

Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernization

Yun-Hsien Diana Lin^{*}

The process of legal modernization in Taiwan began in 1895, when the Japanese colonial government first imposed westernized modern law on Taiwan. Before 1895, the code of imperial Ch'ing—deeply influenced by the Confucian legal culture which emphasized social harmony and was opposed to lawsuits—had been the state law for more than two centuries. A second major transition started in the 1920s, during which Taiwanese people gradually became accustomed to accessing modern courts for their civil disputes, and the number of civil lawsuits eventually surpassed that of cases under mediation. The positive attitude toward civil litigation continued after the Nationalist government retreated to Taiwan in 1949. As a historical coincidence, the Nationalists also applied German- and Japanese-style legal codes in Taiwan, including double tracks of town mediation and family court mediation. Besides addressing this “law-versus-custom” dichotomy, the following article concerns itself mainly with the continuing and ever-evolving process of dialectic and mutual resistance between the different legal orders.

^{*} Yun-Hsien Diana Lin is an Associate Professor at the Institute of Law for Science and Technology, National Tsing Hua University, Taiwan. The author received her J.S.D. and LL.M. degrees from the University of California, Berkeley, and a B.A. from National Taiwan University. This research was supported by the governmental grants of National Science Council, R.O.C. (No. 98-2410-H-007-041). An earlier version of this paper was presented at the 2010 Inaugural East Asian Law and Society Conference at Hong Kong University and the 2009 World Congress of Philosophy of Law and Social Philosophy in Beijing, China. The author would like to thank Professor Tony Carty, Faculty of Law, University of Hong Kong, for excellent comments, and the Honorable Justice Peter Rose, Family Court of Australia, for thought-stimulating discussion.

I. INTRODUCTION	192
II. THE CONFUCIAN INFLUENCES ON DISPUTE RESOLUTION: THE ANTI-LAWSUIT ATTITUDE, LAW AS PUNISHMENT, COLLECTIVISM AND FAMILY-CENTERED ETHICS	194
A. The Anti-Lawsuit Attitude	195
B. Law as Punishment	195
C. Collectivism	196
D. Family-Centered Ethics	197
III. MEDIATION IN TAIWAN DURING JAPANESE COLONIAL TIMES: 1895–1945	199
IV. MEDIATION IN THE NATIONALIST GOVERNMENT ERA: 1949–PRESENT	202
A. Town Mediation	205
B. Court Mediation	207
V. INTERACTIONS BETWEEN STATE LAW AND TRADITIONAL CHINESE LEGAL CULTURE	210
VI. CONCLUSION	214

I. INTRODUCTION

The history of the law in Taiwan can be traced back to multiple sources, which contribute to its diversified and hybrid legal culture. Before the Westerners occupied part of Taiwan in the 17th century,¹ the majority inhabitants of Taiwan were aboriginal people who have long applied tribal laws for dispute resolution. Most aboriginal laws and customs were passed by word of mouth. Each Taiwanese tribe had a chief who was often chosen by his bloodline and who was responsible for the arbitration of tribal disputes.² In 1624, the Netherlands established a defensive Castle in Anping as her colonial capital under the auspices of the United East India Company. In need of laborers, the Dutch had begun to import Han Chinese workers from southeast China since 1630, many of whom settled and thus brought traditional Chinese laws and customs to

¹ In 1624, the Dutch built a commercial base in southern Taiwan called Anping; and in 1626, the Spanish landed on and occupied northern Taiwan in Keelung and Tamsui so as to extend foreign trade. The Spanish rule ended in 1642 while the Dutch colonial period lasted until 1662. Since the Spanish stayed for only 16 years and limited their control to northern Taiwan, this article focuses more on the island's occupation by the Netherlands, who later controlled the south, north and east of Taiwan for 38 years.

² Tay-Sheng Wang, *Chapter 4: Taiwan*, in *ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA* 158–61 (Poh-Ling Tan ed., 1997).

Taiwan.³ The Dutch colonists maintained a system of legal pluralism: a Court of Justice was established for adjudication of disputes involving Europeans, where Dutch law would apply; if the case concerned Taiwanese aboriginals, the chief or elders of the tribe would arbitrate in accordance with tribal laws and customs; and if disagreements were among Han Chinese immigrants, the customs of the Han people would prevail.⁴ Generally, the three types of law coexisted in harmony during the 38 years of Dutch rule.

The Chinese regime in Taiwan was first established when Cheng Chengong, also known as Koxinga, led naval ships from southeast China and drove away the Dutch in 1662.⁵ The Cheng regime controlled Taiwan for 22 years until imperial Ch'ing took over.⁶ During the 212 years of Ch'ing rule, traditional Chinese law became the dominant legal culture in Taiwan.⁷ One important reason was the increase of Han Chinese population between 1680 and 1892: as recorded in historical documents the Han population grew by a factor of 10, to 250 million, while the Taiwanese aborigines became a minority in Taiwan.⁸ The other reason lies in assimilation: as commercial and cultural exchange between ethnic groups occurred, many aboriginal tribes assimilated to Han culture and even adopted Han identities.⁹ As a result, although traditional Chinese law is not the only element that shaped Taiwan's legal culture, it is without doubt the most influential one.

This article examines the process of legal modernization in Taiwan and its implications for civil mediation. To understand the context of civil mediation in Taiwan, the next part presents four aspects of traditional Chinese legal culture based on Confucian thought. Part III focuses on Taiwan's first contact with westernized laws. It explores possible reasons for the increase in civil litigation until it surpassed civil mediation during the Japanese colonial period. Part IV discusses town mediation after 1949 and its differences from prior systems with the same name. Taiwan's latest developments in family court mediation are also introduced. Part V looks at the interaction between westernized state law

³ YONG-HE CAO, TAIWAN ZAOQI LISHI YANJIU [EARLY-PERIOD TAIWAN HISTORICAL STUDIES] 61–65 (1979).

⁴ TAY-SHENG WANG, TAIWAN FALÜ SHI GAILUN [GENERAL DISCUSSION ON TAIWANESE LEGAL HISTORY] 27 (2004).

⁵ WANG, *supra* note 2, at 266–67.

⁶ Following the defeat of Koxinga's grandson in 1683 by the Qing Dynasty, Taiwan was formally annexed by a Chinese regime and was placed under the jurisdiction of Fujian province.

⁷ WANG, *supra* note 4, at 33.

⁸ SHAO-SHIN CHEN, TAIWAN DE REN KO BIEN CHIEN YÜ SHE HUI BIEN CHIEN [DEMOGRAPHIC AND SOCIAL TRANSITIONS IN TAIWAN] 379–81 (1979).

⁹ WANG, *supra* note 4, at 33.

and traditional customs from the perspective of legal pluralism. Part VI concludes.

II. THE CONFUCIAN INFLUENCES ON DISPUTE RESOLUTION: THE ANTI-LAWSUIT ATTITUDE, LAW AS PUNISHMENT, COLLECTIVISM AND FAMILY-CENTERED ETHICS

The Confucian tradition is often noted as an important factor in understanding many East Asian societies, such as South Korea, China and Taiwan. Founded by Confucius, Confucianism was not viewed merely as a valuable stream of philosophy, but was incorporated as part of the everyday life of Chinese people.¹⁰ Indeed, it may be that because Confucianism thus exists in a less visible and more diffuse state, it is exerting an unconscious and therefore more powerful influence on people's lives.¹¹ Clifford Geertz defines culture as the fabric of meaning in terms of which human beings interpret their experience and guide their action.¹² On this view, law is also a part of culture, for to be meaningful to the people it regulates the law must partake of the resources within the culture.¹³ To that extent, Confucianism may influence legal discourse because legal meaning largely depends on cultural signs and narrative.¹⁴

In contrast to the general agreement that Confucianism is still an important part of East Asian societies, there is little agreement as to what Confucianism means or which elements of East Asian culture are attributable to Confucianism. Many things commonly counted as part of the Confucian legacy, such as family centered ethics, respect for elders and social harmony can also be described as attributes of many other cultures in different areas of the world and in different historical periods. Chaihark Hahm therefore argues that, while similar culture attributes can be found in other places, the way in which they are combined to form a "package" reveals the unique nature of Confucianism in East Asian culture.¹⁵ In order to draw up some abstract character traits from Confucian culture, it is Hahm's suggestion that the discussion should be country-specific, for it is impractical to expect Confucianism to have the same status and value among East Asian countries.¹⁶ Also, since the same

¹⁰ Shin-Yi Peng, *The WTO Legalistic Approach and East Asia: From The Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL'Y J. 13, 21 (2000).

¹¹ Chaihark Hahm, *Law, Culture and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 270 (2003).

¹² CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 145 (1977).

¹³ Sally E. Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 578 (1998).

¹⁴ Robert M. Cover, *The Supreme Court 1982 Term: Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

¹⁵ Hahm, *supra* note 11, at 268.

¹⁶ *Id.*

Confucian influence can work in different ways depending on the concrete issues involved, it is helpful to be issue-specific when discussing the cultural underpinnings of certain laws.¹⁷

A. The Anti-Lawsuit Attitude

Particularly, Confucianists in ancient China emphasized the importance of social harmony, which is still valued highly in contemporary Taiwan. In maintaining interpersonal harmony, the Confucianist expressed disfavor towards resolving disputes via a lawsuit. Confucius once said, “In hearing litigation, I am just like another man. But I try always to eliminate the need for litigation[.]”¹⁸ Accordingly, the Confucian regarded litigation as a last resort in resolving a dispute. This anti-lawsuit attitude has been adopted by Chinese people for centuries and thus provides fertile soil for the development of mediation. Through mediation, disputants are allowed to seek solution to their conflict by mutual compromise while still maintaining harmony.

Apart from the Confucian teachings on social harmony, Chinese people also avoided lawsuits for various practical reasons. For one, frequent delays often occurred and corruption in the system for administration of justice was well-known. Besides, the courts were not usually located at the site of disputes, thus it was very difficult for peasants to petition the court due to the long distance of travel and the time away from work.¹⁹ Lastly, the magistrates often were associated with powerful local figures, which caused people to harbor distrust when members of the powerful classes were involved in disputes.

B. Law as Punishment

Another factor that contributed to the prevalence of mediation is the traditional Chinese concept of law as mainly punitive in nature. To Chinese minds, the law was nothing more than the imposition of fines and penalties for official transgression.²⁰ Since law meant punishment, the imperial law was in effect criminal law, with only a few provisions on civil issues such as family, marriage, adoption, inheritance, property and debts. The ancient Confucianists believed that an ideal society would

¹⁷ *Id.* at 268–69.

¹⁸ See Analects of Confucius, ch. XII, verse 13.

¹⁹ Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1213 (1966).

²⁰ WILLIAM H. MCNEILL & JEAN W. SEDLAR, CLASSICAL CHINA 76 (1960).

never require extensive legislation or litigation, because the law was for barbarians, not for a civilized society.²¹

Moreover, imperial China employed criminal punishment even for civil disputes. All types of litigation, including marriage and property issues, were subject to criminal procedures that included torture and corporal punishment. As a result, being a party to a lawsuit was viewed as involvement in a crime both in the judge's and in society's eyes.²² Since people were treated in a humiliating manner in court, it was considered a shame to be involved in a lawsuit and thus people inclined to settle matters outside of the court, especially civil disputes.

C. *Collectivism*

Confucianism honors selfless righteous deeds and often contrasts these with personal interests, which it labels trivial or less important.²³ To carry out righteous conduct, one must calculate profit not for oneself but for the greater good. As a result, asserting one's personal rights was generally not encouraged by society. The traditional expectation of a selfless individual became one of the obstacles to adoption of modern civil litigation.

For Confucianists, the mutual obligation between the individual and his family serve as powerful social control agent. The individual's responsibility to his family and the family's responsibility to the individual are interdependent.²⁴ This is in sharp contrast to western individualism, and its emphasis on personal rights. Collectivism, which emphasized group and communal goals, has been the norm for traditional Chinese society.²⁵ While individualist cultures consider placing personal goals ahead of collective goals to be acceptable, in collectivist cultures it is socially desirable to place collective goals ahead of personal goals.²⁶

²¹ See DEREK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 21–22 (1973) (discussing the idea that Confucianism always emphasized using reason to educate people because ritual and education—rather than law—represented the most essential way to attain social goals; moreover, education could prevent future wrongdoing, whereas law only punished what had already happened, and therefore could only serve the limited purpose of punishing evil but not of encouraging the good).

²² JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 12 (2008).

²³ See *Analects of Confucius*, ch. IV, verse 23 (containing Confucius's statement that “[a] gentleman understands righteousness while a petty man understands profits”). See also *id.* ch. XVII, verse 23 (“[A] gentleman who has courage but not righteousness will cause disorder; a petty man who has courage but not righteousness will cause thievery.”).

²⁴ Peng, *supra* note 10, at 24; REN XIN, *TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE AND SOCIAL CONTROL IN CHINA* 25–27 (1997).

²⁵ BEE-CHEN GOH, *NEGOTIATING WITH THE CHINESE* 24–27 (1996).

²⁶ Harry C. Triandis, *Cross-Cultural Studies of Individualism and Collectivism*, in *NEBRASKA SYMPOSIUM ON MOTIVATION 1989* (No. 37): *CROSS-CULTURAL PERSPECTIVES* 42 (Richard A. Dienstbier & John J. Berman eds., 1990).

As a typical example, a potential breakdown of marriage between couples was not viewed as a personal matter.²⁷ Rather, the dispute soon became the pre-occupation of the two families, even the entire village or community. Since divorce has been regarded as a disgrace throughout history, every effort was directed at reconciliation of the marriage for the purpose of safeguarding the reputation and social standing of the families. Whether the couple still had feelings for each other was not the main concern in the process of dispute resolution.

D. Family-Centered Ethics

The above discussion of cultural background leads us to a discussion of how the concept of family shaped the traditional Chinese way of dispute resolution. This view of interpersonal relationships was demonstrated through the mode of differential association formulated by the Chinese sociologist and anthropologist Hsiao-Tung Fei. According to Fei, a Chinese society's social pattern is like the different myriads of ripples sent out by a stone thrown in the water. Everyone is situated in the center of a circle created by one's social connections, and those affected by the ripples of the circle are also linked with each other.²⁸ Among the different circles, family plays an essential role and was regarded as the most basic unit in Chinese society.²⁹ Of the five "cardinal relationships" advocated by Confucianists, three lie within the family: the relationships between father and son, elder and younger brother, and husband and wife.³⁰

Filial piety is still emphasized in father-son relations in contemporary China, Taiwan, Hong Kong and Singapore. To observe filial piety, Confucius instructed, one must obey one's parents without complaining.³¹ This teaching also extends to other elders in the family and the clan. The notion that a parent's status was higher than that of a child's was embedded in state law throughout Chinese legal history.³² For

²⁷ Michael Palmer, *The Revival of Mediation in the People's Republic of China*, in *YEARBOOK ON SOCIALIST LEGAL SYSTEMS*: 1987, at 250–51 (W. E. Butler ed., 1988).

²⁸ Regarding the mode of differential association in Chinese interpersonal relationships, see generally HSIAO-TUNG FEI, *RURAL DEVELOPMENT IN CHINA: PERSPECT AND RETROSPECT* (1989).

²⁹ Peng, *supra* note 10, at 24.

³⁰ The remaining two could be viewed as an expansion of the other three: the lord-subject relation was an extension of that of father and son, and the bond among friends grew out of the connection between elder and younger brothers.

³¹ See *Analects of Confucius*, ch. IV, verse 18 (citing Confucius as saying, "[i]n serving parents, make suggestions tactfully, and if your aspirations are not pursued, still respect and do not disobey, bear burdens and do not complain").

³² HWEI-SHIN CHEN, *INDIVIDUAL, FAMILY, MARRIAGE AND THE STATE: RESEARCH AND METHODOLOGY OF CHINESE LEGAL HISTORY* 256–58 (2006).

example, according to the Code of the T'ang Dynasty,³³ parents were entitled to give children corporal punishment, even after the offspring reached their majority.³⁴ If the parent's chastisement caused the child's death, it was not viewed as a crime. But the child would face the punishment of exile if it showed unfilial behavior toward the parents. Moreover, a child which scolded its parents could be sentenced to death.³⁵

As for relations among siblings, brothers are known in Chinese terms as "hands and feet," which means one is expected to love his or her brothers as one's own limbs. According to Confucianism, filial piety and brotherhood are the fundamental elements of benevolence, the highest moral standard of a gentleman.³⁶ Over the centuries these scriptural guidelines—both positive and negative—have shaped people's expectations and behavior, which in turn influenced the Chinese way of dealing with family disputes.³⁷ For instance, the clan usually delegated to its elders the role of arbitrating disputes because of their authority.³⁸ Also, one was expected to obey one's eldest brother, while an eldest brother was held accountable for the doings of his younger siblings.

In the eyes of traditional Chinese society, a wife's social and legal status was inferior to the husband's; and one's maternal relatives were less important than their paternal counterparts. For example, grandparents on the maternal side are called "external" (外, *wai*) grandparents in Chinese. This is partly because in the patriarchal Chinese society, when a couple gets married it is understood that the wife is joining the husband's family, rather than vice versa. According to the Code of the Imperial Ch'ing, when the husband passed away inheritance of his estate passed on to his son, not his widow.³⁹ The unequal legal status of husband and the wife was also demonstrated in laws on family violence. A woman could face the death penalty if she dared to hit her husband, even if the husband sustained no injury at all. On the contrary, only when a husband's violence severely injured the wife could the law intervene on her behalf.⁴⁰

³³ The T'ang Code (Tang Lü, 唐律), following the pattern of several earlier codes (including the Sui-era Kaihuang Lü), described the "ten abominations"—or ten major vices singled out for harsh punishment under law—which included plotting treason, the failure to abide by filial piety, scolding parents or grandparents, and moving out of the family home while parents or grandparents are still alive.

³⁴ WANG, *supra* note 4, at 40.

³⁵ *Id.* at 41.

³⁶ See Analects of Confucius, ch. I, verse 2.

³⁷ Charlotte Ikels, *Introduction*, in *FILIAL PIETY: PRACTICE AND DISCOURSE IN CONTEMPORARY EAST ASIA* 3–4 (Charlotte Ikels ed., 2004).

³⁸ Jin Zhan, *Zhongguo Chuantong Tiaojie Zhidu de Yunxing Jizhi ji Qi Tedian* [*The Mechanism and Characteristics of Ancient Chinese Mediation Systems*], 18(4) *JOURNAL OF BEIJING INSTITUTE OF EDUCATION* 38, 38–39 (2004).

³⁹ TUNG-TSU CHU, *CHUNG GUO FA LÜ YÜ CHUNG GUO SHE HUI* [LAW AND SOCIETY IN TRADITIONAL CHINA] 132–42 (1984).

⁴⁰ *Id.*

The dominant influence of Confucianism has been passed down to each generation of Han Chinese in Taiwan, together with its anti-lawsuit attitude, its notion of law as punishment, its collectivist ideals and outlook and its family-centered ethics system. As a result, these concepts have been preserved and practiced in Taiwan until the impact of the Westernized law brought over by the Japanese colonial government and, later on, the Nationalist government.

III. MEDIATION IN TAIWAN DURING JAPANESE COLONIAL TIMES: 1895–1945

The process of legal modernization in Taiwan began when Japan gained control over Taiwan in 1895, as a result of its victory in the Sino-Japanese War.⁴¹ During the Japanese occupation, the number of Japanese in Taiwan was rather small, amounting to only 6% of the total population in 1942, yet ruling over the remaining 94% of the population, comprised mainly of Han Chinese and Taiwanese aboriginal tribes.⁴² By 1895, Japan had completed its own modern codes, modeled on German laws of the late nineteenth century.⁴³ However, due to Taiwanese armed resistance against military takeover, in the beginning the Japanese government adopted English colonial laws to rule this newly-acquired land.⁴⁴ In other words, modern Western law was first introduced to colonial Taiwan in late nineteenth century, which is much earlier than the case in China. It should be noted, however, that Japanese colonial government maintained the “old customs” of the Han Chinese in dealing with family disputes. Later, in 1923, as the policy of cultural assimilation continued, Japan started to extend its own laws to Taiwan, including civil codes, commercial codes and many administrative laws and rules.⁴⁵ “State law” in this article is used to describe the positive law of the state, including legislation, executive measures and judicial decisions, which have been the primary way of imposing modern western laws on Taiwan.

As aforementioned, the Han Chinese who migrated from mainland China carried with them the traditional Chinese legal culture which was reinforced through the Code and rule of the imperial Ch'ing. As a result, the Han Chinese population in Taiwan preferred to settle disputes out of

⁴¹ Taiwan was ceded to Japan in 1895 under the terms of the Treaty of Shimonoseki, also known as the Treaty of Maguan, signed by the representatives of Japanese government and imperial Ching.

⁴² CHEN, *supra* note 8, at 96–97.

⁴³ Dan F. Henderson, *Law and Political Modernization in Japan*, in *POLITICAL DEVELOPMENT IN MODERN JAPAN* 419–36 (Robert E. Ward ed., 1968).

⁴⁴ Henry J. Lamley, *Taiwan under Japanese Rule, 1895–1945: the Vicissitudes of Colonialism*, in *TAIWAN: A NEW HISTORY* 204–06 (Murry A. Rubinstein ed., 1999).

⁴⁵ TAY-SHENG WANG, *LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE 1895–1945: THE RECEPTION OF WESTERN LAW* 52–55 (2000).

court and via informal means. During the rule of the Ch'ing, there were two types of mediation: clan mediation and local mediation.⁴⁶ Clan mediation was presided over by “the elder and virtuous” of the clan, with its legitimacy based on both state law and clan rules.⁴⁷ Elders of a clan were given the power to punish a member who violated their clan's rules.⁴⁸ Therefore, families and clans had significant influence in Taiwanese dispute resolution. Leaders in the small local geographic divisions called *shiang pao* were locally powerful and usually served as mediators.⁴⁹ *Shiang pao* were themselves responsible for the behavior of the local populace and provided local resolution to disputes which erupted within the district. This network of clan leaders and *shiang pao* often overlapped, working hand in hand to ensure social order and harmony.

Under Japanese colonial rule, two kinds of mediation were utilized for the purpose of local dispute resolution. One was known as *pao chia* (保甲). The word *pao* was used standing alone to specify an organization comprised of a hundred families, and *chia* to refer to 10 family units. The leaders of a *pao chia* were appointed and directed in their role as agents of social control by Japanese police officers and thus emerged as the new local leaders.⁵⁰ A *pao zhang*, the leader of a *pao*, was given the right to mediate simple civil issues; among them were the division of family property and dissolution of marriage.

At the same time, civil disputes were also mediated by the chief of the district government according to Han Chinese “old customs.”⁵¹ The mediation under Japanese rule however, was very different from traditional Chinese clan mediation or *shiang pao*. According to the 1904 Civil Disputes Mediation Law, a party who failed to be present at a mediation faced visits to the police station and the imposition of a fine; once a solution was reached by the parties, subsequent lawsuits were forbidden and the mediated solution was enforced by the district government.⁵² It is fair to conclude that the colonial government extended its control through such district administrative mediation.

Initially influenced by the traditional Han Chinese anti-lawsuit attitude, most disputants preferred mediation to litigation in colonial

⁴⁶ See Jin, *supra* note 38, at 38.

⁴⁷ See CHEN, *supra* note 8, at 96–97.

⁴⁸ *Id.* at 39.

⁴⁹ *Shiang pao* were sometimes also known as *pao chia*.

⁵⁰ See Chiu-Fen Hung, *Rizhi Chuqi Huludun Qu Baojia Shishi de Qingxing ji Baozheng Juese de Tantaoy (1895–1909)* [A Probe into the Paochia System and the Role of Pao-cheng in the Huludun District during the Early Period of the Japanese Occupation (1895–1909)], 34 JIN DAI SHI YAN JIU SUO JI KAN [BULLETIN OF THE INSTITUTE OF MODERN HISTORY, ACADEMIA SINICA] 211, 258 (1990).

⁵¹ See Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward A Liberal and Democratic Country*, 11(3) PAC. RIM L. & POL'Y J. 531, 557 (2002).

⁵² *Id.*

Taiwan. In the early period of Japanese rule, administrative mediation was very appealing due to its simple procedures and inexpensive fee structure.⁵³ Moreover, the administrative mediator was given wide discretion because civil courts had only few precedents at the time.⁵⁴ In fact, there were also other reasons which served to discourage people from accessing the courts. From their own local perspective, Taiwanese worried about Japanese officials' unfamiliarity with native languages and customs; while from the viewpoint of the Japanese colonial authorities, they were reluctant to increase their monetary investment into the judicial system of the colony and therefore sought to promote mediation as a means of reducing the caseload of the courts.⁵⁵

In the 1920s however Taiwanese people gradually became accustomed to using modern courts to resolve civil disputes, and the number of civil lawsuits eventually surpassed that of administrative mediation.⁵⁶ Partial reasons for this major transition may be found in the increase of judicial staff and funding, general economic progress and the growing prevalence of education among Taiwanese people.⁵⁷ Another reason for the trend may be found in the fact that civil litigation precedents were expanding, and the wide discretion formerly enjoyed by administrative mediators contracted because the scope of resolution was limited by law and such precedents. Little by little, Taiwanese became more familiar with modern court procedures, means of accessing the justice system, and working with and through lawyers and notaries.⁵⁸ The more that Taiwanese reaffirmed that modern courts were able to protect their interests and rights efficiently and at a reasonable cost, the more they were likely to resort to litigation over mediation. This increasingly positive attitude toward civil litigation intensified the extent of legal transplantation of westernized Japanese laws and accelerated the development of civil procedural laws in Taiwan.⁵⁹

Although the Japanese legal system replaced the imperial Ch'ing legal system in Taiwan, government-sanctioned practices concerning family and inheritance survived the transition.⁶⁰ The Japanese colonial government found it more effective in governing their colonial society to employ the existing infrastructure at the level of the family and local community. Reinforcing the old Taiwanese customs not only kept society

⁵³ See WANG, *supra* note 45, at 198.

⁵⁴ *Id.*

⁵⁵ *Id.* at 84–85.

⁵⁶ *Id.* at 91–94.

⁵⁷ *Id.* at 204–13.

⁵⁸ *Id.*

⁵⁹ *Id.* at 57.

⁶⁰ See Tay-Sheng Wang, *Bai Nian Lai Taiwan Falü de Xifanghua* (The Westernization of Taiwanese Legal System for One Hundred Years), in TAIWAN FALÜ SHI DE JIANLI (THE ESTABLISHMENT OF TAIWANESE LEGAL HISTORY) 347–48 (1997).

in order, but also reduced costs in law enforcement. Moreover, upholding original social norms was a convenient way for Japan to uphold its own legitimacy in the eyes of the Taiwanese people.⁶¹ In addition, family law may not be as useful as criminal law or land law for purposes of social control; nonetheless, it is so intimately related to social norms and customs that it cannot be as easily changed by simply imposing new laws.⁶²

However, Japanese judges in colonial Taiwan did not adopt or follow every old Taiwanese custom without submitting it to further scrutiny. In adjudicating family disputes they applied Taiwanese customs selectively. These judges were trained in Japan to employ westernized Japanese laws and sometimes reinterpreted old Taiwanese customs. Because part of the old customs were rejected or modified in this way, courts in the Japanese colonial era played an essential role in shaping Taiwanese family law.⁶³ For example, according to the Han Chinese legal practices and culture, a wife could only passively be divorced by her husband and could not actively pursue a divorce; having no independent legal standing, she was not allowed to file for a divorce by herself. In the Japanese colonial courts, however, the custom was modified and Taiwanese wives were given legal standing against their husbands in cases of marriage dissolution.⁶⁴ The Japanese judges' initial goal may not have been gender equality, but rather to make colonial Taiwan more "civilized" and "modernized."⁶⁵ But via numerous and consistent judicial decisions, this part of the old Taiwanese customs regarding family practice was ultimately and irrevocably changed.

IV. MEDIATION IN THE NATIONALIST GOVERNMENT ERA: 1949–PRESENT

After the defeat of Japan in World War II, Taiwan was surrendered to Allied Forces in 1945. Later in 1949, Taiwan was acquired by the Chinese Nationalist Party (Kuomintang, "KMT") after it was overpowered by the Communist Party in mainland China, and subsequently the KMT reestablished the Republic of China (ROC) in

⁶¹ See Li-Ju Lee, *Law and Social Norms in A Changing Society: A Case Study of Taiwanese Family Law*, 8 S. CAL. REV. L. & WOMEN'S STUD. 413, 426 (1999).

⁶² *Id.* at 427.

⁶³ See Chao-Ju Chen, *Quanli, Falü Gaiige yu Bentu Fu Yun [Rights, Legal Reform and Local Women's Movement]*, 62 CHENG TA FA HSUEH PING LUN [NATIONAL CHENGCHI UNIVERSITY LAW REVIEW] 25, 40–46 (1999).

⁶⁴ See Chao-Ju Chen, *Riben Shidai Taiwan Nüxing Lihun Quan de Xingcheng (the Formation of Taiwanese Women's Right to Divorce in Japanese Colonial Era)*, in TAIWAN CHUNG TSENG JIN TAI HUA LUN WEN JIH [COLLECTION OF TAIWAN STRATIFIED MODERNIZATION] 218–20 (M. Wakabayashi & M. Wu eds., 2000).

⁶⁵ *Id.* at 220–29.

T'aipei.⁶⁶ By claiming to be the sole legitimate Chinese government, the KMT identified itself as the advocate and true successor of Chinese cultural tradition. For example, facing the destruction of Chinese culture during the Cultural Revolution in Mainland China, the ROC government initiated the Chinese Cultural Renaissance Movement in 1967 to preserve and promote traditional Chinese culture, and especially Confucianism.⁶⁷

Between the 1920s and mid-1930s, when the KMT still controlled mainland China, it followed the example of Meiji Japan by promulgating German style codes as part of its efforts to unify the country and establish a modern legal system.⁶⁸ However, due to a state of recurrent war, the new laws were never actually applied in mainland China. Only after the 1949 military retreat did the KMT have the opportunity to enforce the new laws in Taiwan. It was a historical coincidence that the new codes brought by KMT to Taiwan were actually modeled on Japanese laws, with significant German influences. Based on the legacy of prior Japanese rule in Taiwan, the ROC codes were easily implemented and followed.⁶⁹ During the 1960s and 1970s, the rapid economic development of Taiwan facilitated the further expansion and progress of these civil and commercial codes.⁷⁰ To add to the diversity of legal transplantations, American legal concepts were initially introduced to the Taiwanese people in the midst of the Cold War, when the ROC government joined the Western camp led by the US.⁷¹

After 1949, the number of lawsuits continued to grow due to the process of urbanization.⁷² When people relocated to the cities for job opportunities, they often had difficulty finding a well-respected mediator

⁶⁶ *Kuomintang*, NEWWORLDENCYCLOPEDIA.ORG (Dec. 15, 2008, 2:40 PM), http://www.newworldencyclopedia.org/entry/kuomintang#KMT_in_Taiwan (“In December of 1949, [Chiang Kai-Shek] moved [to Taiwan], along with approximately two million Nationalists . . . [where] the KMT established a provisional government . . . which it called the Republic of China (ROC), claiming it to be the legitimate government of China.”). See also *Party's History*, KUOMINTANG OFFICIAL WEBSITE, <http://www.kmt.org.tw/english/page.aspx?type=para&mnum=108> (last visited June 9, 2012) (providing a chart with information about more than a century of the KMT's history, which relates that on December 10, 1949, “[f]ollowing the government of the Republic of China, the Kuomintang relocates to Taiwan . . . [and] Party headquarters are set up at No. 11 Zhongshan South Road”).

⁶⁷ Since 1967, Confucianism has been integrated into teaching materials for elementary and middle school level in Taiwan. See Taiwan R.O.C. government information office website, available at <http://www.gio.gov.tw/info/taiwan-story/culture/down/3-3.htm> (last visited Jan. 20, 2010).

⁶⁸ See WANG, *supra* note 51, at 535–36.

⁶⁹ See WANG, *supra* note 45, at 174–83.

⁷⁰ See WANG, *supra* note 51, at 537–38.

⁷¹ See generally Kaufman Winn & Tang-Chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 20(2) LAW & SOC. INQUIRY 561, 579 (1995).

⁷² Wang, *supra* note 2, at 154.

who could be trusted by both parties. As a result, state authorities such as courts were relied upon to solve civil disputes. The capitalistic economy also raised complicated commercial disputes involving, for example, issues of intellectual property that could only be decided by a court.⁷³ In other words, an agricultural economy and face-to-face interpersonal relations used to form the foundation of mediation. Such a foundation has been changed and transformed during the process of industrialization and urbanization since the 1960s.⁷⁴

The lifting of martial law in 1987 opened up a new era for legal development in Taiwan. Echoing the political transformation toward democracy, there have been strong demands for judicial reform in Taiwan. According to Judicial Statistics, one of the factors that deterred people from accessing the courts was the unreasonable delay involved in lawsuits, which was caused by an understaffed judicial workforce and the heavy caseload.⁷⁵ Judicial reform is still an ongoing project in Taiwan. Mainly carried out by lawyers and professors, groups such as the Foundation of Judicial Reform have sought to revise laws to create a more transparent judicial procedure, to improve courts' demeanor and competence, and to better protect human rights and access to justice.⁷⁶

Among the boom in social movements since after 1987, child welfare activists and women's groups have advocated the rights of women and children through the revision of Family Law.⁷⁷ Taiwan's Family Law is contained in two separate parts of the Civil Code: the Division of Relatives and the Division of Succession.⁷⁸ Although Family Law in Taiwan incorporated some modern ideas when first enacted in 1930, it also upheld traditional patriarchal values and was criticized for discriminating against women, disregarding child welfare and reinforcing unequal gender roles.⁷⁹ In response to the public pressure fostered by activists and social groups, family law went through seven major amendments from 1985 to 2007. The revision of the law coincided with political changes, economic growth and development of women's

⁷³ *Id.*

⁷⁴ Lee, *supra* note 61, at 414–15.

⁷⁵ The average number of days to close a civil case was 53.95 days in 1996, which gradually increased to 111.12 days in 2001, and then dropped to 71.57 days in 2005. See Judicial Statistics, available at <http://www.judicial.gov.tw/juds/year95/8> (last visited June 6, 2000).

⁷⁶ For details about judicial reform in Taiwan, see Judicial Reform Foundation, available at <http://www.jrf.org.tw/newjrf/english.htm> (last visited Apr. 20, 2009).

⁷⁷ Lee, *supra* note 61, at 436.

⁷⁸ See Minfa (民法) [Civil Code] [hereinafter Civil Code], Qinshu bian (亲属篇) [Division of Relatives], art. 967 to art. 1137; Jicheng bian (继承篇) [Division of Succession], art. 1138 to art. 1225 (Taiwan).

⁷⁹ Janice A. Lee, *Family Law of the Two Chinas: A Comparative Look at the Rights of Married Women in the People's Republic of China and the Republic of China*, 5 CARDOZO J. INT'L & COMP. L. 217, 217 (1997).

movement in Taiwan.⁸⁰ The new Family Law incorporated the principles of gender equality and the best interests of the child, while emphasizing the state's role as guardian of disadvantaged family members in various matters, such as those involving domestic violence.⁸¹ The trend of heightening state legal intervention in the family not only helps to break down the boundary between the traditionally-separate public and private spheres, but also provides a foundation and increased legitimacy for state-sponsored family mediation.

A. Town Mediation

The Act of Town Mediation (hereinafter, the Act) was enacted in 1955 and most recently amended in 2007.⁸² Under the Act, a mediation committee composed of seven to fifteen mediators is in charge of mediating civil disputes as well as minor criminal cases.⁸³ Different from mediation under the Japanese occupation, which was generally administrative in nature, town mediation after 1949 shows more profound judicial influences. The control exercised by the judicial branch over this mediation can be demonstrated in two ways: (i) the process of recruiting mediators, and (ii) the judicial supervision of mediation.

Under the 2002 Amendment to the Act, potential mediators in a particular township were initially to be nominated to a pool by the town administrative chief, and then elected to their positions by the township's Representative Assembly.⁸⁴ To further cultivate mediator impartiality, after 2005 neither administrative heads nor current members of the legislature were to be allowed to join a mediation committee.⁸⁵ Moreover, if a dispute involved the mediator or his family, the mediator was to recuse himself from the particular mediation upon the request of a disputant.⁸⁶ Furthermore, the power to decide on town mediators was then to be transferred from the Representative Assembly to the trial court or the district attorney's office nearest to the town.⁸⁷ Since local powerful

⁸⁰ Yuan-Chen Lee, *How the Feminist Movement Won Media Space in Taiwan: Observation by A Feminist Activist*, in SPACES OF THEIR OWN: WOMEN'S PUBLIC SPHERE IN TRANSNATIONAL CHINA 95–113 (Mayfair Mei-Hui Yang ed., 1999).

⁸¹ Li-Ju Lee, *Fabu Ru Jiamen? Jiashifa Yanbian De Falu: Shehuixiao Fenxi [Between the State and the Family—A Study of Recent Taiwanese Family Law Development]*, 10 ZHONGYUAN CAIJING FAXIAO [CHUNG YUAN FIN. & ECON. L. REV.] 41, 83 (2003).

⁸² See Taiwan Ministry of Justice, Database of Law, available at <http://law.moj.gov.tw/Scripts/Query4A.asp?FullDoc=all&Fcode=I0020003> (last visited July 23, 2010).

⁸³ See Xiang Zhen Shi Tiaojie Tiaoli (乡镇市调解条例) [Act of Town Mediation], art. 1 and art. 2 (Taiwan) [hereinafter, the Act].

⁸⁴ See the Act, art. 3.

⁸⁵ *Id.* art. 5.

⁸⁶ *Id.* art. 16.

⁸⁷ *Id.* art. 3.

figures often occupy administrative and legislative positions in the townships, the 2002 Amendment also aims to reduce potential conflicts of interest by setting limitations on who may participate in mediation committees. Besides their power to decide upon town mediators, trial courts possess the power to review settlements made at the town level to see whether they are consistent with existing law.⁸⁸ Once confirmed by a judge, the settlement receives legal status making it automatically enforceable, and disputants are enjoined from launching subsequent litigation on the decided matter.⁸⁹ This binding effect is similar to that of administrative mediations conducted during the Japanese colonial period.

According to statistics provided by Taiwan's Ministry of the Interior, cases of town mediation have increased from around 45,000 in 1991 to 112,000 in 2008.⁹⁰ Apparently, urbanization and industrialization have not been responsible for this rise in the overall number of mediated cases, as they have with litigation. The nature of disputes leading to an increased caseload has in either case been different. The statistics indicate that the number of civil mediation cases has not changed much since 1995, whereas criminal mediation cases have grown tremendously. Since 2003, the number of criminal cases has surpassed civil ones. According to the latest data, among all the cases which were submitted to town mediation during 2008, only about 43% were civil cases, while 57% were criminal cases.⁹¹ One field study pointed out that the notable increase of traffic accidents during this period actually accounts for the boost to town mediation figures.⁹²

Although town mediation in Taiwan seems to be modernized, some aspects of the system still show traces of Confucian thought. For example, mediators tend to be mostly elder males. In fact, prior to 2005 more than 85% of mediators were male.⁹³ It was not until 2005—when cases involving domestic violence were on the rise—that a new provision was added to the Act, proclaiming that one fourth of mediator positions were henceforth to be reserved for female mediators.⁹⁴ As a result in 2008 the overall percentage of male mediators dropped to 72%, but they still comprise 78% of mediators over fifty years of age.⁹⁵ This common

⁸⁸ *Id.* art. 26.

⁸⁹ *Id.* art. 27.

⁹⁰ Department of Statistics, Taiwan Ministry of the Interior, available at <http://www.moi.gov.tw/stat/english/index.asp> (last visited Nov. 3, 2010).

⁹¹ See Nei Cheng Tung Chi Tong Bao [Statistics of the Interior Report], available at http://www.moi.gov.tw/files/news_file/week9715.doc (last visited Mar. 15, 2010).

⁹² Shao-Wu Jung, *Wen Hua Fa Lu yu Tze Lue: Shiang Chen Tiao Jie Guo Cheng de In Jio* [Culture, Law and Strategy: Research on the Process of Town Mediation], 38 TAI WAN SHE HUI XIAO KAN [THE TAIWANESE JOURNAL OF SOCIOLOGY] 57, 70 (2007).

⁹³ Statistics of the Interior Report, *supra* note 90.

⁹⁴ The Act, art. 3, para. 4.

⁹⁵ Statistics of the Interior Report, *supra* note 90.

practice is consistent with Confucian teachings on gender roles and the respect due to elders.

One commentator has pointed out that many town mediators consider mediation as a forum in which to reach a compromise and avoid litigation, restoring social harmony, a concept closely related to the Confucian tradition.⁹⁶ Taiwanese society is still a relationship-driven society composed of primary and secondary interpersonal relationships.⁹⁷ Since the maintenance of relationships, or *guan shi*, is more important than questions of actual right and wrong, fairness must be judged in the context of such social relations instead of according to strict justice under the law.⁹⁸ If a mediator happens to be an acquaintance of a disputant, his relatives or his friends, the mediator will often appeal to mutual relations or *guan shi* as part of reaching a settlement. Furthermore, some disputants have been asked to perform a favor of benevolence, or *jen ch'ing*, on behalf of an elder mediator, by thinking of the situation from the opposite party's perspective and achieving conciliation. The concept of *jen ch'ing* is a mutually-recognized social obligation, crucial to maintaining the "face" of both mediator and disputants.

B. Court Mediation

Statistics show that court mediation in Taiwan is increasing because of legal reforms, but has been relatively less used and less efficient, when compared to town mediation. Specifically, the 1999 amendment of the Civil Procedure Law ordained eleven types of civil cases as being obligated to undergo mandatory mediation before proceeding to litigation, including property and family disputes.⁹⁹ Even at the litigation stage, the two parties may, upon agreement, suspend the lawsuit and restart court mediation.¹⁰⁰ The new law has resulted in the increase of court mediation from about 47,000 cases in 1999 to 81,000 in 2008, though that figure is still much less than the figure for cases mediated through town mediation.¹⁰¹ The percentage of successfully mediated cases is also low: only around 14% were successful in 1999, but this grew to 47% in 2007.¹⁰² On the other hand, civil lawsuits handled by

⁹⁶ Jung, *supra* note 92, at 78–80.

⁹⁷ DUAN LIN, RU JIA LUN LI YU FA LÜ WEN HUA: SHE HUI XUE GUAN DIAN DE TAN SUO [CONFUCIAN ETHIC AND LEGAL CULTURE: A SOCIOLOGICAL ANALYSIS] 86–87 (1994).

⁹⁸ *Id.* at 28–29.

⁹⁹ See Minshi Susong fa [hereinafter Civil Procedure Law], art. 403 (Taiwan).

¹⁰⁰ Civil Procedure Law, art. 420-1.

¹⁰¹ See Statistics of Judicial Yuan, Taiwan available at <http://www.judicial.gov.tw/juds/year96>. (indicating from 1999 to 2007, town mediation in Taiwan increased from 99,000 to 112,000 cases.)

¹⁰² Statistics of Judicial Yuan, Taiwan available at http://www.judicial.gov.tw/juds/year96/08/08_027.pdf.

Taiwan's district courts amounted to 1.37 million cases in 1998, increasing to 2.81 million cases in 2008, which is altogether far higher than the number of cases resolved by court mediation and town mediation combined.¹⁰³ On the whole, Taiwanese people are showing more inclination to use litigation to address disputes, which is rather consistent with their behavior during the late Japanese colonial period.

Court mediation is not conducted directly by judges, but rather by a panel of one to three mediators appointed by the court.¹⁰⁴ If the dispute is not settled, the process of litigation resumes and neither statements made nor any compromises agreed to during the mediation phase may be used as the foundation of a later judicial decision.¹⁰⁵ The advantage of such a distinction is procedural justice, because the judge's opinion is not contaminated by a party's statement made during court mediation. One potential disadvantage of the court mediation model is that it creates unnecessary structural and procedural overlaps with town mediation, as a result of the fact that pools of mediators are shared between the two systems.

The above disadvantage could be partly alleviated by the latest developments in family mediation. The new system recruits licensed experts, such as social workers, to conduct family mediations and to assist divorcing couples in post-divorce arrangements, including custody issues, alimony and child support.¹⁰⁶ The legal reform was inspired by the work of the Child Welfare League Foundation (hereinafter, the Foundation), a non-profit organization dedicated to advocating children's rights for the purpose of raising awareness of child welfare issues in Taiwan.¹⁰⁷ In the process of a divorce, children's interests are often overlooked. The two ways of applying for a divorce in Taiwan are argued to exacerbate the situation of children involved. Divorce by mutual consent is extremely simple, requiring only the submission of a written form with two parties' and two witnesses' signatures, and the completion of a household registration procedure.¹⁰⁸ Children's rights are left to negotiation between parents because court supervision is not required in this type of divorce. In contrast to the scenario where there is mutual consent, divorce through

¹⁰³ Statistics of Judicial Yuan, Taiwan available at http://www.judicial.gov.tw/juds/year96/08/08_03.pdf.

¹⁰⁴ See Civil Procedure Law, art. 406-1.

¹⁰⁵ See *Id.* art. 422.

¹⁰⁶ Jing-Hui Hsieh, *Tan Shun Jia Shi Tiao Jie Xin Fang Xiang: Yi Taiwan Shilin Di Fang Fa Yuan Jia Shi Fa Ting Chu Li Jia Shi Tiao Jie Jing Yan Chu Fa* [In Search of the New Direction of Family Mediation: Starting from the Experiences of Family Mediation by Family Court of Taiwan Shihlin District Court], 9(8) QUAN GUO LU: SHI [TAIWAN BAR JOURNAL] 13, 13-14 (2005).

¹⁰⁷ For more information see generally the Child Welfare League Foundation's website, available at <http://www.children.org.tw/>.

¹⁰⁸ See Minfa [Civil Code], art. 1050 (Taiwan).

litigation is a rather tough process, in which the party wishing to divorce must meet a high evidentiary bar. That party must use concrete and legally-accessed evidence to demonstrate the other party's adultery, use of violence, or abandonment.¹⁰⁹ In the process of such divorce litigation, emphasis is placed on the issue of whether a divorce can be granted, and not on the best interests of the child in the post-divorce setting.

In this context, the Foundation first introduced family conciliation in 1996, and after several years of advocacy and preparation began to provide consultation services for divorcing couples in 2002.¹¹⁰ Due to the increase in divorce cases and the highly emotional setting of family mediation, it is necessary for a trained mediator to assist the two parties in reaching an agreement that considers the child's best interests as well as the needs of the parents. A few judges responded to the Foundation's efforts by promoting family mediation in their courts.¹¹¹ In 2005, the Judicial Yuan launched a family mediation pilot project in six district courts, and in 2008 promoted this to every family court in Taiwan.

The non-adversarial approach of using mediation is considered appropriate for resolving family disputes, because most disputants either live in the same household or need to cooperate with each other in caring for children. To resolve disputes and to restore harmony to families, family courts recruit experts such as psychotherapists, lawyers and social workers to work with the disputants. If domestic violence is involved, mediation is not allowed unless the mediator has been trained to handle such cases or the victim is accompanied by a supportive person.¹¹² Interestingly, each family court has developed a model of family mediation which differs slightly from that of its peers. For example, in T'aipei District Court, two mediators usually meet with each of their respective parties separately, and only proceed to a meeting of both disputants and mediators to decide the matter with the two parties' consent.¹¹³ In T'aichung District Court, however, parties do not have separate mediators but both are required to be present in the meeting with the mediator.¹¹⁴ Still, judges are the ultimate supervisors of family mediation and are responsible for choosing suitable mediators according to the nature and type of the family dispute.

Compared to the mediators who conduct town mediation, the mediators in court mediation generally have a higher level of education

¹⁰⁹ *Id.* at art. 1052.

¹¹⁰ Hsieh, *supra* note 106, at 15.

¹¹¹ *Id.*

¹¹² See Jiating Baoli Fangzhifa [Domestic Violence Prevention Act], art. 47 (Taiwan).

¹¹³ Wen-Hsueh Hsiao, Jia Shi Tiao Jie Zhi Yan Jiu: Yi Lun Li Yu Ti Wei Zhong Xin [Research on Family Mediation: Focusing on Ethical Issues] 130–31 (2008) (unpublished LL.M. thesis, National Tsing Hua University) (on file with author).

¹¹⁴ *Id.* at 131–33.

and more opportunities to partake in specialized training programs.¹¹⁵ The facilities that courts provide to such mediation—both physical, such as the mediation room, and otherwise, such as legal assistance—are also much superior than those available at the township level. Nevertheless, there are emerging challenges that such family mediation must face. The process of providing counseling services, especially where those are provided by mediators who are simultaneously psychotherapists and social workers, should remain confidential so as to comply with professional ethics. Mediators should not be required nor asked to reveal details concerning their mediation, so that the judge will not be biased if later the case is to be litigated. However, since judges have the power to supervise and to give instructions, there are potential professional conflicts between the judge and the court-appointed mediator. Currently, there are no standard rules or operating procedures concerning what kind of information may and may not be revealed to the judge during the mediation, because the new system has only lately been implemented. One potential consequence of not having unified and clear guidelines on this matter could be that the two parties will not feel comfortable or safe to speak to mediators for fear of making the inevitable disclosure to the judge, and the goal of mediation would in this case not be met.

V. INTERACTIONS BETWEEN STATE LAW AND TRADITIONAL CHINESE LEGAL CULTURE

Taiwan has adopted western legal thoughts and codes since the Japanese military takeover in late nineteenth century. Meanwhile, the Taiwanese people's experiences of dispute resolution continue to be influenced by traditional Chinese legal culture. Even though the state law is now completely westernized, the long-lasting legal tradition still has power over how law is interpreted and enforced. Law scholars and practitioners in Taiwan have encountered the dilemma of how to reconcile state law with Confucian tradition. In other words, when the "law on the books" is not identical to the "law in action," how might this discrepancy impact and transform the system of dispute resolution? Would the official state law simply become ineffective due to a problem of enforceability? Or would the construction of traditional legal culture be gradually changed?

As a Chinese society that underwent Japanese colonial rule and a process of legal transplantation, Taiwan's law flows from multiple sources

¹¹⁵ For example, mediators of Tainan District Court are composed of physicians, lawyers, teachers and social workers, who have at least a college degree. See Taiwan Tainan District Court, http://tnd.judicial.gov.tw/HN/H06_04.asp. On the other hand, only 27.7% of town mediators had a college-level of education in 2011. Department of Statistics, Taiwan Ministry of the Interior, http://www.moi.gov.tw/stat/news_content.aspx?sn=5114.

and exhibits legal pluralism. Legal pluralism is generally defined as a situation in which two or more legal systems coexist in the same social field.¹¹⁶ In his pioneering work on “legal levels,” Pospisil claims that “every functioning subgroup in society has its own legal system which is necessarily different in some respects from those of the other subgroups.”¹¹⁷ By “subgroups” he means sub-units such as family, lineage and community that are integral parts of a homogenous society. Early studies of legal pluralism examine indigenous legal ways among tribal and village people in colonial Asia, Africa, and the Pacific.¹¹⁸ Tribes and villages had developed some law over generations, on to which western law was then imposed by the European colonial powers. The imposed law, forged in a state of industrial capitalism rather than an agrarian way of life, embodied very different principles and procedures.

Before the Japanese military takeover in 1895, Taiwan was ruled by the imperial Ch’ing for more than two centuries. The code of the imperial Ch’ing was the state law of Taiwan during that period, and was deeply influenced by Confucian ideas of dispute resolution.¹¹⁹ Brought by Han Chinese immigrants to Taiwan, the Confucian tradition incorporated the notions of an anti-lawsuit attitude, law as punishment, a collectivist ideal or outlook and family-centered ethics—and melded these into the day-to-day life of Taiwanese people. When Japanese colonial power further brought German-style laws and a modern court system to Taiwan, representing the western ideals of individualism and of legal rights, the consequence of this was that a plurality of legal orders was created.

For a society like Taiwan, however, the existence of legal pluralism is itself of less interest than the relationship between Japanese colonial law and the Confucian legal tradition. On many occasions, state law may be utilized as a competent tool for the modernization of Third World countries.¹²⁰ For example, leaders of many post-colonial societies often regard their traditional legal system as messy and obstructive to

¹¹⁶ See generally LEOPOLD J. POSPISIL, *THE ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY OF LAW* 107 (1971), SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: CUSTOMARY LAW ON KILIMANJARO, 1880–1980* (1986) (discussing the definition and concepts of legal pluralism).

¹¹⁷ See LEOPOLD J. POSPISIL, *THE ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY OF LAW* 107 (1971) (“Every functioning subgroup in society has its own legal system that is different in some respects from those of the other subgroups.”).

¹¹⁸ See Sally E. Merry, *Legal Pluralism*, 22(5) *LAW & SOC’Y REV.* 869, 869 (1988) (examining the indigenous law ways among tribal and village peoples in colonized societies in Africa, Asia, and the Pacific, and how they maintained social order without European law).

¹¹⁹ Chu, *supra* note 39, at 355 (stating that Confucian thought’s influence and transformation of Chinese state laws should be described as “the Confucianization of Chinese law”).

¹²⁰ See, e.g., JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

progress, and therefore draw on the power of state law to reshape the social order.¹²¹ As post-colonial societies endeavor to adopt more “civilized” state law for the purpose of modernization, however, they meet with intense resistance from those groups whose law has been preserved in some fashion.¹²² This is partly because new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence.¹²³ The social arrangements are often effectively stronger than the new laws.

During the Japanese colonial period, mediators no longer tended to be elders of clans or respected local figures, but were individuals appointed by the district governments or by Japanese police officers. At the same time, the Han Chinese “old customs” continued to be applied in both civil mediation and litigation. Since traditional Chinese legal culture was so deeply rooted in the minds of the Han Chinese populace, the preservation of certain customs helped to uphold the legitimacy of the Japanese rule and reduced resistance to it from the ruled class. In the course of this dialectical, mutually-constitutive interaction between state law and Chinese legal tradition, customs regarding family and succession became part of the state law through selective application by the colonial courts. After 1920, Taiwanese became more familiar with modern court procedures and learned to work with lawyers.¹²⁴ In this context, some traditional Chinese legal culture was gradually changed. For example, the traditional belief that a wife had no separate legal standing was modified because colonial courts afforded Taiwanese women legal standing against their husbands in cases of marriage dissolution.¹²⁵ Although Taiwanese women were often powerless in settings of private negotiation, they were nevertheless empowered by such colonial court practices and thus became more willing to resort to litigation. In this case, instead of revolutionary changes, there was a gradual transformation in women’s access to the courts to address family problems.

After the ROC government retreated to Taiwan in 1949, a second westernized legal system—modeled this time after both German and Japanese law—was brought to Taiwan. Compared to town mediation,

¹²¹ See, e.g., John Griffiths, *What is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM 1–55 (1986).

¹²² See CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 228 (1983) (stating how post-colonial societies respond to attempts to enact more “civilized” and modernized laws with resistance).

¹²³ Sally Falk Moore, *Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7(4) LAW AND SOC’Y REV. 719, 723 (1973) (analyzing the effects of law being abstracted from the social context in which it exists).

¹²⁴ WANG, *supra* note 51, at 557 (stating how Taiwanese civil matters were governed by old Han Chinese customs and laws).

¹²⁵ WANG, *supra* note 45, at 204–13.

¹²⁵ Chen, *supra* note 64, at 218–20.

however, the number of lawsuits continued to grow after this point because of urbanization and the relocation caused by industrialization.¹²⁶ In disputes over family and succession issues, for example, the 2008 statistics show that the number of litigated cases was around 12 times greater than cases under town mediation.¹²⁷

Mediation by experts in family courts, which has been adopted in Taiwan since 2008, is a new experiment aimed to reduce the cost of litigation and tailor results better to disputants' needs. Because family court mediation has only just been implemented in Taiwan recently, studies on this new kind of court mediation are still in their infancy. Nevertheless, Taiwan has adopted westernized law for more than a century since 1895. Have long-existing Confucian views about family harmony and interpersonal relationships died away? Or do these still play a part in mediators' approach to resolving family disputes? More empirical studies will be required to learn more about court mediators' state of mind and their views about certain traditional Chinese values.

One quantitative study that explored the ethical conception and behavior of mediators from 17 family courts in Taiwan provides some insight on the above questions. First of all, the study indicated that 53% of mediators tended to counsel against divorce for the sole purpose of maintaining family harmony, while 47% had never done so.¹²⁸ It also discovered other intriguing facts, such as the following: in mediating family disputes, 55% of mediators often or sometimes suggested that a wife who refused to live with her husband's parents was morally wrong, while 45% never made such a suggestion; 52.3% advised that women working outside of homes were still responsible for most household chores, while only 47.7% reported never having said so.¹²⁹ Even in the context of domestic violence, 48.3% of mediators have at least once told a wife that physical violence was not a serious matter; and 49.4% have expressed the opinion that a husband's constant use of swearwords towards his wife did not constitute abuse, and therefore should be tolerated.¹³⁰

¹²⁶ Wang, *supra* note 2, at 154.

¹²⁷ See Judicial Yuan, Difang Fayuan Jiashi Shijian Shoujie Jianshu Yi An Nian Biefen [地方法院家事事件收結件數一按年別分], <http://www.judicial.gov.tw/juds/year97/09/021.pdf> (last visited May 8, 2010). See also Taiwan Ministry of the Interior, Summary of Mediation Services Conducted [辦理調解業務概況], <http://sowf.moi.gov.tw/stat/year/y01-09.xls> (last visited May 8, 2010).

¹²⁸ Hsiao, *supra* note 113, at 162 (providing statistics from a study that revealed how 53% of mediators advised against divorce in order to maintain familial harmony).

¹²⁹ *Id.* at 170–72 (providing statistics demonstrating that 55% of mediators have suggested that a wife is morally wrong for refusing to live with her husband's parents).

¹³⁰ *Id.* at 173 (providing statistics showing that almost 50% of mediators do not believe violence is a serious matter and also do not think the pervasive use of swear words against a wife constitutes abuse).

Judging from above statistics, although court mediators in Taiwan tend to be better-educated and more professionally advanced than their town mediator peers, they may still be subject to a strong influence from certain patriarchal ideas embedded in Taiwan's traditional culture. One idea, for instance, is the Confucian principle of maintaining family harmony at any cost—and often at the cost of a woman making her own choices about her life, as well as the principle of gender equality, and even personal safety. A similar study has not yet been carried out for town mediation, which still awaits a future survey. The above study did indicate, however, that mediator gender and age were the most statistically significant variables insofar as their attitude towards gender equality was concerned.¹³¹ Specifically, female mediators and mediators under the age of sixty years displayed far greater awareness of ethical behavior and so did those mediators under sixty years old.¹³²

VI. CONCLUSION

The legal operation of dispute resolution can be viewed as a continuum, with private negotiation between disputants at one end and litigation on the other. Between the two ends are: mediation within a clan, town mediation, and court mediation. From informal private settlement to formal judicial decision, the influence of Confucian teaching generally declines while the control of the law tightens. Traditionally, Taiwanese people have preferred to settle civil and family disputes outside of courts and through informal means, due to the continuing influence of traditional Chinese legal culture. The modern town mediation, which is derived from the German civil procedure laws, however, is different from traditional mediation in many ways. For example, traditional clan or town mediation is a private way of resolving disputes, while modern town mediation has been controlled by either township officers—in Japanese colonial times and the early Nationalist government era—or alternately the courts, which are responsible for supervising it at present. As for in-court mediation, it is modeled on western laws and therefore it has no parallel in traditional Taiwanese society.

In the context of Taiwan's legal modernization, this article examined the history and evolution of civil mediation in Taiwan from the beginning of the Japanese colonial era in 1895, up to 2008 when the new system of family court mediation was implemented to every district court in Taiwan. Traditional Chinese culture is not entirely compatible with westernized state law first adopted by the Japanese colonial government.

¹³¹ *Id.* at 34 (referencing a study that showed a mediator's gender and age to be the most significant factors in their views concerning gender equality).

¹³² *Id.* at 181–84 (referencing a study that showed female mediators and mediators under sixty years old to engage in more ethical behavior).

However, because of the increase in judicial staff and funding required, the progress of economic development and the growing prevalence of education among Taiwanese people, a major transition has occurred over this period and gradually, Taiwanese have reached the point where they resort to courts more often than they will to mediation.¹³³ This inclination to engage in civil litigation has continued to grow during the Nationalist government era beginning in 1949.

However, the new westernized state law and Chinese tradition have not always been mutually exclusive. The dynamics of change and transformation between legal orders holds especially true in the area of family issues. On the one hand, Taiwan's current family law was enacted in 1930 with German law influences that emphasized individualism, personal rights and gender equality. On the other, the traditional Chinese values of collectivism, interpersonal harmony, and patriarchy continue to affect the way in which law is interpreted and enforced in Taiwan. Setting aside the "state-law-versus-custom" dichotomy, this ever-evolving process of dialectic, resistance and melding between different legal orders shows no signs of abatement, and will continue to affect life and legal practice in Taiwan.

¹³³ WANG, *supra* note 45, at 204–13.