

Article

Family Law and Politics in the Oriental Empire: Colonial Governance and its Discourses in Japan-Ruled Taiwan (1895-1945)

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ABSTRACT

This article challenges the common misconception that in Japan-colonized Taiwan, family law was considered marginal and secondary in the arena of legal reforms. Instead, through multi-faceted analysis of family laws, customs, and politics, the article argues that family law intertwined with politics in various ways. Examples are found in internal discussions among Japanese scholars, political advisors, officials, and jurists, on wide ranging topics from colonial policies and legal structures to, more specifically, whether Taiwanese family customs or Japanese family law should apply to Taiwanese. Moreover, family law served as an essential tool not only for cultural assimilation, but also on legal aspects such as the very definition of who were Japanese/Taiwanese. The importance of family law is also reflected in the fact that on one hand, family law was viewed as the last bastion for special colonial legislation, and on the other deemed a crucial step for racial integration by assimilationists. Moreover, the intertwining of family law and politics were not localized to substantial matter,

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but also rhetoric. The ambiguity of the Japanese colonialism being a “nation-empire” or “oriental colonialism” made it possible for Japanese to retain a fluidity in its rhetoric based on both similarity and difference at the same time. There were interconnections between rhetoric modes on “factual question” (such as “close vs. far” and “similar vs. different”) and normative decision (such as “assimilation vs. special rule” and “Japanese family law vs. Taiwanese customs”). Overall, the reason why Japanese colonial rule left Taiwanese family matters in the customary law regime for the entire colonial time was not that it was mere an afterthought. On the contrary, family law was too relevant to change.

Keywords: *Family Law, Custom, Politics, Colonialism, Nation-empire, Taiwan, Japan, Household Registration, Rhetoric Mode*

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I. INTRODUCTION

The idea that the distinctiveness of family law is neither natural nor inherent but is instead a social construction has been an important theme in US legal scholarship. Based on observations of feminist movements of the 19th- and 20th- century America, Frances Olsen disputes the government neutrality in family policies. Challenging the illusion of “non-intervention,” Olsen shows that the family and its laws are constructed socially and legally as a distinctive sphere apart from the market and its laws.¹ More recently, Janet Halley and Kerry Rittich propose the theory named “family law exceptionalism” to illustrate the infinite ways in which family and family law are considered special and exceptional, as opposed to market and market law, which are deemed general and universal.² In her study of the genealogy of American family law, Halley further describes how the body of law we know as family law came into being as laws of domestic relations, emerged as a distinctive legal topic in late 19th century legal treatises, and renamed/reconstructed as family law.³ The American genealogy of the emergence of modern family law is by no mean a single or isolated case. For instance, Duncan Kennedy analyzes the distinction between family law and patrimonial law crystalized in Savigny’s *System of the Modern Roman Law* as well as how it globalized through the diffusion of Classical Legal Thought.⁴

The above-mentioned phenomena also prevail in the context of legal reception. However, there existed new twists, especially in the so-called “East-meets-West” contexts. In the colonies, the western rulers usually hesitate to “intervene” in family affairs of the eastern colonialized people.⁵

1. Olsen typologizes the paired ideological artifacts of the market and the family. The market and the family are either contradictory or are both moving in the same direction away from feudalism to individualism at different speeds. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HAR. L. REV. 1497, 1497-530 (1983).

2. Market law and family Law are polarized and yet mutually constitutive. Family and family law are based on love, caring, and intimacy; hence it should be guided by altruism. In contrast, the market is a field for ruthless individualist competition. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

3. Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J. L. & HUMAN 1 (2011); Janet Halley, *What is Family Law?: A Genealogy Part II*, 23 YALE J. L. & HUMAN 189 (2011). Riva Sigel illuminates the way in which a “separate sphere” privacy doctrine in US law develops and how American family life is delegalized in the second half of the nineteenth century. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117 (1996).

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

5. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 34 (David M. Trubek & Alvaro Santos eds., 2006).

Colonizers frequently imposed market law in far greater consistency than family law. Despite the numerous different practices varied by region and time across the India continent, the East India Company made it clear throughout the colonial period that Hindu (*dharmashastra*) and Muslim (*shari's*) laws were applicable to Hindus and Muslims respectively in cases regarding “inheritance, marriage, caste and other religious usages and institutions.”⁶ The Dutch rulers in 19th century Indonesia believed that native customary law was based on Islamic law, and thus recognized the jurisdiction of Islamic courts over family matters.⁷ In other words, the colonial governments seemed to show greater “respect” to the area of family law and reserved it to native tradition, be it customs or tradition.⁸ However, despite their “non-intervention” policy on family matters, the western colonizers were more than willing to single out what they perceived as “backward” practices, such as widow immolation (*sati*) in British India, to demonstrate their glorified mission of saving brown women from brown men.⁹ Therefore, one might criticize the colonizers (or nationalist elites in post-colonial era) for carrying out merely piecemeal legal reforms in family law area and failing to emancipate native women.¹⁰

Analyzing family law and its policy in colonial Taiwan (1895-1945), this article could be regarded as a sequent development of the abovementioned theme of Family Law Exceptionalism. If I may anticipate, one crucial feature of the family law in Japan-ruled Taiwan is that for the entire fifty-year colonial rule, family law had been in the domain of customary law. As this article will be illustrated later, in the first half of the Japanese rule, the colonial government suspended the application of most of the Meiji Civil Code (1898) to Taiwanese. Related affairs were to be decided following the so-called “Taiwanese old custom (旧慣).” Later in the early 1920s, when the colonial policy changed from “respecting customs (旧慣温存)” to “elongation of the metropole (内地延長),” the Meiji Civil Code became applicable to the local Taiwanese. However, family law was made an exception. It was not until the doomsday of the Japanese Empire when the wartime mobilization reached

6. M. B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* 61 (1975).

7. Daniel S. Lev, *Judicial Institutions and Legal Culture*, in *LEGAL EVOLUTION AND POLITICAL AUTHORITY IN INDONESIA: SELECTED ESSAYS* 161, 167 (2000).

8. Daniel S. Lev, *The Supreme Court and Adat inheritance Law in Indonesia*, in *LEGAL EVOLUTION AND POLITICAL AUTHORITY IN INDONESIA: SELECTED ESSAYS*, *id.* at 99, 105.

9. JANAKI NAIR, *WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY* 51-52 (2000); Gayatri Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Larry Grossberg eds., 1988).

10. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 *VAND. J. TRANSNAT'L L.* 1043, 1146 (2004).

its highest did the Japanese decide to make Japanese applicable to the Taiwanese. However, this plan was never fulfilled due to the sudden collapse of the Japanese Empire after WWII. Accordingly, depending on viewpoints about legal pluralism, some might think that family matters kept in customary law regime were preserved in a somehow autonomous space free from colonial intrusion.¹¹ Others criticize Japanese colonial regimes for leaving out family matters from a progressive legal modernization due to a “laissez-faire attitude” or even “obscurantist” policy.¹²

However, recent research findings suggest that the Japanese colonial government, including the courts, in fact transformed Taiwanese family law in various ways.¹³ Challenging a common understanding that family law was considered secondary or marginal in legal reforms in colonies, including colonial Taiwan, this article shows that family law and politics in fact intertwined with each other in various ways in Japanese colonial rule. Focusing on the internal debates among the Japanese colonizers, the article analyzes discourses of Japanese colonial advisors, officials, and jurists on issues about colonial policies, legal structures, and more specifically, whether Taiwanese family customs or Japanese family law should be applicable to Taiwanese, in order to illuminate the

11. See Kennedy, *supra* note 5, at 23, 34.

12. Jingjia Huang criticized the Japanese colonial government for recognizing familial customs which should not be preserved, such as concubinage. The reason for this “laissez-faire attitude” and “obscurantist” colonial policy, Huang argues, is because “old customs” were personal law mainly applicable to Taiwanese (and Chinese) in colonial Taiwan. See HUANG JING-JIA (黃靜嘉), CHUNFAN LOUXIA WANTAO JI: RIBEN DUI TAIWAN ZHIMIN TONGZHI JI QI YINGXIANG (春帆樓下晚濤急：日本對臺灣殖民統治及其影響) [JAPANESE COLONIAL RULE IN TAIWAN AND ITS INFLUENCE] 112 (2002); Kō Ikujo also claimed that “old customs” and related policies in fact varied in Japanese colonial governance. Matters related to land ownership or opium, for instance, belonged to the category of “urgent” and “top priority.” Meanwhile, there were also “old customs” which were considered of secondary importance, such as the practice of daughter-selling. Kō Ikujo (洪郁如), *Shokuminchi No Hou To Kanshuu: Taiwan Shakai No Zyoji Torihiki Wo Meguru Sho Mondai* (殖民地の法と慣習：台湾社会の女兒取引をめぐる諸問題) [Law and customs in colonies: Problems about Trafficking of Girls in Taiwan's society], in SHOKUMINCHI TEIKOKU NIHON NO HOU DEKI KOUZOU (殖民地帝国日本の法的構造) [THE CONSTRUCTION OF LAW IN THE JAPANESE COLONIAL EMPIRE] 246 (Asano Toyomi (浅野豊美) & Kizuda Tosiyo (松田利彦) eds., 2004).

13. Tseng Wen-Liang (曾文亮), *Quanxin de “Jiuguan”*: *Zongdufu Fayuan dui Taiwanren Jiazuo 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 RESEARCH] 125 (2010); SHEN JING-PING (沈靜萍), DUOYUAN XIANGQIAN DE TAIWAN RIZHI SHIQI JIAZU FA: CONG RIZHI FAYUAN PANJUE TANTAO GUOJIA FALU DUI TAIWAN REN ZHI JIA JI NUXING FALU DIWEI 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] (2015).

interconnection between family law and politics.¹⁴

The article shows that family law played an essential role in Japanese colonial governance not merely in cultural or symbolic level. Family law was also the essential legal measure which drew the boundary between Taiwanese and Japanese. It would be helpful to discuss what family law(s) was/were in this article before proceeding further. In order to command family law scholars' attention beyond black-letter rules, Halley and Rittich devise a terminology: Family 1, 2, 3, and 4 ranging from specific rules to cultural, social, and political ideologies of law.¹⁵ In this article, the terms "family law" mainly refers to Family 1, such as the books of Relative (親族) and Inheritance (相続) of the Meiji Civil Code. These two books in the civil codes were often lumped together and categorized as status law or personal law.¹⁶ However, sometimes, the term also includes the law of household registration, an administrative law that not only supplemented laws of family and succession in Japanese legal system but also, as will show later, defining who was Japanese/Taiwanese within the empire. Besides, the article touches upon family law as an embodiment of culture when demonstrating how the Japanese colonizers singled out Taiwanese customs, such as monetary payment in marriage and adoption, as evidence of Taiwanese backwardness as a way to represent Japanese as the civilized colonized.

Moreover, the article finds that family law and politics were intertwined not only substantially but also rhetorically. As will be discussed more, the fact that Japan's presence in Taiwan as "oriental colonialism," made the boundary between the colonizers and the colonized, if compared to European colonialism, blurrier.¹⁷ On the other side of the same coin, Japan's expanding empire from the late 19th to the mid-20th century was also characterized as a "nation-empire."¹⁸ Arguably, the ambiguous character of Japanese colonialism made the

14. For Taiwanese anti-colonial nationalists' discourses on family law and politics, see Chen Yun-Ru, *The Emergence of Family Law in Colonial Taiwan: A Genealogical Perspective* 47-76, 215-64 (2013) (unpublished SJD Dissertation, Harvard Law School) (on file with Harvard University Library).

15. Halley & Rittich, *supra* note 2, at 761-67 (2010).

16. Similarly, in postwar Taiwan, family law is usually referred to Book IV, Family (親屬) and Book V, Succession (繼承) of Taiwan's civil code. It is worth mentioning that in many other countries, such as the United States and the UK, the standard building blocks family law includes marriage/divorce and parent-child relationships but do not include succession.

17. Wu Rwei-Ren, *The Formosan Ideology: Oriental Colonialism and the Rise of Taiwanese Nationalism, 1895-1945* (2003) (unpublished Ph.D. dissertation, University of Chicago) (on file with University of Chicago Library).

18. Shinichi Yamamuro (山室信一), *Guomin Digu Riben de Yi Fayu Tonghe yu Chabie* (國民帝國日本的異法域統合與差別) [*Integration and Discrimination in the Japanese Nation-empire*], 16 *TAIWAN SHI YANJIU* (臺灣史研究) [*TAIWAN HISTORICAL RESEARCH*] 1, 15 (2009).

status of Taiwan more ambiguous (a colony or a newly-acquired territory) and enlarged the space for Japanese to maneuver rhetoric emphasizing both difference and similarity between the motherland and the colony. As a result, there was a highly patterned discourse organized around a series of oppositions (such as “close vs. far,” “similar vs. different”, and “advanced vs. backward”) utilized in debates about Taiwan’s status in Japanese empire (“new territory vs. colony”) or, put it differently, about the direction colonial policy in (“assimilation vs. special rule” and “French model vs. British model”). In other words, these opposed rhetoric modes were first formulated in terms of general colonial policy and legal structure, not specifically for policy of family law. However, since the 1920s when Japanese civil law was gradually introduced to Taiwan and the area of family law was considered the last battle field between assimilationists and those who favored special colonial laws, similar pair of rhetoric modes mentioned above was further connected to the debate on family law policy in Taiwan (Japanese family law or Taiwanese family custom).¹⁹

relation between JP & TW	similar/close	different/far
character of JP	nation	empire
foreign models	French	British
character of TW	new territory	colony
colonial policy	assimilation/integration	special rule/separation
legislative body	Diet	GGT
civil law	Japanese civil law	Taiwanese civil customs
family law	Japanese family law	Taiwanese family custom

Pairs of rhetoric modes applied in areas ranging from colonial policies to family law

The discussion proceeds as follows. Section II first outlines the two opposing views on the choices of colonial governance between assimilation and special rule as well as the two opposite opinions on the characters of the relation between motherland Japan and colonial Taiwan. Then it sketches the way in which a special yet tentative legal zone in the Japanese empire was founded in Taiwan. Following the chronological order, Section III and IV respectively discuss the choices between Taiwanese family customs and Japanese family law in the so-called “special rule/gradual assimilation” (1895-1922) and “full-flag assimilation” (1923-1945). Okamatsu Santaro (岡松参太郎1871-1921) and Aneha Shohei (姉齒松平1885-1941), two influential Japanese jurists,

19. On rhetoric modes, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1778 (1976).

were representative figures in each secession. They drew existing political and legal ideas from Japan or abroad, maneuvered these ideas for their agendas, and shaped the form and substance of family law in colonial Taiwan. Section V is the conclusion.

II. BETWEEN SIMILARITY AND DIFFERENCE: TWO VIEWS ON JAPAN'S COLONIAL RULE AND THE SPECIAL LEGAL ZONE IN TAIWAN

After the reign of the Qing-Chinese Empire for more than two hundred years, in 1895, Taiwan became the first colony of Japan. Japan's nation-building and legal modernization were carried out since the 1870s, in response to oppression by Western imperialists, at the time of the so-called "opening" of Japan. Ironically, twenty-five years later, Japan's unexpected victory in the Sino-Japanese war made it the first and arguably only Oriental Empire to force legal modernization upon Taiwan.

Indeed, the acquisition of Taiwan rendered Japan the prestige as one of the colonial powers, rather than potential colonial subjects. Takekoshi Yosaburō (竹越與三郎), a member of the Japanese Diet, told his western readers in 1905:

The 17th of April, 1895, is a day long to be remembered by us, because on that day the people and territory belonging to another nation were transferred to our rule, a fact never before met with in all the long twenty-five centuries of our national existence, and thus the Empire of Japan came to be counted among the colonial power of the world.²⁰

However, the fact that Japan itself had only narrowly avoided colonial subjection to Western powers in East Asia a quarter of a century ago and was still feeling such a threat gave unfavorable connotation to colonialism. Colonialism seemed to imply the phenomenon that white people exploited the black and yellow people in Africa and Asia.²¹ Also, the Japanese empire was distinct from most of its Western counterparts, such as the British and the French, in that it was a regional empire annexing its neighboring areas, such as Taiwan and Korea, whose inhabitants were racially and culturally akin to the Japanese ruler. The fact that Japan's presence in Taiwan as "oriental colonialism," added new

20. TAKEKOSHI YOSABURŌ, JAPANESE RULE IN FORMOSA 14 (George Braithwaite trans., 1907).

21. Edward I-Te Chen, *The Attempt to Integrate the Empire: Legal Perspectives, in THE JAPANESE COLONIAL EMPIRE, 1895-1945*, at 240, 251 (Ramon H. Myers & Mark R. Peattie eds., 1984).

complexities in the conventional understanding of colonial structure.²² Japan's simultaneous development of nation-state and colonial empire is also called "nation-empire,"²³ which partly resulted in the ambiguous and ambivalent attitude toward the status of Taiwan--was Taiwan a colony (such as British India) or a newly-acquired territory (such as Hokkaido)? In consequence, the Japanese government was reluctant to call Taiwan a colony (殖民地 *shokuminchi*). In addition to "colony," other terms such as "new territory" or "outer area" (外地 *gaichi*) (as opposed to 内地 *naichi*, the "inner area" or mainland, namely the metropole) were seen interchangeably in official documents.²⁴ The terminology also reflected the ambiguous and uncertain status of Taiwan as well as other colonies in the Japanese empire.

As we will see in the next section, during its fifty-year rule in Taiwan, the Japanese government vacillated between two approaches of colonial governance, namely assimilation and special rule. Furthermore, the two opposed political approaches were connected to two opposed rhetoric modes arguing over the similarity or difference between Japan and Taiwan.

A. *Between Similarity and Difference: Two Views on Japan's Colonial Rule*

There were two competing approaches of colonial governance in colonial Taiwan, the French model and British model, the two paradigms of colonial rule in the late nineteenth century. Despite the variety and divergence within the colonies of each empire, French colonialism represented the assimilationist policy, while British colonialism stood for the special rule.²⁵ Under the doctrine called "Système de Rattachement," French colonies, such as Algeria, were regarded as provinces and

22. Wu, *supra* note 17.

23. Shinichi, *supra* note 18.

24. AKIRA NAKAMURA (中村哲), SHOKUMINCHI TÔCHIHÔ NO KIHON MONDAI (殖民地統治法の基本問題) [FUNDAMENTAL QUESTIONS OF LAW IN COLONIAL GOVERNANCE] 105-09 (1943).

25. In the early 20th century, Great Britain possessed more than forty colonies. Only eleven of them, such as Australia and Canada, had colonial government consisting of representatives elected by the people. The others, such as Hong Kong, were subject to the order and supervision of the home governments. French colonies could also be divided into two groups. The first group of colonies, such as Algeria, was regarded as provinces and departments of France. The second group, including French Indo-China, was regarded as separate and special land from the home country and was under the control of the governor-general. See TAKEKOSHI, *supra* note 20, at 27-29. Pre-WWII Japanese scholars on comparative colonial governance also adopted similar characterization of British and French colonialism. See IZUMI TETSUO (泉哲), SHOKUMINCHI TOUCHIRON (殖民地統治論) [COLONIAL GOVERNANCE] 243-52 (1924); AKIRA, *supra* note 24, at 7-9.

departments of the homeland. French constitution was said to be applied to the colonized without modification. Representatives elected from the colonies could participate in the Senate and the Chamber of Deputies at Paris. Laws based on human universality were applicable in both the metropole and the colonies. The colonized, who were deemed less developed people, would eventually appreciate and receive the law through enlightenment and become assimilated. In contrast, the ideal type of British colonialism was best exemplified by its North American colonies. The colonies were placed outside the direct control of either the parliament or sovereign of the home government. The constitution was hardly applied without modification. The parliament of the home country did not enact laws for the colonies. The colonial people were permitted to participate in elections but only those for local council members. Each colony had its particular government and laws according to the special circumstance and needs.²⁶

The Japanese government came to be aware of the existence of the two contradictory models when the Treaty of Shimonoseki, by which China ceded Taiwan to Japan, was about to be ratified by the two countries in 1895. Lacking experience of governing colonies, the Japanese government sought advice from two foreign experts. The French advisor, Michel Joseph Revon, suggested that Japan should follow the model of French Algeria and transform Taiwan into a prefecture or a local area of Japan, such as Okinawa or Hokkaido. In contrast, The British advisor, William Montague Hammett Kirkwood, proposed that Taiwan should be treated as special land outside the purview of the newly-enacted Meiji Constitution (1890). The legislative power was exercised by a colonial legislative council which consisted of the governor-general, officials and natives.²⁷

In the beginning, the Japanese government seemed to lean toward the French model. That was the so-called or “principle of assimilation” (同化主義 *dōka shugi*) or later on, “doctrine of the elongation of the metropole” (内地延長主義 *naichi enchō shugi*).²⁸ Three day before the inauguration

26. TAKEKOSHI, *supra* note 20, at 27-29.

27. WANG TAY-SHENG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE (1895-1945): THE RECEPTION OF WESTERN LAW 37 (2000); TAIWAN SHIRYŌ (台灣資料) [DATA OF TAIWAN] 407-408 (Itō Hirobumi (伊藤博文) ed., 1936).

28. Similar approach and rhetoric could be seen two decades ago in early Meiji leaders' policy toward Okinawa (or Ryūkyū), which had been a kingdom. The Ryūkyū Kingdom (1429-1879) existed for five hundred years before it became a part of Okinawa prefecture in 1879. The early Meiji political leaders stressed the geographical proximity and cultural and linguistic similarity between Ryūkyūans and Japanese and argued that the Ryūkyū Island was part of Japan. See Ikeda Masako Kobayashi, French Legal Advisor in Meiji Japan (1873-1895): Gustave Emile Boissonade de Fontarabie 112 (1996) (unpublished Ph.D. dissertation, University of Hawaii) (on file with the Osaka University International Studies Library). Also, it is worth

of colonial rule, on June 14, 1895, the hastily organized Taiwan Affair Bureau, the “little cabinet” that oversaw the Taiwan administration in the central government, debated on which model of colonial rule should be adopted. Hara Takashi (原敬) (1856-1921), who represented the Ministry of Foreign Affairs in the Bureau and later became the first commoner appointed to the office of prime minister of Japan (1918-1921), rejected treating Taiwan as a colony but instead considered it an integral part of Japan, such as German-ruled Alsace-Lorraine or French-ruled Algeria.

The argument for assimilationist policy was primarily grounded in the similarity between Japan and Taiwan, if compared to European countries and their African or Asian colonial subjects. In a written opinion, *Two Views on Taiwan* (台灣問題二案 *Taiwan Mondai Nian*), Hara emphasized the geographical and ethnical proximity between Taiwan and Japan. Taiwan was geographically close to the homeland Japan. The distance would be even shorter with the completion of submarine cable and the frequent shipping transportation. Compared to European overseas colonies where the whites ruled the natives, Taiwan was considered a neighboring territory inhabited by people of “same ideograph, same race (同文同種 *dōbun dōshu*),” meaning the same race, written script and culture heritage of Confucian teaching. Even though there were more or fewer differences between Taiwan and Japan, Taiwan should not be deemed as a colony. Regarding legal policy, since Taiwan became part of Japan, it should be brought under the jurisdiction of the Japanese legal system. Not only the newly promulgated Meiji Constitution (1889) but also the laws enacted by the Imperial Diet should be enforced in Taiwan. Only when existing Japanese laws were not feasible to the circumstance in Taiwan were matters to be regulated by imperial ordinance.²⁹

Hara’s proposal won the support of most of the members in the bureau. The rhetoric emphasizing the unique character of Japanese colonialism, namely the similarities or closeness between the colonizer and the colonized, prevailed. The uniformity within the expanding nation-empire appeared to be a major concern of the Japanese leaders in determining the political structure. However, the unexpected fierce Taiwanese armed resistance that Japanese troops later encountered shook the foundation of the initial plan. The civilian government designed earlier to govern Taiwan suddenly seemed infeasible. Taiwan was then put into direct control of the Japanese military authority after August 6, 1895.

emphasizing that in the beginning of the colonial rule, it was still uncertain that Taiwan should be called “outer area” (外地 *gaichi*) (as opposed to 内地 *naichi*, the “inner area” or mainland Japan).

29. TAIWAN SHIRYŌ, *supra* note 27, at 32-34; Chen, *supra* note 21, at 240, 250-51; WANG, *supra* note 27, at 37-38.

The Taiwan Affairs Bureau was then disbanded in April 1896.³⁰

Then, the debate around the two contrasting views of colonial government reappeared. This time, the motif of the leading discourse was the difference between Japan and Taiwan. On March 17 1896 in the Japanese Imperial Diet (1889), the governor-general of Taiwan (hereinafter the GGT or the governor) proposed a bill to the Diet, which sought special legislative power of the GGT to issue executive ordinances having the same effect as laws of Japan. Representing the GGT, Mizuno Takashi (水野遵) (1851-1900), the first civil administrator of Taiwan (1896-1897), spoke on the floor of House of Representatives. In addition to the state of “rebellion” in Taiwan, Mizuno emphasized the geographical remoteness and cultural-racial difference between Taiwan and Japan. Since Taiwan was “hundreds of miles away from Japan,” communication between Taipei and Tokyo was difficult. Customs and climate in Taiwan also differed from those in Japan.³¹ In contrast to Hara’s assertion that Taiwanese and Japanese belonged to the same race, Mizuno emphasized the “native-ness” or exoticness of the colonized. He contended that Taiwanese people were the hybrid of Chinese immigrants and the indigenous and were thus a “semi-barbarian people.” Therefore, it was not proper to either grant political rights to Taiwanese as the British model suggested, or to directly enforce Japanese law in Taiwan.³²

As we will see in this article, the rhetorical modes for “similar-assimilation vs. different-special rule” reappeared and metamorphosed in successive debates, including the ones on family law reforms in colonial Taiwan.

For instance, Goto Shinpei (後藤新平) (1857-1929), the civil administrator of Taiwan (1898-1906) appointed by Governor Kodama Gentaro (児玉源太郎) (1852-1906), emphasized the difference between Taiwanese and Japanese when speaking on behalf of the colonial government for the special rule. According to Goto, Taiwanese were too “crude and childish” to appreciate the laws of civilized countries (i.e., laws in Japan). The concept of right would be at odds with the minds of these primitive people. Moreover, the ideas in modern law might “excite” the natives to be in revolt against the government. Therefore, Goto advocated that the ideal way of governing Taiwan would be delegating to the GGT legislative power, at least tentatively, to make laws suitable to the

30. Chen, *supra* note 21, at 251; WANG, *supra* note 27, at 38.

31. TAIWAN NI SHIKŌ SUBEKI HŌREI NI KANSURU HŌ REIRSU NO GIJROKU (台湾ニ施行スヘキ法令ニ関スル法律の議事録) [THE DIET RECORD ON THE LAW CONCERNING LAWS AND REGULATIONS TO BE ENFORCED IN TAIWAN] 3 (Gaimushō (外務省) [Ministry of Foreign Affairs of Japan] ed., 1966).

32. *Id.* at 4-5.

particular situation in Taiwan.³³

Goto preached his ideas on colonial governance as “politics of biology”, which he illustrated by the famous “flounders vs. sea breams” with pride:

The eyes of flounders are on the one side of their head. Although flounders look ridiculous, we cannot change flounders into sea breams by relocating each of the eyes into two sides of heads. There is a biological necessity that the eyes of a flounder are on one side of its head . . . this is also true in policy.³⁴

In Goto’s politics of biology, Taiwanese and Japanese were different. The flounder was the metaphor of Taiwanese; while the sea bream was referred to the Japanese. Flounders and sea breams were both fishes but belonged different species. So did Taiwanese and Japanese. In other words, these two people were not, as Hara Takeshi asserted earlier, “of the same race.”

Furthermore, in Goto’s colonial policy, Taiwanese and Japanese were not merely different. Instead, they were located in different levels of the ladder of civilization. Flounders looked “ridiculous” and were often found the bottom of the sea. In contrast, sea breams were the sought-after fish in Japan and were served in ceremonies since ancient times. In other words, Taiwanese were “primitive,” “crude,” “childish,” and therefore inferior to Japanese. Due to the inferiority of flounders and the Taiwanese, he suggested, instead of applying a superior way of governance, like the one in homeland Japan, that it was wiser to rule the colonized in accordance to their disposition.

Interestingly enough, Goto in 1898 revealed his anxieties to a Japanese audience that the Japanese may not hold prestige over the Taiwanese because, unlike in European colonies, the colonized in colonial Taiwan were similar, and sometimes even superior to the colonizer regarding physical constitution:

. . . There is nothing different between the Japanese and the Chinese [in Taiwan] in skin color and all other physical features.

33. OGUMA EIJI (小熊英二), “NIHONJIN” NO KYŌKAI: OKINAWA, AINU, TAIWAN, CHŌSEN, SHOKUMINCHI SHIHAI KARA FUKKI UNDŌ MADE (「日本人」の境界—沖縄・アイヌ・台湾・朝鮮殖民地支配から復帰運動まで) [THE BOUNDARIES OF THE JAPANESE: FROM THE COLONIAL GOVERNANCE IN OKINAWA, AINU, TAIWAN, KOREA TO EVERSION MOVEMENT] 132-33 (1998); TSURUMI YŪSUKE (鶴見祐輔), 1 GOTO SHINPEI (後藤新平) [GOTO SHINPEI] 916 (1937).

34. See TSURUMI, *id.* at 399.

This situation is profoundly different from how the Dutch, the French, or the Spanish held and ruled over their colonies. Therefore, if [we Japanese] do not behave ourselves discreetly and maintain our dignity, I believe it would be difficult to make the newly incorporated people respect us with all their hearts. Why do I say so? If [the Chinese in Taiwan] cut their hair and put on Western clothes, they would be virtually indistinguishable from us; nay, their physique may be superior to the Japanese . . .³⁵

Nevertheless, Goto made the “advance Japanese versus backward Taiwanese” hierarchy clear when rejecting the extension of Japanese law to Taiwan. Following Goto’s politics of biology, the above-mentioned Diet member Takekoshi argued in 1915 that it was not only impossible but also inappropriate to reform the Taiwanese and customs considered backward, such as foot-binding and queue-keeping:

The biological laws prevail in politics as well as in the human body. No matter how hard an organic being may try, it cannot go beyond the bounds of biological laws. However, the short-sighted politicians imagine that the mere possession of a colonial land should enable a nation to transplant bodily . . . or that by importing the learning of the motherland, the character of the native of the colony can be transformed . . . We of the latter-day school of the science of government firmly believe that the government of a colony cannot go beyond biological laws; that is, in governing Formosa, for instance, we must not govern the Formosans as we do the Japanese, but as we should the Formosans. We should not necessarily forbid the tying of the feet, nor should we compel the men of Formosa to cut off queues. We need not to take pains to extract homage from the natives, but should allow them to love and have their own being which suits themselves.³⁶

It is worth mentioning that, unlike Takekoshi, Goto did not rule out the possibility that the Taiwanese could one day evolve themselves and become Japanese. For Goto, the assimilation, even if it can be achieved,

35. Goto Shinpei (後藤新平), *Taiwan Kyōkai Setsuritsu nit Suite Shokan o Nobu* (臺灣協會設に就て所感を述ぶ) [*On the Establishment of Taiwan Association*], 2 TAIWAN KYŌKAI KAOHŌ (臺灣協會會報) [TAIWAN ASSOCIATION JOURNAL] 2, 5-6 (1898); Translated text is directly from Wu, *supra* note 17, at 89.

36. Takekoshi Yosaburō, *Japan’s Colonial Policy*, in JAPAN TO AMERICA 95, 97 (Masaoka Naoichi ed., 1915).

would not happen in the foreseeable future.³⁷ Speaking on the floor of the imperial Diet, Goto asserted that Taiwan would gradually evolve through the colonial rule fit both the situation in the indigenous society and the goal of colonial rule.³⁸

B. *Taiwan as a Tentative and Special Legal Zone in the Japanese Empire*

After the initial debates, compromises were made. A flexible guideline of colonial rule, the so-called “gradual assimilation,” was adopted in the earlier years of colonial rule. The gradual assimilation was as a synthesis of the two sets of opposing doctrines about colonial governance. Generally speaking, from 1895 to the early 1920s, the paradigm of special rule dominated. Special colonial law, either in the form of law or custom, was the principle. Codification of Taiwanese customs, either for the entire civil law or, later on, for the family law only, was proposed. In the second period, from the early 1920s to 1945, the guiding principle changed into the so-called “elongation of the metropole.” The ideas of integration prevailed. The provision of Japanese law largely took effect in Taiwan. Certainly, the periodization was not clear-cut. In each period, many of the colonial or legal policies, if closely examined, consisted of alloys, in which ideas drawn from the special rule, for instance, were mitigated by a few ideas from integration, and vice versa.

Indeed, the Japanese government wavered over not only different approaches for colonial governing but also, closely related, whether a unified or unique law should be enforced in Taiwan. The so-called, “Law No. 63” system, the result of debates mentioned above on who could decide which laws should be enforced in Taiwan, was a primal example of a compromise between two views of colonial governance. In 1896, the Diet passed the bill titled “Law Relating to Laws and Ordinances to Be Enforced in Taiwan (台湾ニ施行スヘキ法令ニ関スル法律 *Taiwan ni Shikō Suheki hōrei ni kansuru Hōritsu*)” under Title 63 (1896), which was usually referred to as “Law No. 63.” Law No. 63 granted the GGT the power to issue special ordinances called *ritsurei* (literally translated as statute-ordinance, hereafter the GGT-ordinance), which carried the same

37. OGUMA, *supra* note 33, at 142.

38. Haruyama Meitetsu (春山明哲), *Taiwan Kyūkan Chōsa to Rippō Kōsō: Okamatsu Santarōn niyoru Chōsa to Ritsuan wo Chūshin ni* (台湾旧慣調査と立法構想：岡松参太郎による調査と立案を中心に) [*The Investigation of Taiwanese Old Custom and Legislative Plan: Okamatsu Santarōn's Enterprise and Ideas*], 6 TAIWAN KIN GENDAISHI KENKYŪ (台湾近現代史研究) [HISTORICAL STUDIES OF TAIWAN IN MODERN TIMES] 81, 95 (1998).

legal effect in Taiwan as Diet-enacted statute in his jurisdiction.³⁹ A GGT-ordinance shall receive imperial approval, usually through the prime minister, either before or, in case of emergency, after promulgation.⁴⁰ Japanese laws enacted by the Diet were not automatically enforced in Taiwan. Diet-enacted laws could be extended to Taiwan or other colonies, such as Korea (which became a Japanese protectorate in 1905 and a Japanese colony in 1910) or Karafuto (which became a colony of Japan in 1905) by imperial ordinances (*chokurei*).⁴¹ Besides, the Diet could enact special law for Taiwan, such as the Law of The Taiwan Development Corporation (1936), which could be directly enforced in Taiwan.

In other words, Law No. 63 created a special legal zone within the Japanese empire, in terms of both the special legislative process and the selective application of Japanese laws. While the Diet served as the legislative branch in the homeland, the GGT and central government jointly form a unique colonial legal system in Taiwan. This special legal zone was also a tentative one. Given the challenge of justifying the constitutionality of such a sweeping delegated legislation, Law No. 63 was approved with the stipulation that its duration was limited to three years.⁴² Whenever the respective governor pleaded for its extension in the Diet, heated debates arose in the Diet and beyond.⁴³ Underlining the controversy was political struggles among the Diet, the cabinet, and military authority in Japan, as well as between the central government and the GGT. Although it was created as an interim measure before the full integration of Taiwan into Japan, such a structure was largely maintained throughout the colonial time.

In practice, the GGT would initiate the extension of Japanese laws in two ways. He could secure an imperial ordinance ordering the extension of a specific Japanese law through the prime minister if he desired so.⁴⁴ The central government generally promulgated such an imperial ordinance only upon the request of the GGT.⁴⁵ While extending Diet-enacted Japanese laws to Taiwan, modifications to the law were usually made. As

39. See WANG, *supra* note 27, at 38-39, 42-43; Edward I-Te Chen, *Japanese Colonialism in Korea and Formosa: A Comparison of The Systems of Political Control*, 30 HARV. J. ASIAT. STUD. 126, 126-27 (1970).

40. WANG, *supra* note 27, at 14-15.

41. *Id.* at 43.

42. In 1906, the duration extended to six years. In 1921, the time limit was removed. Edward I-Te Chen, *Formosan Political Movements under Japanese Colonial Rule: 1914-1937*, 31 J. ASIAN STUD. 477, 482 (1972).

43. *Id.*

44. Chen, *supra* note 21 at 255. After 1921, the cabinet made it a rule that the imperial ordinance that required application of a specific Japanese law in Taiwan should be issued upon the proposal of the GGT or after a request of his opinion in order "to prevent conflict with the governing policy of the governor-genera". See WANG, *supra* note 27, at 43-44.

45. WANG, *id.* at 43.

we will discuss, the Japanese Civil Code (1898), for instance, was extended to Taiwan via imperial ordinance No. 406 (1922) and No. 407 (1922) except for the Books on Relative and Inheritance. Also, the GGT could propose a GGT-ordinance which stipulated that the content specific in Japanese law will be applied in Taiwan and sought imperial approval through the prime minister. In other words, diet-enacted law could also be introduced to Taiwan indirectly by the GGT-ordinance. The content of a GGT-ordinance could be entirely different from a Japanese law in content, such as the notorious Bandit Punishment Ordinance (1898) that allowed the death penalty for any group of two people or more who gather to use violence or coercion to achieve any purpose.⁴⁶ Another example was the Taiwanese Civil Law proposed in 1914, which codified the long-existing customs and institutions in Taiwan.

Unfamiliar with the situation and affairs in Taiwan, the central government usually respected the decision made by the GGT and rarely denied its request. Many compromises between the GGT and the central government would be made even before the submission of drafted GGT-ordinance or imperial ordinance. Through negotiation with the central government, the colonial government had significant leeway to decide whether a specific Japanese law was introduced to Taiwan, what modifications were to be made, and, more generally, the form and content of its law as it saw fit.⁴⁷ However, there were two most seminal exceptions that the GGT and the central government seemed to fail to resolve their differences. In each case, the central government suspended GGT's proposal. Interestingly enough, both cases were about family law. This also hinted how political family law was in the politics of the empire.

In the next section, we will see how family law reforms were proposed and debated among colonial jurists and administrators and how a special family law for Taiwanese was decided and later maintained through the above-mentioned legislative process or, more generally, the power struggle between the colonial and central governments.

46. *Id.* at 47, 196-197. From 1898 to 1902, a total of 11,950 "bandits" were killed, with or without legal proceedings. In 1902, nearly 75% of defendants in banditry cases were sentenced to death. See Liu Yen-Chun (劉彥君), *Qiangdao Huo Kangri?: Yi Rizhi Fayuan Panjue Zhong de Feitu wei Hexin (強盜或抗日? —以日治法院判決中的「匪徒」為核心)* [Bandits or Political Criminals?-A Research on Court's Archives under Japanese Colonial Rule in Taiwan] (2006) (unpublished master thesis, National Taiwan University) (on file with National Taiwan University Library).

47. WANG, *supra* note 27, at 44.

III. OKAMATSU SANTARO: TAIWAN CUSTOM, CODIFYING, AND THE MISSION OF FAMILY LAW

Under the policy of “respecting customs,” the GGT set up the Survey Commission to investigate existing laws and customs in Taiwan in 1901. Invited by Governor Kodama and Goto, Okamatsu Santaro (1871-1921),⁴⁸ an elite civil law professor from Kyoto University led the Commission until its dissolution in 1919. Versed in both classic Chinese and modern-western laws, Okamatsu was an ideal candidate for this mission. Born as the third son of a Japanese Sinologist, Okamatsu received training in classical Chinese language and scholarship. He also studied British law as an undergraduate at Tokyo University from 1891 to 1894, a time when the controversy between the French school and British school on the codification of the Japanese Civil Code was at its climax.⁴⁹ In Taiwan, Okamatsu is remembered as a scholar- technician advising and facilitating colonial governance. In contemporary Japan, he is and has been first and foremost known in Japan’s legal academia mainly as a pandectist. Okamatsu’s *Commentaries on the Civil Code* (注釈民法理由 *chūshaku minpō riyū*) published right after the promulgation of the first three books of the Japanese Civil Code that made him well-known as the rising star in Japan’s legal academia.

Okamatsu expertise was not limited to civil law. His first academic work was a translation of a book entitled *Studies of Constitutional Law* (*Études de droit constitutionnel*) by the French political scientist and sociologist Emile Gaston Boutmy (1835-1906). Also, after accepting the position as the civil law professor at Kyoto University, Okamatsu was sent by the Meiji government to study in Germany, France, and Italy for three years. His mentor at Berlin University was Josef Kohler (1849-1919), a new-Hegelian scholar who belonged to the school of “ethnic jurisprudence (*ethnologische Jurisprudenz*),” a particular school of law in Germany that believed in the spirit of the law (*volksgeist*) of each people

48. For a short biography of Okamatsu, see Haruyama Meitetsu (春山明哲), *Hōgaku Hakase: Okamatsu Santarōn to Taiwan* (法学博士・岡松参太郎と台湾) [*Doctor of Law: Okamatsu Santarōn and Taiwan*], TAIWAN KIN GENDAISHI KENKYŪ, 6 TAIWAN KIN GENDAISHI KENKYŪ (台湾近現代史研究) [HISTORICAL STUDIES OF TAIWAN IN MODERN TIMES], *supra* note 38, at 197, 202-11; Fukushima Masao (福島正夫), *Okamatsu Santarōn no Taiwan Kyūkan Chōsa to Kahoku nōson kankōchō niokeru Suehiro Izutarō Hakase* (岡松参太郎博士の台湾旧慣調査と華北農村慣行調査における末弘巖太郎博士) [*Okamatsu Santarōn’s Investigation of Taiwanese Old Custom and Dr. Suehiro Izutarō’s Investigation of Rural Customs in North China*], in FUKUSHIMA MASAO CHOSAKUSHŪ: DAI ROKU KAN, HIKAKUHŌ (福島正夫著作集：第六卷：比較法) [COLLECTED WRITINGS OF FUKUSHIMA MASAO: VOLUME SIX: COMPARATIVE LAW] 392, 392-421 (1995).

49. Chen, *supra* note 14, at 47-76.

(nation) and its development. Kohler was, similar to Henry Sumner Maine (1822-1888) in British India or Cornelis van Vollenhoven (1874-1933) in Dutch Indonesia, entrusted by the German government to study native customs in German colonies and advise on colonial policy.⁵⁰ In sum, Okamatsu's knowledge of civil law, constitutional law, and colonial governance were shown when he served as the legal advisor for the GGT.

Upon returning from Europe, Okamatsu was soon invited by Goto to advice on the legal policy in Taiwan. Versed in Sinology, Okamatsu seemed to show more respect to the culture and tradition in Taiwan, if compared to Goto. He asserted that the "cultural level" of the Taiwanese was in fact rather high. Nevertheless, Taiwanese had neither experience nor knowledge of modern political systems. Okamatsu considered the politics of integration suitable in French colonies because the people governed by the colonial government were entrepreneurial French immigrants in the uncultivated lands. In Taiwan, in contrast, the special rule was preferred because instead of the Japanese, the Chinese/Taiwanese were an overwhelming majority. According to Okamatsu, the Chinese in Taiwan were not barbaric but were rather a people that "had its own particular culture and particular disposition." It was thus inappropriate to rule the Taiwanese by the same system in Japan.⁵¹ That was to say, Taiwanese (or, in Okamatsu's words, Chinese in Taiwan) were not primitive people and even had a certain high level of culture. However, regarding receiving modern political knowledge, Taiwanese were far behind the Japanese.

Accordingly, Okamatsu argued that a "homeland-centered" special rule was the "suitable" model in Taiwan. Unlike Vollenhoven in Dutch

50. For Kohler's influence in the old-custom project, see Nakamura Akira (中村哲), *Kora no Kan taru Taiwan no Kyūkanm* (コーラーの観たる臺灣の舊慣) [*Kohler and Taiwanese Old Customs*], 4 MINZOKU TAIWAN (民俗臺灣) [TAIWANESE FOLKLORE] 2 (1944); Unlike Kohler or van Vollenhoven, however, Okamatsu was not an orientalist enthusiast. Neither did he have much romantic feeling or sympathy about the "primitive men" or their spirit of the law. Okamatsu's old-custom project centered on the law and customs of the Han-Taiwanese, the descendants of Chinese immigrants who made up the majority of the population in colonial Taiwan. It was only after Kohler expressed his discontent about the fact that the customs of the Taiwanese aboriginal were not covered in the old-custom project and encouraged Okamatsu to do related research did an investigation of the Taiwanese aboriginal customs take place. WU HAO-JEN (吳豪人), ZHIMINDI DE FAXUEZHE: "XIANDAI" LEYUAN DE MANYOUZHE (殖民地的法學者: 「現代」樂園的漫遊者) [WANDERING THE MODERN "PARAÍSO": PORTRAITS OF THE JURISTS IN COLONY] 10-74 (2017); Haruyama, *supra* note 48, at 197, 206.

51. Okamatsu Santarōn (岡松參太郎), *Taiwan no Seido ni Kansuri Ikensho* (台湾ノ制度ニ関スル意見書) [*Opinions on Political and Legal Systems in Taiwan*], 6 TAIWAN KIN GENDAISHI KENKYŪ (台湾近現代史研究) [HISTORICAL STUDIES OF TAIWAN IN MODERN TIMES], *supra* note 38, at 217, 217-18. Interestingly, Taiwanese nationalists in the 1920s deployed similar arguments to argue for political participation and family law for the Taiwanese; Chen, *supra* note 14, at 47-76.

Indonesia, Okamatsu did not support colonial self-government. Neither did he show much sympathy to the colonized.⁵² Instead, Okamatsu advised the GGT not to grant political rights to the Taiwanese and be concerned only with the interest of the metropole. In a letter to Goto in 1901, Okamatsu presented his opinion on fundamental structures for governing Taiwan. Putting into use his knowledge on comparative colonial governance, Okamatsu categorized policies in newly-acquired territories into three groups: (a) self-government (e.g., Britain and USA); (b) integration (e.g., France and Italy) and (c) subordination (e.g., Holland and Germany). Okamatsu stressed on the difference and distance between colonial Taiwan and Japan and, accordingly, suggested that the GGT should adopt the policy of subordination, in which “people were submitted to the homeland to its deterrent power” and “governed by an administration centered only on interests of the homeland.” He believed that such a policy best suited the current situation of Taiwan, a newly acquired congested land far away from the metropole.⁵³

In terms of private law, the role of Okamatsu being a scholar-advisor was analogous to either “Roma jurisconsult,” an expert of law in civil law traditions, who advised the praetor and the judge but had no legislative or judicial responsibility or the Commentators after the revival of Roman law in Italy beginning in the late eleventh century.⁵⁴ There were two methods that the Survey Commission deployed to “discover” Taiwanese customs. One was through the studies of the imperial Chinese Code, especially the Qing Code, which provided written laws. As for the unwritten law, a vast project of interviewing locals and collecting legal documents was carried out to understand the existing practices. Through a careful process of selecting and interpreting the existing law and customs by the conceptual tools of German legal science, systematic knowledge of the law was created and served as an essential reference for the judges. One of the most important products of this ambitious project was *Taiwan Private Law* (台湾私法 *Taiwan Shihō*, 1909-1911), a work of three volumes on the customs and laws in Taiwan, including seven books of text and six books of appendices, which comprised of a collection of deeds, contracts, and other legal documents.

Okamatsu’s ambition went far beyond advising the colonial jurists or producing academic works. From the very beginning, the task of the Survey Commission was not merely investigating but rather codifying Taiwanese customs. Referring to Sir Henry Maine’s accomplishment of

52. For a comparison between Okamatsu and van Vollenhoven, WU, *supra* note 50, at 10-74.

53. Okamatsu, *supra* note 51, at 217-18.

54. JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 60 (2007).

codifying India customs, Goto argued in 1901 that a Taiwanese code was the foundation for a long-lasting colonial rule.⁵⁵

Granted, as I will show later, Okamatsu's enterprise of a Taiwanese Civil Code was often criticized by the anti-codifiers, who advocated replacing Taiwanese custom with the Japanese civil law, for perpetuating a separate colonial jurisdiction and creating an obstacle for the ultimate assimilation of Taiwan into Japan. However, Okamatsu saw such a project as an opportunity to demonstrate an ideal model of a national code for legal reform back home in Japan, a model analogous to the Reception of Modern Roman Law during the reconstruction of Germany law in the mid-nineteenth century. What drove his enthusiasm for the codification of Taiwanese customs was his belief in German legal science as well as resentment at the Japanese Civil Code (1898). In a speech to Japanese jurists in Taiwan, Okamatsu enumerated in detail several contradictions and inconsistencies in the Japanese Civil Code and regarded it as a lousy compromise between German law and French Law. He complained that although the Japanese Civil Code was modeled on German law, the French-trained drafters misunderstood the German law and produced a strange code.⁵⁶ Colonial Taiwan provided a stage that Okamatsu, a Japanese jurist from the rising generation, could not find in the metropole to put into practice his ideas of codification.⁵⁷ Like Goto, Okamatsu also raised the example of Maine's enterprise in British India but emphasized how it further served as a model for the legal reform in Britain. He thus encouraged the colonial jurists to join the glorious mission of codifying

55. Goto Shimpei (後藤新平), *Hakkanshi* (發刊の辭) [*Opening Statement*], 1 TAIWAN KANSHŪ KIJŪ (臺灣慣習記事) [TAIWAN CUSTOMS] 1, 2 (1901); Haruyama, *supra* note 38, at 90 (1998). Another important task of the Survey Commission was to collect information on Western colonies in order to serve as a point of reference for administering the laws and customs in Taiwan. In addition to British India, Okamatsu also consulted the experience in Dutch India, namely the project of the "discovery" of adat law project led by C. van Vollenhoven and his voluminous work, *Adatrechtbundel* (1910-1943). The *Provisional Report on Investigation of Laws and Customs in the Island of Formosa* (1902), a report translated into English to showcase Japan's colonial rule and the old-custom project in Taiwan to Western readers, was inspired by similar work in colonial Indonesia. Fukushima, *supra* note 48, at 392, 394; Katayama Hidetaro (片山秀太郎), *Okamatsu Santarōn to Taiwan no Rippō* (岡松博士と台湾の立法) [*Dr. Okamatsu and Taiwan's Legislation*], 31 TAIWAN JIHŌ (臺灣時報) [TAIWAN TIMES] 18, 21 (1922).

56. Okamatsu Santarō (岡松参太郎), *Nihon no Minpō Ketten o Ronji te Taiwan Rippō ni taisuru no Kibō ni Oyobu* (日本民法の欠点を論じて台湾立法に対する希望に及ぶ) [*The Defects of Japanese Civil Law and The Expectation for Legislation in Taiwan*], 5 TAIWAN KANSHŪ KIJŪ (臺灣慣習記事) [TAIWAN CUSTOMS] 195, 195-208 (1905).

57. For more about Okamatsu and Codification of Taiwanese custom, see WANG TAY-SHENG (王泰升), JUYOU LISHI SIWEI DE FAXUE: JIEHE TAIWAN FALUSHEHUISHI YU FALU LUNZHENG (具有歷史思維的法學：結合台灣法律社會史與法律論證) [JURISPRUDENCE WITH HISTORICAL THINKING: COMBINATION OF TAIWANESE SOCIAL HISTORY OF LAW AND LEGAL REASONING] 167-220 (2010).

Taiwanese customs in order to reform the hastily-made civil code in the homeland.⁵⁸

In Okamatsu's old-custom project, matters about family law played an important role. It is worth pointing out that Okamatsu used modern European categories and structure of law, more precisely, the Pandekten system which had been profoundly influential in Germany and beyond. Consequently, family law and related matters were lumped together into one category and separated from other areas of law.⁵⁹ Juxtaposing with *Unmovable Property* (Real Estate 不動產) and *Movable Property* (動產), *Persons* (人事) was the topic of Volume Two of *Taiwan Private Law*, which included name, household registration, family, and inheritance. In an earlier publication of the old-custom project, *Provisional Report on Investigation of Laws and Customs in the Island of Formosa* (1902, hereafter, the Provisional Report), Okamatsu asserted that family relation, inheritance, and land jointly "form the basis of all legal relations, and different countries have their peculiar systems." However, due to the illness of two members of the investigation, only the part on land was published in this book. Nevertheless, the Commission decided to reserve the other two parts for future publication while keeping what had been investigated into as in a summarized form in the appendix for the time being. The reason was the huge difference between related customs in Taiwan and Japan:

However, Formosan customs in respect to family relationships and succession differ so much from Japanese customs of a like nature, that the Commission was led to believe that the publication of the result of its investigation, however imperfect, would be of some use in the administration of this island. For this reason, a summary of what has already been investigated into will be found in the appendix.⁶⁰

58. *See id.* at 208.

59. Fukushima Masao criticized Okamatsu for imposing modern European legal concepts and structure on "pre-modern social norms." Fukushima, *supra* note 48, at 370.

60. OKAMATSU SANTARŌN (岡松参太郎), PROVISIONAL REPORT ON INVESTIGATION OF LAWS AND CUSTOMS IN THE ISLAND OF FORMOSA, Preface, at I-II (1902). While Okamatsu seemed to care more about the immediate need to acquire the knowledge about customs which Japanese rulers found hard to understand, the findings of the old-custom project were precious and highly praised by social scientists. For example, in 1912, a Japanese economist named Fukuda Tokuzō admired Taiwan Private Law as "an immortal gift brought by the Japanese-Sino War." Out of aversion to the "current improper fashion of producing useless lengthy works simply after browsing Western books and providing random thoughts," Tokuzō praised, "the abundance of knowledge and information hidden everywhere" and the way of applying Western methodologies to examine this data. The sections on "name, household registry, family, and the succession of family line" in particular interested him and constituted the central part of his review. Fukuda Tokuzō (福田徳三), *Taiwan no Shihō Kansei* (臺灣私法ノ完成) [*The*

Here Okamatsu stressed the “usefulness” of investigation into Taiwanese family matters which were different from those in Japan for colonial administration. However, the “usefulness” of knowledge of native family customs was not limited in day-to-day colonial governance on the site. Western colonizers often signed out “backward” family custom of the colonized to attack native culture and presented themselves as the bringer of emancipation of native women. In the case of colonial Taiwan, reporting and shaming “backward” family customs was a way not only to construct a hierarchal distinction between “the civilized Japanese colonizer” vs. “the backward Taiwanese colonized” but also to prove to westerners that Japan was now a capable colonizer power and hence in the club of a civilized country.

Okamatsu criticized the practice of the bride-price, the money gifts presented to the family of the bride-to-be, and criticized the “bargain marriage” as treating women as commodities in the above-mentioned English translated Provision Report (1902). Reporting to his Western readers in English, Okamatsu claimed that the practice of securing a wife with money had been prevalent in China from the old time. In Taiwan, this practice became so extreme that money payment was regarded as a prerequisite to marriage.⁶¹ Similar criticism was found on his description of adoption in Taiwan. According to Okamatsu, although Confucian teaching opposed adopting children from families of different clans and surnames in order to avoid complication of the family relation, this practice was quite common in Taiwan. Adopting children, especially boys, for elder support or keeping up memorial service of the ancestors was almost “every-day occurrence.”⁶²

Okamatsu also reported, almost in a matter-of-fact style, on the various and highly flexible practice of a special adoption: one could adopt a daughter, usually as a little girl, as a potential daughter-in-law. When the girl reached a certain age, her adopted parents could get her married to one of their sons. This adopted daughter or practice is called *shin-pu* (or *simpua* 媳婦仔). Also, her adopted parents could marry her out or secure a marry-in husband for her and the adopted family. According to Okamatsu, this practice also originated from China but had deteriorated after traveling to Taiwan. In China, the purpose of *shin-pu* was quite simple. That was, to adopt a girl to secure a future wife for one of the sons in the family. However, in Taiwan, the girls might be adopted to families with no sons. Sometimes, the purpose of such custom was to make money

Completion of Taiwan Private Law], 12 KOKUMIN KEIZAI ZASHI (經濟學商業學國民經濟雜誌) [THE MAGAZINE OF NATIONAL ECONOMY] 67 (1912).

61. OKAMATSU, *id.* Appendix V.

62. *Id.* Appendixes X-XI.

through re-sales of the girls, providing they later became good-looking women.⁶³

It was a common practice that the Japanese colonizers singled out Taiwanese family custom, particularly those related to the commodification of women, as symbols of Taiwanese backwardness. For example, a Japanese prosecutor criticized the “uncivilized” practice of daughter-selling and attributed such a practice to the “greediness” inherent in the Taiwanese disposition. Interestingly enough, he admitted the existence of a similar practice back home in Japan but asserted that Japanese daughter-selling was practiced as a last resort for a family in desperate need and was entirely different from Taiwanese daughter-selling in nature.⁶⁴

Overall, the practice of paying money in exchange for an adopted child, Okamatsu claimed, was peculiar to Taiwan and not found in Tseuen and Tsong districts in China, where most Han-Taiwanese’s families were originally from. He criticized the present institution of adoption in Taiwan as “buying sons and daughters with money” and as the result of “the general degeneration of Chinese customs”⁶⁵

Despite his criticism, Okamatsu did not consider it wise to prohibit human trafficking when it came to actual legislation or judicial decision in the colonies. In the Japanese written law journal in Taiwan, the *Monthly Law Report* (法院月報 *Hōin Geppō*), he argued in 1908 that it would be in vain if the state interfered with such practice in the colonial society by law- after all, Okamatsu claimed, in Japan and many other countries, the effort to ban human trafficking was usually in vain. Furthermore, since

63. *Id.* Appendixes XV-XVI. Although this practice was condemned by some Japanese because they saw it as trafficking of women, the status of *sin-pu* and the motive behind such practice were in fact variable. As mentioned, *shin-pu/sim-pua* might later marry one of the sons of the family, remain as a daughter and marry into another family, or marry a marry-in husband. In a worst-case scenario, she could be used as a child labor-slave and then sold to a brothel. One primary motivation was economic. Rather than paying the bride-price, the adopted parents usually paid smaller amounts of money to a *sim-pu*’s original family. However, another nontrivial reason behind the practice lay in adopted mothers’ strategy of controlling the family. A daughter-in-law raised by her future mother-in-law from her childhood was said to be more obedient. In contrast, an adult daughter-in-law was more likely to stand up against her mother-in-law. In other words, the practice of *sin-pu* sometimes was better understood via the lens of the power struggle between women of different generations in the family. See ARTHUR P. WOLF & CHIEH-SHAN HUANG, MARRIAGE AND ADOPTION IN CHINA, 1845-1945, at 230-41 (1980); Chang Hsun (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 TAIWAN DAXUE KAOGU RENLEI XUEKAN(國立臺灣大學考古人類學刊) [THE JOURNAL OF ARCHAEOLOGY AND ANTHROPOLOGY] 15, 15-43 (2000).

64. KAMIUCHI TSUNESABURŌ (上内恒三郎), TAIWAN KEIJI SHIHŌ SEISAKURON (臺灣刑事司法政策論) [CRIMINAL LAW AND POLICY IN TAIWAN] 110-11 (1916).

65. OKAMATSU, *supra* note 60, Appendixes X-XI.

human trafficking was still prevalent, even in “civilized countries,” Okamatsu assured the colonial jurists that a similar custom in Taiwan “would not bring any shame to a country.”⁶⁶ That meant human trafficking in colonial Taiwan would not hamper Japan’s ambition of being recognized by western countries as a civilized nation.⁶⁷

In addition to adjudicating Taiwanese family affairs and showing Taiwan’s backwardness, family law (along with household registration) played another critical role in colonial governance. In Japan, family law stipulated that many legal actions would not be effective without being registered in household registration (戸籍 *koseki*). For example, the marriage and adoption would be effective by filing a notification to the household register. Accordingly, an administrative law, Household Registration Act (戸籍法 *koseki hō*), supplemented family law in governing family affairs.⁶⁸ In other words, the two were almost inseparable in the Japanese legal system. However, if we look beyond Japan proper into the entire Japanese empire, household registration served as the way to draw the boundary between the colonizer and the colonized. Regarding nationality, the Taiwanese and the Korean became the Japanese since the colonial rule. However, within the Japanese empires, racial boundaries still existed not only socially but also legally. These boundaries were administered by household registration. There was no unified household registration law for entire Japan. Instead, each colony and the motherland had its household registration law. If someone’s household registration was in Taiwan, s/he was not a Japanese/mainlander but a Taiwanese colonized.⁶⁹ Moreover, a foreigner (such as an American) could become a Japanese by entering a Japanese household registration by marriage or adoption. That was not the case for a colonial subject in the Japanese empire, such as a Taiwanese or a

66. Okamatsu SANTARŌN (岡松参太郎), *Taiwan no Rippō* (臺灣の立法) [*Legislation in Taiwan*], 2 HŌIN GEPPŌ (法院月報) [MONTHLY LAW REPORT] 35, 47-48 (1908). However, as will be shown later in this article, Okamatsu changed his opinion on human trafficking and asserted that children-selling should not be legally recognized when commenting on the draft of Taiwan Family Law in 1912.

67. Interestingly, later in 1930 when the League of Nations led an international campaign against traffic in women and planned a supposedly undercover visit to Xiamen, China where Japanese and Taiwanese women were said to be trafficked to and became prostitutes, Japanese governments panicked and ordered the GGT to properly prepared a report to avoid embarrassment to be brought by this visit. See Kō, *supra* note 12, at 264-67.

68. For more about household registration and its relation to family law in Japan, see Petra Schmidt, *Chapter Three, Civil Law, Family Law*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, at 262, 268, 271, 275-76, 286-87, 290, 294, 299, 304, 309-10 (Wilhelm Röhl ed., 2005).

69. ENDO MASATAKA (遠藤正敬), *KINDAI NIHON NO SHOKUMINCHI TOUCHI NIOKERU KOKUSEKI TO KOSEKI: MANSŪ, CHŌSEN, TAIWAN* (近代日本の殖民地統治における国籍と戸籍：満州・朝鮮・台湾) [*NATIONALITY AND HOUSE REGISTRATION IN MODERN JAPAN’S COLONIAL GOVERNANCE: MANCHURIA, KOREA, AND TAIWAN*] 338 (2010).

Korean. In principle, before 1933, inter-racial marriage and adoption between Taiwanese and Japanese was not allowed. Since both Japanese family law and Japanese Household Registration Act were not introduced to Taiwan, the validity of the marriage between Taiwanese and Japanese became problematic. A Taiwanese was not able to enter a Japanese household registration by marriage or adoption and therefore became a Japanese. Similarly, neither was a Japanese allowed to enter into a Taiwanese household.⁷⁰ Also, a Taiwanese household was not allowed to transfer its registration to the homeland even after the family moved to Japan and lived there for years. Nor could a household originally from Japan transfer its registration to Taiwan.⁷¹

Okamatsu was fully aware of this crucial function of family law and household registration in colonial administration. In a lecture to the members of the Taiwan Bar in 1908, he explained the current law: foreigners could become Japanese if they got married to Japanese. However, for Taiwanese, even if they got married to Japanese, their household registration could not transfer to Japan. Although Okamatsu felt that the current system should not be continued for long, he also worried that once the prohibition was lifted and Taiwanese or Japanese could freely transfer their household registrations to Japan or Taiwan, there was no way to distinguish them. The current system kept the “benefit” of distinguishing these two people but failed to provide a unified or integrated system.⁷² In other words, there were two conflicting interests involved in the issues of household registration system: one is the goal of assimilating Taiwanese into Japanese. The other was to maintain the superiority of Japanese over Taiwanese.

In 1908, when the work of investigating and interpreting Taiwanese customs was close to the end, the Survey Commission began to codify Taiwanese customs. Within the commission, there were different opinions on the extent to which the Taiwanese Civil Law should be different from

70. However, there were in fact certain ways to accommodate inter-racial marriage between Japanese men and Taiwanese women and inter-racial adoption for Japanese adopters and Taiwanese adopted. Chen Chao-Ju (陳昭如), *Xingbie yu Guomin Shenfen: Taiwan Nuxing Zhuyi Falushi de Kaocha* (性別與國民身分—台灣女性主義法律史的考察) [*Gender and National Membership-A Feminist Legal History of Gender and Nationality in Taiwan*], 35 TAIDA FAXUE LUNCONG (臺大法學論叢) [NATIONAL TAIWAN UNIVERSITY LAW JOURNAL] 1, 22-24 (2006); Tseng Weng-Liang (曾文亮), *Rizhi Shiqi Taiwanren Jiazufa de Jindaihua yu Ribenhua-Quanxin de Jiuguan* (日治時期台灣人家族法的殖民近代化與日本化—全新的舊慣) [The Family Law of Taiwanese under Japanese Colonial Rule: The Shaping of New Old Customs] 91 (2008) (unpublished Ph.D. dissertation, National Taiwan University) (on file with National Taiwan University Library).

71. See OGUMA, *supra* note 33, at 195-214.

72. Okamatsu, *supra* note 66, at 40.

the Japanese Civil Code. On the other side of the same coin, the question was about how much Japanese law should be introduced to Taiwan. Okamatsu insisted on the idea that a unique Taiwanese civil code would be tailored and enacted for Taiwan, and was unwilling to make modifications based on Japanese civil law as he saw unnecessary. He said in 1908: “it is improper to break the customs of the three million Taiwanese for the sake of a minority of Japanese mainlanders” living in Taiwan.⁷³ It was worth pointing out that, while Okamatsu embraced the idea of a unique Taiwanese Civil Law, he articulated a spectrum of laws for the legislation in Taiwan. On the one end were the laws (such as commercial law or contract) which should follow the principle of unification and adopt the content of Japanese law. On the other end were laws of family and real property, where the principle of the special rule should triumph, at least for the time being.⁷⁴

Others, especially the judicial officials in the commission, advocated for incorporating Japanese civil law into the drafts of Taiwanese Civil Law.⁷⁵ This debate could be understood as a replay of the rivalry between the doctrine of special rule and integration discussed earlier. While both camps agreed that full-assimilation was the ultimate goal of colonial legal policy, they differed on how fast it should be achieved. It also revealed the conflicting goals of the Taiwanese Civil Law. That was, Taiwanese Civil Law was expected to suit the particular condition and customs in Taiwan but was at the same time required to be reconcilable with the Japanese law.

Outside the Committee, there were also oppositions to old-custom codification in the colonial judicial circle. As early as 1903, a young Japanese lawyer named Hosotani Goro (細谷五郎) attacked Okamatsu successively on *Taiwan Daily Newspaper* (臺灣日日新報) (*Taiwan Nichinichi Shinpō*) and *Taiwan Customs* (臺灣慣習記事) (*Taiwan Kanshū Kiji*) for legalizing, or at least tolerating, certain Taiwanese customs, such as wife-selling or son/daughter selling.⁷⁶ In 1915, the Taiwan branch of the Japan Bar Association criticized the old-custom codifiers for being complacent and merely enjoying being different. The codification was said to be running counter to the trend that Taiwanese customs were gradually assimilated into Japanese law.⁷⁷ The *shin-pu* (or *simpua*) was

73. *Id.*

74. *Id.* at 36-39.

75. WANG, *supra* note 27, at 37; TAIWAN SHIRYŌ, *supra* note 27, at 145.

76. Okamatsu Santarōn (岡松參太郎), *Hosotani Kun ni Kotae* (細谷君に答ふ) [A Response to Mr. Hosotani], 3 TAIWAN KANSHŪ KJI (臺灣慣習記事) [TAIWAN CUSTOMS] 303 (1903).

77. See Chen Chao-Ju (陳昭如), Li Hun de Quanli Shi: Taiwan Nuxing Lihun Quan de Jianli Ji Qi Yiyi (離婚的權利史：臺灣女性離婚權的建立及其意義) [The History of Divorced Right: The Establishment of Right to Divorce of Taiwanese Women and its Meaning] 101-02 (1997)

raised as an example of the undesirable consequence of codifying Taiwanese customs. The Taiwan Bar saw the custom of *shin-pu* as human trafficking. They claimed that a *shin-pu* would either be driven to prostitution or become a slave. It was just unthinkable that such a backward custom that contradicted the modern trend of respecting individual dignity and free will could be codified.⁷⁸

Back in Japan, in contrast with the enthusiasm shared by Okamatsu and the GGT toward codifying special colonial laws, the central government was more reserved. When the central government leaned toward the principle of assimilation, the project of a unique and separate Taiwanese Civil Law fell out of favor.

Family law then became the bastion for the old-custom camp in their losing battle. To prevent the whole project from failing, Okamatsu retreated to family law. In 1914, the GGT submitted drafts of the Taiwanese Civil Law, Taiwanese Family Law, and Taiwanese Household Registration Act to the Cabinet Legislation Bureau in the central government. The draft of Taiwan Family Law, if compared to existing Taiwanese customs or what Okamatsu previous ideas on Taiwanese family law, was arguably more individualistic, “advanced”, and closer to Japanese family law. For instance, as discussed earlier, Okamatsu criticized the present institution of adoption in Taiwan as “buying sons and daughters with money” in the English report on Taiwan’s custom in 1902. Yet, he considered it unwise to prohibiting human trafficking in 1908. However, the draft of Taiwan Family Law clearly denied the validity of children-selling. In his manuscript on the customs in Taiwan Family Law, Okamatsu asserted in 1912 that such a “vulgar custom” should be flatly prohibited. Another “vulgar custom” which was not recognized in the draft was concubinage. Marriage should be based on the will of bride and groom. The parents merely had rights of consent. The legal mechanisms and concepts in Japanese family law, such as guardian and parental rights, were adopted to replace the existing customs on entrusting orphans (to relatives or friends) or the power of elders in families. Rules about inheritance in Japanese family law, as Okamatsu suggested, should be adopted in Taiwan as much as possible.⁷⁹

Despite the compromises Okamatsu made in order to make Taiwan

(unpublished master thesis, National Taiwan University) (on file with National Central Library, Taiwan).

78. *Id.* at 102.

79. Okamatsu Santaro, *Shinzokusouzokurei niokeru Kansyouno Kaihaiten* (親族相続令における慣習の改廃点) [*The Reform and Abolition of Customs in Taiwan Family Law*], in OKAMATSU SANTARO BUNSYOU (岡松参太郎文書) [OKAMATSU SANTARO ARCHIVE], microfilm stored in Waseda University Library, C32, 7-1 (2008). For a more comprehensive analysis on Okamatsu’s opinions on the draft of Taiwan Family Law, see WANG, *supra* note 57, at 186-93.

Family Law more acceptable to Japanese, the draft was not approved by the central government. Neither were the drafts of Taiwanese Household Registration Act or Taiwanese Civil Law. The political implication of codifying Taiwanese customs was the institutionalization of the special legal zone in Taiwan, which was considered harmful to the ultimate goal of Japan's colonial governance. That was, assimilating Taiwanese into Japanese.⁸⁰

The Bureau worried that the codification of Taiwanese customs would prevent the ever-changing customs from advancing and would further perpetuate the special legal zone of Taiwan. The Bureau suggested that Japanese law, especially family law, was “the most suitable means to achieve the integration between the Japanese and the Taiwanese,” and should be applied to Taiwan as much as possible.⁸¹ A similar concern was expressed in the Imperial Diet. In 1911, a Japanese congressman argued that the codification of Taiwanese customs would become an obstacle not only to the abolishment of existing customs in Taiwan but also to the colonial mission of “civilizing Taiwanese.”⁸²

After the initial failure, the GGT revised and resubmitted drafts of Taiwanese Family Law and Taiwan Household Registration Act multiple times. Until early 1920, it was still believed that the central government would soon approve these two legislations. In October 1919, Taiwanese Family Law was read in the second time in the Cabinet Legislation Bureau. Since the Cabinet agreed on the main points of the proposed bill, it was expected that the bill would be approved soon. Taiwan Household Registration Law was also believed to be coming soon.⁸³

Negotiations under the table went on. In March 1920, Governor Den paid a visit to Prime Minister Hara Takashi's official residence in Tokyo and sought Hara's support for the Taiwan Household Registrar Act, which Den believed would remove the technical obstacle from legally recognizing the marriage between the Taiwanese and the Japanese. Hara agreed to lend his support.⁸⁴ However, the sudden turn of the colonial policy enhanced the unifying tendency of the Japanese empire, a direction which did not condone the prospect of writing separate legal codes in the colony. The project of writing a Taiwanese family law was abruptly

80. See WANG, *id.* at 197-98.

81. Tsutsumi Houni (鼓包美), *Koseki ni Kansuru sho Hōrei Seitei nitsuite* (戸籍に関する諸法令制定に就て) [*The Legislation of Laws and Ordinances about Household Registration Act*], 20 TAIWAN JIHO (臺灣時報) [TAIWAN TIMES] 86, 92 (Mar. 1921).

82. See Chen, *supra* note 77, at 100-01.

83. Tsuzumi, *supra* note 81, at 93.

84. DEN KENJIRŌ DENKI HENSANKAI (田健治郎伝記編纂会) ed., DEN KENJIRŌ DEN (田健治郎伝) [BIOGRAPHY OF DEN KENJIRŌ] 412 (1932).

abandoned. So was the old-custom enterprise.

VI. ANEHA SHOHEI AND THE EXTENSION OF JAPANESE FAMILY LAW

Under the new colonial policy, the entire Japanese Civil Code was said to be introduced to Taiwan in 1923. However, as mentioned earlier, Japanese family law was made an exception. As the article will discuss later, the GGT then made several attempts to introduce Japanese family law and the Household Registration Act to Taiwan. So did the colonial jurists. Aneha Shohei (1885-1941), a Japanese judge in colonial Taiwan and an expert in Taiwan custom, was, paradoxically, a leading figure in advocating for the extension of Japanese family law.

Unlike Okamatsu, Aneha was not an elite jurist.⁸⁵ Despite being an authority on the laws and customs of Taiwan, he was known, at best, as a dedicated and learned judge in colonial Taiwan, the periphery of the Japanese Empire. His family and educational background were also much humbler. Born as the fifth son to a commoner family in Tohoku Region, remote and impoverished area from the standpoint of Tokyo, Aneha once dropped out of high school to work in the district office because the family could not afford his tuition. He left for Tokyo and, worked for a lawyer, who later became his mentor, in exchange for meals and lodging.⁸⁶ Meanwhile, Aneha studied in Chuo Law School, known for its common law tradition and moderate British style liberalism. Unlike the Law Department of Tokyo University, Chuo Law School was neither a prestigious imperial university nor did it aim to produce government elites.⁸⁷ Instead, Aneha's alma mater focused on training practitioners who could "meet the need of the society."⁸⁸

Aneha went to Taiwan in his late twenties in 1912 and stayed in this

85. Ono Shinzei (小野真盛), *Aneha Sensei no Itsuwa* (姉齒先生の逸話) [*Anecdotes about Teacher Aneha*], 36 TAIHŌ GEPPŌ (臺法月報) [MONTHLY LAW REPORT] 311 (1942); WU HAO-JEN (吳豪人), *Shokuminchi no Hōgakusha Tachi* (殖民地の法学者たち) [*Jurists in the colonies*], in TEIKOKU NIPPON NO GAKUCHI: DAIICHIKAN "TEIKOKU" HENSEI NO KEIFU (「帝国」日本の学知：第一卷「帝国」編成の系譜) [THE KNOWLEDGE OF THE "EMPIRE": VOLUME I: THE GENEALOGY OF THE FORMATION OF THE "EMPIRE"] 123 (Sakai Tetsuya et al. eds., 2006); WU, *supra* note 50, at 164-80; WANG, *supra* note 57, at 221-42. For a complete list of Aneha's writings published in Monthly Law Report (*Taihō Geppō*), see Anonymous, *Aneha Hōgan Kenkyū Ronbun Honshi Tōsai Nenpu* (姉齒判官研究論文本誌登載年譜) [*Annual of Judge Aneha's Research Papers Published in this Journal*], 36 TAIHŌ GEPPŌ (臺法月報) [MONTHLY LAW REPORT], *id.* at 1, 1-14.

86. There was no entry about Aneha found in any encyclopedias of Japan.

87. Led by the Tokyo Imperial University (1877), there were nine imperial universities in pre-WWII Japan, including seven in the metropole and one in Taiwan and one in Korea. The imperial universities were founded and run by the imperial governments. The imperial university graduates enjoyed certainly privilege.

88. See WU, *supra* note 50, at 170.

island for the next thirty years until his death in 1941.⁸⁹ Aneha was first a practicing lawyer for a few years. During this time, he became known for his diligence and studiousness of legal learning. He was then appointed as a judge in Taichung District Court in 1918, made it to the Higher Court (the highest court in the jurisdiction of colonial Taiwan) in 1929, and was invited to lecture on civil procedure in Taipei Imperial University.⁹⁰ He began to write, prolifically, especially after beginning his work as a judge and law teacher. The pragmatic and positivist discipline in the British style law schools training, which his Alma Mater Chuo Law School was proud of, seemed to manifest in Aneha's legal research. From 1923 till his death in 1941, despite his judging and law-teaching work, Aneha published one hundred and sixty-seven essays in *Monthly Law Report* (台法月報 *Taihō Geppō*), averaging about ten articles a year. Aneha devoted himself to the study of the Taiwanese legal system, especially on family law. The reason for that was quite natural: family law disputes involving Taiwanese remained in the domain of customary law after 1923 and presented challenges to judges, most of whom were Japanese who did not have much knowledge about Taiwanese customs. His voluminous writings, including commentaries, law review articles, and court decisions, were later turned into two books, *Outline of the Laws on Relative and Succession Regarding Taiwanese* (本島人のみに關する親族法並相續法大要 *Hontōjin Nomi ni Kansuru Shinzokuhō Narabini Sōzokuhō no Taiyō*, 1938, hereafter “Outline of Family and Succession”)⁹¹ and *Common Property for Ancestor Worship and the Special Laws in Taiwan* (祭祀公業並臺灣ニ於ケル特殊法律ノ研究 *Saishi Kōgyō Narabi ni Taiwan ni Okeru Tokushu Hōritsu no Kenkyū*, 1934).⁹² Contrary to Okamatsu's work, most of what Aneha wrote focused on cases and judicial opinions without referring much “fancy” European laws or legal theories. However, Aneha's writings not only had great influences on

89. Unlike Okamatsu, who was invited by the GGT as legal advisor, Aneha's career in Taiwan did not have such a high-profile start. The motivation for Aneha's trip to Taiwan was instead an escape from an unwanted marriage/adoption. After the death of his mentor, the widow invited him to join the family as the “adopted son-in-law” (*muko Yoshi* 婿養子) partly to escape from an unwanted arranged marriage to his mentor's daughter. For “adopted son-in-law” in the Japanese Civil Code, see JOSEPH E. DE BECKER, *THE PRINCIPLES AND PRACTICE OF THE CIVIL CODE OF JAPAN: A COMPLETE THEORETICAL AND PRACTICAL EXPOSITION OF THE MOTIFS OF THE JAPANESE CIVIL CODE* 539 (1979). Aneha did not accept such a proposal. He left the law firm which he was proposed to inherit and went all the way to Taiwan. Ono, *supra* note 85, at 311-12.

90. See Anonymous, *supra* note 85, at 311.

91. ANEHA SHŌHEI (姉齒松平), *HONTŌJIN NOMI NI KANSURU SHINZOKUHŌ NARABINI SŌZOKUHŌ NO TAIYŌ* (本島人のみに關する親族法並相續法大要) [OUTLINE OF THE LAWS ON RELATIVE AND INHERITANCE REGARDING THE TAIWANESE] (1938).

92. ANEHA SHŌHEI (姉齒松平), *SAISHI KŌGYŌ NARABI NI TAIWAN NI OKERU TOKUSHU HŌRITSU NO KENKYŪ* (祭祀公業並臺灣ニ於ケル特殊法律ノ研究) [COMMON PROPERTY FOR ANCESTOR WORSHIP AND THE SPECIAL LAWS IN TAIWAN] (1938).

the judicial decisions, especially those related family law and customs, in the colonial court but also presented opinions of the practicing lawyers and judges in the colonial bar, as opposed to the “elite” jurists in the old-custom camp.

One might suppose that Aneha, a jurist versed in Taiwanese custom, would support the old-custom project and codification of Taiwan customs. However, this was a mistake. Quite the contrary, Aneha was an enthusiast of legal assimilation. Strongly opposed Ministry of Colonial Affairs’ disagreement of introducing Japanese family law to Taiwan, Aneha once wrote that “we cannot help but doubt the meaning of existence of the Ministry of Colonial Affairs.”⁹³ Aneha’s political view for assimilation was also vivid in his support for introducing Japanese Registration Act to Taiwan in order to “abolishing barrier between Japanese and Taiwanese.”⁹⁴

Actually, as one contemporary scholar correctly point out, Aneha criticized the findings of the old-custom investigation quite fiercely.⁹⁵ In the above-mentioned masterpiece on Taiwanese family and succession law, Aneha warned the readers, including judges and lawyers in Taiwan, from regarding the Taiwanese customs described *Taiwan Private Law* as “infallible law”. In his opinion, the findings of the investigations were outdated, if not simply incorrect. The knowledge of customs in the investigation was acquired through examining Chinese Classics and books, analyzing original documents (such as deeds), and interviewing learned men. However, in order to understand Taiwanese customary law regarding family law and succession, merely consulting old Chinese writings was insufficient. It was also necessary to have insight into the “characters” and “feeling” of Taiwanese living in this island and to take into the “trend of the time” into account. According to Aneha, it was “anachronic” to understand contemporary Taiwanese family customs through Chinese traditions.⁹⁶ According to Aneha, Taiwan family customs had changed and were no longer the customs when Japan acquired Taiwan more than four decades ago, let alone the customs recoded in ancient Chinese books.

Instead of embracing the codification of Taiwanese customs, Aneha welcomed the full-scale assimilationist policy and the extension of Japanese civil law to Taiwan. For him, the colonial policy had always been assimilation from the very beginning of the Japanese rule in Taiwan.⁹⁷

93. *Id.* at 208.

94. *Id.*

95. WU, *supra* note 50, at 173.

96. ANEHA, *supra* note 91, at 15-19.

97. ANEHA, *supra* note 92, Preface, at 1.

His own research and writing on Taiwanese customs were not to perpetuate customary law regime but to provide a clearer understanding of specific legal issues for the time being.⁹⁸ In the preface of *Outline of Family and Inheritance*, Aneha expressed the dissatisfaction with the situation that family law was left in the customary law regime, which was “ambiguous, improper, and insufficient” in dealing the abundant cases involving Taiwanese family affairs. For him, the solution was not to codify Taiwanese customs. Instead, he asserted that a legal system which followed the new “epoch” and “culture” was needed.⁹⁹ In his article titled “Reasons for the Exigency of Personal Law to the Taiwanese”(本島人に付民法人事編の施行は何故急務なるや) Aneha argued that the enforcement of Japanese family law with some exceptions made for Taiwanese customs would not destroy the customs but, on the contrary, was to “classify” and “supplement” the customs.¹⁰⁰

In fact, he repeatedly called upon the authority to extend Japanese law to Taiwan. Like many of his colleagues in colonial Taiwan, he was disappointed to learn that family law was left out while the Japanese Civil Code and Commercial Code were applied to the Taiwanese in 1923. Despite the difference between Taiwanese familial customs and Japanese family law, he argued, Japanese family law shall still be enforced, with exceptions made for some Taiwanese customs, such as the system of equal succession among all sons.¹⁰¹

Aneha’s argument for a unified family law was mainly grounded on the similarity between the Taiwanese and the Japanese. Reiterating the assimilationist rhetoric, he claimed that the Taiwanese, who were ethnically Chinese people, and the Japanese “belonged to the same race and used the same script (同文同種 *dōbun dōshu*).”¹⁰² He also asserted that there was a common foundation of Japanese family law and Taiwanese customs: Confucian familism.¹⁰³ In addition to the commonly-shared racial and cultural background, there was an institutional and ongoing factor which strengthen the similarity between Japanese and Taiwanese. Aneha asserted that legal similarity had been

98. See ANEHA, *supra* note 91, Preface, at 1-2.

99. *Id.*

100. Aneha Shōhei (姉齒松平), *Hontōjin Ni Tsuke Minpō Jinjihen No Shikō Ha Naze Kyūmu Naruya* (本島人に付民法人事編の施行は何故急務なるや) [*Reasons for the Exigency of Bringing Books of Family Law and Inheritance Law to the Taiwanese*], 23 TAIHŌ GEPPŌ (臺法月報) [MONTHLY LAW REPORT] 28, 28-29 (1929).

101. Aneha Shōhei (姉齒松平), *Minpō Shōhō Shikō nitsuite* (民法商法施行に就いて) [*About the Enforcement of Civil Law and Commercial Law*], 17 TAIHŌ GEPPŌ (臺法月報) [MONTHLY LAW REPORT] 33, 34 (1923).

102. *Id.*

103. *Id.* at 35. For Familism in traditional Chinese codes, see T’UNG-TSU CH’U, *LAW AND SOCIETY IN TRADITIONAL CHINA* 41-91 (1961).

achieved through colonial rule and in particular, the collective effort of the colonial judiciary over the years. He stated that, regardless of their validity in Taiwan, Japanese laws served as guiding law under the assimilationist policy. Even before Japanese civil and commercial law was enforced in Taiwan, when deciding cases, the judges in fact considered these two laws, as “reason (条理 *jōri*; *naturalist ratio*),” in addition to the existing customs in Taiwan. As a result, the difference between the rules related to the law of obligation in Taiwanese customary law and the respective rules in Japanese civil and commercial law became, he claimed, merely nominal. In substance, they were nearly identical.¹⁰⁴

For Aneha, Taiwanese family customs not only departed from the pre-colonial practices, but also moved toward Japanese law. He stated that, concomitant with “the progress of times and the awakening of the Taiwanese” brought by the Japanese rule, Taiwanese familial customs were “gradually improving and evolving,” and, consequently, became closer and closer to Japanese family law.¹⁰⁵

In other words, although Japanese family law was deemed superior to Taiwanese family customs, Aneha did not consider them incompatible. On the contrary, as mentioned earlier, Japanese family law could “classify” and “supplement” Taiwanese customs. It has been acknowledged that many provisions in Japan’s Civil Code had been introduced to Taiwan through the medium of customary law before its official enforcement here. The description might be even more accurate for the provisions in Japanese family law, which never officially took effect in Taiwan throughout the colonial period. The judicial divorce and women’s right to divorce were introduced into Taiwanese customary law regime no later than 1906.¹⁰⁶

Aneha even openly dispelled the myth that Japanese judges merely applied the pre-existing Taiwanese familial customs. He made it explicit that in many cases which were supposed to be reserved to customary law regime, it was the Japanese civil laws, rather than Taiwanese customs, served as the guidance:

Due to the extreme ambiguity of old customs, in reality, the books of family and inheritance in the [Japanese civil law] were served as “reason (*jōri* 条理)” in adjudicating related cases . . . On the surface, the decision were grounded on Taiwanese custom. However, the truth was the opposite. Instead, the decisions were based on Japanese family law. In order to clear up

104. *Id.* at 33-35.

105. *See* ANEHA, *supra* note 91, at 16-17.

106. *See* Chen, *supra* note 77, at 141.

such an incongruity, it was imperative to enforce the [Japanese] personal law.¹⁰⁷

Since Taiwanese customs had been interpreted and adjusted through the vehicle of reason along the line of Japanese family law for more than thirty years when Aneha wrote the article, the discrepancy between Taiwanese customs and Japanese family law had diminished over time.¹⁰⁸ It was worthy to note that the tendency of the Japanese judges to use customary law as the vehicle to introduce laws that were in theory not applicable were anything but unique. It was a practice that had a long history in the West and was widely observed in many colonies where it could be perceived as a subtle way of legal and social change.¹⁰⁹ The Japanese jurists might find what took place in Taiwan similar to what the early Meiji judges had done back home.¹¹⁰

Aneha also claimed that although Japanese family law had not been introduced to Taiwan, the terms and categories in Japanese family law, such as “head of the house” (戸主 *koshu*), were not foreign to Taiwanese. These terms had been widely enforced in the process of registering family relations in every household.¹¹¹ Thus the enforcement of Japanese family law would not be a drastic change or inconvenience to Taiwanese. In addition to pre-existing cultural similarity, judicial transformation of Taiwanese customs by interpreting Taiwanese custom along the line of Japanese law also brought Taiwanese customary law closer to Japanese law. Since the current Taiwanese customs did not differ from Japanese law very much, it would not bring any surprise or inconvenience to people if Japanese family law was introduced. In other words, because Taiwanese and Japanese were similar, assimilation was not only desirable but also feasible.

107. See Aneha, *supra* note 100, at 29.

108. *Id.*

109. See Lev, *supra* note 8, at 105-07; Terence Ranger, *The Invention of Tradition in Colonial Africa*, in *THE INVENTION OF TRADITION* 221-62 (E. Hobsbawm & T. Ranger eds., 1983).

110. In the 1870s, when Japan had just begun to modernize its legal system, judges were asked to decide cases according to provisions of written law, or, in cases which had no such written law, according to customs. In the absence of both written law and customs, “the principles of reason and justice” could serve as the guidelines. Since many new laws had not been enacted and old laws or customs from the Tokugawa period failed to provide specific rules for legal disputes in the rapidly changing society, the judges had no other option but to study “the principles of reason and justice” in Western laws and jurisprudence. Western Codes, commentaries, and legal treatises were widely consulted. Textbooks or outlines of the famous Europe-American jurists, for example, William Blackstone (1723-1780) and Christopher Columbus Langdell (1826-1906), were also regarded as repositories for “the principles of reason and justice.” HOZUMI NOBUSHIGE, *LECTURES ON THE NEW JAPANESE CIVIL CODE: AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE* 38-40 (1912).

111. Aneha, *supra* note 100, at 29, 34.

Interestingly, there were other Japanese who advocated introduction of Japanese family law by emphasizing the difference between the Taiwanese and the Japanese, or more specifically, the backwardness of the Taiwanese, in order to show the need for dramatic change in family and even “spirit” of Taiwanese. As discussed earlier, the lawyers in Taiwan criticized Okamatsu’s codification project for allowing daughter/wife-selling, which was said to be the evidence of backward Taiwanese custom. Others show passion about the function of the inter-racial marriage between Japanese and Taiwanese in assimilating and “purifying” the latter. Nagamene Shigeru (長嶺茂) (1869-?), a Japanese lawyer and an enthusiastic assimilationist in Taiwan,¹¹² claimed that the introduction of Japanese family law could facilitate inter-racial marriage that helped refine the “muddy blood” of the Taiwanese and infuse Japanese spirit into Taiwanese.¹¹³ Similarly, Iwazaki Ketsuji (岩崎潔治), a Japanese Taiwan expert, claimed that family law, along with household registration act, was located in the core of “national characteristics” and an important tool for cultivation of Japanese spirit. The unification of such systems was crucial to the “exchange of the blood” between Japanese and Taiwanese.”¹¹⁴

However, compared to Aneha’s enthusiasm for legal assimilation, there were more considerations in the mind of Japanese officials in Tokyo as they saw the introduction of Japanese family law related to the fundamental structure of colonial rule in Taiwan.

As mentioned earlier, the GGT made several attempts to introduce Japanese family law and household registration law to Taiwan. Like what happened previously when the GGT tried to enact a special Taiwanese family law and household registration law, the central government hesitated to approve fundamental family reform in colonies. The main reason again lay in the crucial role of family law in demarcation of racial boundaries. For example, Wata Kazutsugu (和田一次), the legal director of the GGT once told the reporter in 1925 about what he learned from negotiating with the central government on the enactment of Taiwan House Registration Act. In short, it was complicated. According to Wata, the problem was not limited to inter-racial marriage itself but rather the

112. Nagamene graduated from Meiji Law School in 1890 and then joined the Taipei Bar in 1901. See Kobata Komazō (小畑駒三), *Hontōjin Hōsō Ryaku Tsu* (本島法曹略傳) [*Short Biographies of the Jurists in Taiwan*], 2 HŌIN GEPPŌ (法院月報) [MONTHLY LAW REPORT], *supra* note 66, at 178.

113. Nagamene Shigeru (長嶺茂), *Ichihō o Susume te Jinjihō o* (一步を進めて人事法を) [*Advancing Personal Law*], 17 TAIHŌ GEPPŌ (臺法月報) [MONTHLY LAW REPORT], *supra* note 101, at 70, 75.

114. Iwazaki Ketsuji (岩崎潔治), *Taiwan Tōchi to Inin Rippō* (台灣統治と委任立法) [*The Governance of Taiwan and the Delegation of Legislation*], 26 TAIYŌ (太陽) [THE SUN] 143, 144, 150 (1920).

very fundamental question about colonial governance in Taiwan. That was, again, was Taiwan a colony or a territory of Japan? Should the boundary between Taiwanese and Japanese be maintained? Related to this issue, there were also specific questions, such as: what happened to a Japanese man's voting right or obligation of military service when he entered into a Taiwanese household, and vice versa?¹¹⁵ In addition to whether Taiwanese should have the right for political participation and enjoy equality in education, military service was arguably the most important issue that would come into question. Military service in Japan was in principle reserved to the adult males who were registered as Japanese under the Japanese Household Registration Act.¹¹⁶ Whether Taiwanese had become genuine and loyal Japanese subjects and were allowed to serve in the military was an extremely sensitive political issue. Moreover, the Japanese military authorities also concerned that some Japanese men might seek to escape obligation of military service by entering into Taiwanese household through adoption or marriage. The enactment the Common Law (共通法), a legislation designed to solve conflicts of laws among the several legal zones within the Japanese empire, such as mainland Japan, Korea, Taiwan, Kantoushu, and Karafuto (Sakhalin), was illuminating. The Common Law in 1918 stipulated a principle that a Japanese citizen, except for men who had military status or obligation of military service, could join a household in a different legal zone.¹¹⁷ Later on, the enactment of Taiwan Household Registration in 1933 marked the final step for legalization of inter-racial marriage between Taiwan and Japanese. However, either the Common Law or legalization of inter-racial marriage did not mean that legal boundary between Taiwanese and Japanese was erased. On the contrary, they should be better understood as expedient legal measures which aimed at solving the problems on inter-racial adoption and marriage without altering the fundamental legal distinction between Taiwanese and Japanese.¹¹⁸

During 1931 and 1932, the introduction of Japanese family law and the Household Registration Act (with modification) to Taiwanese seemed to be coming when both the Cabinet Legislation Bureau and the Ministry of Justice agreed on the GGT's proposal. However, the plan was

115. Anonymous, *Kosekihou no Zisshi ha Rokusan Mondainimade Eikyou* (戸籍法の實施は六三問題にまで影響) [*The Impact of the Household Registration Act Could Reach the Question of Law No. 63*], TAIWAN NICHINICHI SHINPOU (臺灣日日新報) [TAIWAN NEWS DAILY], Apr. 6, 1925, at 2.

116. See OGUMA, *supra* note 33, at 208-09.

117. However, it was not until 1933 when the Taiwan Household Act took into effect, inter-racial adoption and marriage between Japanese and Taiwanese in Taiwan was legally possible. Tseng, *supra* note 70, at 80-81.

118. *Id.* at 80-98.

suspended again because the Japanese military authorities intervened and argued that the extension of Japanese family law and Household Registration Act to Taiwan would affect the draft for military service.¹¹⁹

As long as such boundaries between the colonizer and colonized were to be kept, a unified family law was not desirable. It was not until the doomsday of Japanese rule did the central government decide to introduce Japanese Family Law and House Registration Act to Taiwan. The introduction of these two legislations was part of the plan of “enhancing the treatment” of Korean and Taiwanese when wartime mobilization reached its climax. Other measurements included (limited) franchise for Taiwanese and Korean men, abolition of the notorious Bandit Punishment Ordinance in Taiwan, and, interestingly enough, implementation of mandatory military conscription in Taiwan. Once again, family law and military service were linked together and played essential roles in deciding whether Taiwanese were merely colonial subject or genuine Japanese.¹²⁰ However, such a decision was never put into practice before the collapse of Japanese Empire after WWII.¹²¹

V. CONCLUSION

This article analyzes a cluster of ideas—family law, custom, and politics in the setting of Japan-colonized Taiwan. It might be tempting to consider Taiwanese family law or related customs to be untouched, irrelevant, or at least marginal, in the Japanese rule. In response, this article shows that family law and politic were intertwined with each other in colonial Taiwan in many ways.

First of all, the “non-intervention” or “laissez-faire” family policy in colonial Taiwan, similar to its counterpart in the contemporary US, was an illusion. An area of family law or, in other words, the boundary between family law and other areas of laws, was an artificial creation--a creation involving legal ideas which had been traveling around the world. If family law in the US gradually emerged as a distinctive legal topic since the late 19th century,¹²² in Taiwan, it was the Japanese colonizers who brought

119. *Id.*; Banno Kishirō (伴野喜四郎), *Kyōkonhō no seitei to Tozan saretatu Konpon Mondai nitsuite* (共婚法の制定と取残されたる根本問題に就て) [*The Residual Problems regarding the Enactment of the Common Marriage Law*], 157 TAIWAN JIHŌ (臺灣時報) [TAIWAN TIMES] 1-6 (Dec. 1932).

120. WANG TAY-SHENG (王泰升), TAIWAN FALU XIANDAIJHUA LICHENG: CONG NEIDIYANCHANG DAO ZIZHUJISHOU (臺灣法律現代化歷程—從「內地延長」到「自主繼受」) [THE PROCESS OF LEGAL MODERNIZATION IN TAIWAN: FROM “THE EXTENSION OF MAINLAND” TO “INDEPENDENT RECEPTION”] 44-46 (2015).

121. ENDO, *supra* note 69, at 338-39.

122. Halley, *supra* note 3. *What is Family Law?: A Genealogy Part I.*

newly-adopted legal concepts to Taiwan and created a distinctive area of family law, while made it subject to customary law. While family affairs remained in the domain of customary law for the entire colonial period, Japanese colonialism did more than “respecting” customs. Okamatsu’s old custom project not only used modern European concepts to reconstruct customs but also served as a showcase of Japanese colonialism to westerners. Like widow immolation (*sati*) in British India, foot-binding provided the most clinching example in the rhetoric of reforming Taiwanese customs and colonist “civilizing mission.”¹²³ The “commodification” of the family relation, such as marriage and adoption, was singled out to demonstrate the greedy nature of Taiwanese and the degrading of Chinese customs. Also, colonial jurists also played an important role in transforming Taiwanese family customs into something similar or even, in Aneha’s words, only “nominally different” to Japanese family law.

Also, the reason why Taiwan family matters were left under the custom regime could not be simply explained as the result of “obscurantist” colonial policy. There were much more political interest and considerations involved in deciding choice between Taiwanese family custom or Japanese family law in law-making. Family law in the Japanese empire played an essential role in managing the boundary between colonies and the motherland, as well as between the colonized and the colonizers. While colonial policy changed into the “full-scale assimilation,” the area of family law became the last bastion for the shrinking special legal zone as well as the old custom project. Meanwhile, for the assimilationists, family law was deemed a crucial step toward integration. On the even more fundamental level, laws on household registration literally managed the racial boundaries between the Taiwanese and the Japanese within the Japanese empire. Interracial marriage between Taiwanese-Japanese marriage and Japanese family law was considered “the most suitable means” to achieve the integration. The reform of family law was also related to the extremely political issue of military service. Given the conflicting interests of on the one hand assimilating Taiwanese into Japanese, and on the other hand maintaining the superiority of Japanese, the negotiation between the central and colonial governments

123. Like *sati*, the practice of foot-binding was limited, mainly among well-to-do Holo-Taiwanese families, in which the daughters and wives needed not to do the farm work. Nevertheless, the GTT often joined by the mobilized local Taiwanese gentries and medical doctors, launched out series of campaigns aiming at abolishing foot-binding, transform it into a sign of an inherently backward nature of the entire culture of Taiwan. See KŌ IKUJO (洪郁如), KINDAIDAI TAIWAN JOSEI SHI: NIHON NO SHOKUMIN TŌCHI TO “SHINJOSEI” NO TANJŌ (近代台湾女性史—日本の殖民統治と「新女性」の誕生) [WOMEN’S HISTORY IN MODERN TAIWAN: THE JAPANESE COLONIALISM AND THE BIRTH OF THE “NEW WOMEN”] 23-72 (2001).

on the family law reform, either in the way of codifying Taiwanese family customs or introducing Japanese family law, repeatedly reached to deadlock.

Last but not least, family law intertwined with politics not only substantially but also rhetorically. The ambiguity of the Japanese colonialism being “oriental colonialism” made it possible for Japanese to maneuver the rhetoric on similarity or difference between Taiwan and Japan in the so-called “nation-empire.” The rhetorical modes for “similar-assimilation vs. different-special rule” reappeared in debates on legal reforms ranging from colonial policies and legal structures to whether Taiwanese family customs or Japanese family law should apply to Taiwanese.

Overall, the exceptional location of family law in the legal system is commonly considered because family matters were, compared to issues such as land ownership, of secondary importance in colonial governance. However, this is a limited understanding of a much more profound and various relations between family law and politics. The reason why Japanese colonial rule left Taiwanese family matters in the customary law regime was not that it did not matter. Quite the contrary, the fact that family law was a long-standing question for the entire colonial time suggested that family law was too relevant to change.

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東方殖民主義下的家庭法與政治： 以日治臺灣的殖民統治與 論述為中心

陳韻如

摘要

在整個日治臺灣五十年的期間，日本民法典中的家庭法（即，民法中的親屬與繼承兩編），並未施行於臺灣。既有對於臺灣家庭相關法律或習俗的研究，往往將此現象亦或歸諸於殖民統治政權的愚民政策，抑或認為此因家庭相關事務，乃為殖民統治中次要的、非核心的領域。本文討論家庭相關法律、習慣與政策之間的關係，主張日治家庭法與政治事實上以多種方式相互交織。本文所分析的論述，包括殖民地日本官員、學者、法官，對於日本家庭法應否實施於臺灣，乃至整體殖民統治法律架構（「同化—特別」）的論辯。本文發現，家庭相關法律不只是被認為同化的重要工具，更用來在法律上定義孰為臺灣人，孰為日本人。1920年代以降，日本民法漸次施行到臺灣。家庭法一方面是主張殖民地特殊立法者的最後堡壘。另一方面，家庭法也被同化論者認為種族與法律同化的關鍵步驟。家庭法與政治的交織，不只表現在政策實質內容，也表現在各種論述的修辭之中。由於日本身為所謂「東方殖民者」以及作為所謂「國民帝國」的曖昧特質，使得日本殖民統治時，得以交錯主張與被殖民者的「相同」與「不同」點，為其主張與政策辯護。有趣的是，在修辭模式中，對於事實問題（例如「遠—近」或「類似—

不同—」) 與規範決定(「同化—特別統治」或(採取)「法律—習慣」)有修辭上的相互連接關係。總結來說,臺灣家庭法之所以在整個日治時期,皆依照臺灣習慣而非日本法律加以規制,並非因為其屬於邊緣。相反地,家庭法因為與殖民政策太過密切,而難以進行根本性的改變。

關鍵詞：家庭法、習慣、政治、殖民主義、國民帝國、臺灣、日本戶籍、論述模式