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Tzung-Mou Wu

Western Legal Traditions for »Laying Down Taiwan’s Indigenous Customs in Writing«

Abstract

The question of what the law is may preoccupy some legal theorists. Answering it is definitely the legal professionals' nightmare. Constitutional and statutory requirements now require Taiwan's officials and lawyers to confront the problem of ascertaining and applying indigenous customs in the exercise of all state powers. Yet, the most widely accepted juridical concept of custom results in a choice between two evils, to wit, breaching either the general duty to uphold law or the concrete obligation to respect indigenous values. So far, efforts have only been made to document the customs, but the documentation thus produced is too ethnographic to be legally useful. The challenge, therefore, is one of translation. Values are to be carried from an indigenous world into the modern one, and the little-known form of custom is to be expressed in the language of the science of law.

This paper argues for the translation of indigenous customs with conceptions available in an array of examples from European legal history. This paper explains that, in cases like Taiwan, the solutions known to the English-speaking literature all end in the dilemma I call »modern state centralism« (MSC). The solutions are divided into two types: legal pluralism and Francisco Suárez's conception of custom. The former defeats itself in that its criticism against the state's monopoly of law amounts to suggesting that the state tolerate all kinds of non-state normativity. The latter reduces to MSC because recent literature ignores Suárez's legal historical references and important studies written in German. The rest of the section shows how »non-modern« legal techniques may help. This paper concludes by suggesting that the concept pair of law and custom be dissociated from four others, to wit, written and unwritten law, state and society, law in books and law in action, and, finally, alien and native law.



Tzung-Mou Wu*

Western Legal Traditions for »Laying Down Taiwan's Indigenous Customs in Writing«**

I. Indigenous Customs and State Legislation

All ethnic groups are now called indigenous peoples as in the following pages, or aboriginals, autochthonous peoples, First Nations, and the like because of their contact with others. None of them used to refer to themselves with any of those apparently relational terms in their own languages. Most of those contacts entailed colonization and, both at the time and since, the connection to the global economy and politics. Most indigenous individuals currently live in a normative order run by a modern state, among others, and are subject to an alien cosmology and all of its consequences, and are thus denied the freedom to take for granted everything about and around themselves. This is the case whether or not an indigenous people gained political independence in the last century. Despite local differences, all sovereign states inherited by indigenous peoples have preserved the machinery of government left by their colonizers instead of generalizing the pre-colonial form of political organization. In so doing, the newly independent countries have left many pre-existing juridical relations untouched. While the indigenous cosmology and, according to H. P. Glenn, its chthonic legal tradition persist, they remain, if not condemned, subaltern.¹

To borrow Glenn's terms, it is *not the rule of law*, but *the rule of laws that is at stake* here, to wit, the implementation of a »sustainable diversity in law.«² Legal professionals and scholars are familiar with approaches to reconciling seemingly incompatible principles. Yet difficulties arise in ascertaining a customary rule in a given case and, more broadly, in describing the body of a people's custom. Some widely discussed domestic court decisions notwithstanding,³ it remains an open question as to how the normative order of a modern state integrates that of an indigenous community under the state's sovereignty. Such integration is effective only if officials know how to implement relevant indigenous principles and, if possible, rules and procedure in an administrative or judicial proceeding. It may sound unrealistic to pursue this goal. Those who prefer either of the two apparently more straightforward options to relate two normative orders, to wit, the full application of the state order on the one hand and that of the indigenous on the other, may dislike such integrative diversity. The former, as a way to assimilate indigenous individuals by force, recalls the bygone civilizing missions that are now condemned by contemporary international standards.⁴ The latter faces two major challenges. First, it fails to take into account many states' constitutional and international commitments to human

* Assistant Research Professor, Institutum Iurisprudentiae, Academia Sinica. The author thanks Awi Mona, Miloš Vec, Shih-Tung Chuang, Wen-Chi Kao, Yun-Chien Chang, Shu-Perng Hwang, Tzu-Yi Lin, Cheng-Yi Huang, Pin-Hsuan Huang, Akira Fujimoto, Laurent Mayali and Clifford Ando for their generous help and insightful comments. The usual caveat applies.

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mosa, the Pescadores (Penghu in Mandarin) Quemoy (or Kinmen) Matsu (or Mazu) and other smaller islands. Among her many aliases, the best-known is »Chinese Taipei«, used by the International Olympic Committee, and »the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TPKM)«, though less popular, is used in the World Trade Organization. All terms of Chinese languages are transcribed according to their modern-day Mandarin pronunciation in the Hanyu Pinyin system, if unspecified. All non-western names are transcribed in the respective order.

1 See GLENN (2014) 60 f.

2 GLENN (2014) 361–385; for a shorter version, see GLENN (2012).

3 For example, the Mabo case where the High Court of Australia recognized the »native title« to the land of the Mer Island as belonging to the aboriginal group of Meriam people represented by Eddie Mabo. *Mabo v Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).

4 See among others the Indigenous and Tribal Populations Convention of the International Labor Organization (ILO C107, 1957) the Indigenous and Tribal Peoples Convention (ILO C169, 1989) and the United Nations Declaration on the Rights of Indigenous Peoples (DRIP, 2007).

rights, in particular to those that override indigenous values. Second, it raises, among others, »separate-but-equal« types of concerns on the access to a fair trial.⁵ Under the contemporary western understanding of equal protection under the law, a mandatory, ethnicity-based division of jurisdictions is constitutionally suspect in many countries.⁶ Such an arrangement could probably be legitimate and feasible if – perhaps only if – individuals of different ethnicities live in the same country but in segregation. It would fail in societies without such boundaries, let alone where jurisdictions are run only by professional, tenured state officials instead of non-professional magistrates from indigenous communities. In other words, legal historians should know better about the limits to the personality of laws and disdain the apparently easy solutions.

This article discusses the potential of legal historical scholarship on Western European customs for contemporary Taiwan with respect to the question of how to integrate such normative orders. It is a pilot study for future research projects. The article aims to explain the theoretical positions and methodological decisions that framed a workshop held in May 2015, where the nine other contributions in this Focus were presented and discussed. Leaving debates on Taiwan's status and statehood in international law aside, this article argues that the country presents a worthy test case for issues concerning indigenous customs, because it casts a new light on the literature and demands different approaches. For the problems that Taiwan's indigenous peoples (hereinafter TIPs) are confronting, this Focus affirms the deficiency, if not failure, of conventional approaches, which range from certain variants of U.S. legal realism, the anthropological versions of legal pluralism, and the neglect of non-English literature. The deficiency, here called »modern-state centralism« (hereinafter MSC), refers to the inconsistency that conventional approaches, while criticizing the modern state's hegemony over indigenous customs, use the same hegemony to implement legal pluralistic ideals.

MSC correlates with the absence of a satisfactory, overarching concept of custom. This paper argues that legal and /or historical scholarship of custom in Western Europe, along with up-to-date historiographical knowledge exemplified in the rest of this section, provides models and examples to produce and revise concepts applicable to everyday legal practice and policy debates. This approach challenges four concept pairs that strangers to legal history often associate with law and custom, to wit: written and unwritten law; state and society; law in books and law in action; and the final one of alien and native law. This section focuses on the work of officials and practitioners under Taiwan's current constitutional framework. *Lex mercatoria*, other political agendas, and institutional reform initiatives are left out of consideration without prejudice.

This article contains two parts, each of which contains two subparts. In the next section I discuss background information and Taiwan's significance. The following section discusses the dilemma of the MSC caused by the scant, obsolete legal historical knowledge available in the country. It explains why neither of the approaches, the ideal type of legal pluralism and civil law scholarship in Taiwan, is able to overcome the MSC.

II. Why Taiwan Matters?

Some basic information about TIPs and a short history of their struggles and the institutional background help to understand why Taiwan matters in the domain of indigenous customs.

A. *A Short History of Taiwan's Indigenous Peoples vis-à-vis State Power*

Anthropological and linguistic literature puts TIPs into the greater family of Austronesian- or Malayopolynesian-speaking peoples. Despite scholarly and political debates, this Focus concentrates only on the sixteen officially recognized peoples

⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶ See Art. 7 and Art. 10 of the Universal Declaration of Human Rights; Art. 6, Sec. 1, and Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

among Taiwan's whole indigenous population.⁷ As of January 2016, official statistics count 547,035 indigenous people or about 2.3% of the total population. The ratio has been stable for decades. The four largest groups account for 81.4% of Taiwan's overall indigenous population. These include the Pangcah or Amis (203,547 people/37.2% of the whole indigenous population), Paiwan (97,710/17.9%), Dayan (formerly known as Tayal or Atayal, 87,080/15.9%), and Bunun (56,788/10.4%). Currently, about 45.9% of the indigenous individuals live in urban areas, 24.2% in so-called plain indigenous townships, another 29.9% in mountain ones or districts of one of the six metro-poles (*zhixiashi*). These names are explained below.

This section is limited to the sixteen peoples because of path dependence. TIPs have been divided into two mutually exclusive hierarchical categories since the Qing Empire's authority reached Taiwan in 1683, the year it defeated the regime headed by Koxinga's grandson. The criterion of the division was neither purely ethnic nor territorial, but the inter-ethnic relation perceived by the empire or, in condescending terms, »degree of civilization.« Roughly speaking, the official records and the literates' writing used to call all non-subjects *fan*, literally »savages;« those who inhabited areas in Taiwan beyond the empire's control were *shengfan*, literally »raw savages.« The others, who lived on the imperial soil were *shoufan*, literally »cooked savages.« Some local settlers called the latter colloquially *penn-po-huan* or *pinn-po-huan* in Southern Hokkien, *pingpufan* in Mandarin, literally »plains savages,« for these indigenous peoples lived in low-lying areas. A *shengfan* individual or community could move into a third category, namely *huafan*, literally »acculturated savage,« who spoke Southern Hokkien yet lived her traditional life, regardless of the geographical location. The Qing's subjects were legally forbidden from entering *shengfan*'s territories, and in general feared some of the latter's lethal force, which included headhunting, while the more peaceful *shoufan* gradually fell victim to assimilation, dispossession, and social marginalization as the Han Chinese settlers proliferated. These ethnic, status, and spatial boundaries continued under the Japanese regime. While *shengfan*'s territories

started to shrink as the modernized army of Meiji Japan advanced from the beginning of the twentieth century, the Government-General of Taiwan (GGT) kept the peoples and areas it called *ban* (later *Takasago* tribes) and *banchi* institutionally and statistically distinct from the *hontōjin* (»people of this island,« including Han Chinese and the *shoufan*), who dwelled on *heichi*, plains, from which the »plain townships« derive. From the *shengfan* territories under the Qing to *banchi* under Meiji Japan, the space became thirty *shandixiang* or mountainous townships, including Orchid Island in the Pacific Ocean, where the Yami or Dawu people reside, in 1951, roughly two years after the Chinese Nationalist regime had fled from the mainland to Taiwan. The sixteen ethnic groups cover all the former *shengfan* and part of the *shoufan*.

The distinction of status as perceived and practiced by the GGT brought about different experiences of land tenure and dispossession among both categories of indigenous peoples. In short, the organized, case-based abolition and compensation of traditional titles land interests was carried out within the former Qing's territories, a wholesale declaration of the Japanese Crown's title to the space free from Qing's control, as if it had been *terra nullius*, except for the parcels with deeds. Annexing Taiwan by virtue of a peace treaty, Japan acquired, in accordance with contemporary international law, sovereignty over the territories that Art. 2 of the Treaty of Shimonoseki defined, including the *shengfans*' territories, where the Qing had never set foot, and the properties that the Qing government had formerly owned. Private properties, either held by Han Chinese or *shoufan*, were to remain as they were. Art. 5, sec. 1 of the treaty also allowed those who intended to move their residences to sell their real estate. Hence, the GGT launched comprehensive surveys of land tenure and ownership, irrigation networks, laws, and customs in 1898. The task was confined to the regions under Japanese control, approximately the former Qing territories. A series of reports and a summary version in English as well as the land administration framework, including title registration and cadastral maps that are still in use, appeared in 1905.⁸ When the first three books

7 The number has varied from 1, 7, 9, 14, to 16.

8 See OKAMATSU (1971).

of Japan's civil code in Taiwan (of General Principles, Obligations, and Things) came into effect in 1919, the land tenure transformation process was complete for Han Chinese and *shoufan*. On the other hand, the GGT declared the Crown's title to all wooded lands and forests on the island with an ordinance of 31 October 1895 to wit, the area which almost only shengfan inhabited. This legislation laid the foundation for the current legal regime concerning the indigenous peoples.⁹ It was also blatantly colonial, since it not only imitated what western powers had done elsewhere, but it was also contrary to the classification of collectively- or communally-owned wooded lands and forests in metropolitan Japan under the land tax reform that was implemented during the 1870s. Having dispossessed the theretofore independent indigenous peoples on paper, the colonial government spent the next twenty years securing its grip on the indigenous territories. Most of the institutional legacy survived the end of the Empire of Japan in August 1945.

The Republic of China ruled by Jiang Jieshi (conventionally transcribed as Chiang Kai-Shek) and his Chinese Nationalist Party, *Guomindang* (conventionally *Kuomintang*, hereinafter KMT), which occupied Taiwan and the surrounding islands in 1945 on behalf of the Allies and has subsisted as an émigré regime there since 1949, added nothing but apparently egalitarian terms to the institutional framework left by the defunct GGT. Although the KMT regime, which was deemed the legitimate government of China in the United Nations until 1971, ratified the ILO Convention C107 in 1962, Art. 4 and 7 to the »cultural and religious values, the forms of social control, institutions, and customary law« were largely ignored until the late 1990s. Among the post-war changes, the official language censored the word »savages,« inventing instead the term of *shandi tongbao* (often abbreviated as *shanbao*), »mountain compatriot,« until opting for the cur-

rent *yuanzhumin*, translated into »aboriginal« for a while and later »indigenous,« in 1994. In addition, elected civil offices became open to all eligible citizens regardless of ethnicity, at least formally. Thus, a new political order emerged gradually and overlapped with the traditional one. The justice system was formally available thereafter. However, poor conditions of infrastructure, literacy, revenue, legal counsel and the like reduced the practical significance of these developments. Because of neglect for the customs, values, and cultural features of each people, the apparent egalitarianism effectively became a process of unintentional assimilation. The Books of Family and of Inheritance of the regime's civil code were applied so indiscriminately as to impose on TIPs the patrilineal family order and the naming system designed for Han Chinese. The change of naming system had caused confusion until the traditional naming system was introduced into the civil registry in 1995. Some indigenous family members were made to acquire surnames unknown to their culture. The Pangcah or Amis, with the largest population and a matrilineal kinship system, must have suffered the most. The current institutional setting is part of the ongoing democratization process of Taiwan's political society. Significant social movements for indigenous causes started in Taiwan in the early 1980s. Along with the domestic process of democratization and the global trend of indigenous empowerment, indigenous customs have been sanctioned on the constitutional and statutory level.¹⁰ The enactment of the Indigenous Peoples' Basic Law (*yuanzhuminzu jibenfa*) in 2005 set a new milestone. § 30 of the act requires the state to respect the language, traditions, customs, and values of TIPs while implementing judicial and administrative remedial procedures, notarization, mediation, arbitration and the like. Since September 2014, there has been a unit tasked with handling cases involving at least one indigenous party in every district court and high court of the

9 Hence, the use or possession of firearms, embezzlement of state-owned tracts of land, theft of state-owned wood, and poaching are among the offenses of which an indigenous individual in mountainous areas is most frequently charged, as hunting remains an integral part of the traditional way of life to many TIPs.

10 The constitutional amendments of 1994 and 1997 adopted the term »indigenous,« recognize ethnic entities as such, and announced the country's commitment to multiculturalism. The ILO Convention C169 and the drafts of the DRIP have served as references for the legislature.

ordinary jurisdiction on the island of Taiwan, the respective public procurator's offices, and all three administrative high courts.

In this setting the application of indigenous customs has become a constant challenge, and it involves two major problems. So far two rules in the positive law guide officials in the cases involving what they call »a custom.« On the one hand, a concept of custom is provided by § 1 of Taiwan's Civil Code. The article instructs the court to decide a civil case with customs if no applicable rule is found in the statutory law. Some believe that the concept of custom is defined there in a manner recalling what Postema calls an »additive conception«: a custom in law is a practice plus an attitude known as *opinio iuris (sive necessitatis)*.¹¹ On the other hand, § 283 of the Code of Civil Procedure lays the burden of proof on the party that raises an issue of custom while allowing the court to take its own notice, which implies that the maxim of *iura novit curia* applies to customs conditionally. The content and scholarly interpretation of both codes draws heavily upon Continental references. There is little doubt that the Republican Chinese lawmakers took into account §1 of the Swiss Civil Code, § 293 of the German Codes of Civil Procedure, and § 271 of the Austrian ZPO while they were drafting the codes in the 1920s and 1930s. Written records on the life or practice of indigenous peoples dating from the seventeenth century onward are either lost or considered outmoded. The eight-volume treatise authored by Okamatsu Santarō (1871–1921) in the late 1910s remains irreplaceable though linguistically accessible only to a few. The author, whose work on Han Chinese customs is cited above, was a civil law professor at the Imperial University of Kyoto after studying with Josef Kohler (1849–1919), a leading figure of ethnological comparative jurisprudence. Informed of Kohler's legal ethnology and questionnaires, Okamatsu presented the customs of both the Han Chinese and indigenous populations with sensitivity to legal history and in the framework of his contemporary system of legal concepts, as Heinrich Brunner had suggested.¹² Some useful

legal historical literature in German had surprisingly been ignored until 2015, despite the presence of jurists trained in Germany. Two copies of Siegfried Brie's 1899 monograph and one of his *Festgabe* papers of 1905 in the possession of National Taiwan University, which took over the libraries of the former Taihoku Imperial University, appear not to have been consulted after 1945.¹³ It is likely that German-speaking Taiwanese scholars were uninterested in considering customs from a legal historical perspective. Otherwise, they would have probably stumbled across Brie's works by following the bibliography that Hermann Krause's dictionary entry has provided since 1971.¹⁴ The neglect of research literature explains in part the lukewarm reception of the government-commissioned surveys of indigenous customs published between 2007 and 2011. The seven volumes of reports focus on the customs of the fourteen then-recognized peoples and explore possibilities to accommodate their customs into state law. However, only two volumes seem useful to the court and the public prosecutor because they cover some relevant administrative and judicial precedents. Falling short of the government's expectations, the rest is ethnography and as a result less valuable to legal practitioners.

B. Taiwan's Four Features

Four features of Taiwan's institution and society are worth mentioning before further discussion. First, its legal institutions belong to the civil law tradition. Second, it is not an indigenous, but a settler sovereignty in the sense that the settlers' descendants, who are ethnically Han Chinese, outnumber the indigenous population in every decision-making sector in the country. Third, Taiwan's institutions and society are secular in the sense that no religion plays any significant role in the exercise of state powers, though most indigenous individuals are either Protestant or Catholic.¹⁵ The last but probably most distinctive feature is the stark separation between the legal institutions and both the settler and the indigenous communities. These

11 POSTEMA (2012) 710–711.

12 See BRUNNER (1885) 1174; GROSSFELD (2010) 389–395; LIEBRECHT (2010) 318.

13 See BRIE (1899); BRIE (1905).

14 KRAUSE/KÖBLER (2012).

15 The U. S. Department of State summarizes Taiwan's official and academic data in English. See International Religious Freedom Report for 2014: Taiwan, <http://www.state.gov/j/drl/rls/irf/religiousfreedom/>

[index.htm?year=2014&dclid=238334](http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2014&dclid=238334). Accessed 6 February 2016.

institutions were deliberately introduced as a third party, first by Meiji Japan in 1895, then by the Japanese-inspired KMT regime in 1945, for the sake of the polity.¹⁶ The settlers' descendants may have various ideas of their Chineseness because of the country's complex identity issues,¹⁷ but all acknowledge the foreignness and, sometimes grudgingly, the »civilizing« character of the legal institutions in place. Nonetheless, the »civilizing missions« that the Han Chinese mainstream undertakes by means of law often backfire. Thus, the more »superior« the mainstream's legal claim sounds, the harder it is for the settlers' regime to justify itself.

These features explain the four following conditions of this project. First, the majority of the research literature, which tackles the former British colonies and the Common Law, is, to say the least, irrelevant. Second, few analogies can be drawn from the experiences of the indigenous peoples after the World War II. The indigenous populations can be considered »discrete and insular« minorities; that is, groups submitted to other groups' political wills in a representative democracy because of their small numbers, and thus potentially requiring special consideration by the mainstream-controlled judiciary (and/or executive).¹⁸ Third, countries where religion substantially constitutes or influences state law are impertinent. These three points narrow the project's scope to the Latin American countries that R. Míguez and B. Truffin analyze with two intriguing examples.

Yet the legal institutions' distinctness as a third party makes Taiwan a better laboratory than Latin America for this article's purpose, because indigenous peoples and individuals can turn the know-how distilled from western legal historical scholarship against the mainstream.

III. Why a New Approach?

The new legal historical approach targets a common deficiency of the two existing approaches, legal pluralism and civil law scholarship: updated knowledge of Western legal history in its current status. The former, as many scholars and activists in Taiwan understand it, argues for the distinctness and irreducibility of indigenous customs in municipal law. For the local version of legal pluralism, however, the translation or even integration of such customs into the singular law of the state is wrong in principle and would only distort the former for latter's profit. The following section argues that, while the Taiwanese variant of legal pluralism fails because of its attachment to the modern state when conceptualizing law and custom, Taiwan's civil legal scholarship offers no solution either because it lacks the necessary historical knowledge to overcome the decontextualized reading of F. Suárez's conception of law and custom.

A. Legal Pluralism

Legal pluralism is variously understood and introduces several problems. It is generally defined as the coexistence of two or more »laws« in Glenn's sense overlapping and competing with each other in one society. Some prefer the term of normative pluralism for broader applicability. It matters little here which author first published such ideas, since most legal historians will be familiar with the phenomena designated by the terms.¹⁹ The term is understood in Taiwan more or less as a consequence of the constitutionally-sanctioned multiculturalism; that is, the position that the state recognizes equally the cultural identity of individuals of different origins or ethnicities that were

16 For the import of western legal institutions in Taiwan, see WANG (2000). Jean Escarra's account of the legal reforms launched in China by different regimes from 1898 to the mid-1930s remains unparalleled. See ESCARRA (1936) 101–104, 106–124, 128–463. Note that the Chinese legislation of the 1930s was applied in Quemoy and Matsu, but neither on the island of Taiwan nor in the Pescadores until Nationalist China's military takeover in 1945.

17 For some recent discussions on these rapidly changing issues, see SCHUBERT/DAMM (2011).

18 See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153 n. 4 (1938); ELY (1980).

19 Some prefer B. Malinowski, others, C. van Vollenhoven. So far the word *Vielfalt* appears current in the German literature. See OESTMANN (2011).

formerly suppressed by official Han Chinese nationalism. Hence, it is often taken for granted that legal pluralism underpins the statutory requirement to respect indigenous customs and values, because, so it is believed, these form distinct normative systems, the best known of which is the sacred law named »gaga« or »gaya« of Dayan and Sejiq (or Seediq) peoples.²⁰

In other words, there is relatively little concern in Taiwan about making normative claims with social scientific accounts. Legal pluralism reached the country along with scholars who studied in North America.

J. Griffiths's intentionally combative version of the idea, taken as an extreme example here, illustrates characteristics shared by most legal pluralist literature. As a caveat, this paper agrees that »Beyond the threshold of the yes or no to legal pluralism, there is little uniformity in the conceptualization of law, or legal pluralism, or about the possible relations between such plurality and social organization and interaction.«²¹

Griffiths attacks what he calls »legal centralism,« an »ideology« according to which »[L]aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.«²² Defending a descriptive theory of law, Griffiths deems legal centralism »the major obstacle« to his goal.²³ Griffiths specifies that his topic is the »legal pluralism in a »strong« sense,« the »weak« one referring, he states, to the situation in which »not all law is state law nor administered by a single set of state legal institutions,« and in which »law is therefore neither systematic nor uniform.«²⁴ This juristic conception of legal pluralism, or the »weak« sense of the idea, is close to the Taiwanese view and applies to legal systems where »[P]arallel legal regimes, dependent from the overarching and controlling state legal system, result from »recognition« by the state of the supposedly pre-existing »customary law« of the groups concerned.«²⁵

Griffiths has reason to stay skeptical toward legal pluralism in the weak sense, for it is

[T]he messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality: until the heterogeneous and primitive populations of ex-colonial states have, in the process of »nation building,« been smelted into a homogeneous population of the sort which »modern« states are believed to enjoy, allowances must be made.²⁶

Simply put, the conception is to be rejected since it still carries the legal centralism that Griffiths condemns and avoids.²⁷ Law, for him, is »the self-regulation of a »semi-autonomous social field,« including but not limited to state law.²⁸ Given that »social action always takes place in a context of multiple, overlapping »semi-autonomous social fields« ... in a dynamic condition,« legal pluralism, argues Griffiths, is »a concomitant of social pluralism«, »refers to the normative heterogeneity«, and »deals with the fact that within any given field, law of various provenance may be operative.«²⁹

In Taiwan's case, one observes the MSC in the paradox that the more successful the legal pluralist claims are, the more dependent on the modern state they become. While the modern state is responsible for the superiority of statutory law over indigenous customs, some legal pluralists mistrust the state's apparent benevolence in documenting and deriving rules from them because customs are *lived* by a community and likely to change faster than a formalized, immobile restatement or codification.³⁰ Interestingly, many of these legal theorists have a law degree. Yet it is not their critical examination of law, but the legal pluralism that leads to their skepticism. As W. Twining argues in a recent, nearly-exhaustive review of legal pluralist literature, the ideal type of the »social fact« view of legal pluralism may cover the array of concepts used by authors of diverse backgrounds and disciplines since the mid-1990s.³¹ Some authors, though taking legal pluralism as a social fact, tend to »slide from the descriptive to the prescriptive« without touching upon issues like »the internal or external legitimacy, obligatoriness, or legality of

20 See an illustration by SIMON (2012).

21 BENDA-BECKMANN (2002) 72.

22 GRIFFITHS (1986) 3.

23 GRIFFITHS (1986) 3.

24 GRIFFITHS (1986) 5.

25 GRIFFITHS (1986) 5.

26 GRIFFITHS (1986) 7.

27 GRIFFITHS (1986) 8.

28 GRIFFITHS (1986) 38.

29 GRIFFITHS (1986) 38.

30 See for example WOODMAN (2011) 29.

31 TWINING (2009) 486; for shorter version see TWINING (2012).

non-state legal orders.«³² Twining argues that solutions to normative problems are absent in most classical accounts of legal pluralism.³³ Certain local indigenous scholars and activists are aware of the problem and have opted for a pragmatic approach. Numerically speaking, it is easier to win over the community of legal professionals than elected officials, civil servants, and of course, the general public. This allows the apparatus of the state- and legal centralist ideology to apply measures enacted by a mainstream in an attempt to remedy historical wrongs. As for indigenous parties, they may, with the help of the institution of legal aid, become legal actors who, as L. Benton and S. Kerneis (in this section) both observe, learn and use state law to their advantage.³⁴

This paradox occurs at least partly because both the anthropological and socio-legal variants of legal pluralism neglect legal history and, especially in the U.S., that of internal legal doctrines. Criticisms of the idea of custom are symptomatic of this neglect. According to K. Llewellyn and E. Hoebel's famous »flat renunciation of the idea of customary practice,«³⁵ custom is »slippery under the hand in three ways«: it is ambiguous for fusing and confusing the notion of practice, lacks edges and may unduly solidify meaningless incidents.³⁶ C. Geertz's also deplors »The mischief done by the word ›custom‹ in anthropology, where it reduced thought to habit, is perhaps only exceeded by that which it has done in legal history, where it reduced thought to practice.«³⁷ American legal scholarship, too, has expelled studies on the history of legal doctrines for almost a century and welcomes instead sociological jurisprudence, including among others the Law and Society approach, with the same vocabulary as R. Jhering against the so-called *Begriffsjurisprudenz*.³⁸ It lacks an S. Milson to remind its proponents that

[T]he customs from which the common law developed were not the habits of ordinary people but the norms followed by governing bodies with power of decision. [I]n most legal areas the

customs of customary courts were not substantive but procedural ...³⁹

Despite the »impressive revival« of research into the history of internal legal doctrines, David Rabban notes that legal scholars in both the U.S. and the U.K. »typically do not approach their research historically.«⁴⁰ Moreover, indifference to literature written in languages other than English results in neglect of interesting Continental works.⁴¹ Legal history could have earned more attention, had Griffiths's discussion on J. Gilissen's 1971 book been followed.⁴² Despite a general disapproval of the Belgian legal historian's definition and examples of customs, Griffiths considers the *corps intermédiaires*, especially the urban guilds, to fit his legal pluralism in the strong sense.⁴³ The article that Griffiths wrote in 1981 missed Gilissen's subsequent 1982 monograph, and the four posthumous edited volumes on customs that collect the papers at conferences Gilissen had organized for the Société Jean Bodin.⁴⁴ The four volumes are the shoulders of giants on which the authors of this section stand.

B. *Ill-informed Civil Law Scholarship*

The second reason for a new, historical approach to deal with indigenous customs is the overstated role of sovereign consent in the evaluation of a custom's validity. Taiwan's civil law scholarship is unable to counter what it believes to be Francisco Suárez's conception of custom. In a secular society with limited Catholic presence, few deem canon law a worthy source of reference, even it offers the key to better appreciate the concept of custom.

As stated above, the rules governing the application and proof of custom in Taiwan resemble those of some Continental codes. The majority of scholarly opinion holds § 1 of Taiwan's Civil Code to refer to statutory law, customary law, and general principles of law, and that the code implies an underlying distinction between custom in fact and

32 TWINING (2009) 484.

33 TWINING (2009) 485.

34 See BENTON (2012).

35 BEDERMAN (2010) 9.

36 LLEWELLYN/HOEBEL (1941) 274–275.

37 GEERTZ (1983) 208.

38 RABBAN (2013) 153–155, 523–529, 532–535.

39 MILSOM (2003) 58.

40 RABBAN (2013) 535.

41 See, for example, DILCHER et al. (1992). See also the illuminating formulation of the customs pertaining respectively to *populus*, judge, and the king in Medieval France in RIGAUDIÈRE (2013).

42 GRIFFITHS (1986) 10–12, 23–29.

43 GRIFFITHS (1986) 11; GILISSEN (1971) 13.

44 See GILISSEN (1971); GILISSEN (1982). The edited items are volumes 51 to 54 of the *Recueil de la Société Jean Bodin* published in 1990. Detailed references are omitted.

custom in law, which sometimes is also called customary law. A less popular opinion, referring to § 2 of the German EGBGB, holds that § 1 of Taiwan's Civil Code rather requires judges to apply all kinds of law, arguing that customary law is equivalent to statutory law for being subjectively binding and should precede non-binding customs in fact. While some authors believe that the purpose of § 1 is to prevent the *déni de justice* as § 4 of the French Code civil intends, more hold the opinion that the provision consecrates a hierarchy of sources of law. Despite this division of opinions, most scholars, influenced by K. Larenz's theory of legal scientific methodology, agree that the scope covered by law or statutory law can largely disregard custom, because a norm constructed with interpretative skills and analogies is no less legal than those written in statutes. The hierarchy of sources of law allows the legislator and the court to decide whether a statute applies or a custom in law exists. The category of *consuetudo contra legem* and even the derogation of statute by custom would qualify such an inference. Yet, unfamiliar with legal history and ignorant of canon law, most Taiwanese legal scholars would simply dismiss the *consuetudo contra legem* as an unlikely irregularity, for most are of the opinion that the rule of law is foremost the rule of written constitutional and statutory provisions. The concept of custom (in law) is, therefore, secondary and residual for Taiwan's milieu of legal professionals, since its remit is delineated by the law and the court. In other words, no matter whether the component of *opinio iuris* is subjectively claimed or objectively acknowledged, the question of its validity is totally subject to the judge's discretion.

One of the most serious consequences of this understanding is related to a translation problem in a recent, important article of Taiwan's leading legal historian.⁴⁵ The title »legalization of societal customs« is open to criticism because it would imply that what he calls »societal customs« had been banned by the law, which is only true in part. What the author in fact refers to is the state's cherry-picking of non-state normative values and practices during the last one hundred years, enacting statutes that draw their normative content

from customs instead of other statutes,⁴⁶ such as Japanese metropolitan legislation. A quick English-language search in major library catalogs produces no book title bearing »customary legislation« or »customary lawmaking.« Such terms would be confusing and misleading, because the form and process of lawmaking refer to some other customs, which fits some African post-colonial experiences but not Taiwan's case. Moreover, these terms appear to be oxymora. As far as the theory of sources of law is concerned, a duly enacted statute overrides the custom on which it is based by becoming a source in its own right, which Wang also acknowledges.⁴⁷ As A. Allott puts it with respect to the British African contexts, »Once custom has been codified or settled by judicial decision, its binding force depends on the statute or the doctrine of precedent; in short, it ceases to be customary law.«⁴⁸ Based on the conception that law is necessarily promulgated societal custom, Wang's article argues for the possibility to shape state law with legal pluralism. It could also imply the impossible objective of making all customs part of state law. A charitable interpretation is that Wang tells the story of a society colonized twice, whose customs remain »societal« simply because the colonial authorities refuse to make them law, and that those customs, though mainly of pre-1895 Han Chinese immigrants, all deserve to be law if Taiwan is a true constitutional democracy. Yet even this reading reiterates the dilemma of MSC. One of the political lessons to be drawn from Wang's legal historical account is that political society requires more active participation. This political society, for Wang, proves its autonomy not only with scholarly restatements of its people's or peoples' customs, but with statutory forms as well. That said, it is worth noting that most customs discussed in Wang's article fall into the domain of civil law. He would have to omit the customs of political activities or, to use the name of a new field of study, »law of democracy,« out of his argument, lest totalitarianism, authoritarianism, and the Chinese and Japanese versions of imperialism revive.

In the language of western legal history, the issues about the rule that judges exercise the power

45 WANG (2015).

46 WANG (2015) 5.

47 WANG (2015) 10.

48 ALLOTT (1957) 258.

to retain or reject a custom invoked by one of the parties can be rephrased as the explicit or tacit will of the sovereign to decide whether a custom is a law or a fact. For legal theorists, this recalls the command theory of law of classical authors like J. Bentham, J. Austin, and more recently A. Marmor.⁴⁹ It also echoes Suárez's conception of custom, according to which customs are not an autonomous source of law, but subject to approval or »legal consent,« *consensus legalis*. It is widely agreed that Suárez distinguishes »mere customs of fact from true customs of law.«⁵⁰ Those who argue for the primacy of law may find in Suárez's definition of »custom of fact ... capable of introducing law« that this kind of custom »is an authorized repetition of actions that contravene no established law.«⁵¹ One can even argue that Suárez supports the requirement of obtaining consent from the prince where a people has established one.⁵² Yet the literature has already noticed that he »sometimes emphasizes the priority of the consent of the people and sometimes the priority of the consent of the prince.«⁵³ While philosophical and interpretative studies can do no better than to emphasize the difficulty in determining whether Suárez was a voluntarist or a realist in the sense that all legislation requires acceptance, the canonist and legal historian P. Landau clarifies the issue by situating Suárez's conception in the early modern period of the Catholic Church. Suárez makes consent necessary for customs in the theory of an enclosed system of law on the one hand, yet he also makes it easier for customs to be validated by arguing that consent had already been granted and become a principle.⁵⁴

IV. Concluding Remarks

As the nine other papers demonstrate, legal history, especially recent Continental scholarship, offers a wide variety of *loci* to discuss issues relating to the integration of indigenous customs into state law. It also rehabilitates the casuistic and technical aspects of the legal studies. These two aspects suggest possible strategies of argumentation out of the modern state, for casuistically- and technically-produced *jurisprudence* has survived the *Ancien régime* and colonialism, among other periods.⁵⁵ Hence, this Focus is a matter of, neither »applicative« legal history, nor new *ius commune*, but a new historical jurisprudence.⁵⁶ Yet its ambition and mission go farther than producing critical analyses of the present conditions with »lessons« learned from history. It urges scholars of other disciplines to abandon the clichés about legal history and see how diverse this discipline has become. Western legal historical scholarship in its current state enriches discussions about indigenous customs not only because customs used to be widespread in Europe, but also for its long history of interactions with Roman legal scholarship, the church law literature that it inspired, and a better understanding of lawmaking.⁵⁷ Instrumentally speaking, the best tool for TIPs to counter western law is this law itself, especially in a non- yet pro-western society like Taiwan.

In light of discussions on a new, positive concept of custom, this project, with concrete historical examples elaborated in the other articles, concludes with a negative result for the moment.⁵⁸ In effect, the concept pair of *law/custom* should no longer be equated to any of the following four:

1. *Written / Unwritten Law*;
2. *State / Society*;
3. *Law in Books / Law in Action*;
4. *Alien / Native Law*.



49 See MARMOR (2001) 110.

50 MURPHY (2014) 26; TIERNEY (2007) 118; SCOTT (1934) 221.

51 SUÁREZ (1613) VII, 1.5; SCOTT (1934) 213.

52 SUÁREZ (1613) VII, 3.10; TIERNEY (2007) 116; SCOTT (1934) 229.

53 MURPHY (2014) 48.

54 LANDAU (2010) 53.

55 See POTTAGE/MUNDY (2004); THOMAS (2005); LATOUR (2004); RILES (2005).

56 HEIRBAUT (2005) 145–148; ZIMMERMANN (2006); MATTEI (1998) 884–887; OSLER (2007); DUBBER (2015).

57 See DILCHER et al. (1992); WORMALD (1999) 480, 483.

58 SCHAUER (2012); MURPHY (2014); PILCH (2009); *Rechtsgeschichte* (2010).

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