

The Modernization of Civil Justice in Colonial Taiwan, 1895–1945

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I. INTRODUCTION

In 1895, Japan acquired Taiwan as a result of Japan's overwhelming victory in the Sino-Japanese War (1894–95) fought over the interests in Korea. In 1945, however, Japan was defeated in World War II and transferred control over Taiwan to the Allied Powers represented by China's army. Japan finally abandoned sovereignty of Taiwan in accordance with the San Francisco treaty in 1952. The fifty-year Japanese rule in Taiwan is ordinarily named an “alien rule” on the grounds that the race and culture of the ruled – that is, ethnic Chinese immigrants and indigenous peoples belonging to the Austronesian language family – were different from those of the ruling Japanese. This period of Japanese rule is also known as “colonial rule” because the Japanese rulers politically and economically exploited native peoples for the interests of the mother country. Nevertheless, the essence of the rule “under a strange legal system” has not received the attention one might expect. This strangeness meant that a legal system modeled on modern Western law, which the ruled had never known before, was brought and implemented by

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newly arrived Japanese rulers. Taiwan was thus exposed to the so-called “reception of Western law”,¹ which is now considered the modernization of law. Taking time and space into consideration, this article will merely focus on the part of civil justice in Taiwan’s legal modernization under Japanese rule.

In fact, a modern-style legal system was to a certain degree strange for the Japanese colonialists as well. Japan had largely completed her modern codes that were modeled on Continental European law of the late nineteenth century when she began to govern Taiwan in 1895.² Promulgation of Western-style codes played an important role in nation-building during the Meiji era (1868–1912), as the codes acted as a tool of unification of the nation and to eliminate Western extra-territoriality.³ The individualist, liberal elements in these Western-style codes were actually unfamiliar to the majority of Japanese then.⁴ On the other hand, the Japanese government did not necessarily apply these modern codes to Taiwan, a colony in the prewar Japanese Empire. Hence, this article will first explore how and why Japan’s modern, Western-style laws were adopted in the colonial legislation on civil and commercial law and civil procedural law. Next, I will present the development of jurisprudence related to civil matters and the legal profession indispensable for implementing modern civil law. It is also important to further examine the extent to which the people in general have received these imported institutions. Finally, I will make a conclusive observation on the transplantation of modern civil justice in colonial Taiwan.

There were different ethnic groups in Taiwan under Japanese colonial rule. The ethnic Chinese who had migrated to Taiwan from the southeastern coast of China before 1895 had been the dominant race in Taiwan before the advent of the Japanese authorities. According to a Japanese survey conducted in 1896, the population of “islanders” (*Hontōjin*) had reached 2.5 million,⁵ constituting the supra-majority (over 90 percent) in Taiwan’s population. “Islanders” as a legal term usually included Hokkien (or Southern Fukienese) and Hakka, both of which were ethnic Chinese in Taiwan, and the plains aborigines who belonged to indigenous peoples but had been assimilated by the ethnic

1 On the reception of Western law, see generally T. SAWAKI, *Hō no keiju* [The Reception of Law], in: Itō (ed.), *Gendai-hō* 14: *Gaikoku-hō to Nihon-hō* [Foreign Law and Japanese Law] (Tokyo 1966) 115–158.

2 See D. F. HENDERSON, Law and Political Modernization in Japan, in: Ward (ed.), *Political Development in Modern Japan* (Princeton, NJ 1968) 419–436.

3 See HENDERSON, *supra* note 2, 389–391, 433; see also L. M. FRIEDMAN, *The Legal System: A Social Science Perspective* (New York 1975) 221–222.

4 The political leaders of Japan, who were influenced by legal thoughts of ancient China, did not sincerely receive the individualism and liberalism from which modern Western law was derived. See T. WANG, *Legal Reform in Taiwan under Japanese Colonial Rule, 1895–1945: The Reception of Western Law* (Seattle 2000) 27–34.

5 See S. CH’EN, *T’ai-wan te jen-k’ou pien-ch’ien yü she-hui pien-ch’ien* [Population and Social Change in Taiwan] (Taipei 1979) 95–98.

Chinese in Taiwan.⁶ The term “Taiwanese” was later used by “Islanders” to identify themselves during the period of Japanese rule,⁷ and therefore this article will employ “Taiwanese” to identify them below. In addition, mountain aborigines who preserved their culture of indigenous peoples made up about three per cent of the then total population of Taiwan. The number of incoming metropolitan Japanese (*Naichijin*, literally the “people in homeland”) was very small among the population of Taiwan (reaching only a total of six per cent in 1942), but they were the master ethnic group in Taiwan’s society and brought with them their legal codes and experiences from Japan as mentioned below. However, one of the important considerations in shaping colonial law was whether the Taiwanese, a supra-majority in the colony, could receive it, or at least tolerate it.

II. RECEPTION OF WESTERN LAW IN THE COLONIAL LEGISLATION

1. Western-Style Customary Civil Law (1895–1922)

Modern law had been retained by the Japanese authorities in Taiwan for the purpose of colonialism. When the Japanese occupied Taiwan, they realized that, given the political, cultural, and other differences that existed between Taiwan and Japan proper, it would not be appropriate to establish identical legal institutions at a stroke.⁸ Thus, following the precedent of contemporary Western colonial powers,⁹ the Meiji government of Japan shaped a special legal system for its rule in colonial Taiwan. Generally, where areas of law significantly concerned the authority of the ruling colonial power, such as the structure of state organs, the judiciary, and the system of criminal sanction, they predominantly accorded with the “mother country’s” law. In contrast, most of those areas of law that concerned the daily life of ordinary people, such as commercial transactions and matters relating to the family and succession, followed native legal practice to avoid the population desperately resisting their new rulers.

Accordingly, the modernized Civil and Commercial Codes of pre-war Japan did not directly apply to civil and commercial matters of Taiwanese during the former period of Japanese rule (1895–1922). In the 1870s, the Japanese had embarked on the task of enacting civil and commercial codes based on modern Continental, especially French, law.

6 See S. ANEHA, *Hontō-jin nomi ni kan suru shinzo-hō oyobi sōzoku-hō no taiyō* [Summary on the Family Law and Succession Law for Matters Involving Only Taiwanese] (Taihoku 1938) 10–12.

7 See W. TU, Cultural Identity and Politics of Recognition in Contemporary Taiwan, in: China Quarterly 148 (1996) 1124. Mountain aborigines were excluded from the scope of “Taiwanese” during the Japanese period.

8 See E. CHEN, The Attempt to Integrate the Empire: Legal Perspective, in: Myers / Peattie (eds.), *The Japanese Colonial Empire, 1895–1945* (Princeton, NJ 1984) 247.

9 See A. GIRAUT, *Shokumin oyobi shokumin hōsei genron* [On the Principles of Colonization and Colonial Legal Institutions] (Taihoku 1918) 521, 524, 545.

However, the Civil Code of 1898, the first one among modern Japanese civil codes, had not yet been completed in 1895, the year of Japan's annexation of Taiwan to Japan. For the purpose of convenience, the Japanese military administration in Taiwan stipulated in 1895 that civil lawsuits of the Taiwanese inhabitants, almost all of whom were Taiwanese, should be adjudicated in accordance with local custom and legal theory. Such a measure had virtually been adopted by the 1898 Civil, Commercial and Criminal Law, an ordinance having the same effectiveness as Japan's Diet-enacted statute (*ritsuri*), issued by the Governor-General of Taiwan.¹⁰ The 1898 Civil, Commercial and Criminal Law provided that the civil and commercial matters involving Japanese (or foreigners except Chinese citizens) were to conform to the Civil Code, but those involving only Taiwanese (or Chinese citizens) were to be decided in accordance with Taiwan's old customs unless there were laws that provided otherwise.¹¹ At the same time, an enforcement regulation for the 1898 Civil, Commercial and Criminal Law stipulated that those involving property rights in land were governed by Taiwan's old customs rather than the Civil Code, even if one of the parties were Japanese.¹² After a decade, the 1908 Taiwan Civil Law promulgated by the Governor-General of Taiwan continued to repeat such provisions and listed the special civil laws that were effective in Taiwan.¹³ Consequently, with few exceptions, a modern Japanese civil code was not applicable for Taiwanese (except when one of the parties involved was Japanese) or for those resident Japanese who had legal transactions for land in Taiwan until the early 1920s (this will be discussed later).

Nevertheless, it seems a mistake to consider the law relating to civil and commercial matters of Taiwanese unchanged by the newly arrived Japanese authorities during the 1895–1922 period. In fact, the positive law in colonial Taiwan was certainly a part of the whole Japanese legal system, which had been modeled on modern Continental law. The concept of law introduced by Japanese colonialists was thus entirely different from that of Taiwan's former ruler, the Qing Dynasty with its Chinese legal traditions.

If, working backward, we use current concepts to observe past facts and make a detailed inquiry as to whether traditional/imperial China indeed produced norms that today would be classed as matters within the scope of civil and commercial law, then we would conclude that she did. These consisted of official regulations, local customs, and reasons based on Confucianism. The most important source of norms for those social relations

10 Under Statute No. 63/1896, the Governor-General of Taiwan was delegated to issue *ritsurei* by the Imperial Diet. See generally GAIMU-SHŌ JÖYAKU-KYOKU HÖKI-KA (ed.), *Taiwan no ninin rippō seido* (“*Gaichi hôsei shi*” *daisan-bu no ichi*) [The Delegated Legislation System of Taiwan, “Records for Outer-Area Legal Institutions,” Vol. 3-1] (Tokyo 1959) 1–83.

11 *Ritsurei* No. 8/1898, see GAIMU-SHŌ JÖYAKU-KYOKU HÖKI-KA (ed.), *Ritsurei Sōran* (“*Gaichi hôsei shi*” *dai-san-bu no ni*) [The Overview on Ritsurei, “Records for Outer-Area Legal Institutions,” Vol. 3-2] (Tokyo 1960) 146.

12 *Ritsurei* No. 9/1898, see GAIMU-SHŌ JÖYAKU-KYOKU HÖKI-KA, *supra* note 11, 146.

13 *Ritsurei* No. 11/1908, see GAIMU-SHŌ JÖYAKU-KYOKU HÖKI-KA, *supra* note 11, 149–150.

that today are categorized as civil and commercial matters was in fact local customs and reasons. There were only few official regulations that dealt with household, marriage, farm, land, money, and debts, by which the emperor ordered his officials to adopt specific measures and punish those parties who should be blamed. Nevertheless, although an official was usually expected to follow these official regulations or local customs in dealing with ordinary cases, the emperor and an official were not absolutely required to decide a case in accordance with them. In other words, the norms in the official regulations or local customs in traditional China were not applied to all of the cases that occurred in the future; a decision that had been made to respond to the facts in a given case was not necessarily followed in the same kind of case in the future.¹⁴ Those norms in imperial China were therefore not rules of general application, which is the essence in the Western concept of law.¹⁵ Meanwhile, a citizen had no legal right (according to the Western concept) to require the official to obey the official regulations, local customs, or reasons in given cases in traditional China, including Taiwan under Qing rule.

However, the Japanese brought the concept of law in modern Continental legal systems to Taiwan. Under the colonial law, civil and commercial matters involving only Taiwanese were in principle to conform to “old customs,” so the Japanese officials had to decide Taiwanese cases by applying “customary law.” For this purpose, the judicial or administrative officials in colonial Taiwan had to find the norms for specific civil and commercial matters in Taiwanese customs, originally composed of Qing dynasty official regulations and local customs in Taiwan, and then apply them to deal with the same kind of cases in the future. More importantly, the Taiwanese enjoyed various legal rights in accordance with the customary law on civil and commercial matters. Under Western-style civil law, a citizen, as a bearer of rights, plays an active role in the enforcement of obligations.¹⁶ In contrast, under Chinese legal traditions, the enforcement of obligations always depended on the voluntary performance of the obligor and the discretion of an official or a community or kin leader. It is somewhat ironic for a Taiwanese obligee to benefit from a modern legal system due to his or her being conquered by Japanese colonialists.

The Government-General of Taiwan (*Taiwan Sōtokufu*) established an institute to help those judicial and administrative officials who came from metropolitan Japan to find the customary “rules” in Taiwanese society. The Commission for the Investigation of Old Laws and Customs in Taiwan (hereinafter the Survey Commission), led by Okamoto Santarō, a Japanese legal scholar, was formally organized in 1901. The task of

14 See also J. BOURGON, Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing, in: Late Imperial China 23 (2002) 50–90.

15 See generally I. TERADA, ‘*Fei-kuei-tse fa’ chih kai-nien: I ch’ing-tai chung-kuo fa wei su-ts’ai* [The Concept of “Law” without “Rule”: Based on the Materials of the Chinese Law of Qing Dynasty], in: Fa-chih-shih yen-chiu [Studies on Legal Institutions] 12 (2007) 81–124 (translated by W. MIN).

16 See J.O. HALEY, Authority without Power: Law and the Japanese Paradox (New York 1991) 20–21.

this institute was to interpret the legal relations in old customs in Taiwan through the Western concept of legal rights derived from Western Roman law so that the “old customs” could be incorporated into the whole Westernized legal system of Japan. But only those customary rules recognized by courts and other competent authorities constituted the customary law. What the Survey Commission hoped to “discover” was merely the customary rules, the existence of which depended on habit and community consensus. In a modern state the customary rules have to be recognized through a specific institutional process and then become law, which acquires its legitimacy from political authority. Under the colonial legal system in Taiwan, this institutional process was undertaken by courts and, in certain circumstances, by executive authorities of the Government-General of Taiwan.¹⁷

The Taiwanese customary law was certainly a product of Westernization. As a Japanese judge in the colony said, a judge should not merely discover local customs but also take into account “improvement” when applying Taiwanese customs to judicial decisions.¹⁸ In law, the applied customs might not be contrary to the public order or good morals. Japanese judges in Taiwan were inevitably influenced by Japan’s Westernized law in deciding whether or not a Taiwanese custom should be recognized by the court, an institution representing the state law. Moreover, by the term “legal theory,” certain provisions in Japanese modern civil law were also incorporated into Taiwanese customary law. Since Japanese modern civil law was virtually received from Continental Europe, this development consequently made a contribution to the Westernization of Taiwanese customary law.¹⁹

Furthermore, when a statute promulgated by the colonial government specially regulated a certain civil and commercial matter, the provisions in this statute would supersede the customary law recognized by the courts. For instance, under Taiwanese customary law, the transfer of certain rights concerning land without any official registration was considered valid by the courts, but after the 1905 Land Registration Law was put into force by the colonial government, such a transfer became invalid unless it was registered in the office.²⁰ The 1905 Land Registration Law also introduced the mechanism of the pledge and mortgage in Japan’s Continental-style civil code to Taiwan, although the terms for rights, *tien* pledge (典) and *t’ai*, were left intact.²¹ Meanwhile, those who were owners (*yeh-chu*) of lands in Taiwan’s plains area became clear after the implementation of the 1898 Land Survey Regulation, and then only one owner

17 See WANG, *supra* note 4, 142–143.

18 S. ANEHA, *Chi-ssu-kung-yeh yü T’ai-wan t’e-shu fa-lü chih yen-chiu* [Studies on Ancestor Worship and the Special Law in Taiwan] (Taipei 1991) 380; translated from the Japanese version 1934).

19 See WANG, *supra* note 4, 143.

20 *Ritsurei* No. 3/1905, Art. 1, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 163.

21 *Ritsurei* No. 3/1905, Art. 2, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 163; see also WANG, *supra* note 4, 148–149.

was legally allowed in a piece of land under a colonial statute in 1904.²² Accompanied with eliminating the phenomenon of “one land/two owners” in old Taiwanese customs, the modern Continental concept of ownership had already been carried out in Taiwan’s legal system.²³ Evidently, Japan was employing “old bottles” (*tien* pledge, *t’ai*, and *yeh-chu*) to accommodate “new wine” (similar rights in modern civil law) in certain civil matters. In conclusion, the modernization of property law had to a large degree made progress in Taiwan during the former period of Japanese rule, though the modern property law of metropolitan Japan was not completely enforced in the colony.

It is important to note, however, that the case of mountain aborigines under Japanese colonial rule was far different from that of Taiwanese. The mountain aborigines were not conquered by the Japanese colonialists until 1915, and they were not regarded as “human beings” in the colonial positive law for a long time due to their “uncivilized” culture. As a result, the civil disputes of mountain aborigines were generally not decided by the court according to a statute, but were instead settled by the police specialized in dealing with the affairs of mountain aborigines, police who often referred to but did not abide by the customs of the mountain aborigines. This situation continued until the end of colonial rule in 1945, even though Taiwanese civil justice experienced a big change after 1923, as will be discussed below. Both the Taiwanese customary law shaped by Western legal concepts and Japanese Continental-style civil laws thus did not govern the legal matters of mountain aborigines in colonial days, with the exception that only a very small number of them had access to the civil court in colonial Taiwan.²⁴ Unlike the Taiwanese, mountain aborigines were almost unexposed to modern civil law under Japanese colonial rule.

2. Modern Civil and Commercial Code and Customary Family and Succession Law (1923–1945)

During the latter period of Japanese rule (1923–1945), more modern Western-style legislation was introduced into the positive law in colonial Taiwan. In the late 1910s, the Japanese Empire faced the rising influence of the idea of self-determination among colonized ethnic groups around the world. In order to eliminate the ethnic self-identification of its colonized peoples, the Empire decided to strengthen its promotion of assimilationism. It set about implementing, as much as it could, a common system throughout the home and colonial areas. Adopting the “metropolitan law extension prin-

22 *Ritsurei* No. 14/1898 and *Ritsurei* No. 6/1904, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 102, 105–106.

23 See WANG, *supra* note 4, 146–147.

24 See T. WANG, *Jih-chih shih-ch’i kao-shan-ts’u yuan-chu min-ts’u te hsien-dai fa-chih chu-ti- yen: I kuan-yu o-hsai te chih-tsai wei chung-hsin* [Mountain Indigenous Peoples’ Initial Encounter with Modern Law during the Period of Japanese Administration: On the Criminal Sanctions], in: T’ai-ta fa-hsueh lun ts’ung [National Taiwan University Law Journal] 40 (2011) 24, 39, 48, 50–51.

ciple,” the Empire extended, as much as possible, the applicability of the law of Japan proper to colonial areas. Consequently, from January 1 of 1923, the greater part of Japanese law was directly implemented in Taiwan, including the Civil Code except the books on Family and Succession (namely, those concerning family and succession law), the Commercial Code, and so on.²⁵ Modern Japanese civil and commercial law had finally been applied to the Taiwanese and all of the resident Japanese in Taiwan, though Taiwanese customary law would still apply to family and succession matters involving only Taiwanese. This “metropolitan law extension” was in reality equivalent to the extension of modern Western law.

Both names and substantive contents of rights in property law were therefore transformed into the rights under Japan’s modern civil law. According to Article 6 of the 1922 Exceptions of Applied Statutes,²⁶ preexisting Taiwanese customary civil law rights were to be treated as if they were comparable in the Japanese Civil Code after January 1, 1923, as follows: (1) the *yeh-chu* right was to be regarded as ownership (*shoyūken*); (2) the *ti-chi* right and the *po-keng* right, and the *yung-tien* right to buildings, bamboo, and trees with a duration of not less than twenty years, were to be treated as superficies (*chijōken*); (3) the *po-keng* right and *yung-tien* right to cultivate fields or to rear horses and cattle on another’s land with a duration of not less than twenty years were to be treated as emphyteusis (*eikosakuken*); (4) the *tien* pledge and *ch’i-keng-t’ai* right (which was actually one of the *tien* pledge rights because of the creditor’s possession of the security) were to be treated as pledges (*shichiken*); (5) the *t’ai* right (except *ch’i-keng-t’ai* right) were to be treated as mortgage (*teitōken*); (6) the *po-keng* and *yung-tien* rights that did not meet requirements in (2) and (3) above as well as the *tien* lease (佃) right were to be treated as leases (*chinshakuken*). Meanwhile, from then on, the requirement of official registration in Taiwan had the same effect in private law as it did in metropolitan Japan: it did not influence the relations between parties, but it did affect the relations with third parties.²⁷

Additionally, the provisions in the book on Obligations in the Japanese Civil Code, which were not quite different from related norms in Taiwanese old customs,²⁸ were also taken into effect in the civil matters relating to Taiwanese. In sum, under the policy of extension of Japanese law in the early 1920s, Japan was employing “new bottles” (the terminology of Japanese civil law, not Taiwanese customs) to accommodate “new wine” (rights in modernized Japanese civil law) in the field of property law.

25 *Ritsurei* No. 6/1922; Imperial Ordinance No. 406/1922, Art. 5 (relating to family and succession matters) and Art. 15 (relating to ancestor worship matters) of Imperial Ordinance No. 407/1922, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA (ed.), *Nihon tōchika gojūnen no Taiwan* (“*Gaichi hôsei shi*” dai-san-bu no san) [Taiwan under Fifty-Year Japanese Rule, “Records for Outer-Area Legal Institutions,” Vol. 3-3] (Tokyo 1964) 75, 80–83.

26 Namely, Imperial Ordinance No. 407/1922.

27 See T. TANINO, *Taiwan shin minji-hō* [Taiwan’s New Civil Law] (Taihoku 1923) 129–142.

28 See RINJI TAIWAN KYŪKAN CHŌSA-KAI (ed.), *Taiwan shihō* [Taiwanese Private Law] (Taihoku 1911) Vol. 3, Part I 281–517; Vol. 3, Part II 1–74.

More modern capitalistic commercial laws became applicable for the Taiwanese as well. Under Taiwanese customary law, *ho-ku* (literally, “combined shares”) was a contract whereby several peoples agreed to pool contributions for managing an enterprise. This enterprise, unlike a company (*kaisha*) in modern Japanese commercial law, had no juristic personality in law, and was not an equivalent of a partnership (*kumiai*) in the Japanese Civil Code. During the former period of Japanese rule, Taiwanese were not allowed to incorporate a modern company according to Japanese commercial law unless they invited at least one Japanese to be a shareholder so that a Japanese had already been involved in such a commercial matter. As a result, a supra-majority of Taiwanese used *ho-ku* to manage enterprises, and only a few Taiwanese had access to a modern company, an important mechanism in capitalistic law. After Japanese civil and commercial law was applied to the Taiwanese, beginning from January 1, 1923, a Taiwanese had in law the same right to incorporate a company as a resident Japanese had had for two decades. However, a *ho-ku* was directly governed by the provisions of partnership in Japanese civil and commercial law, rather than Taiwanese customary law.²⁹ At the cost of losing the *ho-ku* enterprise in law, the Taiwanese made strides in the modernization of commercial law during the latter period of Japanese rule.

On the other hand, the family and succession matters involving only Taiwanese were to be decided in accordance with Taiwan’s customs, rather than the Japanese Civil Code. For extinguishing the differences between Taiwanese and resident Japanese to reach the ultimate goal of assimilating the Taiwanese, the Government-General of Taiwan suggested, in 1929–1930, that the books on Family and Succession in the Japanese Civil Code apply to the Taiwanese, with some special provisions. Nevertheless, the Ministry of Colonial Affairs in Tokyo did not adopt such a proposal. The colonial government discussed similar proposals again in the late 1930s, to promote the Japanization movement, but to no effect.³⁰ The Japanese government avoided a radical change on the family and succession law of the colonized unless this change was needed to cope with an emergency. In March of 1945, the Japanese government declared in the Imperial Diet that Japanese family and succession law would apply to Taiwanese, with some exceptions, to “improve the treatment of the Taiwanese.” But Japan was defeated in World War II in August, and this plan was never realized.³¹ Since the modernity in pre-war Japanese family and succession law was quite limited, this result did not affect the modernization of Taiwan’s family and succession law too much.

29 For the details, see WANG, *supra* note 4, 156–158.

30 See ANEHA, *supra* note 18, 136

31 See H. MUKŌYAMA, *Nihon tōchi-ka ni okeru Taiwan minzoku undō shi* [A History of the National Movement in Taiwan under Japanese Rule] (Tokyo 1987) 1264.

3. Modern Civil Litigation vs. Traditional Administrative Mediation (1896–1945)

In 1896, the modern, Continental-style civil court appeared in Taiwan for the first time. Before the Japanese rule, Taiwan's judicial affairs were handled by the chief of the local government under Chinese legal tradition. In late 1895, the Government-General of the Taiwan Court (*Taiwan Sōtokufu Hōin*, hereinafter “the GGT Court”) established under the military administration was actually a military tribunal. Not until May of 1896 was a modern court, still named the GGT Court, created under civil administration by an ordinance issued by the Governor-General of Taiwan.³² Operating from July 15, 1896, this colonial court followed the model of the prewar Japanese court and thus received the court system of modern Continental law. From then on, civil disputes were not adjudicated by the chief of local government or military officials, but by legal professionals in colonial courts.

Modern law for civil procedures was taken into force in the GGT Court from the beginning of Japanese rule. No statutory provisions on civil procedure were promulgated by the colonial government until 1899; however, by referring to the civil decisions of the colonial court, the GGT Court in practice followed Japanese law for civil procedure during the 1895–1899 period.³³ In 1899, an ordinance issued by the Governor-General provided that Taiwanese civil lawsuits were to conform to the 1890 Japanese Code of Civil Procedure, modeled on modern German law.³⁴ However, not long after the code was enforced in Taiwan, the colonial government simplified this Westernized civil procedure to expedite civil court proceedings. Under the 1905 Special Law for Civil Litigation, the authority of judges was strengthened and the rights of litigants relatively weakened.³⁵ The autonomy of a citizen/litigant in civil lawsuits seemed to be decreased. The effectiveness of this special law was confirmed by the 1908 Taiwan Civil Law.³⁶

Like the civil and commercial law, the civil procedural law in Taiwan was further Westernized during the latter period of Japanese rule. Accompanied by the Japanese Civil Code, the 1890 Japanese Code of Civil Procedure was extended to colonial Taiwan and became effective there in 1 January 1923.³⁷ This legal reform further repealed the 1905

32 *Ritsurei* No. 1/1896, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 130–131. The 1890 Court Organization Law of Japan was never applied to Taiwan under Japanese rule, but it is the model of the ordinance relating to the colonial court in Taiwan.

33 The Taiwan Colonial Court Records Archives (“TCCRA”), compiled by the author, show the actual operation of colonial courts in those days. The digital database for the TCCRA is managed by the National Taiwan University Library now. For the details of the TCCRA, see T. WANG, *K'ua-chieh te jih-chih fa-yuan tang-an yen-chiu* [Interdisciplinary Studies on the Taiwan Colonial Court Records Archives] (Taipei 2009) 1–393.

34 *Ritsurei* No. 8/1899, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 148.

35 *Ritsurei* No. 8/1905, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 159–160.

36 *Ritsurei* No. 11/1908, Art. 6, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 150.

37 Imperial Ordinance No. 406/1922, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 25, 80.

Special Law for Civil Litigation and, unlike criminal procedures,³⁸ was not duplicated in colonial law after 1923 because the civil procedure was less related to the public order in the colony than the criminal procedure. However, the administrative mediation for civil disputes discussed below, a special institution in colonial Taiwan, was maintained. From the perspective of Japanese colonialists, the efficiency in resolution for civil disputes was more important than the promotion of Western law in the colonial rule. Later on, the 1926 Japanese Code of Civil Procedure was applied to Taiwan and became effective on October 1, 1929, the same day as the Code took effect in Metropolitan Japan. Finally, the 1942 Wartime Court Organization Law and the 1943 Wartime Special Civil Law for Civil Procedure, which simplified the civil procedure for saving more resources during the wartime period, also has applied to Taiwan since 24 February 1943.³⁹

On the other hand, didactic mediation by magistrates, a commonplace form of dispute resolution in Taiwan under the rule of imperial China, was restored to reduce the judicial expenditure of the colonial government. Early in 1897, the colonial government had already allowed local officials to mediate civil disputes but didn't regard these mediations as an institution.⁴⁰ The Japanese authorities successfully suppressed Taiwanese armed resistance in 1902 and then wanted to take certain measures to maintain the social order in Taiwan for a long term. According to the Civil Disputes Mediation Law promulgated by the Governor-General of Taiwan in 1904 and later modifications,⁴¹ any civil disputes involving family and succession law or property law, irrespective of their monetary values, could be submitted for mediation by a division of mediation in the local government to which the other party to the dispute belonged, with the payment of certain fees. This institution was actually established for decreasing the number of civil lawsuits so as to reduce expenditure needed for modern courts, but the colonial authorities argued that the Taiwanese were neither accustomed to nor willing to seek access to modern courts.⁴²

Under the administrative mediation system, a local official in colonial Taiwan could therefore play the role of mediator to resolve any civil disputes. If a compromise was

38 Imperial Ordinance No. 407/1922, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 25, 82–83, 89.

39 Law No. 62/1926 (applied to Taiwan by Imperial Ordinance No. 283/1929), Law No. 62/1942 (applied to Taiwan by Imperial Ordinance No. 87/1943), Law No. 63/1942 (applied to Taiwan by Imperial Ordinance No. 88/1943), see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 10, 121, 129, 132.

40 Order (*furei*) No. 31/1897, issued by the Government-General of Taiwan.

41 *Ritsurei* No. 3/1904; *Ritsurei* No. 3/1909; *Ritsurei* No. 2/1912, see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 11, 161–162.

42 See R. MOCHIZU, *Taiwan shokumin seisaku* [The Colonial Policy of Taiwan] (Tokyo 1912) 91. In the early period of Japanese rule, colonial courts rejected about one-fourth of all lawsuits that were brought by Taiwanese to resolve disputes that arose during the Qing period. The fact is that Taiwanese were willing to seek access to modern courts, but colonial courts were not willing to deal with certain Taiwanese disputes.

reached, the entire process of mediation and settlement had to be recorded in an official document by which the parties might apply for compulsory execution, and the parties involved thereafter were prohibited from litigating the dispute further. In fact, administrative mediation was an action of the executive authority rather than the judicial authority. For their administrative purpose of settling down civil disputes as much as possible, an official mediator merely persuaded the parties involved to settle their disputes on the basis of “affection and reason,” not the positive law, and frequently coerced the parties to accede to his official authority and “agree” with his decision of disputes. An administrative mediator actually exercised the power of adjudication over civil disputes without the application of the positive law.⁴³ Such a result is usually not expected in a modern legal system.

It is plausible to say that the administrative mediation offers another selection for parties who want to resolve their civil disputes. Notwithstanding, this system had become an institutional obstacle that prevented people in Taiwan from having access to modern civil proceedings in colonial courts.

III. EMERGENCE OF WESTERN-STYLE JURISPRUDENCE AND LEGAL PROFESSION

1. Westernized and Japanized Jurisprudence in Colonial Taiwan

The implementation of laws derived from modern Europe depends heavily on the knowledge of jurisprudence. It is therefore imperative for an East Asian country which has received modern Continental law to learn Western, especially European, jurisprudence and then employ these legal theories and terminology to develop its own jurisprudence for its own law. Like the reception of modern law in legislation, this task was at first undertaken by Japanese colonialists in Taiwan’s legal development.

Because colonial legislation provided that certain civil matters should conform to “old customs” (1898–1922) or “customs” (1923–1945), the rules in Taiwanese customs must be “found” in legal language. Having been trained by German legal education, Okamatsu Santarō led the Survey Commission to do this job for the first time. In the final reports of the Survey Commission, entitled “Taiwanese Private Law,” various legal relations and the rights and obligations involved in each relation were virtually interpreted in accordance with the concepts and categories of Continental law tradition derived from Roman law.

For example, many types employed by Taiwanese to borrow other people’s land for their own purposes were collectively called *po* in old customs. The Survey Commission classified *po* into (1) *po-tien*, (2) *po-ti-chi*, and (3) *po-ti* on the basis that they were created for the purposes of (1) agriculture, such as to cultivate fields or to rear horses and cattle; (2) building, such as to build houses or to plant bamboo or trees; and (3) others,

43 For the details, see WANG, *supra* note 4, 90–91.

that is, any purposes except (1) and (2), respectively. The *po-tien* relation was further divided into either (a) *tien* lease or (b) *yung-tien* in accordance with its “short or long duration of rights and the nature of rights,” namely an obligation right (*saiken*) or a right over things (*bukken*).⁴⁴ Such classification was virtually made according to the definitions of various rights in the Civil Law tradition. The purposes of (1) and (2) mentioned above obviously corresponded to the definitions of emphyteusis and superficies in the Continental civil law. It is more evident that the distinction between (a) and (b) mentioned above was the nature of rights, an obligation right or a right over things, which is relatively unique in the Civil Law tradition because the same terminology does not exist in the Common Law tradition. These legal interpretations could be considered parts of the jurisprudence created for colonial Taiwan. They were incorporated into Taiwanese customary law recognized by colonial courts and, as discussed above, finally became helpful for the transformation of Taiwan’s civil law in 1923.

In addition to its contribution in assisting colonial authorities to understand Taiwanese customs, the jurisprudence relating to Taiwanese customs, in the opinion of Okamatsu Santarō, would contribute more to Japan. Okamatsu Santarō considered that it was not preferable for the Japanese Civil Code to ignore native customs in Japan. He believed the civil law legislation in colonial Taiwan would become a wonderful showcase for Japan through the legal interpretation by modern Continental jurisprudence and further codification of Taiwanese old customs. As planned in advance, the codification of Taiwanese customary law, again led by Okamatsu Santarō, began in 1909 and ended in 1914. Nevertheless, the drafts of Taiwan’s civil codes completed by the Survey Commission, the first modern civil codes for the people in Taiwan, would to a certain degree emphasize the uniqueness of Taiwan within the Empire of Japan. The imperial government in Tokyo disagreed with the enactment of Taiwan’s civil codes proposed by the colonial government in Taipei.⁴⁵

Instead of enacting Taiwan’s civil codes, the final decision of Japanese colonialists was to have the Japanese Civil Code applied to Taiwan. Consequently, the modern jurisprudence in colonial Taiwan was almost the same as that in metropolitan Japan. One of the most obvious examples is that the curriculum of the Legal Division in Imperial Taihoku University, established in 1928, always focused on the positive law of Japan and Western jurisprudence, but seldom mentioned the special law in colonial Taiwan. Only a few Taiwanese studied the law in metropolitan Japan or colonial Taiwan during the Japanese period, and the number of Taiwanese law students specializing in jurisprudence was very small. Not surprisingly, all members in the law faculty of the Imperial Taihoku University were Japanese; only 10 percent of students in this institution for legal edu-

44 RINJI TAIWAN KYŪKAN CHŌSAKAI, *Taiwan shihō* Vol. 1 Part I [Taiwanese Private Law] (Taihoku 1910) 571.

45 For the details, see WANG, *supra* note 4, 144–145.

tion were Taiwanese.⁴⁶ In conclusion, Taiwan's jurisprudence on civil and commercial law was nothing but a branch of prewar Japanese jurisprudence and still dominated by the Japanese during the latter period of Japanese rule.

For the general public in Taiwan, there were fewer opportunities to be informed of the knowledge and idea of modern Western law and jurisprudence. Colonial education largely emphasized Japanese language and modern practical knowledge. A Taiwanese was always required to act like an obedient, hard-working Japanese subject, but he or she was not taught much about the privileges that a Japanese might be tempted to claim. In colonial Taiwan, the consciousness of legal right was always depressed in matters relating not only to public law but also to private law.⁴⁷ Only some Taiwanese legal professionals, discussed below, tried to educate ordinary people with the idea and institution of modern Western law, including individualistic civil law, in their speeches for the public or in newspapers. The spread of Western jurisprudence to Taiwanese society was thus restricted.

2. Facilities and Personnel for the Implementation of Modern Law

Civil disputes are not necessarily resolved in accordance with the modern civil codes and customary law if they are not filed in the modern civil court. One of the factors that will discourage parties from bringing their civil disputes to the modern court is that the state authority does not supply appropriate facilities and personnel to deal with civil lawsuits.

Japanese colonialists were never stingy in constructing majestic buildings for the GGT Court in order to symbolize the permanent authority of the colonial rule. Not only the law, but also the court building followed the style of the West. Early in 1912, the colonial government invested much money in constructing the Baroque-style Tainan District Court, which was one of the three best buildings during the Japanese period. In 1930, about 30 percent of the entire expenditure for courts was used to build the GGT Higher Court and the Taihoku District Court, in which the highest judicial authority of

46 But certain professors of law in this university conducted research on legal issues closely related to Taiwan's uniqueness in the Japanese Empire, such as the delegated legislation in Taiwan, ancestor worship of ethnic Chinese in Taiwan, and the criminal penalty on indigenous peoples. For details of the curriculum, backgrounds of teachers and students, teaching methods, and the research of professors in the legal division of the Imperial Taihoku University, see T. WANG, *Kuo-li T'ai-wan ta-hsueh fa-lu hsueh-yuan yuan-shih (1928–2000) – T'ai-ta fa-hsueh chiao-yu te hui-ku* [A History of National Taiwan University College of Law: A Retrospect on the Legal Education in Taida] (Taipei 2001) 29–32, 37–38, 57–59, 81–82, 87–88. See also T. WANG, The Development of Legal Education in Taiwan: An Analysis of the History of Law and Society, in: Steel / Taylor (eds.), *Legal Education in Asia: Globalization, Change and Contexts* (London 2010) 137–139 (translated and abridged by S. COONEY).

47 See P. E. TSURUMI, Japanese Colonial Education in Taiwan, 1895–1945 (Cambridge 1977) 144.

today's Taiwan is still located. In contrast, the colonial government was initially reluctant to employ sufficient legal professionals, partly because of the expense, although from 1919 on the situation gradually improved. On average a hundred thousand people in colonial Taiwan were assigned one judge, whereas on average fifty thousand people in metropolitan Japan were assigned one judge.⁴⁸

However, the quality of judicial officials seems to be more important for those people who were involved in civil disputes to decide whether to bring an action in the civil court. In colonial Taiwan, no Taiwanese were appointed as judges until 1931, and the total number of Taiwanese judges was very small. Japanese judges, who took a super-majority in the colonial courts, were unfamiliar with the languages and culture of Taiwan and thus became unfriendly to the Taiwanese litigants. Nevertheless, the modern civil court was still attractive for disputing parties in colonial Taiwan for the following reasons: a decision with the enforcement power of the state was necessary for a civil dispute that could not be settled by the parties themselves; the honesty of judges in the colonial court was recognized by the Taiwanese; and, unlike criminal cases that often involved the public order and thus made administrative interference possible, colonial judges had a better opportunity to decide civil and commercial cases with impartiality, though their weakness in fact-finding impeded them here as well.⁴⁹

When Taiwanese decided to have access to the modern civil court, they could receive legal service from some professionals. The role of lawyers in Western-style civil proceedings was gradually known by the Taiwanese under Japanese rule. The number of Taiwanese lawyers who communicated easily with their clients radically increased after 1920.⁵⁰ In addition, the judicial scrivener (*shihōshishi*), who was to a certain degree familiar with modern law and jurisprudence, could write judicial documents in civil proceedings or apply the civil registration in courts for ordinary people.⁵¹ Judicial scriveners, the majority of whom were Taiwanese in the late period of Japanese rule, provided significant contributions in promoting modern civil law in Taiwanese society, partly because it was cheaper and more convenient in employing them for legal service.

IV. TRANSPLANTATION OF MODERN CIVIL LAW IN TAIWANESE SOCIETY

1. *Property Law and Commercial Law*

As a commentator concluded, the Taiwanese had developed a highly sophisticated legal system of contract based on custom to deal with transactions during the Qing period,

48 See WANG, *supra* note 4, 74–78.

49 See WANG, *supra* note 4, 84–87.

50 See WANG, *supra* note 4, 87–89.

51 Law No. 48/1919 (applied to Taiwan by Imperial Ordinance No. 41/1923), see GAIMU-SHŌ JŌYAKU-KYOKU HŌKI-KA, *supra* note 10, 124.

although its enforcement was not quite perfect.⁵² Generally speaking, the Western concept of legal rights and colonial legislation and courts mentioned above actually supplied a legal mechanism to implement those norms which often had existed already in Taiwanese custom. Therefore, many Taiwanese inclined to welcome both the Taiwanese customary law, originating from native custom and recognized by the Japanese authorities, and Western-style civil and commercial law, the content of which was not far different from native custom, for the sake of their enforceability guaranteed by the modern state authorities. For example, the sales contract on real estate prevalent in Taiwanese society gradually followed Western individualistic civil law after the fifty-year Japanese rule, partly because those judicial scriveners who were required to apply modern civil law and its terminology to write related legal documents played a very active role in the transactions on real estate in colonial Taiwan.⁵³

More convenient Western-style rights sometimes replaced those rights which were derived from Chinese legal tradition with a similar function in civil and commercial transactions, as the case of *t'ai* right shows. At the beginning of the Japanese rule, when a Western-style financial system was introduced into Taiwan, the banks wanted to ask financiers to provide reliable security. Taiwanese financiers could establish either the *tien* pledge or *t'ai* relations with banks for this purpose according to their old customs. However, under the *t'ai* agreement in Westernized Taiwanese customary law, the bank did not need to possess the real estate for security; but if a debt could not be paid off at the time it fell due, the security would be auctioned with the creditor bank enjoying a priority entitlement to the proceeds. Accordingly, Japanese banks offered the lowest available interest rate on loans under the Westernized *t'ai* agreement or the mortgage in Japanese modern civil law, and of course the number of this kind of loans rapidly increased. This caused the number of loans made under the *tien* pledge relationship, which was very prevalent in Qing's Taiwan, to decline. After 1923, the *t'ai* relationship in customary law had completely transformed to the Continental-style mortgage. Meanwhile, the form of mortgage generally used by Japanese banks, the fixed mortgage (*ne-teito*), under which the debtor furnished security for an undetermined number of debts within a fixed amount, continued to prevail in Taiwan. The fixed mortgage is still commonplace

52 See R. H. BROCKMAN, Commercial Contract Law in Late Nineteenth-Century Taiwan, in: Cohen / Edwards / Chen (eds.), *Essays on China's Legal Tradition* (Princeton, NJ 1980) 127–130.

53 For the contents of referred contracts and the argument for this viewpoint, see T. WANG, *T'ai-wan min-shih ts'ai-ch'an-fa wen-hua te pien-ch'ien — I pu-tung-ch'an wei-li* [The Transformation of Legal Culture on Property Law in Taiwan: The Sale of Real Estate as an Example], in: *T'ai-ta fa-hsueh lun ts'ung* [National Taiwan University Law Journal] 33 (2004) 1–41; Japanese version in: *Hokkaido University Law Review* 54 (2004) 241–271 (translated by K. SUZUKI).

in today's Taiwan, over a hundred years after Japanese banks introduced it to Taiwan in the 1900s.⁵⁴

In contrast, after 1923, the *tien* pledge in Taiwanese customary law should be treated as the pledge in the Japanese Civil Code, and the Code stipulated that the term during which a pledge was in force was limited to ten years. Hence, the *tien* pledge relationships created before 1923 were all extinguished by December 31, 1932. From then on until the end of Japanese rule, the traditional Chinese relationship based on the *tien* pledge did not exist in positive law in Taiwan. The fading of the traditional *tien* pledge resulted not only from the legal provisions mentioned above but also the triumphs of the *t'ai* agreement and mortgage.

Under Japanese rule, Taiwanese had already grown accustomed to Western-style commercial laws. During the former period of Japanese rule, because the resident Japanese were the dominant political, economic, and cultural force in colonial Taiwan, many Taiwanese imitated the organizational structure of the Japan's modern-style company for reforming their previous system of pooling capital (*ho-ku*). Furthermore, under the 1898 Civil, Commercial and Criminal Law and the 1908 Taiwan Civil Law, provided that Taiwanese included at least one Japanese shareholder, they were legally allowed to organize any form of modern, Continental-style company prescribed in Japanese commercial law. Some Taiwanese thus invited a Japanese to be a shareholder, even merely for the purpose of incorporating a modern company. It was also possible for a Taiwanese to accept any kind of negotiable instrument written by a Japanese in accordance with Japanese commercial laws, which were of modern Western origin.⁵⁵

Western-style commercial law entered the lives of Taiwanese to an even greater extent from 1923, the year Japan's Commercial Code became applicable for the Taiwanese. Any Taiwanese who wanted to establish any form of company under Japanese law no longer needed to find a Japanese participant as in the former period. By the end of the Japanese rule the number of companies established by Taiwanese was equal to those established by Japanese. Meanwhile, Taiwanese could both accept and make any forms of negotiable instrument under Japanese commercial law during the latter period. Even today, a few Taiwanese who experienced Japanese rule still use the Chinese characters (*kanji*) in Japanese commercial law, *tegata*, pronounced in Taiwanese, to signify negotiable instrument. This is, of course, a reference to life under the Japanese rule.⁵⁶

2. Family and Succession Law

While shaping the customary family and succession law, colonial courts in Taiwan brought certain modern Western legal concepts and terminology into their judgments.

54 See generally, T. WANG, The Impact of Modern Western Law on the Chinese in Taiwan, in: *The Australian Journal of Asian Law* 1 (1999) 208–209 (translated by S. COONEY).

55 See WANG, *supra* note 54, 209.

56 See WANG, *supra* note 54, 209–210.

This occurred in four ways.⁵⁷ First, courts might recognize the existence of certain old customs and apply them, but their way of articulating this would be influenced by Continental civil law. For example, a court considered that marriage and divorce were not permitted simply on the basis of the will of the parties, who must comply with the will of the parents. This decision supported the customary norm that marriage and divorce of sons or daughters should be determined by parents, but conceptualized the husband and wife as “parties,” legal individuals, to a “marriage contract;” the marriage was not viewed, as it was under the old custom, as the union of two “families.”

Second, courts might recognize the existence of certain old customs but decline to give them legal force, on the basis that they violated “public order and good morals.” For example, the old custom of “selling,” “pledging,” or “giving” a wife was held invalid because a woman was treated as the object of a transaction. Obviously, this perspective derived from the Western emphasis on human dignity and the prohibition on trade in the human body.

Third, courts might hold that the particular content of an old custom had to conform with “legal principle.” For instance, courts found that the convention by which it was easy for a man to leave a concubine, but that a concubine did not have a right to leave the man, failed to respect the dignity of the concubine and restrained her liberty. Courts therefore held that “according to legal principle” she should be treated equally and could leave him without being subject to any limitations. Similarly, some provisions in the Civil Code with Western origins had been considered legal principles and accepted as a part of “the customary law” found by judges.

Fourth, courts could find that a new custom had appeared. For example, courts held that for an adoption to occur, it sufficed that there be an agreement between the biological father and foster father in early times; however, “this custom had improved by itself as times had changed and culture had progressed,” and thus “according to the current custom,” the foster child’s consent was required, or agreement to the adoption by the biological father, on behalf of the underage child. This so-called “cultural progression” referred to the diffusion of modern Western law.

Nevertheless, the Westernization of family and succession law was relatively limited during the period of Japanese rule. Many Taiwanese customs against Western individualistic civil law remained intact in the positive law of colonial Taiwan. For example, colonial courts never entirely denied the effectiveness of the concubine system, although they had made some revisions on it. On the other hand, it was not an easy task for the state authorities to implement certain positive law relating to family and inheritance matters. Early in 1917, the contract for female indentured servants was held invalid. But an official report in 1931 stated that people frequently used the term “adopted daughter” to hire a female indentured servant. It should also be noted that if parties did not bring

57 For the details, see WANG, *supra* note 54, 210–212.

their family disputes to courts, the courts could not easily change the behavior of the people. Therefore, the influence of Taiwanese customary law with Western elements on the social lives of people cannot be overestimated.⁵⁸

3. *Resolution of Civil Disputes*

The general public in Taiwan, including Taiwanese and resident Japanese, could choose either the administrative mediation or civil proceedings in courts when they had to resort to the state authority for their dispute resolution. According to the numbers of civil lawsuits and administrative mediation cases during the Japanese rule period, the people in Taiwan initially preferred to employ administrative mediation over court litigation, but after the 1920s, they apparently became accustomed to using Western-style courts to resolve their civil disputes. The number of cases litigated in court increased until they eventually surpassed the cases decided by the administrative mediation procedure. In any event, the administrative mediation was still considerably welcomed on the grounds that the expense required for administrative mediation was much lower than that for filing a suit in the modern court.⁵⁹

Those civil disputes which were adjudicated by the courts were certainly resolved by modern-style civil law, especially after Japanese civil and commercial law took effect in Taiwan in 1923. Moreover, after 1923, administrative mediators had been required to apply the Civil Code when they managed to resolve civil disputes, and Taiwanese parties in disputes gradually became reluctant to give up their interests supported by the Civil Code, even though administrative mediators persuaded them to do so for resolving the disputes on the basis of “affection and reason.”⁶⁰ Judging from both substantive and procedural aspects, modern law had already played a very significant role in the positive law for dispute resolution in colonial Taiwan. However, the influence of modern dispute resolution machinery cannot be overemphasized because a large number of civil disputes, especially those involved in family and succession law, were not dealt with by the state authority in colonial Taiwan.

V. CONCLUSION

The whole process of transplantation of modern Western law in colonial Taiwan was dominated by Japanese authorities. Without a colonial parliament, the Taiwanese had no way to express what kind of law they preferred. As a consequence, modern Western civil law was received step-by-step into the legislation of Taiwan during that period. How-

58 See WANG, *supra* note 4, 168.

59 See WANG, *supra* note 4, 90–93.

60 See *Sōhō*, Law No. 256/1921, the Government-General of Taiwan Archives. See also T. WANG, *T'ai-wan tsung-tu-fu tang-an ssu-fa wen-shu hsuan-chi* [Selected Judicial Documents in the Government-General of Taiwan Archives] (Taipei 2010) 296.

ever, the utmost goal of legislation was the benefit of the Japanese Empire rather than the Taiwanese. Japan's refusal to enact Taiwan's civil codes, which had successfully combined Taiwanese customs and modern Continental civil law, is an evident case.

Similarly, taking the need for colonial rule into consideration, the Japanese authorities in Taiwan discouraged native Taiwanese from becoming legal scholars or legal professionals. It was therefore difficult for modernized positive law to penetrate into Taiwanese society. In addition, because most jurists were Japanese and laws in metropolitan Japan were extended to Taiwan as much as possible, the jurisprudence in colonial Taiwan paid attention to the contents of Japanese law or legal theories of Continental countries. Modern law and jurisprudence were seldom applied to discussions of various legal issues in Taiwan for pursuing the best interests of the Taiwanese. The modern idea, therefore, could not largely change traditional ideology through the localization of Western jurisprudence.

Notwithstanding, due to their pragmatic attitude, the Taiwanese rapidly learned to use the modernized positive law that the Japanese authorities brought into Taiwan for dealing with their civil and commercial matters. Both the sales contract on real estate prevalent in Taiwanese society and the progress of modern companies in Taiwan clearly illustrated that many Taiwanese understood and easily employed modern civil and commercial law under Japanese rule. The general public in colonial Taiwan also preferred to bring a lawsuit in modern courts when they had to resort to the state authority for their dispute resolution. In addition, Taiwanese family and succession matters were to a limited extent influenced by modern ideology introduced by colonial judges. The transplantation of Western civil law during the Japanese colonial period did lay a firm foundation for the government and the positive law in postwar Taiwan to continue the process of such transplantation.⁶¹

SUMMARY

This paper will focus on how and to what extent modern European law was received in Taiwanese civil law and practice during the period of Japanese colonial rule (1895–1945). In 1895, the Japanese government, whose legal system had recently received modern European law, began its rule on Taiwan, where people were initially unfamiliar

61 The government of the Republic of China took over Taiwan in 1945 and immediately enforced its civil code in Taiwan. This newly arrived civil code of Republican China, however, was very similar to the Japanese Civil Code discussed above. After 1949, Taiwan became a de facto country and continued to enforce the civil code of Republican China. On the development of civil justice in postwar Taiwan, see WANG, *supra* note 54, 212–215; T. WANG, The Legal Development of Taiwan in the 20th Century: Toward A Liberal and Democratic Country, in: Pacific Rim Law & Policy Journal 11 (2002) 558.

with modern law. Taiwanese old customs were adopted to be the governing law for Taiwanese civil and commercial matters during the former period of Japanese rule, but European-style Japanese civil and commercial laws (except those relating to family and succession) became applicable to Taiwanese civil matters during the latter period. From the beginning of colonial rule, a European-style court system and civil procedural law were in principle enforced in Taiwan. However, unlike that in metropolitan Japan, the law in the colony allowed the local administrative branch to mediate civil disputes and implement the resolutions that resulted from this mediation, which was quite similar to the traditional style of civil dispute resolution in East Asia. Accompanying the colonial legislation mentioned above, the Japanese authorities introduced modern jurisprudence to Taiwan as well. An outstanding Japanese jurist, Okamatsu Santarō, systematically interpreted Taiwanese old customs with European jurisprudence. Since the 1920s, especially after the establishment of the legal section in the Imperial Taihoku University in 1928, the jurisprudence in colonial Taiwan gradually lost its uniqueness within the Japanese Empire and followed the mainstream prewar Japanese legal community. In fact, the super-majority of jurists and legal professionals in colonial Taiwan were Japanese rather than Taiwanese. Under such a legal reform led by the Japanese colonialists, Taiwanese society to a large degree transplanted European property law and commercial law, but received to a limited extent European family and succession law. In sum, the modernization of civil justice in Taiwan under Japanese colonial rule was not managed by native people but had some achievements due to the pragmatism of Taiwanese.

ZUSAMMENFASSUNG

Dieser Artikel widmet sich der Frage, wie und in welchem Umfang modernes europäisches Recht das taiwanische Zivilrecht und die taiwanische Rechtspraxis während der japanischen Kolonialherrschaft (1985–1945) beeinflusst hat. Im Jahr 1985 begann die japanische Herrschaft in Taiwan, zuvor hatte Japan selbst das europäische Recht rezipiert. Zu dieser Zeit war die Bevölkerung Taiwans mit modernem Recht nicht vertraut. Zunächst beruhte das taiwanische Zivil- und Handelsrecht auf taiwanischen Bräuchen. Dieses wurde in der Folge durch europäisch beeinflusstes Zivil- und Handelsrecht aus Japan ersetzt, das mit Ausnahme des Familien- und Erbrechts für Zivilstreitigkeiten in Taiwan galt. Seit Beginn der Kolonialherrschaft wurden eine europäisch geprägte Gerichtsbarkeit und ein europäisch geprägtes Zivilprozessrecht in Taiwan etabliert. Dennoch erlaubte das Recht in der taiwanischen Kolonie – anders als in Japan selbst – der örtlichen Verwaltung, Zivilstreitigkeiten zu schlichten und die Ergebnisse dieser Schlichtungen umzusetzen. Dies entsprach weitgehend der traditionellen zivilrechtlichen Streitbeilegung in Ostasien. Zusammen mit der Gesetzgebung im kolonialen Taiwan führte die japanische Verwaltung auch eine moderne Rechtswissenschaft ein. Ein herausragender japanischer Jurist, Okamatsu Santarō, interpretierte systematisch die taiwanischen Bräuche mit der Methode der

europäischen Rechtswissenschaft. Seit den 1920er Jahren, insbesondere nach der Gründung der rechtswissenschaftlichen Abteilung an der Kaiserlichen Taihoku Universität im Jahr 1928, verlor die Rechtswissenschaft im kolonialen Taiwan langsam ihre Einzigartigkeit innerhalb des japanischen Kaiserreichs und glich sich dem Recht in der japanischen Rechtsgemeinschaft der Vorkriegsjahre an. Die große Mehrheit der Juristen und Rechtspraktiker im kolonialen Taiwan waren japanischer und nicht taiwanischer Herkunft. Aufgrund der von der japanischen Kolonialherrschaft angestoßenen Rechtsreformen übernahm die taiwanische Gesellschaft zu einem großen Teil europäisches Sachen- und Handelsrecht, aber nur zu einem geringen Teil europäisches Familien- und Erbrecht. Zusammenfassend lässt sich sagen, dass die Modernisierung der Ziviljustiz in Taiwan unter japanischer Kolonialherrschaft nicht von den Taiwanesen ausging. Dennoch hatte die Modernisierung aufgrund des pragmatischen Umgangs der Taiwanern mit dem neuen Recht einen Erfolg.

(Deutsche Zusammenfassung durch die Redaktion)