

Comparative Legal History for the Rights of Indigenous Peoples^{*}

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23.12.2016.

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^{*}This article is part of the research project supported by my institution and Taiwan's Ministry of Science and Technology. Please contact the author at tmwu@gate.sinica.edu.tw before citing the paper. In this article, Taiwan refers to the regime officially named Republic of China which governs effectively the island of Taiwan or Formosa, 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 in the International Olympic Committee. A less known one is the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TPKM) in the World Trade Organization. All terms of Chinese languages are transcribed based on their modern-day Mandarin pronunciation according to the Hanyu Pinyin system, if unspecified. All non-western names are transcribed in the respective order.

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1 Introduction

Contemporary Taiwan provides a setting in which legal history can become a policy instrument. The setting is the attempt of reconciliation made by the Han Chinese ethnicity to Taiwan's indigenous peoples. The objective is to make indigenous customs and values enforceable by officials. This attempt has been inscribed in the constitution and the body of statutory law. Almost every first-instance and appellate court and the public procuracy office now has a permanent unit to treat the cases involving an indigenous party. Legal professionals are compelled to answer the million-dollar question of what the law is in a given case over and over again.

Participants of this conference, I assume, need no explanation for the utility of legal history for the challenge which Taiwan confronts. The concept of custom is a settled issue in Europe, though each country has its particular context. The issue was settled with the work of, among others, legal historians and lawyers who read history. Europe is the only place on the globe where legal traditions that used to exist in the form of custom have been successfully transformed into a system of written norms. This process of transformation relied on the surveys of customs accomplished centuries ago. The process results in the marginalization of the customary law in the state juridical order on the one hand, and, on the other, the crystallization of legal norms in the form of statute.

Surveys of customs have also been done in colonies and the non-western countries. Yet these are different from the what had been done in Europe. The documentation and survey of customs in European were done, generally speaking, for and, in some cases, by each polity itself, though the intervention of another political authority could be present. In non-western countries, they were done from the perspective of the reluctantly imported science of law. In colonies, finally, colonial powers did the job for their own sake and from their own point of view. The indigenous interests were secondary, if not irrelevant.

Taiwan has both of the non-western characteristics, for the lack of a native, island-wide polity in her history. The empire of Japan, which acquired it in 1895, has commissioned comprehensive surveys of Han-Chinese and indigenous customs that dates back to the 1900s and 1910s. The regime of Republic of China (ROC regime below), which governs effectively the country since 1945, has brought with it from the Chinese mainland the codes of law promulgated in late-1920s and 1930s. These resembled their contemporary German, Austrian, French or Japanese counterparts, because they served as an integral part of the Chinese legal reform which western powers required to leave their citizens or subjects to Chinese jurisdiction. Thus they were drafted with the help of

western and westernized Japanese advisors and a language of law that Chinese-speaking law students take pains to learn and to keep away from their own legal tradition.

The difference in the ways to record customs entail difference in the understanding of the relation between the statutory and the customary law. The more autonomously the work was done, the more compatible the statutory and customary law are with one another. In Europe, issues about this relation stay in the domains of law and/ or history, for it is the same body politic that enacts laws and forms customs. On the contrary, the same issues, in former colonies and non-western countries, spark debates about political autonomy and domination, and put colonialism and/ or imperialism on trial. Hence, legal professionals in Europe know about how legal history helps them do their work, though it is true that such utility is much limited within the Continent than in the over-sea territories of the European states.¹ Their colleagues in Taiwan look for legal historical resource only in the land tenure or inheritance disputes among Han Chinese parties, because the Japanese government has officially named “customs”² since the end of nineteenth century the Han Chinese inhabitants’ law of family and inheritance, as well as the land tenure regime of religious institutions. The jural relations in these domains are maintained under the ROC regime. When it comes to the indigenous customs, no one knows what to do, not even the indigenous peoples themselves. Among the multiple reasons, the institutional one is essential. The majority of Taiwan’s indigenous peoples (TIPs below) were considered a distinct, non-Japanese ethnicity, and segregated from the ordinary legislation and jurisdiction throughout the Japanese rule, from 1895 to 1945. Disputes among them were resolved partly according to the local tribal custom, partly with police authority. The ROC regime, since 1945, called the TIPs “compatriots” and applied the ordinary legislation in a wholesale manner, thus dismissed their ethnic and cultural particularity and assimilated them in egalitarian terms. All of this was done in spite of the ILO Convention C107 of 1962, the art. 4 and 7 of which address the “cultural and religious values, the forms of social control, institutions, and customary law” of indigenous peoples. The ROC regime ratified the convention as the

1. A Swiss case, though somewhat anecdotal, is to my knowledge the only recent one related to customs and decided on legal historical grounds. The lawsuit in question, which may be called the Sanctuary Lamp (*ewiges Licht*) case, occurred in Glarus, Switzerland. There, the cantonal court, ruling in the defendant’s favor, ordered the plaintiff, that is, the Catholic parish in Näfels village, to pay 4,000 Swiss francs for the “substantial legal historical research” necessary for the trial. The parish had been receiving annually from a certain Müller’s family an amount of 70 Swiss francs to refill the sanctuary lamp with nut oil since 1357, the year in which, according to the court, someone named Konrad Müller pledged as expiation this “eternal” endowment secured by his estate title in order to avoid the private vengeance for a certain Heinrich Stucki he killed under circumstances to us unknown. The court ruled that the mortgage for this debt was abolished by the canton’s reform in the 1840s if not earlier, and, hence, rejected the church’s claim to have the 659-year-old debt written into the canton’s land registry. Kantonsgericht Glarus, Urteil vom 20.12.2012. – ZG.2011.00992.

2. The term means literally “ancient” or “old customs,” *kyūkan* in Japanese and *jiuguan* in Mandarin.

legitimate government which represented China in the United Nations.

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 customs of indigenous peoples are not studied in their own terms. Instead, this paper aims at crafting a toolbox of notions and concepts that facilitates the translation of indigenous norms and values in two senses of the word, to wit, translation into the lawyer's language as well as into the juridical order of the state.

This paper suggests that the components of such a toolbox be retrieved in the experiences of European legal cultures.³ At least two facts explain the value of these experiences. The mostly autonomous recording of customs being stated above, European polities did the work against the backdrop of the Roman-canon legal scholarship. If Bruno Latour has some reason about the claim that the operation of law, considered in the *longue durée*, has never been modern in the western world, conventionally trained legal professionals can, to put in a simplified way, learn from these experiences how to better accommodate indigenous customs without doing another degree in anthropology.⁴ As to the indigenous individuals and communities, they can fight fire with fire, asking the state machinery to find solutions from within. They can, when corroborated by well-informed officials and counsellors, also shape incrementally their contemporary "customs" by and for themselves.

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 TIPs are confronting, this paper asserts the deficiency, if not failure, of the 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" (MSC below), refers to the inconsistency that the conventional approaches, while criticizing the modern state's hegemony over indigenous customs, uses the same hegemony to implement legal pluralistic ideals. MSC correlates with the absence of a satisfactory, overarching

3. Relevant instances include publicizing the hidden texts where customs derive (as Flavius allegedly did in Livy 9.46.5), the famous personality of laws, compiling manuals of local "customs" (as in Roman Egypt) or collections of oral traditions (as the *Sachsenspiegel* and other law books) by private hands, cohabitation of multiple cultural communities (as in Sicily), and, of course, in the widespread practice of surveys of customs (as in France, Low Countries, etc.) and countless litigations.

4. Bruno Latour, *La Fabrique du droit. Une ethnologie du Conseil d'Etat* (Paris: La Découverte, 2002).

concept of custom. This paper argues that legal and/ or historical scholarship of custom in Western Europe, along with up-to-date historiographical knowledge which shall be mentioned very briefly, 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 paper 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 in the research landscape. 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. I conclude with the challenges to the above-mentioned concept pairs.

2 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.

2.1 General information about TIPs *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 paper concentrates only on the sixteen officially recognized peoples among Taiwan's whole indigenous population.⁵ As of May 2016, official statistics count 549,127 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 (204,423 people/ 37.2% of the whole indigenous population), Paiwan (98,155/ 17.9%), Dayan (formerly known as Tayal or Atayal, 87,485/ 15.9%), and Bunun (57,013/ 10.4%). Currently, about 46.6% of the indigenous individuals live in urban areas, the rest of them in rural and mountainous ones. Beside, there are also sinicized indigenous peoples who are currently classed as ordinary citizen, yet still demanding for a special legal status. These yet-to-be recognized

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

ethnicities are generally called *pingpu*, literally those who dwell on plains. The ancestors of some were reported by Jean-Baptiste du Halde and mentioned in Montesquieu's Spirit of Laws (for example, in the Books XXIII, XXIV, and XXVI).

TIPs have been living in multiply disadvantageous conditions compared to the national average. The mountainous areas where the TIPs in question here used to live had never been controlled by any foreign power, until the Japanese government declared the state's acquisition of their ownership in 1895. Their use of natural resources, even in the most traditional ways, have since been confined by the legislation and regulation of, for example, forestry, national parks, protection of wildlife, and the like. Between 1949 and 1987, the martial law imposed by the ROC regime put the mountainous areas under military surveillance and thus restricted their communication with the rest of Taiwan. Most of the indigenous individuals fall into the vicious circle of those in poverty. With a lower disposable income, most receive less education, start working or sign up for the military or police force at a younger age, become limited to low-paid, less-skilled, more demanding and dangerous job offers, have worse health condition, and become more dependent on subsidies and charities, and so on. The life expectancy of an indigenous individual is about 10 years shorter than the national average.

Like the indigenous peoples elsewhere, TIPs have also been victims of outright discrimination. Under the ROC regime, the apparent egalitarianism in the statutory law effectively became a process of unintentional assimilation because of neglect for the customs, values, and cultural features of each people. 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. Even today, some indigenous individuals have a lot to explain about their respective naming system.

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.⁶ The enactment of the Indigenous Peoples' Basic Law (*yuanzhuminzu jibenfa*) in 2005 set a new milestone. §30 of the

6. The constitutional amendment 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.

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. As is mentioned above, cases involving an indigenous party go to a specialized unit in the court and public procuracy from 2014 onward.

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 *opinion iuris (sive necessitatis)*.⁷ On the other, §283 of the Code of Civil Procedure lays the burden of proof on the party who raises an issue about a 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 drawing 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 treatises authored by Okamatsu Santarō (1871–1921) in the late 1910s remain irreplaceable though linguistically accessible only to a few. The author, whose work on Han Chinese customs is cited above, was a civil law professor in the Imperial University of Kyoto after studying with Josef Kohler (1849–1919), leading figure of an ethnological comparative jurisprudence. Informed of Kohler’s legal ethnology and questionnaires, Okamatsu presented the customs of both the Han Chinese and indigenous populations with good senses of legal history and in the framework of his contemporary system of legal concepts, as Heinrich Brunner had suggested.⁸ Some useful legal historical literature written in German has surprisingly been ignored until 2015,⁹ despite the presence of Germany-taught legal scholars. Two copies of Siegfried Brie’s monograph of 1899 and one of his *Festgabe* paper of 1905 shelved in a library of Na-

7. Gerald J. Postema, “Custom, Normative Practice, and the Law,” *Duke L.J.* 62, no. 3 (2012): 710–711.

8. Heinrich Brunner, “Die Landschenkungen der Merovinger und der Agilolfinger,” *Sitzungsberichte der Preussischen Akademie der Wissenschaften zu Berlin* 2 (1885): 1174. See also Bernhard Grossfeld, “Josef Kohler (1849–1919),” in *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart und Zukunft*, ed. Stefan Grundmann et al. (Berlin: de Gruyter, 2010), 389–395; Johannes Liebrecht, “Heinrich Brunner (1840–1915),” in *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart und Zukunft*, ed. Stefan Grundmann et al. (Berlin: de Gruyter, 2010), 318.

9. I reported the literature’s falling into oblivion in my unpublished presentation to the annual conference of Taiwan Association for Philosophy of Law and Social Philosophy held on April 25, 2015.

tional Taiwan University, which took over the libraries of the former Taihoku Imperial University, appear to have never been consulted after 1945.¹⁰ 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 1971.¹¹ 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.

2.2 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.¹² The last but probably most distinctive feature is the stark separation between the legal institutions and both the settler and the indigenous communities. These 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.¹³ The settlers' descendants may

10. See Siegfried Brie, *Die Lehre vom Gewohnheitsrecht : eine historisch-dogmatische Untersuchung* (Breslau: M. & H. Marcus, 1899); Siegfried Brie, "Die Stellung der deutschen Rechtsgelehrten der Rezeptionszeit zum Gewohnheitsrecht," in *Festgabe für Felix Dahn zu seinem fünfzigjährigen Doktorjubiläum*, vol. 1 (Breslau: M. & H. Marcus, 1905), 129–164.

11. Hermann Krause and Gerhard Köbler, "Gewohnheitsrecht," in *Handwörterbuch zur deutschen Rechtsgeschichte (HRG)*, 2nd ed., ed. Albrecht Cordes, Heiner Lück, and Dieter Werkmüller, vol. 2 (Berlin: Erich Schmidt, 2012), 364–375.

12. The U.S. Department of State summarizes Taiwan's official and academic data in English. See International Religious Freedom Report for 2014: Taiwan. Accessed 15.06.2016.

13. For the import of western legal institutions in Taiwan, see Tay-Sheng Wang, *Legal Reform in Taiwan under Japanese Colonial Rule, 1895-1945: the Reception of Western Law* (Seattle, WA: University of Washington Press, 2000). Jean Escarra's account of the legal reforms launched in China by different regimes from 1898 to the mid-1930s remains unparalleled. See Jean Escarra, *Le Droit chinois. Conception et évolution, institutions législatives et judiciaires, science et enseignement* (Pékin: Vetch, 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.

have various ideas of their Chineseness because of the country's complex identity issues,¹⁴ 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).¹⁵ 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.

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.

3 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

14. For some recent discussions on these rapidly changing issues, see Gunter Schubert and Jens Damm, eds., *Taiwanese Identity in the 21st Century: Domestic, Regional, and Global Perspectives*, vol. Routledge (Abingdon: Routledge, 2011).

15. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153 n. 4 (1938); John Hart Ely, *Democracy and Distrust: a Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

the decontextualized reading of F. Suárez's conception of law and custom.

3.1 Legal Pluralism

Legal pluralism is variously understood and introduces several problems. It is generally defined as the coexistence of two or more “laws” in H. P. Glenn’s sense overlapping and competing with each other in one society.¹⁶ 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.¹⁷ 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 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.¹⁸

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.¹⁹

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

16. H. P. Glenn argues for the *rule of laws*, that is, the implementation of a “sustainable diversity in law.” H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed. (New York, NY: Oxford University Press, 2014), 361–385. For a shorter version, see H. Patrick Glenn, “Sustainable Diversity in Law,” in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, ed. Brian Z. Tamanaha, Caroline Mary Sage, and Michael J. V. Woolcock (Cambridge: Cambridge University Press, 2012), 95–111.

17. Some prefer B. Malinowski, others, C. van Vollenhoven. So far the word *Vielfalt* appears current in the German literature. See Peter Oestmann, *Rechtsvielfalt*, ed. Nils Jansen and Peter Oestmann (Tübingen: Mohr Siebeck, 2011).

18. See an illustration by Scott Simon, “Politics and Headhunting among the Formosan Sejiq: Ethno-historical Perspectives,” *Oceania* 82, no. 2 (2012): 164–185.

19. It may be helpful to know that the International Union of Anthropological and Ethnological Sciences (IUAES) founded the Commission on Legal Pluralism and Folk Law in 1978, which has since been renamed “the Commission on Legal Pluralism”. The Commission took over the journal *African Law Studies*, changed its title to the *Journal of Legal Pluralism and Unofficial Law* and made it the Commission’s official publication.

about the possible relations between such plurality and social organization and interaction.²⁰ 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.”²¹ Defending a descriptive theory of law, Griffiths deems legal centralism “the major obstacle” to his goal.²² 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.”²³ 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.”²⁴

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

[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

Simply put, the conception is to be rejected since it still carries the legal centralism that Griffiths condemns and avoids.²⁶ Law, for him, is “the self-regulation of a ‘semi-autonomous social field,’” including but not limited to state law.²⁷ 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.”²⁸

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.

20. Franz von Benda-Beckmann, “Who’s Afraid of Legal Pluralism?,” *The Journal of Legal Pluralism and Unofficial Law* 34, no. 47 (2002): 72.

21. John Griffiths, “What is Legal Pluralism?,” *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 3.

22. *ibid.*

23. *ibid.*, 5.

24. *ibid.*

25. *ibid.*, 7.

26. *ibid.*, 8.

27. *ibid.*, 38.

28. *ibid.*

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.²⁹ 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.³⁰ 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 non-state legal orders."³¹ Twining argues that solutions to normative problems are absent in most classical accounts of legal pluralism.³² 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 observes, learn and use state law to their advantage.³³

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,"³⁴ 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

29. See, for example, Gordon R. Woodman, "A Survey of Customary Laws in Africa in Search of Lessons for the Future," in *The Future of African Customary Law*, ed. Jeanmarie Fenrich, Paolo Galizzi, and Tracy E. Higgins (Cambridge: Cambridge University Press, 2011), 29.

30. William Twining, "Normative and Legal Pluralism: a Global Perspective," *Duke J. Comp. & Int'l L.* 20 (2010): 486; for shorter version see William Twining, "Legal Pluralism 101," in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, ed. Brian Z. Tamanaha, Caroline Mary Sage, and Michael J. V. Woolcock (Cambridge: Cambridge University Press, 2012), 112–128.

31. Twining, "Normative," 484.

32. *ibid.*, 485.

33. See Lauren Benton, "Historical Perspectives on Legal Pluralism," in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, ed. Brian Z. Tamanaha, Caroline Mary Sage, and Michael J. V. Woolcock (Cambridge: Cambridge University Press, 2012), 21–33.

34. David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010), 9.

solidify meaningless incidents.³⁵ C. Geertz's also deplores "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."³⁶ 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's against the so-called *Begriffsjurisprudenz*.³⁷ It lacks an S. Milsom 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 ...³⁸

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."³⁹ Moreover, indifference to literature written in languages other than English results in neglect of interesting Continental works.⁴⁰

Legal history could have earned more attention, had Griffiths's discussion on J. Gilissen's 1971 book been followed.⁴¹ 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.⁴² The article that Griffiths wrote in 1981 missed Gilissen's subsequent 1982 monograph, and

35. Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, OK: University of Oklahoma Press, 1941), 274–275.

36. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983), 208.

37. David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge: Cambridge University Press, 2013), 153–155, 523–529, 532–535.

38. S. F. C. Milsom, *A Natural History of the Common Law* (New York, NY: Columbia University Press, 2003), 58.

39. Rabban, *Law's History*, 535.

40. See, for example, Gerhard Dilcher and u. A., *Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter*, ed. Gerhard Dilcher, Heiner Lück, and Reiner Schulze (Berlin: Duncker und Humblot, 1992). See also the illuminating formulation of the customs pertaining respectively to *populus*, judge, and the king in Medieval France in Albert Rigaudière, "Coutume du *populus*, coutume du juge et coutume du roi dans la France du Moyen Âge," in *La Coutume dans tous ses états*, ed. Florent Garnier and Jacqueline Vendrand-Voyer (Paris: Mémoire du Droit, 2013), 11–26.

41. Griffiths, "What is Legal Pluralism?," 10–12, 23–29.

42. *ibid.*, 11; John Gilissen, ed., *La Pluralisme juridique* (Bruxelles: Editions de l'Université de Bruxelles, 1971), 13.

the four posthumous edited volumes on customs that collect the papers at conferences Gilissen had organized for the *Société Jean Bodin*.⁴³ The four volumes are the shoulders of giants on which I stand.

3.2 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 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.

43. See Gilissen, *La Pluralisme juridique*; John Gilissen, *La Coutume* (Turnhout: Brepols, 1982). The edited items are the volume 51 to 54 of *Recueil de la Société Jean Bodin* published in 1990. Detailed references are discarded.

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.⁴⁴ 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,⁴⁵ 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.⁴⁶ 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."⁴⁷ 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 to retain or reject a custom invoked by one of the parties can be rephrased

44. Tay-Sheng Wang, "Legalization of Societal Customs in Taiwan (in Mandarin)," *NTU Law Journal* 44, no. 1 (2015): 1-69.

45. *ibid.*, 5.

46. *ibid.*, 10.

47. Anthony N. Allott, "The Judicial Ascertainment of Customary Law in British Africa," *Mod. L. Rev.* 20, no. 3 (1957): 258.

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.⁴⁸ 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."⁴⁹ 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."⁵⁰ One can even argue that Suárez supports the requirement of obtaining consent from the prince where a people has established one.⁵¹ 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."⁵² 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.⁵³

4 Concluding Remarks

The gap which separates the human and social scientific approaches to the issues of indigenous customs and what is suggested here appears much wider than that between the Common Law and the Civil Law. This assessment can be supported by

48. See Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001), 110.

49. James Bernard Murphy, *The Philosophy of Customary Law* (Oxford: Oxford University Press, 2014), 26; Brian Tierney, "Vitoria and Suarez on Ius Gentium, Natural Law, and Custom," in *The Nature of Customary Law*, ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge University Press, 2007), 118; James Brown Scott, *The Catholic Conception of International Law: Francisco de Vitoria, Founder of the Modern Law of Nations, Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations: a Critical Examination and a Justified* (Washington, DC: Georgetown University Press, 1934), 221.

50. Francisco Suárez, *Tractatus de legibus ac Deo legislatore in decem libros distributus...* (Antverpiae: apud Ioannem Keerbergium, 1613), VII, 1.5; Scott, *Catholic Conception*, 213.

51. Suárez, *Tractatus*, VII, 3.10; Tierney, "Vitoria and Suarez on Ius Gentium, Natural Law, and Custom," 116; Scott, *Catholic Conception*, 229.

52. Murphy, *Philosophy*, 48.

53. Peter Landau, "Die Theorie des Gewohnheitsrechts im katholischen und evangelischen Kirchenrecht des 19. und 20. Jahrhunderts," in *Grundlagen und Geschichte des evangelischen Kirchenrechts und des Staatskirchenrechts* (Tübingen: Mohr Siebeck, 2010), 53.

Milsom's words of humor. This renowned historian of the Common Law once joked about the fact that "anthropologists and sociologists may make general observations about law, but not lawyers."⁵⁴ One may also add the categories of economist and "law-and-ist" to the top of the list.

Indeed, legal history and historical jurisprudence have been discredited for a long time. When not ignored, they invite outsiders' mockery or contempt, and provoke insiders' self-censorship, when the role of the lawyer comes ahead of the historian's one, or, unfortunately, when something about Germany is involved. While the country was under occupation, Heinrich Mitteis has quoted Raymond Saleilles's following comment twice without specifying his reference. "The German people," so reportedly says the French scholar, "demanded social reforms, and they got philology."⁵⁵

The nineteenth century, on which the comment bears, is long gone. Yet the clichés of the time remain. As some recent monographs and edited volumes on customs and customary law published by U.K.- and U.S.-based legal scholars attempt to restore legal history to favor explicitly and, implicitly, historical jurisprudence, clichés take the place which should belong to the up-to-date, German-speaking research literature.⁵⁶ Those contributions are to be thoroughly reviewed elsewhere. What matters for this occasion is the fact that neither the name of Joachim Rückert nor Peter Landau is mentioned in any of those books touch upon Savigny's *Völkgeist*, customs in canon law, and Suárez's theory of customary law. German is no more an oracle for legal historical studies than any other language. Nor is it capable of a Midas touch for any unconvincing work. Nonetheless, for the studies of customs, the German-speaking literature deserves more attention than most English-speaking milieus currently pay, since it is not worth reinventing the wheel. Besides, let's also keep in mind that there is a respectable and robust Italian scholarship on local customs, which, to my regret and the world's detriment, may be used to being ignored when it speaks its mother tongue.

It may be unpractical to suggest senior legal historians to learn a new language to write or edit only one or two books. Yet for the skeptics of legal history and historical jurisprudence at least, hopefully, this paper can persuade them to drop the clichés, and

54. Milsom, *Natural History*, xiii.

55. Heinrich Mitteis, "Historismus und Rechtsgeschichte," in *Um Recht und Gerechtigkeit. Festgabe für Erich Kaufmann zu seinem 70. Geburtstage* (Stuttgart, Köln: Kohlhammer, 1950), 269; Heinrich Mitteis, "Die Geschichte der Rechtswissenschaft im Rahmen der allgemeinen Kulturgeschichte," *Juristenzeitung* 6, no. 21 (1951): 677.

56. See Amanda Perreau-Saussine and James Bernard Murphy, eds., *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2007); Marie Seong-Hak Kim, *Law and Custom in Korea: Comparative Legal History* (Cambridge: Cambridge University Press, 2012).

look afresh at the possible contributions made by the once condemned disciplines to the protection of indigenous customs.

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.⁵⁷ Hence, this paper points to a matter of, neither “applicative” legal history, nor new *ius commune*, but a new historical jurisprudence.⁵⁸ 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.⁵⁹ 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.

For future discussions on a new, positive concept of custom, I concludes with a negative result for the moment.⁶⁰ In effect, the concept pair of *law/ custom* should no longer be associated to any of the following four:

I. *Written/ Unwritten Law*;

57. See Alain Pottage and Martha Mundy, eds., *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, Cambridge, 2004; Yan Thomas, “L’extrême et l’ordinaire. Remarques sur le cas médiéval de la communauté disparue,” in *Penser par cas*, ed. Jean-Claude Passeron and Jacques Revel (Paris: EHESS, 2005), 45–73; Latour, *Fabrique*; Annelise Riles, “A New Agenda for the Cultural Study of Law: Taking on the Technicalities,” *Buff. L. Rev.* 53 (2005): 973–1033.

58. See Dirk Heirbaut, “Comparative Law and Zimmermann’s New *Ius Commune*: a Life Line or a Death Sentence for Legal History? Some Reflections on the Use of Legal History for Comparative Law and Vice Versa,” *Fundamina* 11, no. 1 (2005): 145–148; Reinhard Zimmermann, “Comparative Law and the Europeanization of Private Law,” in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 540–578; Ugo Mattei, “The Issue of European Civil Codification and Legal Scholarships: Biases, Strategies and Development,” *Hastings Int’l & Comp. L. Rev.* 21, no. 4 (1998): 884–887; Douglas J. Osler, “The Fantasy Men,” *Rechtsgeschichte*, no. 10 (2007): chap. 169; Markus D. Dubber, “New Historical Jurisprudence: Legal History as Critical Analysis of Law,” *Critical Analysis of Law* 2, no. 1 (2015): 1–18.

59. See Dilcher and A., *Gewohnheitsrecht*; Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Blackwell, 1999), 480, 483.

60. See Frederick Schauer, “The Jurisprudence of Custom,” *Tex. Int’l L.J.* 48, no. 3 (2012): 523–534; Murphy, *Philosophy*; Martin Pilch, *Der Rahmen der Rechtsgewohnheiten : Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte* (Wien: Böhlau, 2009).

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

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