese traditions, if compared to that in Christian-Western tradition, was the relatively non-discriminatory attitude toward children out of the wedlock. The Qing Code treated sons of concubines equally with his brothers in terms of division of family and family property. All sons were capable of continuing family line and keeping up memorial services of their ancestors. The same applied to adopted sons. Arguably, this attitude resulted in equalitarian treatments between children within and out of wedlock as well as the easy establishment of father-child relationship when the Civil Code was enacted in 1931 (see section III.A.3).

Adoption was described as "every-day occurrence." Families could adopt a son of their own kindred to continue the family line and to keep up ancestor worshipping. However, the people did not limit themselves to this standard practice, and the related custom could be considered as contrary to Confucius morality. In practice, adopting sons of another families with different surnames were not rare. Also, as discussed in section II.A.1, the practice of *simpua*, adopting young girls for sons as

85. RINJI TAIWAN KYÜKAN CHÖSAKAI, *supra* note 32, at 188-89.

86. *Id.* at 276.

futures wives also prevailed. Sometimes, childless families even adopted a girl and then invite a marry-in son-in-law. Moreover, paying money for adoption was common. The majority of adopted children were purchased.⁸⁷

In theory, there was no individual property. Families were the economic units and legal subjects for property transaction. All the property belonged to families.⁸⁸ While the Qing Code encouraged continuation of multiple-generation families, mostly out of Confucian ideology, it allowed the division of family with consent of the elders.⁸⁹ In other words, the division of family and family property could happen when the parents/elders were still alive. After the division, elders/parents might live with one of the sons. During the division, a portion of family property could be reserved as a fund for elders' support.⁹⁰ According to the Qing Code, family property was divided equally among all sons when setting up new families that continue patrilineal line. However, it was comply practiced that the first grandson also had one portion.⁹¹ Elders' wills in the division of family properties were also respected both outside and inside the courts. The magistrates took the elders' wishes seriously, sometimes even overriding the equal inheritance principle.⁹² In general, daughters could receive a small share of family property as her dowry. Daughters were entitled to the family property of her natal family, adopted and illegitimate ones included, only if no sons existed. In other words, daughters could be seen as "spare heirs".⁹³ Also, in practice, there in fact existed private property of family members. In terms of wives, her dowry might turn into her private property. Daughters could inherit private property of her parents, mostly from their mothers.⁹⁴

87. OKAMATSU, *supra* note 25, at x-xiii.

88. *Id.* at xxii.

89. Yun-Ru Chen (陳韻如) & Ying-Yi Lin (林映伊), *Fu/mu Ming Nanwei? Qingzhi Taiwan Fenjia Zhong Zhi Jiaoling Yu Yizhu (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 TAIWANSHI YANJIU (臺灣史研究) [TAIWAN HISTORICAL RESEARCH] 1 (2020); ZHONG ZHI HUANG (黃宗智), QINGDAI DE FALU, SHEHUI YU WENHUA: MINFA DE BIAODA YU SHIJIAN (清代的法律、社会与文化：民法的表达与实践) [LAW, SOCIETY, AND CULTURE IN QING: CIVIL LAW EXPRESSIONS AND PRACTICES] 15, 26, 103 (2007).

90. OKAMATSU, *supra* note 25, at xxv.

91. *Id.* at xxiii.

92. *See* Chen & Lin, *supra* note 89.

93. RINJI TAIWAN KYŪKAN CHŌSAKAI, *supra* note 32, at 568. For a general analysis for daughters' right of inheritance in traditional Chinese law, *see* BERNHARDT, *supra* note 49, at 9-46.

94. RINJI TAIWAN KYŪKAN CHŌSAKAI, *id.*, at 351.

2. Parent-Child Relationship in Japan-Colonized Taiwan

Like the traditions and customs on marriage and divorce, the parent-child relationships in Han-Taiwanese traditions were selectively maintained, re-interpreted and altered in the Japanese colonial era. For instance, idea of family (or House) in Han-Taiwanese was preserved in customary law. Yet, the colonial administration also introduced the household registration to Taiwan and inserted some of Japanese understandings of House into to Han-Taiwanese's practice.⁹⁵ The feature of will under the Meiji Civil Law, such as the requirement of witness, was also interpreted as part of Taiwan customary law.⁹⁶ Bride and groom became the parties of marriage but the marriage might be revocable without parents' consents.⁹⁷ Last but not least, the practice of *simpua*, the adopted daughter-in law, were recognized by the colonial courts. Not until 1918, did the colonial court allowed an abusive *simpua* to leave her adoptive family.⁹⁸

3. Parent-Child Relationship in Postwar Taiwan

More dramatic legal changes on parent-child relationships happened when the ROC Civil Code enacted in early 1930s-China was introduced to Taiwan after WWII. Daughters' equal right to inherit family property, for example, was unprecedented in either Chinese history or Han-Taiwanese traditions.⁹⁹

95. SHEN, *supra* note 36, at 97-98; See generally Wen-Liang Tseng (曾文亮), *Quanxin De "Jiuguan": Zongdufu Fayuan Dui Taiwanren Jiazu Xiguan De Gaizao* (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 RES.] 125 (2010).

96. See Lin, *supra* note 89, at 69-101.

97. In 1937, the Colonial Court ruled that if the groom was under 30 years old and the bride under 25 years old, the marriage was evocable without parents' consents. See SHEN, *supra* note 36, at 134-35.

98. Chen, *supra* note 27, at 209-10.

99. See BERNHARDT, *supra* note 49, at 133-60; However, statistics shows that even in late 1980s 80% of daughters in fact did not inherit properties from their parents. See ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], TAIWAN FUNU SHENGHUOZHUANGKUANG DIAOCHA BAOGAO (台灣婦女生活狀況調查報告) [REPORT OF THE TAIWANESE WOMEN'S LIVING CONDITION SURVEY] 142 (Figure 5-27, on parents' ways of splitting properties), 153 (Figure 6-24, on husband's family's way of splitting properties) (1989); For more on the practice of daughters' inheritance rights in Taiwan, see Chen Chao-Ju (陳昭如), *Zai Qiquan yu Zhengchan Zhijian: Chaoyue Beihai zhe yu Xingdong zhe Eryuanduili de Nuerjichengquan Shijian* (在棄權與爭產之間：超越受害者與行動者二元對立的女兒繼承權實踐) [*Bargaining with Patriarchy: Daughter's Right of Inheritance in Practice*], 38 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U. L.J.] 133, 133 (2009).

As mentioned earlier, one distinctive feature of Taiwan family law is the relatively equalitarian attitude toward children born out of the wedlock. This attitude is vivid in the Civil Code, especially in provisions on establishment of parentage and equal treatment of marital and non-marital children. In the Civil Code, the person who gives birth to the child is the child's legal mother. The child born to a married woman is presumed to be the child of her husband by virtue of a "presumption of legitimacy" or "marital presumption" (Para. 1, Art. 1063). In the case if a father is not married to a child's mother, the "marital presumption" does not hold. To establish parentage, the biological father may accept the paternity of the child in what is called a "voluntary acknowledgment of paternity". Furthermore, the biological father's behavior of supporting the child may be deemed as acknowledgement (Para. 1 of Art. 1065). Otherwise, the child or the mother can file a petition for a determination of paternity against the biological father (Para. 1 of Art. 1067). It is worth noticing that the acknowledgment of paternity in Taiwan has no specific requirement for formality, meaning that it is relatively easy to establish a father-child relationship. Furthermore, once the paternity is confirmed, the child born out-of-wedlock is treated the same as a child born in a marriage.

Interestingly, Taiwan's Civil Code has approved the equal treatment of marital and non-marital children since 1931 when the Civil Code was firstly promulgated in Mainland China.¹⁰⁰ That is to say, as long as the child out-of-wedlock was acknowledged by the father, the child has the right to be supported and the right to inherit accorded to a child in wedlock (Para. 1 of Art. 1065). This equal protection was admitted at a very early stage. For example, the U.S. Supreme Court started to strike down discriminatory laws in 1968.¹⁰¹ In terms of Japan, in the 1947 Civil Code Reform, Item 4 of Art. 900 stipulated that an illegitimate child's rights to inherit his/her parents' estates was only half that of a legitimate child. This provision is considered to be more generous to the illegitimate child than in Europe at that time. Later some European countries revised their laws in the 1960s, and Japan was left behind.¹⁰² Not until 2013 did

100. In terms of adopted children, their entitled portion of succession was half of that of legitimate children (including marital and non-marital children who were acknowledged by fathers as their children) until 1985 (Art. 1142, repealed in 1985).

101. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination against Nonmarital Children*, 63 FLA. L. REV. 345, 347 (2011) (stating that since 1968 the U.S. Supreme Court began dealing with the laws regarding the non-marital child's right to paternal support, intestate succession, government benefits, and damages for the wrongful death of a parent).

102. Shizawa Masumi (始澤真純), *Hichakushutsushi Sozokubun Sabetsu ni Kansuru Kosatsu* (非嫡出子相続分差別に関する考察) [*A Study on the Discrimination against the Statutory Share of Child out of Wedlock*], 58 TOYO HOGAKU (東洋法学) [TOYO L. REV.] 145, 151 (2014).

the Japanese Supreme Court declare the discrimination on an intestate share to be unconstitutional.¹⁰³ Notwithstanding Taiwan's Civil Code seems "progressive" compared to the U.S. and Japan, the reason to provide equal treatment is not the interests of the non-marital child,¹⁰⁴ but the Chinese traditional ethics favor offspring and continuance of family blood more than legal marriage.¹⁰⁵ In reality, the number of child out-of-wedlock in Taiwan has risen slightly over the last 40 years, from 1.39% in 1976 to 3.89% in 2019 (see Figure 2), which is higher than East Asian neighbors but actually considered low in the global level (see Figure 3).

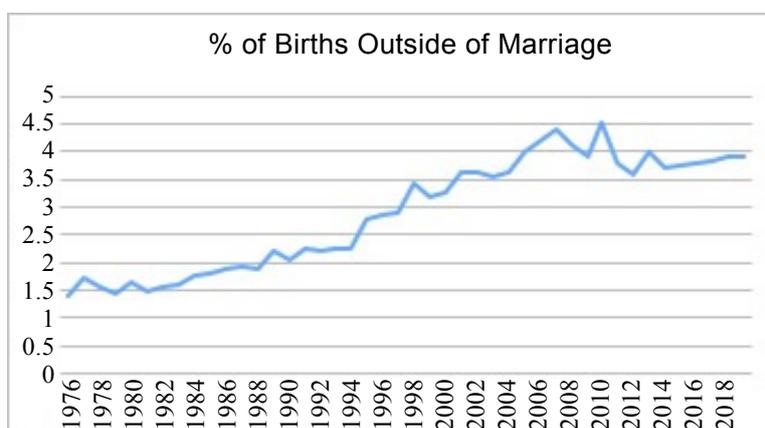


Figure 2: Percentage of Births Outside of Marriage¹⁰⁶

		% of Births Outside of Marriage, 2008-2009	% of Children in Single Parent Households, 1999-2000	Total Fertility, 2010	Net Reproduction Rate, 2005-2010
AFRICA	KENYA	19	26	4.6	1.96
	NIGERIA	6	13	5.7	1.84
	SOUTH AFRICA	59	58	2.4	1.04

103. Saikō Saibansho [Sup.Ct.] Sep. 4, 2013, Hei 24 (Ku) no.984, 67 Saikō Saibansho Minji Hanreishu 1320 (Japan).

104. Shee, *supra* note 11, at 21, 37 (pointing out that the best interest principle was adopted firstly in the 1993 Child Welfare Act).

105. CHEN & HUANG & GOU, *supra* note 4, at 283.

106. Data retrieved from *supra* note 52, under the section LINIAN RENKOU TONGJI ZILIAO (歷年全國人口統計資料) [PAST POPULATION STATISTIC DATA], and under the subsection CHUSHENG JI SIWANG (出生及死亡) [BIRTHS AND DEATHS], then under the subsection CHUSHENG AN SHENFEN (AN DENGJI) (出生按身分(按登記)) [BIRTHS BY IDENTITY (BY REGISTRATION)].

		% of Births Outside of Marriage, 2008-2009	% of Children in Single Parent Households, 1999-2000	Total Fertility, 2010	Net Reproduction Rate, 2005-2010
ASIA	CHINA	<1	4	1.5	0.77
	INDIA	<1	9	2.6	1.17
	INDONESIA	1	10	2.4	1.02
	JAPAN	2	12	1.3	0.61
	MALAYSIA	-	6	2.6	1.23
	PHILIPPINES	37	10	3.2	1.46
	SOUTH KOREA	2	-	1.2	0.57
	TAIWAN	4	4	1.0	0.51
EUROPE	FRANCE	53	15	2.0	0.91
	GERMANY	32	14	1.3	0.64
	ITALY	18	10	1.4	0.66
	POLAND	20	17	1.4	0.63
	SPAIN	32	18	1.4	0.68
	SWEDEN	55	22	1.9	0.90
	UNITED KINGDOM	45	24	1.9	0.89
	LATIN AMERICA	ARGENTINA	58	19	2.3
CHILE		68	-	1.9	0.94
COLOMBIA		74	33	2.4	1.15
MEXICO		55	13	2.2	1.05
PERU		69	21	2.6	1.21
MIDDLE EAST	EGYPT	<1	5	3.0	1.34
	SAUDI ARABIA	<1	-	3.8	1.52
NORTH AMERICA	CANADA	25	22	1.7	0.75
	UNITED STATES	41	29	1.0	1.01
OCEANIA	AUSTRALIA	33	20	1.9	0.88
	NEW ZEALAND	47	21	2.1	0.97

Figure 3: Global Children's Trends¹⁰⁷

Generally speaking, the postwar development of parent-child relation was founded on a relatively equalitarian and individualistic R.O.C. Civil Code and transformed further. The postwar reform on adoption in 1985 is illuminative. Before that, adoption in the 1930 Code focused more on the interest of family or parents. Adoption by will (Art. 1701 repelled in 1985) once existed for the purpose of securing an heir for a childless man in order to continue his family line after his death. Yet, adoption by will

107. *Global Children's Trends*, THE SUSTAINABLE DEMOGRAPHIC DIVIDEND, <http://sustaindemographicdividend.org/articles/international-family-indicators/global-childrens-trends> (last visited Nov. 27, 2018).

was criticized being contradictory with the doctrine of best interest of child and abolished in 1985. Meanwhile, more regulations, such as courts' approval, was added in the process to prevent human trafficking and children's welfare.¹⁰⁸ When nuclear family replaced the patriarchal idea of House, parent-child relations gradually changed from ones which emphasized on filial obedience to a new model based on gender equality and children's rights. More will be discussed in the following sections.

B. *Current Issues*

1. *Establishments of Paternity and its Rebuttal*

As explained earlier, maternity in Taiwanese law is based on the fact of birth. It is not possible for a mother to legitimize or delegitimize a child through acknowledgement or denial of motherhood. If the birth registry is wrong, meaning that the registered mother is not the one who gave birth--no matter how long this situation lasts--the wrongfully registered mother is not the legal mother. The establishment of a legal relationship between the father and the child does not depend on a single natural fact--the father-child relationship is either presumed by law (the above-mentioned "presumption of legitimacy" or "marital presumption") or constructed by the father's acknowledgement. That is to say, marriage legitimates the child and establishes legal parenthood between the married couple and the child.

Where paternity of the child is in question, the presumption may be rebutted by proving that the presumed father has no genetic relationship with the child (Para. 2, Art. 1063). In current law, the mother, the presumed father (the husband of the mother), and the child her/himself are allowed to initiate a lawsuit to rebut the presumption of legitimacy within two years after learning that the child is not biologically related to the husband. If no one has contested the presumption within this period, the presumption becomes conclusive.

However, not long ago it was a different story. The presumed father was the only person entitled to bring the lawsuit before 1985. There were a few husbands not reluctant to take legal action simply in order to harass the mother and the child. In response, the legislator entitled the mother the right to rebut in 1985. Nevertheless, at that time the child her/himself was not entitled to question their own biological origins. It is because that doing so seemed to be a violation of a child's filial duty to obey the

108. LIN, *supra* note 6, at 261-62; CHEN & HUANG & GOU, *supra* note 4, at 322-23; TAI et al., *supra* note 8, at 388-90.

parents, including not doubting the mother's allegiance and purity in the marriage.¹⁰⁹

Later, there was another dispute that a child abandoned by the legal parents was raised by the actual biological father. Since the mother and her legal husband estranged the child, it is almost impossible to expect them to bring a lawsuit, thus preventing the biological father from acknowledging the child. The child petitioned to the Grand Justices asserting that Art. 1063 of the Civil Code violates the Constitution. In the famous J.Y. Interpretation No. 587, the Constitutional Court firstly confirmed that the child's right to identify his/her blood filiations and to ascertain his/her paternity is concerned with the right to personality and shall be protected by the Constitution. The Grand Justices held that Art. 1063 of the Civil Code is inconsistent with the constitutional principles of protecting the right to personality and the right to litigation, and hence required the legislator to amend the law. J.Y. Interpretation No. 587 is an unprecedented constitutional decision in Taiwan: the Grand Justices for the first time directly quoted the UN Convention on the Rights of the Child, the German Civil Code, the Swiss Civil Code, and Taiwan's Constitution as the primary legal resources to disavow the interior civil code. It also marks that family law in Taiwan is moving into the era of full-fledged globalization.¹¹⁰ This landmark case also led to the revision of the Art. 1063 in 2007 to include the child to rebut the marital presumption.

Nonetheless, contrary to the fact that some legal systems such as Germany entitles the biological father to be the plaintiff under certain conditions, Taiwan's Civil Code continues to disqualify the biological father from bringing an action, on the ground that entitling biological fathers to rebut paternal assumption could not only damage marriage stability and family harmony, but also risk children's right to be educated and nurtured in marital families. Another upcoming issue is the presumption of both paternity and maternity when sex-same marriage is recognized in Taiwan. Again, to face this challenge the legislator and legal scholars in Taiwan will need to examine the local situation and draw inspiration from international precedents.

2. *Parental Rights and Child Custody*

Prior to the amendment in 1996, the Civil Code recognized numerous paternal preferences in parental rights, the assignment of children's

109. Kuo, *supra* note 51, at 232.

110. Shu-Chin Kuo, *A Cultural Legal Study on the Transformation of Family Law in Taiwan*, 16 S. CAL. INTERDISC. L.J. 379, 394-95 (2007).

surnames and domicile as well as post-divorce arrangements; these patriarchal clauses became ones of the major targets of legal reform over the past thirty years in Taiwan.

At first, reform of parental rights was part of the movement on women's rights and gender equality. By 1996, Art. 1089 of the Civil Code provided that in the event that parents disagreed over how to exercise parental rights over a minor, the father had the right of final decision. Owing to feminist movements in the Post-Martial Law Period, Art. 1089 was held unconstitutional in 1994 by J.Y. Interpretation No. 365 of the Grand Justices, stating that it was incompatible with Article 7 of the Constitution, which proclaims that both sexes are equal under the law, as does Article 9, Paragraph 5, to the Amendment in eliminating sexual discrimination.¹¹¹ In their reasoning, the Grand Justices in Taiwan raised the "best interests of the child" standard, which had been adopted world-widely, for the first time, leading to significant parentage amendment in 1996.

Following J.Y. Interpretation No. 365, the amendment in 1996 not only dealt with Art. 1089, but also Art. 1055 to comply with gender equality. The previous Art. 1055 stipulated that, in both consensual and judicial divorce, the custody of children belonged to the father unless either it had been agreed otherwise in a consensual divorce (Art. 1051) or the court had decided otherwise for the interests of the children (Art. 1055). In addition, there was only one form of child custody: sole custody; joint custody was not an option. Art. 1051 was abolished and Art. 1055 was amended in 1996, which replaced paternal preference with the best interests of the child doctrine, admitting joint custody and non-custodial parent's visitation rights.

Both before and after the amendment, the majority of the custody arrangements in Taiwan were made voluntarily between the parents rather than being judicially decided. Official statistics on consensual custody arrangements show that the distribution of sole paternal and maternal custody is gradually becoming equal, and joint custody is becoming common (see Figure 4).¹¹²

111. Chen, *supra* note 83, at 125-27 (describing the role of feminist organizations on family law reform in 1990s thoroughly).

112. Data retrieved from *supra* note 52, under the section NIANDU XIANSHI JI QUANGUO TONGJI ZILIAO (年度縣市及全國統計資料) [ANNUAL DATA OF CITIES, COUNTIES, AND THE WHOLE STATE], then under the subsection QITA (其他) [OTHERS], then under the subsection XIANSHI WEICHENGNIAN ZINYU FUDAN AN YUANYIN GUI SHU (縣市未成年子女負擔按原因歸屬) [CUSTODY ARRANGEMENTS ACCORDING TO CAUSES]. The reality of custody arrangements prior to 2002 was unknown due to a lack of information.

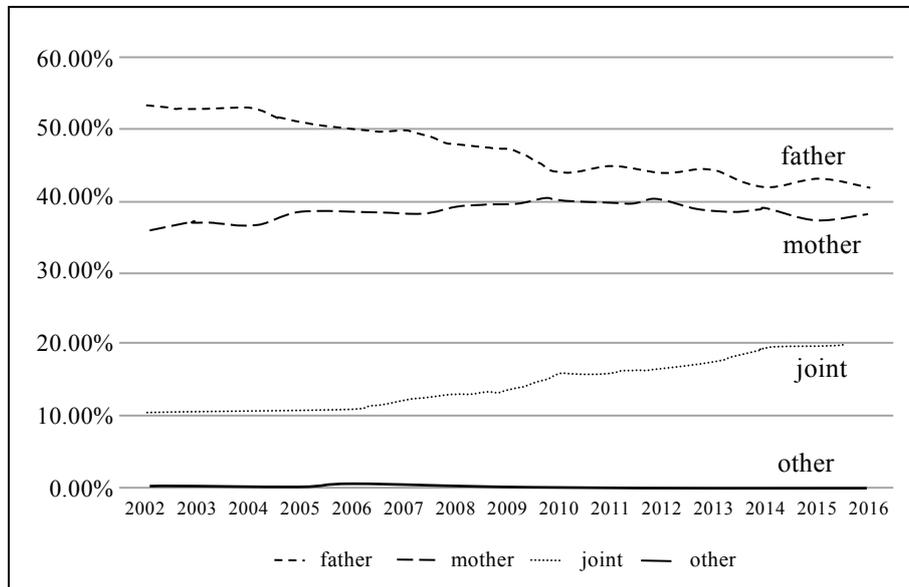


Figure 4: Custody Arrangements in All Divorce Cases

Data retrieved from <<http://sowf.moi.gov.tw/stat/gender/ps03-12.xls>>

Custody arrangements decided by a court in judicial divorces show a different picture from all divorce cases. Prior to 1996, it is estimated that courts awarded custody to fathers in 80-90 percent of the cases.¹¹³ According to Hung-En Liu's empirical study analyzing court decisions from 1998 to 2000, the years immediately after the 1996 law reform, maternal sole custody was prevalent, although economic competence was regarded as a necessary, but not sufficient factor in determining custody, which might privilege fathers.¹¹⁴ After 2002, custody continues to go to the mother, although the gap between paternal and maternal sole custody is narrowing (see Figure 5). Contrary to a growing preference for joint custody outside the courts, the courts tend not to consider joint custody. This is because these parents who were not able to voluntarily divorce and entered into judicial process are believed to be highly conflicted, which the court tends to consider not suitable for joint custody.¹¹⁵

113. Hung-En Liu, *Mother or Father: Who Received Custody? The Best Interests of the Child Standard and Judges' Custody Decisions in Taiwan*, 15 INT'L J.L. POL. & FAM. 185, 186 (2001).

114. Hung-En Liu, *Custody Decisions in Social and Cultural Contexts: In-Depth and Focus Group Interviews with Nineteen Judges in Taiwan*, 17 COLUM. J. ASIAN L. 225, 225 (2004).

115. Hung-En Liu (劉宏恩), *Lihunho Zinyu Jianhu Anjian "Zinyu Zuijia Liyi Yuanze" de Zajainshi: Shipingxi 2013 Nian 12 Yue Xiuzheng zhi Minfa di 1055-1 Guiding (離婚後子女監護案件「子女最佳利益原則」的再檢視——試評析二〇一三年十二月修正之民法第一〇五五條之一規定)* [Revisiting the Principle of the "Best Interests of the Child" in the Custody Cases: Evaluating the New Article 1055-1 of the Civil Code Revised in December 2013], 234 YUEDAN

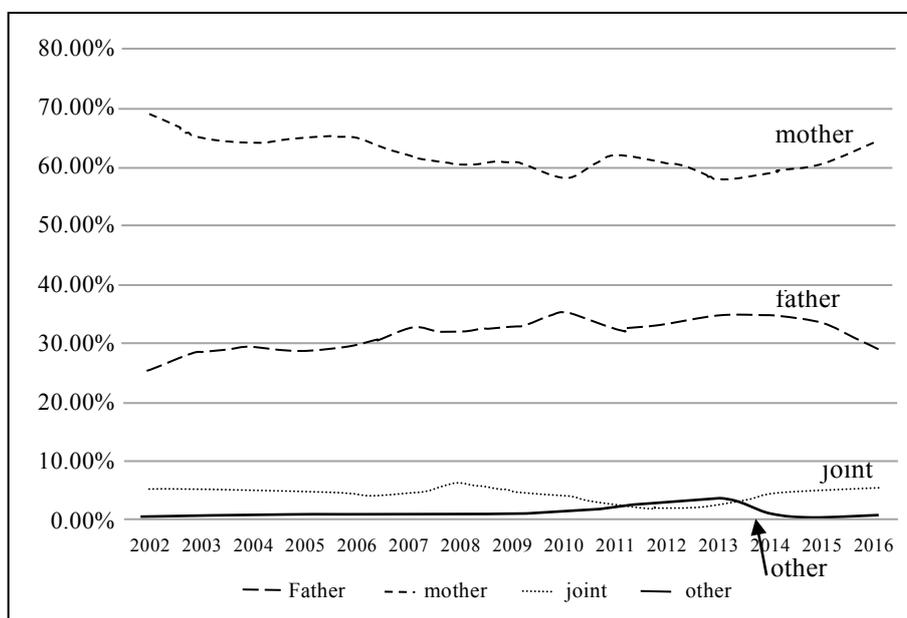


Figure 5: The Assignment of Custody in Judicial Divorces

Data retrieved from Judicial Yuan, Judicial Statistics Yearbook (2002-2016) <<http://www.judicial.gov.tw/juds/>>

In order to assist the court to determine the child's best interests, new Art. 1055-1 lists several factors that the judge should consider, such as the age, sex, family rank and health condition as well as the will of the child, the age, occupation, character, economical ability and the life style of the parents. Although in Taiwan empirical legal studies are not widely adopted by researchers¹¹⁶ including family law scholars, child custody is undoubtedly an exception, meaning that there was some research to explore the "law in action" regarding custody. In 2001, Hung-En Liu's path-breaking article collects 70 cases during 1998 to 2000 and shows that the courts tend to consider only some of the factors listed in Art. 1055-1, such as "interview report of social workers" (45.5%), "occupation and economic resources of the parents" (38.6%), "will of the child" (31.8%), and "age of the child" (27.3%).¹¹⁷ Later, Yen-Ni Cheng codes factors that have been considered in each of the 540 cases in 2012-2014 and finds

FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 193, 201-02 (2014).

116. Kai-Ping Su (蘇凱平), *Zaifang Fashizheng Yanjiou Gainian yu Jiazhi: Yi Jiandan Lianghua Fangfa Yanjiou Woguo Jianxing Zhengce Weili* (再訪法實證研究概念與價值：以簡單量化方法研究我國減刑政策為例) [Revisiting the Concept and the Merits of Empirical Legal Studies: Lessons from Taiwan's Commutation Policy], 45 TAIWA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U. L.J.] 979, 984-85 (2016).

117. Liu, *supra* note 115, at 195.

that “interview report of social workers”, “will of the child”, “primary caretaker”, “current residence of the child”, “wishes of the parents”, “parent-child interaction”, “misbehavior of the parents” are significantly associated with the custodian.¹¹⁸ Meanwhile, Chao-Ju Chen collects 272 cases from 2000 to 2013 and sets up four doctrines: the tender years doctrine, the primary caretaker doctrine, the principle of continuity, and the friendly parent doctrine, and observes whether each was applicable. It is pointed out that the significance of the tender years doctrine has gradually weakened over the years. Recently, Sieh-chuen Huang & Hsuan-lei Shao collected 448 cases including 690 children whose parents are both Taiwanese and willing to acquire custody but finally adjudicated sole custody as a result in 2012 to 2014. This article concludes that “primary caregiver”, “child’s will” and “parent-child interaction” are the three most significant factors considered by judges in Taiwan (see Figure 6).¹¹⁹

In conclusion, law reform in 1996 created gender-neutral parenthood in law, which shifted the legislative concern from parents’ rights to children’s rights and welfare. In custody disputes resolved by judicial decision, the mother seems to have overwhelming supremacy. However, the reason that mothers acquire custody easier than fathers is simply because in most cases mothers are primary caregivers. Mothers remain trapped in a traditional maternal role and are forced to balance between work and family. It is pointed out that this legal reform does not fundamentally challenge the patriarchal norms that locate motherhood in its subordination to fatherhood.¹²⁰ Also, in the following III.B.3, this research will attempt to demonstrate that some aged and poor fathers who did not support the child have become a new social and legal problem in Taiwan.

118. Yen-Ni Cheng (鄭諺霓), *Lihunho Weichengnian Zinyu Qinquan Zhuoding Zhi Shizheng Yenjiou* (離婚後未成年子女親權酌定之實證研究) [Empirical Study of Child Custody after Divorce] 120 (2015) (unpublished master thesis, National Taiwan University) (on file with National Taiwan University Library).

119. Sieh-Chuen Huang (黃詩淳) & Hsuan-Lei Shao (邵軒磊), *Zhuoding Zinyu Qinquan zhi ZhongyaoYinsu: Yi Juezeshu Fangfa Fenxi Xianguan Caipan* (酌定子女親權之重要因素：以決策樹方法分析相關裁判) [What Factors Determine Child Custody in Taiwan? Using Decision Tree Learning on Court Decisions], 47 TAIDA FAXUE RUNCONG (臺大法學論叢) [NAT’L TAIWAN U. L.J.] 299, 325 (2018).

120. Chao-Ju Chen, *Mothering under the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan*, 1 NTU L. REV. 45, 89-90 (2006).

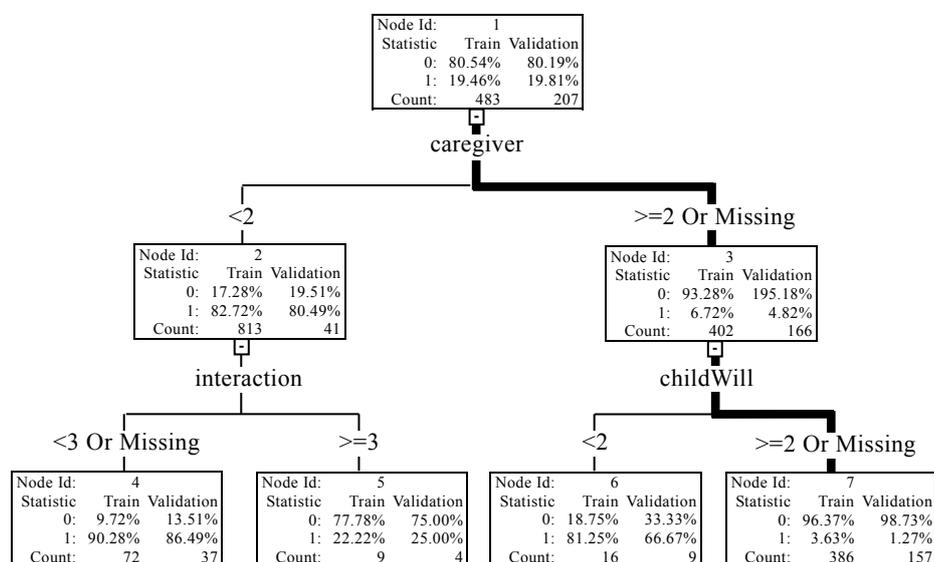


Figure 6: Decision Tree of Child Custody Cases in Taiwan¹²¹

In conclusion, law reform in 1996 created gender-neutral parenthood in law, which shifted the legislative concern from parents' rights to children's rights and welfare. In custody disputes resolved by judicial decision, the mother seems to have overwhelming supremacy. However, the reason that mothers acquire custody easier than fathers is simply because in most cases mothers are primary caregivers. Mothers remain trapped in a traditional maternal role and are forced to balance between work and family. It is pointed out that this legal reform does not fundamentally challenge the patriarchal norms that locate motherhood in its subordination to fatherhood.¹²² Also, in the following III.B.3, this research will attempt to demonstrate that some aged and poor fathers who did not support the child have become a new social and legal problem in Taiwan.

3. Elderly/Family Support

While financial support and care for the elderly might be a private responsibility of the elderly themselves or a collective responsibility of the society in the West, it is a family responsibility in most non-Western

121. *Id.* at 326.

122. Chao-Ju Chen, *Mothering under the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan*, 1 NTU L. REV. 45, 89-90 (2006).

societies such as China, Japan, Singapore, India¹²³, and Taiwan. Filial obligation in traditional Chinese society includes financial, personal care and affectionate bonds. Among the three, however, only financial obligation is retained in modern Taiwanese law.

In Taiwan's Civil Code, the obligors of the family support are ranged widely, including (1) lineal relatives by blood; (2) lineal relatives by marriage living in the same household; (3) siblings; (4) the head and the members of a house (Art. 1114), and of course, (5) the spouse (Art. 1116-1). Among the abovementioned, the adult child and the spouse come first (Art. 1115 & 1116-1). The children's obligation of providing maintenance to their elder parents is based on the traditional notion of filial piety in Confucianism. According to an official survey of seniors in Taiwan, the most important economic form of support, although declining gradually, is still that from children even today.¹²⁴

Nevertheless, a fundamental change in population and family structure has made it difficult for this regime to continue. The first important demographic trend is aging; with improvements in medical treatment and standards of living, life expectancy in East Asia including Taiwan has been remarkably extended (see Table 1).

Table 1: Life Expectancies at Birth in East Asia¹²⁵

Year	Taiwan		China		Japan		Korea	
	Male	Female	Male	Female	Male	Female	Male	Female
1990	71	77	67	71	76	82	66	73
2012	76	83	74	77	80	87	78	85
2017	77	84	74	78	82	89	79	86

123. Katherine Nga Ming Liu, *Filial Obligation: When Confucian Meets the West*, 2003 UCL JURIS. REV. 43, 43 (2003).

124. ZHONGHUA MINGUO WEISHENG FULIBU (中華民國衛生福利部) [MINISTRY OF HEALTH AND WELFARE, R.O.C.], ZHONGHUA MINGUO 106 NIAN LAOREN ZHUANGKUANG DIAOCHA BAOGAO (中華民國106年老人狀況調查報告) [REPORT OF THE SENIOR CITIZEN CONDITION SURVEY 2017], <https://dep.mohw.gov.tw/DOS/lp-1767-113.html> (last visited May 18, 2019).

125. *World Health Statistics 2014*, WORLD HEALTH ORG. [WHO], at 60-67 (2014), http://apps.who.int/iris/bitstream/10665/112738/1/9789240692671_eng.pdf?ua=1 (last visited Nov. 27, 2018); see also ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], WOGUO SHENGMINGBIAO (我國生命表) [LIFE TABLE FOR THE REPUBLIC OF CHINA], <https://www.moi.gov.tw/stat/node.aspx?Z=1&sn=4883> (last visited Dec. 13, 2018); ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], INTERNATIONAL COMPARISON, at tbl. 29, https://www.moi.gov.tw/files/site_node_file/6462/01.土地與人口.pdf (last visited Nov. 27, 2018).

In 1957, the life expectancy in Taiwan was 60.17 years for males and 64.22 years for females.¹²⁶ In 2017, it was 77.28 years and 83.70 years, respectively.¹²⁷ Seniors in Taiwan now have sixteen to nineteen more years compared to their counterparts fifty-eight years ago.

Another notable change in Taiwan is the extremely low fertility rate. The total fertility rate in Table 2 refers to the average number of children born by each woman over the course of her life. The data clearly shows the total fertility rate in East Asia is far lower than 2.1 children per woman, the so-called replacement rate. Compared to the data from the United States, East Asian countries have achieved the lowest number in the world (see Table 2). Moreover, Taiwan unfortunately owns the lowest total fertility rate in the world (see Figure 7).

Table 2: Total Fertility Rate¹²⁸

Year	Taiwan	China	Japan	Korea	U.S.	Germany
1970	4.00	5.74	2.1	4.27	2.45	2.02
1985	1.88	2.36 (1986)	1.73	1.66	1.84	1.39
1995	1.78	1.86 (1994)	1.39	1.66 (1996)	2.01	1.25
2005	1.12	1.33	1.22	1.14	2.04	1.33
2010	0.90	1.47 (2008)	1.35	1.31	2.08 (2008)	1.37
2015	1.18	--	1.45	1.24	1.84	1.50

126. ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], HISTORICAL DATA OF TAIWAN LIFE TABLES, <https://www.moi.gov.tw/stat/english/node.aspx?sn=7357&Page=2> (last visited Nov. 27, 2018).

127. ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], ZHONGHUA MINGUO 106 NIAN ZEIZHENG TONJI NIANBAO (中華民國106年內政統計年報) [REPUBLIC OF CHINA INTERIOR YEARBOOK] 66, 68 (2017), https://www.moi.gov.tw/files/site_node_file/7784/106年內政統計年報電子書.pdf (last visited Nov. 27, 2018).

128. Data retrieved from U.N. DEPARTMENT OF ECONOMICS AND SOCIAL AFFAIRS, POPULATION DIVISION, WORLD FERTILITY DATA 2012: AGE-SPECIFIC FERTILITY RATES, TOTAL FERTILITY AND MEAN AGE AT CHILD BEARING (Mar. 03, 2013), <http://data.un.org/DocumentData.aspx?id=319> (last visited Nov. 27, 2018); ZHONGHUA MINGUO NEIZHENGBU TONGJICHU (中華民國內政部統計處) [DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C.], STATISTICAL YEARBOOK OF INTERIOR, https://www.moi.gov.tw/files/site_stuff/321/2/year/year_en.html#2%20Population (last visited Nov. 27, 2018) (under subsection 2.04 Fertility Rates of Childbearing Age Women); DEPARTMENT OF STATISTICS, MINISTRY OF THE INTERIOR, R.O.C., *supra* note 127, at tbl. 26.

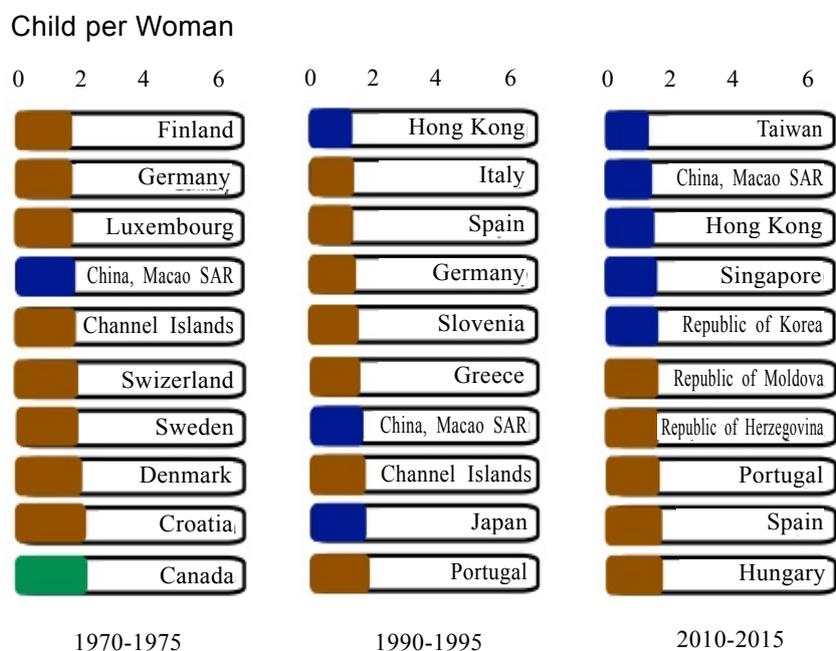


Figure 7: Ten Countries with the Lowest Total Fertility 1970-2015¹²⁹

Fewer births and longer life expectancy have led to a higher proportion of seniors. Japan outweighs all other nations with the highest rate of elderly people (28.1% of the population was over the age of sixty-five in 2018)¹³⁰ and Taiwan officially became an aged society, as the population of seniors reached 14.0% in March 2018.¹³¹

Table 3: Percentage of Population over 65 in East Asia¹³²

Year	Taiwan	China	Japan	Korea
1980	4.0	5.1	9.0	3.9
1990	6.1	5.8	11.9	5.0
2000	8.5	6.9	17.2	7.3

129. U.N. DEPARTMENT OF ECONOMICS AND SOCIAL AFFAIRS, POPULATION DIVISION, WORLD FERTILITY PATTERNS--DATA BOOKLET 2015, 7 (2015).

130. *For the First Time, 1 Person in 5 in Japan Is 70 or Older*, THE JAPAN TIMES (Sep. 17, 2018), https://www.japantimes.co.jp/news/2018/09/17/national/number-women-japan-aged-least-65-year-s-old-tops-20-million-first-time/#.W_9dxS33WDc.

131. George Liao, *MOI: Taiwan Officially Becomes an Aged Society with People over 65 Years Old Breaking the 14% Mark*, TAIWAN NEWS (Apr. 10, 2018), <https://www.taiwannews.com.tw/en/news/3402395>.

132. U.N. DEPARTMENT OF ECONOMICS AND SOCIAL AFFAIRS, POPULATION DIVISION, THE 2017 REVISION OF WORLD POPULATION PROSPECTS (2017), <https://population.un.org/wpp/Download/Standard/Population/> (last visited Nov. 27, 2018) (select "Download Data Files" then select "Percentage by Broad Age Groups--Both Sexes").

Year	Taiwan	China	Japan	Korea
2010	10.7	8.4	23.0	11.1
2015	12.3	9.7	26.0	13.0

At the same time, in Taiwan, the average number of household members in 1990 was 4.00 persons, and in 2017, the number decreased to 2.73 persons.¹³³ The weakening of family solidarity and the “graying” of the population make it more difficult for families to support the elderly and this has an impact on the law.¹³⁴ In order to help to deal with the financial and healthcare needs of the elderly, the Taiwan government started a series of law reform such as setting up a national pension system, improving health insurance, amending occupational pension systems and revising adult guardianship. Among these new attempts, adult guardianship is stipulated in Part IV (Family) of the Civil Code. This article will briefly introduce current status of guardianship in Section III.B.4.

Meanwhile, facing a rapidly expanding elderly population, many countries have begun to shift the cost of caring for the elderly to their children through enacting filial responsibility law,¹³⁵ providing deduction or exemption programs,¹³⁶ or linking support and inheritance.¹³⁷ Some of these family-oriented approaches already exist in Taiwan’s legal regime. It is worth pointing out that Taiwan does not follow this direction in the sense that Taiwan does not tend to reinforce the abovementioned approaches. Rather, in some occasions, such as the adult guardianship, the legal reform aims at lightening the burden of family by making it the state or society responsible for elderly care and support.

Another example of shifting part of the responsibility of support from private to public is the newly introduced Article 1118-1 of the Civil Code, which entitles adult children to waive or mitigate obligation of supporting

133. ZHONGHUA MINGUO NEIZHENGBU HUZHENGSU (中華民國內政部戶政司) [DEPT. OF HOUSEHOLD REGISTRATION, MINISTRY OF THE INTERIOR, R.O.C.], NEIZHENG TONGJI CHAXUNWANG (內政統計查詢網) [RESEARCH SYSTEM FOR THE STATISTICS OF INTERNAL AFFAIRS], <http://statis.moi.gov.tw/micst/stmain.jsp?sys=100> (last visited Nov. 27, 2018).

134. Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 403 (2002).

135. Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 203, 210 (1992).

136. Usha Narayanan, *The Government’s Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to... What? A Cross-Cultural Perspective*, 4 ELDER L.J. 369, 392, 405 (1996); Andrea Rickles-Jordan, *Filial Responsibility: A Survey across Time and Oceans*, 9 MARQ. ELDER’S ADVISOR 183, 203 (2007); Donna Harkness, *What Are Families For? Re-Evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 339-40 (2013).

137. Frances H. Foster, *Linking Support and Inheritance: A New Model for China*, 1999 WIS. L. REV. 1199, 1257-58 (1999).

parents, if parents who require support did not fulfill their duty of supporting the children in early days. Traditionally, the family responsibility of support stipulated in the Civil Code is applied prior to public assistance. That is to say, in order to receive public assistance, one has to prove that his/her income and assets is less than the minimum level and has no family members who are legally responsible to offer support (Art.4 & 5 of Public Assistance Act). If the applicant has family, he/she will not be entitled to public assistance unless he/she uses all means including suing the family members to acquire the support but fail. Nevertheless, slightly different from the regime in Japan and Korea, Taiwan's Public Assistance Act does not require the applicant of public assistance to acquire the support from all of the family members listed in the Civil Code, because such a requirement is considered unrealistic. Instead, it only considers the support capability of the applicant's spouse, parents and the children (Art. 5 of Public Assistance Act). Through the difference between Public Assistance Act and the Civil Code, we could see the state's endeavor to make up for the shrinking family functions.

As indicated earlier, in 2010, the newly introduced Article 1118-1 of the Civil Code further lighten the obligation of family support. As known to all, the responsibility of family support is in principle not reciprocal. Namely, the fact that a parent did not support his/her child does not affect his/her right to claim support from the child theoretically. However, this result is considered "unfair" nowadays. To deal with this problem, according to Article 1118-1, if the parent requiring support did not fulfill the obligation to the child in early days without justifiable reasons, the child is entitled to petition to the court for mitigating or waiving such an obligation. In many cases, the plaintiff, usually the detached father/mother, brings the law suit against the child reluctantly as a prerequisite of acquiring public assistance and actually anticipates the court to favor the child's defense. Even if the true intention of the parent and the child are consistent (in not putting the burden of support on the child), on account of the public interest, they still have to go to the court and receive the decision officially. Bo-Ren Chen has done an empirical study, collecting 148 cases from all district courts in Taiwan from 2010 to 2013, finding that most of the suits are between aged fathers and adult children,¹³⁸ which indicates that the males in Taiwan were less likely to

138. Bo-Ren Chen (陳柏仁), *Minfa Di 1118 Zhi 1 Yu Laoqin Fuyan Zhi Sifa Shizheng Yianjiu* (民法第1118條之1於老親扶養之司法實證研究) [An Analysis of Court Cases Regarding Civil Code Article 1118-1 in Taiwan: Judging Children's Maintenance Obligation to Aged Parents] 60 (2013) (unpublished master thesis, National Taiwan University) (on file with National Taiwan University Library).
<https://ndltd.ncl.edu.tw/cgi-bin/gs32/gswweb.cgi/ccd=IU25bM/record?r1=1>.

do “good parenting” than females.¹³⁹ The application of Article 1118-1 shows that people in Taiwan agree to excuse a child who experienced a miserable childhood caused by his/her parent from filial obligation. And the support of the “former unfit parent” becomes a public responsibility.

4. *Adult Guardianship*

Adult guardianship is another pressing issue faced in an aged society. In Taiwan, guardianship has been a family matter rather than social responsibility for a long time. This is because in traditional Chinese society, the role of the state is different from that in western countries and hence lacks the idea of “*parens patriae*,” which is the cornerstone of guardianship in England and America.¹⁴⁰ More specifically, prior to the legal reform in 2009, adjudication of interdiction was the legal instrument used to protect a vulnerable person.¹⁴¹ A person “declared an interdict” would become completely legally incompetent, meaning that the person was deprived of capacity in all areas of decision-making.¹⁴² The “all-or-nothing” model of the 1931 Civil Code was criticized as being inflexible, making people reluctant to use guardianship. The 2009 law reform repeals the old adjudication of interdiction and establishes two types of protection: guardianship and assistance. Table 4 indicates that the number of guardianships (adjudication of interdiction) was around 2,000 per year before the 2009 law reform and gradually increased to 4,000 per year.¹⁴³

139. *Id.* at 134.

140. About the *parens patriae* doctrine, see A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 6-28 (1997).

141. Zhonghua Minguo Mingfa (中華民國民法) [Civil Code of R.O.C.] § 14 (promulgated May 23, 1929, effective Oct. 10, 1949, as amended Nov. 23, 2009).

142. Zhonghua Minguo Mingfa (中華民國民法) [Civil Code of R.O.C.] § 15; De-Kuan Liu (劉得寬), *Chengnian “Jianhufa” Zhi Jiantao Yu Gaige (成年「監護法」之檢討與改革)* [Reconsidering and Reform of Adult Guardianship], 62 ZHENGDA FAXUE PINGLUN (政大法學評論) [NAT'L CHENGCHI L. REV.] 229, 230 (1999).

143. Japan's population is 12.7 million, which is 5.5 times that of Taiwan, and there were 31,713 persons starting guardianship/curatorship/assistance in 2014. SAIKOUSAIBANSHO JIMUSOUKYOKU KATEI KYOKU (最高裁判所事務総局家庭局) [FAMILY BUREAU OF SUPREME COURT IN JAPAN], SEINEN KOKEN KANKEI JIKEN NO GAIKYŌ (成年後見関係事件の概況) [STATISTICS OF ADULT GUARDIANSHIP] (2014), http://www.courts.go.jp/vcms_lf/20180622kkoukengaikyoku_h26.pdf (last visited May 20, 2019). Compared to the guardianship numbers in Japan, Taiwan's numbers pale in comparison. But turning to Korea, which had only 1,206 guardianship cases in the first 14 months since the new guardianship system promulgated in 2013-2014, and which had two times the population of Taiwan, the numbers in Taiwan did not seem so extremely low. See Cheol Ung Je, *Korean Guardianship as a Policy for the Protection of Adult with Impaired Decision-Making Abilities*, 9

Table 4: Number of Cases Regarding Guardianship in Taiwan¹⁴⁴

Year	The number of cases of petition for commencement of guardianship or assistance (or Interdiction)	The number of guardianship (or Interdiction) cases approved by the court	The number of assistance cases approved by the court	Percentage of approval
2008	3,102	2,062	N/A	66.47%
2009	3,696	2,430	3	65.83%
2010	4,196	2,739	488	76.91%
2011	4,444	2,728	524	73.18%
2012	4,666	2,809	538	71.73%
2013	5,031	3,052	577	72.13%
2014	5,214	3,170	668	73.61%
2015	5,428	3,387	653	74.43%
2016	5,796	3,677	644	74.55%
2017	6,349	4,057	778	76.15%
2018	6,812	4,321	939	77.22%

* Data obtained during confidential interview with a Judicial Yuan official.

In the 1931 Civil Code, the guardian of a vulnerable person was restricted to his or her family members or the person recommended by the family council.¹⁴⁵ Also, it was the family council's duty to supervise guardianship.¹⁴⁶ The 2009 amendment revokes the order of priority and authorizes the court to select "one or more guardians [or assistants] among [the] spouse, any relative within the fourth degree of kinship, relatives with whom the ward has lived recently, the public agency, the organization of social welfare or other proper person[s]. . . ." ¹⁴⁷ Meanwhile, the law also shifted the duty of monitoring of guardianship from the family council to the court.

Notwithstanding this change, it is estimated that more than ninety percent of guardians in Taiwan are still family members of the ward.¹⁴⁸ A

J. INT'L AGING L. & POL'Y 101, 103 (2016).

144. ZHONGHUA MINGUO SI FA YUAN (中華民國司法院) [JUDICIAL YUAN, R.O.C], JUDICIAL STATISTICS YEARBOOK (2008-2017), <http://www.judicial.gov.tw/juds/goa/yearly.htm> (last visited Nov. 27, 2018); Email interview with Si-Fan Chen, Judicial Yuan Judge, Taipei, Taiwan (Sep. 1, 2017).

145. The provisions of the Civil Code regarding adult guardianship were first promulgated in 1931 and were not revised until the 2009 law reform, except Paragraph 2 of Article 1113.

146. Civil Code of R.O.C. §14, §§ 1099, 1101, 1103, 1106.

147. Civil Code of R.O.C.] § 1111.

148. Sieh-Chuen Huang & Ying Chieh Wu, *The Collaboration of Guardianship and Trusts*, NAT'L TAIWAN UNIV. CTR. FOR PUB. POL'Y & LAW (2014), <http://www.cppl.ntu.edu.tw/research/enresearch/summary/CPPL10306ensummary.pdf> (last

judge of Shilin District Court, one of the courts in Taipei City, stated in an interview held by the author that there were 180 cases on commencement of guardianship approved by the Shilin District Court in 2011. Among these, only twelve cases had non-family guardians selected.¹⁴⁹ Furthermore, according to Pei Chi Hu's study on 500 guardianship cases in 2015, more than 97% of guardians are family members, among which the proportion of adult children of protected persons is at the most (48.8%). As for the 330 assistance cases, 95% of assistants are family members, where the adult children also account for the largest share (29%), albeit not much as in guardianship.¹⁵⁰ The reason for this family-inclined practice is that there are no trained legal professionals, such as lawyers and social workers, that the court can rely on to be guardians. And regarding the possibility of appointing public agencies to be guardians, it is found that public agencies are reluctant due to limited budgets.¹⁵¹

In conclusion, although the backdrop of the 2009 law reform has weakened family solidarity, the family's role in adult guardianship is indeed diminishing, but not vanishing. To make up for the deficit, the legislators involved the court to shoulder this responsibility. Despite family still plays an important role in adult guardianship, the court needs to be careful about the distinction between family's arbitrariness and the ward's real wishes or interest.

IV. CONCLUSION

As maybe clear from this article that family law in Taiwan is, and has been, undergoing tremendous changes. The successive regimes, including Qing-Chinese empire, the Japanese empire, and the post-war KMT government, introduced multiple laws and customs, some of which are still very much with us today. Also, despite of the fact that family law is considered as a repository of local traditions, sometimes, it has been

visited Nov.18, 2018).

149. Interview with Chao-Jie Zhan, Judge of Shilin Dist. Court, see *Jianhuxuangao Zhi Shiwu Yu Ketu Zuotanhui Jilu* (監護宣告之實務與課題座談會紀錄) [*The Record of Forum on the Practice and Issues of Adult Guardianship*], in GAOLINGHUA SHEHUI FALU ZHI XIN TIAOZHAN: YI CAICAN GUANLI WEI ZHONGXIN (高齡化社會法律之新挑戰：以財產管理為中心) [NEW LEGAL ISSUES IN AGING SOCIETY: FOCUSED ON FINANCIAL DECISION-MAKING] 468 (Sieh-Chuen Huang & Tzu-Chiang Chen eds. 2d ed., 2019).

150. Pei Chi Hu (胡珮琪), *Woguo Chengnian Jianhu Zhidu Zhi Shizheng Yanjiou* (我國成年監護制度之實證研究) [Empirical Study of Adult Guardianship in Taiwan] 85, 122 (2017) (unpublished master thesis, National Taiwan University) (on file with National Taiwan University Library).

151. Sieh-Chuen Huang, *Adult Guardianship in Taiwan: A Focus on Guardian Financial Decision-Making and the Family's Role*, 9 J. INT'L AGING L. & POL'Y 127, 137-38 (2016).

highly influenced by legal ideas circulated globally. Arguably, the differences between Taiwan family law and those in the Euro-American countries have diminished steadily over the past century, despite contrasts in political and cultural contexts of legal reforms. The trend toward individualism and equalitarianism among family members are definitely discernible pattern of the development of Taiwan family law. Universal legislative principles, such as the doctrine of Best Interest of the Child or non-fault divorce, were also adopted, at least partially, and became the guiding principles in Taiwan.

However, as shown in this article, distinctive features in Taiwan family law also existed. One example is the historical trajectory of marriage. If the transformation of family law in Euro-America suggests a withdrawal, in various degree, of regulation of marriage, the story in Taiwan shows that historically, neither the state nor religious institutions regulated much about the formation and dissolution of marriage. In other words, matters regarding family had been largely arranged through private ordering.

Another feature is the space to advocate for a national yet universalistic and progressive family law. Unlike many other (post-)colonial states where neo-traditional and reactionary family laws are, more than often, maneuvered for national identity, Taiwanese nationalists since the Japanese colonial period seem to enjoy more leeway to advocate for a special yet progressive family law. This feature has to do with the formation of Taiwanese identity and its intimate relation with liberal values.¹⁵² The relatively tolerant attitude toward same-sex marriage could be, at least partially, explained by the secular understanding of marriage and tradition of liberal nationalism in Taiwan. Moreover, Taiwan family is, like many other countries, struggling to keep pace with fast-changing family life. One critical issue is an aging society. Having the lowest fertility rate in the world, Taiwan faces serious challenge to elderly support and assistance. Referencing the legal innovation in countries which also face rapidly expanding elderly population, at the same time, adapting these legal methods to local situation where families have been taking most of the responsibility of care-taking, the revision of adult guardianship in Taiwan aims at mitigating the burden of family by making the state or society more

152. On Taiwanese nationalists' discourse on family and law during the Japanese colonial period, see Chen, *supra* note 20, at 215-64; the reason for such leeway has to do with the strategies of Taiwan nationalists who allied with western liberal value to differentiate themselves from neighboring Asia "others." On the liberal and cosmopolitan tendency of Taiwanese nationalists during the colonial time, see Chen Yun-Ru, 'Rule of Law' as Anti-colonial Discourse: Taiwanese Liberal Nationalists' Imagination of Nation and World under Japanese Colonialism, 18 LAW TEXT CULTURE 166 (2014).

responsible for elderly care and support.

Indeed, Taiwan family law is a local development in the context of globalization. The strong comparative approach in scholarly writings and policy-making made international precedents a crucial part of its legal reform. The recent trend of empirical studies on local situation could be seemed as part of a continuous effort of adapting foreign legal tools to Taiwan's society. This article is simply a beginning point. More endeavors are needed to explore the multiple contexts and subjects of Taiwan family law.

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臺灣家庭法： 歷史變遷與現代課題

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摘 要

本文以法律全球化的視點，檢討臺灣家庭法的主要歷史變遷、特徵與現代課題。首先介紹的是傳統中國法、近代日本法與戰後國民黨所帶來的中華民國法，以及這些在歷史上接續而來的法律體系，如何構成了今日「多源」的臺灣家庭法。之後，本文進一步梳理結婚、離婚及親子法的變遷，包括近期發生的同性、跨境婚姻、高齡者扶養及成年監護等新議題。綜合言之，臺灣家庭法的發展，可以視為一種「全球化脈絡下的在地發展」。亦即，臺灣家庭法的變遷與現狀，一方面顯示了全球化的浪潮，另一方面也是此浪潮於在地的特定文化與時空脈絡化的適應、轉化或妥協。除了考察制定法的條文與司法裁判的轉變外，本文也使用相關統計數據以及法學文獻，以便國際讀者理解臺灣的社會變遷，以及掌握近來的若干法學研究成果，以作為進一步研究之基礎。

關鍵詞： 臺灣、家庭法（身分法）、全球化、國家、社會、歷史