

A CULTURAL LEGAL STUDY ON THE TRANSFORMATION OF FAMILY LAW IN TAIWAN

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ABSTRACT

The discourse of Family Law, including the doctrines, interpretation, legal practice and scholarship, all define and construct the model of marriage, family, and relationships. In this manner, Family Law is not a system for resolving disputes among family members over the control, protection, and custody of specific family members. In this article, Family Law is understood to be not merely legal doctrines, but rather, a cultural declaration of morality, of legitimization of intimacy, and of modernization in a specific social context—more precisely, within the context of contemporary Taiwan.

The following cultural analysis of Family Law will be based on the three issues: first, I will provide the rhetoric of Family Law Reform and discuss the bias toward the modernization of Family Law; second, I will analyze the Marriage Agreement Section of Family Law, which has for a long time been neglected by feminists, legal reformers and Family Law scholars in Taiwan; and third, I will discuss the trend of doing interdisciplinary legal research on Family Law by a sample discussion of “family right” and proceed to consider future research strategies and the alternative methodology of Family Law. Ultimately, I wish to provide a different view to link the distinct, but related areas of legal scholarship of Family Law, Law and Social Movement, Feminist Jurisprudence, Comparative Law, and Legal Transplant.

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I. INTRODUCTION

As the well-known family law scholar Mary Ann Glendon notes, “[c]ontemporary family law reflects new ways of thinking, not only about marriage and family life, but also about law and government.”¹ Indeed, the discourse of Family Law,² including the doctrines, interpretation, legal practice and scholarship, all define and construct the models of marriage, family, and relationships. Family Law constructs the value, culture, and morality of the state. Thus, the doctrines of Family Law are not only meant to be rules, but also meant to be “recognition.” As Jurisprudence theorist Tim Murphy asserts,

“In these domains [persons, gender, thing, and family], legislative and adjudicative processes are involved in ‘recognition’ rather than constitutive exercises, in recognition or non-recognition of realities”³

As a matter of fact, among the scholarship of Family Law, one of the on-going critical debates revolves around when and how the state’s powers interfere with the family.⁴ Such debates demonstrate the conflicts over the dichotomy between public and private spheres;⁵ moreover, the dilemma of “state vs. family,” which involves constitutional issues.⁶ These questions lead to discussions about how Family Law, its discourse, the local culture and, overall societal change are all intertwined with peculiar social norms.⁷ Indeed, feminist legal scholars note that Family Law can not be easily characterized as neutral or subject to official law alone.⁸ I wish to provide an “ethnographic object” of Family Law, in which I borrow Legal Anthropologist Annelise Riles’ approach of taking law as an ethnographic

¹ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 2* (University of Chicago Press 1989).

² In this essay, I interchangeably use the terms “Family Law” and “Taiwan Civil Code” (TCC). The former indicates the whole legal discourse on family, while the latter is used when referencing specific Articles.

³ Tim Murphy, *Legal Fabrications and the Case of ‘Cultural Property’*, in *LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS* 115–41 (Alain Pottage and Martha Mundy, eds., 2004).

⁴ See, e.g., MARY ANN GLENDON, *supra* note 1, at 291–314; Andra Nahal Behrouz, *Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative*, 103 *COLUM. L. REV.* 1136 (2003).

⁵ See, e.g., Martha Fineman, *What Place for Family Privacy?*, 67 *GEO. WASH. L. REV.* 1207 (1999).

⁶ See, e.g., MARTIN GUGGENHEIM, ALEXANDRA DYLAN LOWE & DIANE CURTIS, *THE RIGHT OF FAMILIES* 87–93 (Carbondale and Edwardsville: Southern Illinois University Press 1996); Chen-Shan Li, *Right to Family Life: Constitutional Aspects*, *NAT’L CHUNG-CHENG UNIV. L. J.* 103, n.16 (2004).

⁷ For example, Martha Fineman discusses the history of the organization of the family through the English and American legal tradition with corresponding its social change. See, e.g., MARTHA FINEMAN, *THE AUTONOMY MYTH—A THEORY OF DEPENDENCY* 118 (The New Press 2004). For a discussion on the family reform and social norm, see Li-Ju Lee, *Law and Social Norms in a Changing Society: A Case Study of Taiwanese Family Law*, 8 *S. CAL. REV. L. & WOMEN’S STUD.* 413 (1999) (hereinafter Lee, *Law and Social Norms*).

⁸ Feminist legal scholars point out the impropriety when characterizing law as neutral and, for example, Martha Fineman proposes “the Perspective Legal Scholarship” to encourage legal scholars to look for bias hidden behind the legal doctrine. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY* 14–33 (Routledge 1995).

object,⁹ and attempt to analyze the cultural contention of the Marriage Agreement section of Family Law and the rhetoric of Family Law reform. Based on such theoretical analysis, I will offer an alternative explanation about the “legal transplant effect,” in which I will point out the paradox of the legal transplant receiver’s system.

As for the framework of this essay, I will begin with a brief introduction about Taiwan’s Family Law transformation and analyze its rhetoric of reform. Then, I will discuss the problematic application of Confucianism or the so-called “Asian Value” toward the discourse of Family Law. I will then turn to the Marriage Agreement section in Family Law,¹⁰ which has been neglected by feminists, legal reformers, and Family Law scholars in Taiwan. I will argue that the Marriage Agreement section in its archaic form appears to be a source of friction and creates an inconsistency in Family Law. I will also discuss the two key principles of gender equality and the child’s best interest within the marriage, which primarily undergird the discourse of Family Law reform in Taiwan.

Finally, I will refer to the “vagueness of ‘family right’ ” as proof of the hidden conflict behind Family Law reform: western ideology (e.g., individualism and gender equality) versus Confucianism (e.g., collectivism, family/clan-oriented, and patriarchy). I wish to point out that the uneasiness of constructing the “family right” for Family Law scholars and constitution scholars in Taiwan may illustrate the friction and inconsistency of legal transplant among these two areas of scholarship. Furthermore, while indicating the inconsistency of Family Law, I will propose that we reconsider the methodology of the interdisciplinary legal study of Family Law, especially when the legal transplant has been influenced by the phenomena of globalization.

II. THE CULTURAL CHARACTERISTICS OF FAMILY LAW

The scholar of law and society, Teemu Ruskola offers his view on family law in the Confucian context with a cultural perspective.¹¹ Ruskola notes,

Confucian political and social thought viewed family as the paradigmatic governance model which in turn implied the notion of a metaphorical ‘political family’ on the level of the state.¹²

⁹ Annelise Riles, *Property as Legal Knowledge: Means and Ends*, 10 J. ROY. ANTHROP. INST. 775, 775 (2004).

¹⁰ In Taiwanese Family Law, the marriage agreement section is named “Betrothals,” but “marriage agreement” is also interchangeably used in this betrothal section. See Taiwan Civil Code Part IV arts. 972–76, translation available at <http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=740> (last visited Aug. 26, 2006) (hereinafter TCC Family Law). In this article, I use “marriage agreement” instead of “betrothal” to avoid confusion. All clauses of the TCC cited in this article are the official English translations from the Taiwanese Ministry of Justice.

¹¹ Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1622–23 (2000).

¹² *Id.* at 1622.

In this way, “family” includes its extended meaning as a “level of the state.” It is, therefore, not surprising that Chinese scholar Xiaoqing Feng describes marriage and family as follows,

Marriage and family is a historical conception, a form of system regarding the union of a man and woman constituting relative entities that appear after some stage of the development of mankind. Marriage is the union of a man and woman confirmed by a definite social system. The form of such unity creates a husband-and-wife relationship Family is a group of relatives relation and a life unit composed by reason of marriage, blood, adoption and mutual economic relation. The appearance of marriage and family is a special phenomenon of human beings, and is also an important part of social systems.¹³

In Feng’s assertion on marriage and family in China, there are several elements emphasized: (1) monogamy; (2) firm heterosexual relationship; (3) marriage as the sole entity to establish family; and, (4) marriage/family as the singular institute from which all relative relationships are generated. For Feng, marriage/family also generates a specific, yet socialized position for each individual in the society; and is therefore an institution which forms a prominent base in order to establish a concrete social system.

However, Feng’s position takes the nuclear family as the only model and has been highly criticized. For instance, from the perspective of cultural feminism, Feng’s contention is as an example of what Martha Fineman critiques as the “sexual family”:

The sexual family is the traditional or nuclear family, a unit with a heterosexual, formally celebrated union at its core. . . . The sexual family is considered the “natural” form for the social and cultural organization of intimacy, its form ordained by divine prescription and perpetuated by opinion polls. The sexual family is an entity entitled to protection—granted “privacy” or immunity from substantial state supervision. . . . The reflection of the sexual family that is ensconced in law may be a distortion or a mere fragment of social reality, but that legal image constitutes the legal reality and forms the basis for state regulation. . . . [M]arriage is constructed as essential, not only the foundational relationship of the nuclear family but the very basis of society itself.¹⁴

The sexual family as a “natural form” ensconced in law is not a unique proposition in either the west or east. I am not, however, using sociology, anthropology, or history to study the origin and transition of

¹³ Xiaoqing Feng, *A Review of the Development of Marriage Law in the People’s Republic of China*, 79 U. DET. MERCY L. REV. 331, 331 (2002).

¹⁴ FINEMAN, *supra* note 8, at 143–46.

marriage/family or challenge the assumption of the sexual family. Rather, I suggest legal scholars, as well as those involved in Family Law discourse, take for granted the sexual family as an undoubted form, the only model protected by law, without considering the possible vagueness of the concept. For instance, in Taiwan, the single and supreme legal institution, the Justices of the Constitutional Court,¹⁵ affirms the sexual family concept (borrowing Fineman's definition) in their numerous constitutional interpretations, yet they never give firm details about the content. For example, Justices of the Constitutional Court, Interpretation No. 365, officially confirms gender equality in exercising parental rights in "today's family" in Taiwan, but the methods and content defining family have been neglected.¹⁶ Especially in the context of Family Law reform in East Asia, legal scholars in Taiwan, China, and Korea, emphasize marriage/family as the base to maintain the state's stability and social order.¹⁷ In these contexts, marriage/family is not only the personal choice of individuals pursuing relationships and satisfaction,¹⁸ it also involves the stability of the state/society.¹⁹ In fact, Family Law is just an example illustrating how Family Law is a cultural declaration.

The Justices of the Constitutional Court is the most supreme law institution and has sole authority to interpret the Constitution to make uniform interpretations of statutes and regulations. As the legal interpreter of Family Law, Taiwan's Justice of the Constitutional Court delivers powerful messages combining culture, morality, and the value of marriage/family in the social order. For example, in Justice of the Constitutional Court Interpretation No. 242, bigamy "would significantly disrupt family life and human relations and might lead to social disorder. This would be in conflict with Article 22 of the Constitution,²⁰ which provides that people's freedoms and rights shall be protected."²¹ Another example is in Justice of the Constitutional Court Interpretation Number 552:

As marriage involves change in the relation of personal status, which has to do with the *public interest*, the parties to the second marriage must be required to meet more stringent tests in respect of their reliance on the

¹⁵ Justices of the Constitutional Court, Judicial Yuan, http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p01_03.asp (last visited Aug. 26, 2006).

¹⁶ Justices of the Constitutional Court, Interpretation No. 365, http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=365 (last visited Aug. 26, 2006).

¹⁷ Feng, *supra* note 13; Lee, *Law and Social Norms*, *supra* note 7; Mi-Kyung Cho, *Korea: The 1990 Family Law Reform and the Improvement of the Status of Women*, 33 U. OF LOUISVILLE J. OF FAM. L. 431 (1995).

¹⁸ Stephen J. Bahr, *Social Science Research on Family Dissolution: What it Shows and How it Might be of Interest to Family Law Reformers*, 4 J. L. FAM. STUD. 5, 8 (2002).

¹⁹ Ruskola, *supra* note 11.

²⁰ Article 22 of the Taiwanese Constitution states: "[a]ll other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution." TAIWAN CONST. art. 22, available at <http://www.gio.gov.tw/info/news/constitution.htm> (last visited Aug. 26, 2006).

²¹ Justices of the Constitutional Court, Interpretation No. 242, http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03_01.asp?expno=242 (last visited Aug. 26, 2006).

dissolution of the prior marriage rather than relying on mere good faith and lack of negligence on the part of the person with whom he or she contracts the second marriage.²²

The interpretation emphasizes that marriage/family forms a stable social order and involves the public interest in the Family Law discourse. Obviously, such proposition takes a different view from Western Family Law discourse. For instance, as Bahr considers, human rights and individualism are the critical issues among Western Family Law scholarships.²³

In the next part of this article, I will discuss the distinguishing characteristics in the discourse of Family Law reform, especially the rhetoric of reform involved in the ideology of Western/Eastern dichotomy, individualism, and gender equality.

III. TRANSFORMATION OF FAMILY LAW IN TAIWAN

Taiwan's Family Law is included in the Civil Code (hereinafter Taiwan Civil Code, TCC). The TCC consists of five divisions based on the German system. Division I is "General Rules," Division II is "Obligations," Division III is "Property," Division IV is "Relatives," and Division V is "Succession."²⁴ The "Relatives" division primarily regulates the relationship between persons who are connected by blood or marriage, and also defines relatives, marriage and divorce, adoption, as well as rights and obligations of children and parents.

The "Succession" division regulates inheritance between relatives basically according to their position and rank in the family tree. Both divisions, "Relatives" and "Succession," are referred to as "Family Law" in Taiwan. In general, Family Law in Taiwan refers to the male-lineage oriented clan model and demonstrates a patriarchal family system that is still profoundly influenced by Confucianism.²⁵ However, Taiwanese Family Law went through large-scale amendments in 1985, 1996, 1997, and 2002. These amendments coincided with political changes, economic growth, and the growth of the women's movement in Taiwan.²⁶ The continuous Family Law reform primarily focuses on adopting several ideas mostly imported from Germany and the US: no-fault divorce, gender equality, and the children's best interest principle.²⁷ In 1996, parental rights and child

²² Justices of the Constitutional Court, Interpretation No. 552, http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03_01.asp?expno=552 (last visited Aug. 26, 2006) (emphasis added).

²³ Bahr, *supra* note 18; Arland Thornton, *Comparative and Historical Perspective on Marriage, Divorce, and Family Life*, in PUBLIC AND PRIVATE FAMILIES: A READER 40-52 (A. J. Cherlin ed., 1998).

²⁴ Taiwan Civil Code, available at <http://law.moj.gov.tw/Eng/> (last visited Aug. 26, 2006).

²⁵ Lee, *Law and Social Norms*, *supra* note 7.

²⁶ Yuan-chen Lee, *How The Feminist Movement Won Media Space in Taiwan: Observation by a Feminist Activist*, in SPACES OF THEIR OWN: WOMEN'S PUBLIC SPHERE IN TRANSNATIONAL CHINA 95-114 (Mayfair Mei-Hui Yang ed., 1999).

²⁷ Lee, *Law and Social Norms*, *supra* note 7.

custody were amended; in 1998, the focus was marital domicile and marital name; then, in 2002, the major amendment was matrimonial property.²⁸

IV. RHETORIC OF FAMILY LAW REFORM

Numerous developing countries today are experiencing a transition in legal culture and law reforms. The indigenous legal cultures in detail are probably different, yet the rhetoric and the destination of law reform show similar trends. For example, the most commonly adopted principle of Family Law reform is gender equality, specifically, improving women's status in marriage law and divorce law.²⁹ Specific examples are seen in Taiwan and South Korea. As members of the Civil Law family, Taiwan and South Korea share very similar legal transplant routes and similar legal cultures, including the Confucian influence, the legal profession recruitment system, recent legal education reform, and the substantial influences of the German system transplantation and Japanese colonialism.³⁰ In the field of Family Law, Taiwan and South Korea have coincidentally experienced Family Law reform in the last twenty years.

Indeed, among the societies and cultures of East Asia, Confucianism has a fundamental influence. However, in a certain context, Confucianism may be taken as the opposite of modernization and contemporary social reform.³¹ For instance, according to Easter Yao's comparison of the Confucianism practiced in Taiwan and China in the mid-20th century, Confucianism and modern social progress seem to occupy two poles; the former is traditional and conservative, while the latter is, not surprisingly, emancipated and progressive.³² In Chaihark Hahm's study on Confucianism and Korean legal culture, he points out that Confucianism is taken as a pole of binary discourse in Korea's law reform.³³ Furthermore, Hahm asserts that the "Confucian legacy" is like a "package" which contains the elements of family-centered ethics, respect for elders, group loyalty, hard work, meritocracy, and so forth. Yet these elements may also be found in some other cultures. Neither of these elements can completely explain the precise contents of Confucianism.³⁴ However, the ambiguity of Confucianism did not restrain Family Law scholars from using the Confucian legacy in Family Law discourse.

Without inheriting any scholarly tradition of cultural legal study in Taiwan, Taiwanese Family Law scholar, Hui-Hsin Chen, a well-known

²⁸ Taiwan Civil Code, available at <http://law.moj.gov.tw/Eng/> (last visited Aug. 26, 2006).

²⁹ Cho, *supra* note 17; Taimie L. Bryant, *Family Models, Family Dispute Resolution and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1 (1995).

³⁰ Weiming Tu, "Cultural Identity and the Politics of Recognition in Contemporary Taiwan", in CONTEMPORARY TAIWAN 71 (David Shambaugh ed., 1998); see also ESTHER S. LEE YAO, CHINESE WOMEN: PAST & PRESENT, 199-240 (1983); Chan Jin Kim, *Korean Attitudes Towards Law*, 10 PAC. RIM L. & POL'Y 1, 1-41 (2000).

³¹ Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 266 (2003); ESTHER S. LEE YAO, *supra* note 30.

³² ESTHER S. LEE YAO, *supra* note 30.

³³ Hahm, *supra* note 31, at 268.

³⁴ Hahm, *supra* note 31, at 268.

feminist and activist, became the first Family Law scholar to initiate studies of the hidden bias within the statutes of Family Law. Coordinating with other feminist activists in the mid 1990s, Chen also worked on utilizing the epidemiology of feminist jurisprudence to stimulate a trend towards improving women's status in Family Law.³⁵ When commenting on the amendment to Family Law in 1991, Chen pointed out that,

In the past sixty years, the law scholars and practitioners in Taiwan have all encountered the same dilemma, that is, how to reconcile the human relationships [*Ren Lun*] indicated in both Confucian tradition and the valid codes [symbolizing the Western ideology]. When law scholars and legal practitioners are dealing with newly reforming Family Law which adapted Western ideology, they are, consciously or unconsciously, carrying a deeply traditional value in mind. So it is a conflict for them [Family Law scholars and practitioners] when utilizing the modern laws yet interpreting them with traditional Confucian values in mind (Chen, 1991).³⁶

In fact, Taiwan's Family Law was established in 1930, adopting "individualism" and "male/female equality" from German law. Yet such a "Westernized" Family Law actually differed from collectivism and patriotism which were rooted in Chinese cultural practice.³⁷ Such dilemmas, as Chen points out, can be explained as the "transplant effect," a term devised by Daniel Berkowitz. Berkowitz's idea of the "transplant effect" is to examine the process of transplantation effecting both origins and transplants.³⁸ Berkowitz asserts that the transplant effect possibly cripples the transplant countries more than the origin countries because of the "mismatch between preexisting conditions and institutions and transplanted law, which weakens the effectiveness of the imported legal order."³⁹ Applying Berkowitz's "transplant effect" to the dilemma of the dichotomy of Taiwan's Family Law discourse, there appears to be a *negative* transplant effect happening since it "weakens the effectiveness of the imported legal order" and generates embarrassment when the ideology of origins and transplants are not easy to harmonize.

³⁵ See Yu-Hsiu Liu, *Nan Jen de Fa Lu, Nan Jen de Guo Gia: Min Fa Chin Shu Pien de I Shyh Hsing Tai Fen his* [*Men's Law, Men's Nation and Family: An Analysis on the Ideology of the Family Law of the Civil Code*], in TAI WUAN FU NU BAI PI SHU: 1995 [THE WHITE PAPER OF WOMEN'S STATUS IN TAIWAN: 1995] 39-92 (Yu-Hsiu Liu ed., 1995) (criticizing that embedded patriarchy within Family Law led to the subordination of women in Taiwan).

³⁶ Hui-Hsin Chen, *Bian Dong Chung De Jen Lun Chih Hsu Yu Fa Lu Chih Hsu: Cong Qin Shu Fa Chung Fu Qi Quan Si Tan Qi* [*The Transition of Orders of Relatives and Family Law: Examining the Husband-Wife Relationship*], 21 NATIONAL TAIWAN UNIVERSITY LAW JOURNAL 1, 330-31 (1991) (asserting that there is a dilemma for Family Law scholars in Taiwan, which originates from two poles of thought: Western individualism and Confucian ideas of collectivism).

³⁷ *Id.*

³⁸ Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 171 (2003).

³⁹ *Id.*

However, I am more interested in analyzing the cultural characteristics indicated by such a transplant effect. First, like Hahm's use of "package" to describe the politics of Confucianism on Korean law,⁴⁰ Chen, along with the rest of Family Law scholars in Taiwan, did not fully clarify how the content of Confucianism or the substance of the so-called traditional value affects the legal practice of Family Law. Yet, such ambiguity of Confucianism seems not to interfere with scholars utilizing it as an effective rhetoric to make distinctions between indigenous legal culture and the origins (i.e., the western countries).

Second, the legal doctrines and ethos of the origin countries are unsophisticatedly located in a pole far away from the indigenous culture, and therefore, originate the whole context of the origins vs. transplants discussion. I will suggest that the binary rhetoric of Family Law discourse in Taiwan could be found in numerous law reforms and legal transplantations. In the field of Family Law, on one hand, the principles of individualism, male/female equality and human rights are usually the unbending agenda of the reform. On the other hand, the local traditional customs and cultural practices are pushed to the other pole, generating the negative transplant effect.⁴¹

Third, facing the so-called negative transplant effect, the anxiety demonstrated by legal scholars and practitioners in transplant countries, for example as Taiwanese scholar Chen discusses the dilemma, implies that the comparative areas of legal scholarship should engage in more culturally self-retrospective researches to deal with the wholesale legal transplant phenomena.

Thus, one positive avenue of progress is to engage in sociological analysis on legal transplantation and indigenous social change. This forms the recent reviews and comments on Family Law reform. For instance, Taiwanese feminist legal scholar Li-Ju Lee has utilized the aid of sociological analysis on law and social norm to explain the progress of modernization and improvement of gender equality in Taiwan.⁴² Like Lee's study, for instance, scholars studying Family Law reform in China are also emphasizing political change, formalization and modernization, which are all appearing in Family Law reforms.⁴³ Generally speaking, such research is action-oriented, and most seek to provide a blueprint for improving the situation for groups discriminated against, mainly women. When sketching the reform plan for transplant societies, the systematic analysis of the local context by such research possibly initiates the "self-transformative task of learning," as Riles proposes,

⁴⁰ Hahm, *supra* note 31, at 268.

⁴¹ See Stephen J. Bahr, *supra* note 8, at 6; Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99, 132-44 (2003). See generally Cho, *supra* note 17; Feng, *supra* note 13; Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 299 (2004).

⁴² See Lee, *Law and Social Norms*, *supra* note 7.

⁴³ See Ogletree & de Silva-de Alwis, *supra* note 41, at 251; Woo, *supra* note 41, at 132.

What comparativists share, as much as a body of knowledge, a set of methods or techniques, or even common research questions, is a *passion* for looking beyond, an *empathy* for differences but also for similarities, a *faith* in the self-transformative task of learning, and an interest in the *form* of knowledge itself.⁴⁴

This article may look more like a manifesto for comparative lawyers' future research rather than a practical manual for providing any legal reform outlines. However, I do believe that facilitating more research on cultural self-retrospection and considerably scrutinizing the trajectory of the transition, transformation, and transplantation of legal knowledge, rather than advocating wholesale reform, will be a fruitful mission for a third camp of comparative lawyers who work under the banner of globalization.⁴⁵

A. STUDYING THE INCONSISTENCY

In her earlier work reviewing the transformation of the American Family Law through the historical perspective, American legal theorist Mary Ann Glendon noted that "Many traditional family law norms have been found inconsistent with the values contained in constitutions or international conventions."⁴⁶ Glendon takes the position that, on one hand, the constitution is the symbol of modern law, and international conventions are artifacts of globalization.⁴⁷ In this way, gender equality, free will, personal choice, and so on, are insured. On the other hand, there are "traditional family law norms" that are seen as the foundation of the inconsistencies within the modernization of Family Law. Therefore, in Glendon's proposition, there is a binary condition in the transformation of Family Law.

For instance, the TCC Article 1089 provided that in the case of parental disagreement in exercising parental rights, the father shall have the right of final decision. In contrast, the Justice of Constitutional Court Interpretation No. 365 adopted the gender equality principle and disavowed the TCC Article 1089. The Interpretation No. 365, issued on September 23, 1994, stated,

[t]his particular Article was enacted during the nineteenth year of the Republic, the product of cultural traditions and social mores of a bygone era. With widespread education, and equal access to education granted to both sexes, favorable changes in employment conditions, and women having greater career opportunities, conditions are virtually indistinguishable for both men and women....[T]he recommended action

⁴⁴ Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 230 (1999).

⁴⁵ *See Id.*

⁴⁶ MARY ANN GLENDON, *supra* note 1.

⁴⁷ *See* MARY ANN GLENDON, *supra* note 1.

should be a compromise between the two parents in the interest of preserving gender equality in exercising parental rights, or else, in the event of such a disagreement, the position of the mother will be subordinated to that of the father, which constitutes a gross violation of gender equality, and creates a glaring discrepancy with the actual status of women in today's family.⁴⁸

Another example is Interpretation No. 452 issued on April 10, 1998, declaring the TCC Article 1002 invalid because it stated that the right to determine residence is vested in the husband unless the couple has an agreement declaring otherwise.⁴⁹ Interpretation No. 452's reasoning also recognized social change and the improvement of women's status:

[G]iven that education is very common nowadays and men and women have almost the same opportunity to make career choices, the workplace of the husband and the wife may not be the same. The couple may come to an agreement to designate a residence in the case where the couple is willing to accommodate one another.⁵⁰

These two Justice of Constitutional Court interpretations symbolize the victory of the women's movement in the past three decades in Taiwan, and also mark the changing character of Family Law today, which is absorbing gender equality.

Based on the above transformation of Family Law, I will move forward in studying the inconsistency of Family Law reform and attempt to answer this questions. Where has the discourse of Family Law reform failed to reach and become inconsistent? What does the failure and inconsistency of family law reform indicate? How can I theorize such a dilemma through the lens of comparative law and cultural legal study?

I will begin with the gray area of developing kinships: the engagement stage, its doctrines, and the Marriage Agreement Section of TCC.

B. THE NEGLECTED MARRIAGE AGREEMENT SECTION

The Marriage Agreement Section (matrimonial engagement) in TCC has so far been overlooked by Family Law reform. Feminists and law reformers have worked hard to improve women's status in the marriage and divorce law, as the above two Constitutional Court Interpretations suggest. As for the Marriage Agreement, it creates a " 'special relative status;' but is neither the official martial status, nor a contract."⁵¹ In other words, the Marriage Agreement merely symbolizes a *transition*, which will not

⁴⁸ Justices of the Constitutional Court, Interpretation No. 365, *supra* note 16.

⁴⁹ Justices of the Constitutional Court, Interpretation No. 452, http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=452 (last visited Aug. 26, 2006).

⁵⁰ *Id.*

⁵¹ DONG-HSIUNG YEN-HUI DAI & QIN CHU FA [RELATIVES LAW] 54–65 (Taipei, Dong-Hsiung Dai 2004).

generate any right and obligation for matrimonial parties, or for their families. The Marriage Agreement is a ritual rather than an official legal relationship. Therefore, the Marriage Agreement Section has been neglected by feminists, activists, and Family Law reformers.

However, the Marriage Agreement Section represents a model of patrilineal and patriarchal chain of authority because it is the doctrine that deals with the betrothal parties' rights and obligations before they officially enter the marital stage. However, this section had been blocked from the reform discourse merely due to its ambiguity of legal recognition for "official family/kinships" identity. As a result, the Marriage Agreement Section was neglected by the reformers, and was less influenced by the western ideology of liberalism and equality.

In light of these neglected ideals, I will consider the Marriage Agreement Section by comparing it to the marriage law and the divorce law in the TCC. I argue that the Marriage Agreement Section actually represents a spirit of ritual than that of rather than legal regulation in the context of Taiwan's customs and cultural practices.⁵² The doctrines within the Marriage Agreement Section are relatively simple because it merely addresses two individuals.⁵³ Herein there are three components: first, there should be a male of at least seventeen years old and a female of at least fifteen years old, in their concord, to be the parties in the Marriage Agreement;⁵⁴ second, "No demand shall be made to force the performance of an agreement to marry;"⁵⁵ third, since the core of the Marriage Agreement is to get married officially and legally, the marriage dissolving conditions, in TCC Art. 976, therefore, follow the TCC Art. 977 to 979-2, statutes regarding the equitable compensation for both parties paying for all expenses for their future marriage.

By examining the Marriage Agreement sections, I wish to point out two distinctions that are often neglected, but are meaningful when discussing the "transplant effect:" (1) the ritual character of engagement for two parties, and indeed, for two clans and (2) the *material-based* character of family in Chinese culture. Although the Articles in the Marriage Agreement section appear to be personal-choice oriented, the conditions to dissolve the Marriage Agreement include the liability/compensation clauses, implying that such dissolution needs to involve the more peripheral members of the two families.

The noteworthy point is, since marriage is taken as the original institute to form a family, and accordingly to generate progeny, it can be argued that the stage of engagement is a process of re-socialization for the two persons and all of their family members. Therefore, once two persons dissolve the Marriage Agreement, the process of re-socialization must be terminated, and must also "make compensation for an injury (and) restore the injured

⁵² TCC Family Law, *supra* note 10, at arts. 980–1058.

⁵³ TCC Family Law, *supra* note 10, at arts. 972–979–2.

⁵⁴ TCC Family Law, *supra* note 10, at arts. 972–973.

⁵⁵ TCC Family Law, *supra* note 10, at arts. 972–975.

party to the status quo before the injury.”⁵⁶ The scale of “compensation for an injury” cannot be like an ordinary contract in the case of a Marriage Agreement, because of the engagement’s character, as a ritual containing a cultural declaration and the expectation of re-socialization. It is not a straightforward business-like contract, but refers to a much more complete process encompassing the entire lives from both parties, and their families. The explanation and interpretation from a majority of scholars of TCC Articles 977, 978, 979, and 979-1,⁵⁷ support my arguments, reflecting the theses made at the outset of this essay. That is, the Marriage Agreement section remains a family-oriented Confucian cultural practice and is less influenced by the Western ideology of individualism.

Bonnie Adrian’s ethnographic study on the burgeoning wedding industry in modern Taipei sketches a vivid illustration of how the whole engagement process mobilizes families. Two families will be united as a new clan. Adrian states,

Weddings, then and now, are not merely rites of familial separation and incorporation for the bride but also rites of passage through which both bride and groom become adults (though until they produce a child, the process of becoming a full-fledged adult is considered incomplete)...Weddings move both men women from the “outside” realm to the “inside,” and ceremonies orchestrated and controlled by family elders without regard for the bride and groom’s individual tastes, preferences, and values make good sense as initiation into the adult world of selfless performance of familial responsibilities....⁵⁸

The mix of ingredients leading up to the wedding contains the pre-engagement ritual. This includes, consulting astrology, gift-exchanging, distributing wedding cakes to relatives and friends, taking dozens of dramatically romantic wedding portraits, and arranging engagement and

⁵⁶ Taiwan Civil Code Part II art. 213, *translation available at* <http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=738> (last visited Aug. 26, 2006) (stating that “[u]nless otherwise provided by the act or by the contract, a person who is bound to make compensation for an injury shall restore the injured party to the status quo before the injury.”).

⁵⁷ TCC Family Law, *supra* note 10, at art. 977 (“[w]here an agreement to marry has been dissolved in accordance with the provisions of the preceding article, the innocent party may claim compensation from the other party who is at fault for damage thus sustained. In the case provided in the preceding paragraph, the injured party may still claim an equitable compensation in money for a non-pecuniary loss. The right to claim in the preceding paragraph shall not be assigned to others or be passed to heirs, unless it has been acknowledged by a contract or unless an action has been commenced.”); TCC Family Law, *supra* note 10, at art. 978 (“[o]ne party to an agreement to marry, who breaks it without any of the grounds provided in Article 976, shall be liable to compensate the other party for any damage thus sustained.”); TCC Family Law, *supra* note 10, at art. 979 (“[i]n the case provided in the preceding article, the injured party may still claim an equitable compensation in money for a non-pecuniary loss, provide that he is not at fault. The claim in the preceding paragraph shall not be assigned to others or be passed to heirs, unless it has been acknowledged by a contract or unless an action has been commenced.”); TCC Family Law, *supra* note 10, at art. 979-1 (“[o]ne party may claim the other party for returning gift presented for betrothal when the agreement to marry is null and void, or dissolved, or annulled.”).

⁵⁸ BONNIE ADRIAN, *FRAMING THE BRIDE—GLOBALIZING BEAUTY AND ROMANCE IN TAIWAN’S BRIDAL INDUSTRY* 113–15, 128, 132–33 (University of California Press 2003).

marriage banquets.⁵⁹ These arrangements can not be accomplished without mobilizing at least two family members, and obtaining parents' financial support. Suffice it to say, the Marriage Agreement initiates the process of re-socialization not only for the matrimonial couple, but also for their entire families. Such cultural practices also often appear in the exercise question section of the Family Law text books,⁶⁰ in particular, when discussing the dissolution of a marriage, how to calculate and design the compensation for each party involves the parents' returning gifts (including car, house, jewelry, banquets, etc). Thus far we have only discussed the materialistic aspects. There is another key aspect involving the Marriage Agreement: the materiality of family.

The Taiwanese cultural anthropologist, Antonia Chao in her paper, "Moving House: The Relational-Materialistic Aspect of Queer Cultural Citizenship" proposes the materiality of family to argue that, compared to the "efficacy of 'the family' (or 'patrilineal ideology') in molding queer identities,"⁶¹ the "materiality of family" (my own translation) should be a core issue to constrain the alternative lifestyle.⁶² In Chao's ethnographic research with Taiwan's "first generation of lesbians" (i.e., lesbians growing up during the first decade of post-WWII era), she uses the metaphor of a "moving house" to describe the "first generation of lesbians" lacking the material resources from their natal families, such as a house, car, or even a marriage funding as a dowry. Therefore, these lesbians circumvented the trap in moving in and out because they were unable to afford the purchase of a permanent residence.⁶³ Even worse, their lesbian life style, especially for elder butch women, usually created uneasiness in the workplace, and lead to difficulties in obtaining seniority and promotions. Once again they were failing for financial reasons to establish their own family. The elder lesbians' negative experiences in Chao's research highlighted the materiality of family, which is sustained by law (e.g., Family Law) and cultural practice (e.g., the dowry). Contrary to the elder lesbians in Chao's

⁵⁹ *Id.*

⁶⁰ See DONG-HSIUNG YEN-HUI DAI & QIN CHU FA, *supra* note 51; see also CHI-YEN CHEN et al., MIN FA QIN CHU HSIN LUN [CIVIL CODE-RELATIVE SECTION] 92 (San-Min 2004).

⁶¹ Antonia Chao, *Moving House: The Relational-Materialistic Aspect of Queer Cultural Citizenship*, in TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES 41–85, No. 57 (2005).

⁶² *Id.*

⁶³ In Adrian's research, she describes the "new room" (xinfang) and all related rituals, including gift exchanges, which serve as a good illustration of family, household and materiality:

On the wedding day (usually at least several weeks after the betrothal), the bride retreats to her "new room" (xinfang) upon arriving at the groom's home and bowing to his ancestors. Even when the couple will not be residing with the groom's family after marriage, a room is set up for them as their "new room" for the day. There may be a pair of the groom's trousers draped over two chairs in the room so that later, when the bride and groom sit down, they each sit on a leg of the trousers to enhance fertility. Other rites are more involved. The couple's bed—as well as the sheets, pillows, and bedspread—should be new. And sure enough, most bridal magazines contain a section on bedding design with advertising from bedding manufacturers, because the expectation that a couple will select new bedding is so high. Astrological considerations determine when the new bed may be moved from the store into the new room, and no one may sleep upon the bed until the wedding.

See ADRIAN, *supra* note 58, at 132–33.

project, the heterosexual couple enjoys the legitimacy of materiality reciprocity, for example, the dowry exchange, gifted car, or house funding from their natal families. The Family Law goes even further to regulate heterosexual couple's materiality reciprocity when the marriage agreement fails.

Based on the above contradiction, I argue that, the structure of the Marriage Agreement section in TCC and its interpretations by scholars, further reflects the materiality of family, along with the patrilineal ideology which constructs the economics and politics of family and appears not as custom, but as *law*. Although marriage and divorce law emphasize individual autonomy, the status and ideology reflected by the Marriage Agreement section draws the modern wedding back to traditional clan-centered rituals.

C. CONSTITUTING FAMILY RIGHTS

In the transformation of Family Law in Taiwan, the constitutional scholars participating in the Family Law forum note the positive progress in unfolding the traditional categories of legal studies. Family Law belongs to the camp of civil law, and the constitution is included in public law, so the two camps of scholarship have seldom had mutual concern before. Yet, as addressed at the outset, the state's intervention in the family could be the most critical challenge for Family Law scholars in the near future. For example, as Li-Ju Lee asserts, "The state is now willing to play the role of guardian to disadvantaged members of the family, mainly women and children, in matters such as domestic violence. Unifying the seemingly opposite trends is the new emphasis on individual autonomy and equality in the family."⁶⁴ However, how to generate a concept of "family right" which can draw a line to prevent unappreciated intervention from the state, and how to define the "family right" as the vested right for any individual are puzzling questions for Family Law and constitutional scholars alike. So far, there is only constitutional scholar, Chen-Shan Li, a high-profile constitutional law professor with a Ph.D and law degree from Germany, who offers a definition of "family right," "it is a 'right to family life,' and as a 'basic right' the tension exists among constitution, law and society."⁶⁵ Li also addresses issues on homosexual marriage or partnership, reproductive technology, and alien workers in Taiwan to illustrate the content of "right to family life" and asserts that it should be protected by the constitution.⁶⁶ The content and ambition of "family right" in Taiwan's context has two agendas. One is asking for the state's protection, e.g., in domestic violence, while the other seeks to prevent the state's improper intervention, e.g., rejecting homosexual partnerships. However, neither of

⁶⁴ Li-Ju Lee, *Between the State and the Family—A Study of Recent Taiwanese Family Law Development*, ISSUE 10 CHUNG YUAN FIN. & ECON. L. REV. 41–83 (2003) (hereinafter Lee, *Between the State and the Family*).

⁶⁵ Chen-Shan Li, *supra* note 6.

⁶⁶ See Chen-Shan Li, *supra* note 6, at 61–104.

these agendas can actually be taken as an extension of individual autonomy, which is the vested right protected by the Constitution.⁶⁷

Although in the context of Taiwan's Family Law, the "family right" is brand-new and very ambiguous, this article is not intended to go against the ideas of "family right" or to give a more thoughtful definition of "family right." The question here is why a new generation of Family Law scholars endeavor to seek a hand from constitutional scholarship,⁶⁸ and whether the progress of building up the concept of "family right" indicates the shortcomings of epistemology and methodology of traditional Family Law scholarship. If the discourse of Family Law reform cannot escalate beyond the action-oriented character, then it is likely that "constituting the family right" will soon become invalid rhetoric.

D. RECONSIDERATION OF THE LEGAL TRANSPLANT EFFECTS ON FAMILY LAW IN THE GLOBAL ERA

The above analysis demonstrates how the universal principles of Family Law, i.e., gender equality and children's best interests, have been adopted in the process of legal reform as a victory for the woman's movement and law reformers. With this as a backdrop, we can move on to an analysis of the cultural basis of Family Law – the discourse on Family Law reform, the Marriage Agreement section and a discussion on "family right" among Family Law and constitutional scholars — through the lens of taking Family Law as an ethnographic object.

The legal system in Taiwan belongs to the civil law family, not the common law family, yet Anglo-American common law ideas profoundly influence both theoretical and substantive levels in Taiwan's legal system. Family Law reform is a recent example. Indeed, Family Law reform in Taiwan not only adopted the German pandect system and the U.S. law trend, it also seized upon the tide of globalization and weaved it all together into so-called modern Family Law.⁶⁹ For instance, in the recent Justice of Constitutional Court Interpretation Number 587,⁷⁰ the honorable judges for the first time directly quoted the UN Convention on the Right of the Child, as well as Germany's Civil Code, Switzerland's Civil Code, and Taiwan's Constitution as the primary legal resource to disavow the interior civil code – TCC Art. 1063, more specifically, in regard to authenticating the relationship between the child and his/her biological father.⁷¹ The

⁶⁷ Hsin Hua Wu, "Protection or Limitation?—Marriage and Family in Taiwan's Constitutional Law" (May 21, 2005) (presented at the Second Symposium Sociology of Family Law: "Family Right" and its Regulations, held at the College of Law, National Chung-Cheng University).

⁶⁸ See Lee, *Between the State and the Family*, *supra* note 64; see Amy Shee, *The Model of Individual-Oriented: The Pedagogy of Family Law*, in VOLUME OF SOCIOLOGY OF FAMILY LAW 14–31 (Amy Shee ed., Yuan Chao 2004).

⁶⁹ See Shee, *supra* note 68.

⁷⁰ Justices of the Constitutional Court, Interpretation No. 587,

http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=587 (last visited Aug. 26, 2006).

⁷¹ TCC Family Law, *supra* note 10, at art. 1063 (stating that "[w]here the conception of the wife is during the continuance of a marriage relationship, the child so born is presumed to be legitimate. In regard to presumption of legitimacy provided in the preceding paragraph, either the husband or the wife may bring an action for disavowal if he or she can prove that the conception of the wife is not from the

Interpretation No. 587 is a landmark for the Constitutional Court, in announcing the legal transformation of Family Law in Taiwan as it moves into the era of globalization, and in displaying the ambition and the epistemological depth of the Constitutional Court's utilization and recognition of Comparative Law in Taiwan.

By examining the process of legal transplant, Jonathan M. Miller makes a typology of legal transplants into three modes (these three modes would probably not occur independently but would overlap to some extent).⁷² In Taiwan, as a laggard legal transplant receiver, law scholars and practitioners have not only combined Miller's three types of legal transplant in the past sixty years but have also built up its hybrid legal culture. From a comparative lawyer's view in studying the legal transplant and legal reform in the Family Law context in Taiwan, I wish to question how the phenomena of Taiwanese law scholars, who are studying abroad and returning here from various countries (mostly Germany, the U.S., and Japan), and importing wholesale foreign legal ideas, reflect the paradoxical imaginations of their "origin," or "suzerain" countries, but without reflection on the process of transplanting. As a topic of comparative law and globalization, Riles asserts,

In sum, in the popular understanding of globalization, all of this is a new phenomenon; something in the world has changed, and we, as scholars, had better adapt. In many respects this no doubt is true. Yet the *perception* that the world has changed -- the sense of being on the verge of a different kind of era with different kinds of problems requiring a new and more active engagement with comparative law, and that these problems and their solutions are transnational in character -- is by no means new.⁷³

Riles' assertion points out a fresh perspective for the comparative lawyer's thinking about legal transplant and globalization. Following the same direction to study the process of legal transplant in the Family Law context, I wish to rethink the boundary of law subjects from the core issues of Family Law: state vs. family; public vs. private; tradition vs. modernization.

Thus, through a considerable cultural analysis on Family Law, especially in reading Family Law as an ethnographic object, I wish to suggest that legal scholars of the field of Family Law would take a large step forward in thinking about how to link the distinct but related areas of legal scholarship, such as Family Law, Law and Social Movement, Feminist Jurisprudence, Comparative Law, and Legal Transplant, and then to go further by reconsidering the intricacy of the laws, ideas, techniques,

husband; but such disavowal shall be effected within one year after the knowledge of the child's birth.").

⁷² Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003).

⁷³ Annelise Riles, *supra* note 44, at 256.

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models, knowledge, and information being mobilized in this transnational era.