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**TAIWAN'S LEGAL SYSTEM AND  
LEGAL PROFESSION**

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UNIVERSITY  
of  
MARYLAND**



## ***Occasional Papers/Reprint Series in Contemporary Asian Studies***

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# TAIWAN'S LEGAL SYSTEM AND LEGAL PROFESSION\*

*Hungdah Chiu\*\* and Jyh-Pin Fa\*\*\**

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# Taiwan's Legal System and Legal Profession\*

HUNGDAH CHIU AND JYH-PIN FA

## I. Introduction

Chinese law as implemented and practised in Taiwan today, along with its attending institutions, developed over a period of thousands of years; it contains remnants of Imperial Chinese law, as well as elements from contemporary China, while also borrowing heavily and adopting principles and concepts from civil law jurisdictions (such as Germany and Japan) as well as the United States. This base — combined with a rich business culture, an entrenched administrative structure, and the linguistic barriers presented by numerous Chinese dialects — confronts, and often confounds, the foreign investor and its legal counsel when tackling legal problems connected to Taiwan. This chapter will provide a conceptual and theoretical basis for understanding the Chinese legal system and legal profession. The chapter begins with a survey of the development of Chinese law and then enumerates the law's various sources. Section IV describes the judicial system, while Section V explains the various other means of dispute resolution available in Taiwan. The chapter concludes with a description of Chinese legal education, the legal profession, and the regulation of foreign lawyers and law firms.

## II. Legal Development

### A. *Traditional Chinese Law*

A study of the legal thought and systems prevalent in traditional China provides an indispensable window to understanding the modern Chinese state. Like its political philosophies, China's most influential legal philosophies, which signified conscious reflections on the nature and end of law, emerged, grew, and diversified from the sixth through to the third century BC. This period was characterized by the conflict between the Confucian and Legalist conceptions of government, the former espousing a belief in 'government by men', the latter trusting in 'government by law'. Confucianism's premium on moral education exerted from the top made ethics the principal regulator of human conduct and virtue the chief requirement of the rulers.<sup>1</sup>

Legalists, on the other hand, denied that moral influence could determine the social order or could alone create order within the state. They wished to produce a system of law before which all men were equal and through which proper social behaviour would be inculcated by means of severe penal sanctions imposed by the state.<sup>2</sup> The law, however, was to be enacted by the rulers without participation by the people. Thus, the Legalists were advocating a 'rule by law' and not the 'rule of law' embodied in the Western concept of law.

The fact that the Ch'in dynasty (221–206 BC), which adopted a programme designed by Legalists, was so short-lived vastly enhanced the prestige of

Confucian teaching. During the reign of Emperor Wu-ti of the Western Han dynasty (roughly 140–86 BC), Confucianism was exalted. It is said that Confucianism dominated Chinese political and legal thought from that time until the Republican revolution of 1911, but this is based more on appearance than fact. The Confucianism which became the accepted orthodoxy had been subtly transformed by the addition of substantial parts of Legalism. Legal institutions and organizations identified with Legalism survived into the Eastern Han dynasty (AD 25–221) and thereafter in an exceptional symbiosis with those belonging to the classical Confucian order. The Chinese concept of law, thoroughly grounded in Confucianism, thus differs from that of the West. It began with the idea of the order of nature, the necessity for human actions to harmonize with the natural order, and the ruler's function in maintaining this harmony. Confucius and his followers considered law to be necessary to the maintenance of harmony, though clearly secondary to the virtuous conduct and morality of rulers and officials. The family, not the individual, constituted the unit of the social and the political community, and served as a model by which the state was governed. Just as the highest duties inculcated by the moralists were those owed to parents and elders, so the strictest legal obligations were attached to those relationships. This premium on hierarchical relationships could have either a mitigating or an aggravating influence on penalties.<sup>3</sup> Thus, law in China protected neither the political rights nor the economic position of the individual. This is in sharp contrast to Roman Law, the foundation of modern law, which contained elaborate provisions on the private and economic rights and duties of the individual.

In practice, the Chinese code<sup>4</sup> was chiefly penal and administrative. Legislation concentrated almost solely on public law, and either ignored matters of a civil nature entirely (this was the case, for example, for contract law) or provided only limited treatment within the penal system (for example, property rights, inheritance, and marriage).<sup>5</sup> Law was not considered an independent speciality, but was rather a part of the function of administration in general, and served the interest of the state and society in maintaining the Confucian hierarchy of relationships and social order.

Private law thus remained undeveloped. The law was primarily designed to govern an isolated agricultural society where, unlike in the West, no encouragement or considerable attention was given to capitalism or an independent business class. As a result, ordinary people tended to resolve their conflicts through unofficial channels. Disputes arising out of business deals and contracts were customarily settled within craft or merchant guilds in accordance with the guilds' own customs, while disputes between individuals or families were traditionally mediated by village elders, neighbourhood organizations, or members of the local gentry. Business relations were not cold, impersonal matters governed by law as they were in Western society, but part and parcel of friendship, kinship, and personal relations.<sup>6</sup> This sentiment has resonated in contemporary Chinese business culture, and is even reflected in the conduct of business transactions today.

As part of the government administration, Chinese law had to serve the interests of the state and society, rather than those of individuals. It is hardly surprising, therefore, that no independent judiciary and separate procuracy and police developed in traditional China. For similar reasons, since the law was not primarily designed to grant civil or economic rights to individuals, there was no rationale for recognizing the defence lawyer system, although underground illegal lawyers did exist.<sup>7</sup>

*B. Contemporary Legal Reform*

Increased contact with the West in the 19th century gradually revealed the weaknesses of Chinese law. China was forced to grant foreign nationals extraterritorial rights on the excuse that Chinese law and the legal system were too primitive. Governmental officials and reformers thus widely believed that legal reform, by eliminating the demand for extraterritoriality, would assist China in overcoming its weakness *vis-à-vis* the foreign powers. Indeed, Great Britain, the United States, Japan, Sweden, and Switzerland had all undertaken in their respective treaties with China to dispense with extraterritoriality as soon as the state of Chinese law permitted.<sup>8</sup> This argument gained added impetus when legal reform in Japan resulted in the abolition of extraterritorial rights for foreigners in Japan before the end of the century. In addition, with the opening of China and the introduction of such Western commercial concepts as limited liability corporations, negotiable instruments, and insurance, the inadequacy of the traditional laws and the need for comprehensive civil and commercial legislation became apparent. The result was the establishment of the Imperial Law Codification Commission in 1904.<sup>9</sup>

The new code borrowed heavily from Japan, an East Asian country with a similar cultural heritage to China which had at that time transformed itself into a rising world power. Japan based its legal system upon those of civil law countries, notably Germany, the fragmentary nature of common law systems making it difficult for China to borrow from them.<sup>10</sup>

Although the political chaos of the late Ch'ing dynasty and early Republican period seriously impeded the progress of legal reform, it did not stop completely, and in the decade between the unification of the country by the Nationalists in 1928 and the outbreak of the Sino-Japanese War in 1937, it regained full momentum. During this period, the Nationalist government succeeded in codifying all the major civil, criminal, and commercial laws of China: the Criminal Code (1928, revised 1935), the Code of Criminal Procedure (1928, revised 1935), the Civil Code (1929), the Code of Civil Procedure (1929), the Insurance Law (1929), Company Law (1929), Maritime Law (1929), the Negotiable Instruments Law (1929), Bankruptcy Law (1935), and the Trademark Law (1936). After the end of the Second World War in 1945, the Republic of China (ROC) also adopted a new constitution on 25 December 1946, which entered into force on 25 December 1947.<sup>11</sup>

There has been no need for any major codification efforts since the government of the ROC transferred to Taiwan in 1949, as all the basic codes and legal arrangements necessary for a modern state were already in place. Thus, ROC legal reform has been directed towards the full implementation of the constitution and other existing codes and legislation, and towards the revision of existing codes or laws according to later experience. However, the ROC government has been very active in enacting special legislation to implement its social and economic policies or implementing laws in these spheres enacted before its removal from the mainland.

Since the 1950s the ROC has enjoyed close relations with the United States, and the influence of American law has consequently increased. Amendments of commercial statutes — the Company Law, the Law of Negotiable Instruments, the Maritime Law, and the Insurance Law — have drawn heavily on American theory and practice,<sup>12</sup> and the Chattel Secured Transactions Act, an important appendix to the Civil Code, is said to follow the American model.<sup>13</sup>

Certain American rules of criminal procedure were also incorporated into the ROC Code of Criminal Procedure after the 1966 revision.<sup>14</sup>

### III. Sources of Law and the Legislative Process

#### A. Legislation and the Law-making Process

Legislation in the ROC is clearly defined as bills that have been passed by the legislature (Legislative Yuan) and promulgated by the head of state (President of the Republic).<sup>15</sup> The hierarchy of norms is also formally recognized by the provision in the Constitution that any law that is in conflict with the Constitution shall be null and void.<sup>16</sup> The same principle applies in cases where a regulation is in conflict with a law or the Constitution.<sup>17</sup>

The first question concerning the legislative process is the scope of the power to propose bills. According to the Constitution, statutory bills may be presented to the Legislative Yuan by the Executive Yuan, according to the resolution of its Council,<sup>18</sup> and the Examination Yuan.<sup>19</sup> Members of the Legislative Yuan, who are directly elected for a three-year term, may also propose statutory bills, although this is not provided in the Constitution. Such proposals, however, must bear the signatures of at least 20 legislators; a single member may not directly propose a bill.<sup>20</sup> The Control and Judicial Yuans have also obtained the power to propose bills through constitutional interpretations by the Council of Grand Justices — the former as early as 1952 through Shih-tzu (Interpretation) No. 3,<sup>21</sup> and the latter as recently as 1982 through Shih-tzu No. 175.<sup>22</sup>

The Chinese legislative process follows the general process of three readings in the Legislative Yuan. In the case of a bill sponsored by a government body, the first reading is followed by a review by the relevant committee of the legislature. This stage may be bypassed, however, if it is proposed by 20 legislators and approved by a majority of the Yuan.<sup>23</sup> In the case of bills proposed by legislators, general discussion by the full Yuan is necessary for any further action.<sup>24</sup>

Before examining the bill article by article during the second reading, the Yuan may conduct an extensive discussion of the comments made by the committee and the themes of the original draft. The bill may be sent back for review again or, on the proposal of 20 legislators and with the support of a majority of the house, it may be thrown out altogether.<sup>25</sup> A motion of amendment may be proposed after discussion at this point, or this may be delayed until the third reading.<sup>26</sup> For statutory and budgetary bills, a third reading is required.<sup>27</sup> Unless there is a joint proposal by 30 legislators supported by the majority that the third reading begin immediately, it is conducted at the next meeting of the legislature.<sup>28</sup> Unless the bill is found to contradict the Constitution or other statutes, or unless it contains internal contradictions, only the wording may be changed at the third reading.<sup>29</sup>

In practice, this law-making process has proven to be quite protracted in many instances. For example, in the case of the Fair Trade Law (discussed in Chapter 27), the process took over five years. Amendments to laws in other areas affecting foreign investors (such as patent and insurance) were also unduly lengthy. This delay is due to a combination of factors, including rapidly changing domestic circumstances, resistance in some conservative factions to reform and liberalization, and the growing complexity of legislated matters. The foreign investor must thus take notice of this trend



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and follow the principle of *caveat emptor* (let the buyer beware) when seeking guidance about engaging in unregulated activities or anticipating legislative reform.

The Constitution provides that within ten days of receiving a statutory bill passed by the Legislative Yuan, the Executive Yuan may, with the approval of the President of the Republic, request its reconsideration. If two-thirds of the legislators present at the meeting uphold the original resolution, the premier must either accept or resign from office.<sup>30</sup>

The promulgation by the President of the Republic of a statutory bill passed by the Legislative Yuan is the final step in the enactment of a statute.<sup>31</sup> The relevant statutes make no mention of the possibility that the President might disagree with a bill which the Executive Yuan had not sent back to the legislature for reconsideration. Thus, some scholars argue that an Act should become law from the date stipulated, regardless of whether or not it bears the President's signature and the seal of state.<sup>32</sup> So far, no such case has occurred in the ROC.

### *B. Regulations and the Delegated Law-making Process*

The emergence of a welfare state, the growing complexity of society, as well as the limited amount of time available to legislators and their necessarily limited knowledge in specialized areas subject to regulation, have contributed to the great expansion of the functions of the administrative branch of government. Indeed, many of the major reforms in the areas of foreign trade and investment (such as the relaxation of foreign exchange controls) have been ushered in through administrative regulations. The administration has been granted new powers to deal with new problems, and as a result administrative agencies have encroached upon the legislative and judicial domains through their 'quasi-legislative' and 'quasi-judicial' powers. Of the former, delegated legislation is the best example.

The only legal requirement controlling delegated legislation in the ROC is provided in article 7 of the Standard Law on Enacting National Statutes and Regulations, which requires those rules issued in accordance with prescribed authority or authorized by statutes to be sent to the Legislative Yuan. If the Legislative Yuan finds that the proposed rule opposes, changes, or contradicts the enabling statutes or other statutes, or that the subject should itself have been regulated by statute, it may, after resolution, instruct the responsible agency to make the necessary amendment or even to abrogate the rule.<sup>33</sup>

As for judicial review of delegated legislation, the Council of Grand Justices clarified the issue in three interpretations concerning the review of administrative action. Shih-tzu No. 38 stated that statutes are the primary, not the only, source to be relied upon in reaching a judgment, and that a judge may not simply exclude regulations unless they are in conflict with the Constitution or statutes. This interpretation implied that the judge may review the regulation in order to decide whether it conforms with the Constitution or statute.<sup>34</sup> In Shih-tzu No. 137 the Council unequivocally announced that the judge may express his legal and proper opinions on the legality of interpretations of the regulation.<sup>35</sup> Although the subject of judicial review is not the regulation itself but its interpretation, the general consensus is that such review of administrative action has been fully recognized, and the courts have indeed exercised this power for years without serious challenge. The Council of Grand Justices finally confirmed this practice in Shih-tzu No. 216, stating that although the

legal opinions issued by the Department of Justice may be referred to, the judge is not bound to follow them.<sup>36</sup>

### *C. Treaties<sup>37</sup> and the Treaty-making Process*

There is scant guidance on the legal status of a treaty under Chinese law. The Constitution provides in article 141 that the foreign policy of the ROC shall 'respect treaties and the Charter of the United Nations'. The lack of constitutional and statutory guidance aside, the great majority of writers on this subject in the ROC appear to support the view that treaties duly ratified by the Legislative Yuan have the force of municipal law under the Chinese law. If this is the case, then logically those international agreements concluded solely by the Executive Yuan and not submitted to the Legislative Yuan for ratification should not have the validity of municipal law, though they may have the same validity as administrative orders and decrees. But Supreme Court decisions make no differentiation between treaties and agreements, and both are treated as equivalent to domestic law.<sup>38</sup>

In the United States, the courts distinguish between 'self-executing' and 'non-self-executing' treaties.<sup>39</sup> An American court will apply a 'non-self-executing' treaty only when the necessary implementing legislation has been enacted. In the ROC, the situation is not clear. In practice, the Chinese government will enact the legislation necessary to implement a treaty when the latter explicitly calls for such action.<sup>40</sup> However, the Chinese government has in some cases enacted such legislation or promulgated the necessary administrative decrees even when the treaty does not expressly call for such action.<sup>41</sup> Such laws or decrees do not reproduce every article of the treaty or agreement concerned; they merely supplement or clarify its provision. Therefore, in practice, the courts or administrative organs will apply both the treaty or agreement and the implementing laws or decrees.

With respect to questions of conflict between the treaty and municipal law, decisions of the Supreme Court maintain that the treaty enjoys a higher status than the ordinary statute.<sup>42</sup> In other words, the superiority of treaties in application is generally recognized, and judicial practice supports this view.

Most countries according diplomatic recognition to the mainland Chinese government have considered their treaties/agreements with the ROC as terminated. Under those circumstances, it is only natural for the ROC to consider those treaties/agreements to be no longer in effect under Chinese law. Editions of the official Chinese Treaty Collection published prior to 1964 note those treaties/agreements as being 'temporarily suspended from operation'. No such note is attached after 1965. The legal status of such treaties/agreements is therefore not clear.

The ROC's agreements with countries recognizing neither the ROC nor the People's Republic of China (PRC) have the same status as those with countries which recognize the ROC. If a country, after recognizing the PRC government and terminating diplomatic relations with the ROC, continues to consider its agreements with the ROC to be valid, the ROC would reciprocate. This has been the case with the United States since 1 January 1979, the date on which Washington formally recognized the Peking government. The U.S. Taiwan Relations Act of 1979 provides in section 4(c) that

for all purposes . . . the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United

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States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.<sup>43</sup>

The continuity of the Sino-American treaties and agreements was confirmed in the Letter of the Ministry of Foreign Affairs, Wai (68) Pei-mei (1) No. 06514 of 13 April 1979 to the Ministry of Justice, which states:

Since the breaking of Sino-American diplomatic relations, except for the Sino-American Treaty of Mutual Defense to be terminated on January 1, 1980 and the consequent termination of the Status of United States Forces in the Republic of China, all other treaties or agreements, including those provisions involving the judiciary, shall remain in force. Those treaties with an effective period shall lose their validity according to their terms if not extended.<sup>44</sup>

The process of treaty-making in the ROC, as with statute-making, involves the President, the Executive Yuan, and the Legislative Yuan. The Constitution requires that treaties which affect the territory of the ROC be approved by the National Assembly.<sup>45</sup> The deliberation and resolution of the treaty bill by the Executive Yuan Council is the first step in the process.<sup>46</sup> Then, the Legislative Yuan must give its consent.<sup>47</sup> As a result, the power of the President of the Republic to conclude treaties, which is provided in the Constitution,<sup>48</sup> is only nominal.

The ROC has adopted a unique, and rather strict, approach in determining the hierarchy of authority of international agreements. There are a variety of names employed in international agreements besides the word 'treaty' (convention, protocol, agreement, pact, memorandum, provisions, and so on). Further, under American practice, some 'executive agreements' are exempted from legislative review. A guideline established by the Executive Yuan and approved by the Legislative Yuan provides that only those agreements bearing the name *t'iao-yüeh* (treaties or conventions) containing a ratification clause need to be ratified by the legislature. All agreements involving international organizations, national finances, and changes of current statutes, and those of special importance, must go through the ratification procedure even if they do not contain the above ratification clause.<sup>49</sup>

### D. The Role of Precedent

As a member of the civil law family, the ROC has not accorded formal binding authority to judicial decisions in subsequent cases handled by the same court or its inferior courts. The doctrine of *stare decisis* is thus not followed. Aside from this theoretical reason, there are additional practical difficulties preventing the formal recognition of the system of precedent. The volume of cases pending in the Supreme Court is enormous, and it is likely that the decisions made under such tremendous pressure will not always be of the highest quality. The many divisions within the Supreme Court also increase the likelihood of conflict among themselves, and make *stare decisis* almost impossible to apply. The separation of the Administrative Court from the regular court system adds further difficulties in this regard.

Nevertheless, as in other civil law countries, precedent has always had a *de facto* binding force in the ROC. The requirements of certainty and predictability of the law are undoubtedly the primary causes for judges, consciously or unconsciously, to follow their own prior decisions and those rendered by superior courts. The habit of mental economy may also play a

role in the judges' following of these precedents. However, the fear of reversal is particularly strong in countries where the judge is a civil servant whose future depends upon the extent to which his decisions are upheld by the superior court. This is probably the real reason for the establishment of the *de facto* binding force of precedent. In addition, as judges in higher courts enjoy not only a higher stipend but also higher status in the current judicial hierarchy, few judges in lower courts would ignore their leading opinions.

Not all decisions of the Supreme Court are precedent, however. Only those selected by judges and chief judges and approved by either or both the civil and criminal divisions of the Supreme Court may be classified as such.<sup>50</sup>

#### IV. The Judicial System

##### A. *The Judicial Yuan*

Although article 77 of the Constitution provides that the Judicial Yuan shall have charge of civil, criminal, and administrative cases and cases concerning disciplinary measures against public functionaries, it does not, in fact, entertain litigation at all. Instead, the Supreme Court and the various lower courts, the Administrative Court, and the Commission on the Discipline of Public Functionaries under the Judicial Yuan are responsible for this. Combined with the Council of Grand Justices, which is responsible for the interpretation of the Constitution, these bodies constitute the major part of the Judicial Yuan. The Judicial Yuan seems to have little to do except to co-ordinate the various courts and to serve as the nominal leader of the judiciary, since judicial independence is guaranteed in the Constitution.<sup>51</sup> However, because Chinese judges are part of the civil service system, judicial administration has become the Yuan's major function.

##### B. *The Council of Grand Justices*

As the only organ that interprets the Constitution and renders a uniform interpretation of laws, statutes, and regulations, the Council of Grand Justices occupies a conspicuous position in the structure of the Chinese government. It is composed of 17 members who are appointed by the President of the Republic with the prior approval of the National Assembly.<sup>52</sup> The members serve a nine-year term and may be reappointed without restriction.<sup>53</sup> Their qualifications are explicitly provided for in the Organic Law of the Judicial Yuan. Senior judges (those with ten or more years on the bench) of the Supreme Court, law professors, legislators who have served for nine or more years, judges in the International Court of Justice, authoritative scholars of public or comparative law, or politicians with legal backgrounds are eligible to serve on the Council. The number of Grand Justices appointed from any one of the above groups must not exceed one-third of the total.<sup>54</sup>

The jurisdiction of the Council of Grand Justices includes not only the constitutionality of statutes and regulations, but also any doubt arising from the application of the Constitution.<sup>55</sup> Despite its expansive jurisdiction, the Council has not been submerged by a flood of applications. This is because in the case of a dispute among the different Yuans, the President of the Republic is authorized by the Constitution to call for a meeting of their heads,<sup>56</sup> and also because applications by subordinate government agencies to the Council may only be made through a superior agency, which may refuse to pass the application on or simply take the initiative to solve the problem *ex officio*.<sup>57</sup>

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Individuals have had the right since 1958 to challenge the constitutionality of a statute or regulation by application to the Council of Grand Justices. However, the applicant must exhaust all other legal remedies before taking this step.<sup>58</sup> In this respect, the Council is similar to the American Supreme Court.

When dealing with the uniform interpretation of statutes or regulations, only a simple majority of the Council members is required to reach a conclusion.<sup>59</sup> However, three-quarters of the total membership is required for a quorum and three-quarters of the members must concur before a decision on constitutionality is made.<sup>60</sup> Such a demanding procedural requirement is unusual in the contemporary world and has caused serious difficulties in the functioning of the Council.<sup>61</sup>

### *C. The Administrative Court*

Following the French model, administrative adjudication in the ROC is separated from the regular courts. An Administrative Court has been set up alongside the Supreme Court, likewise under the supervision of the Judicial Yuan. The Administrative Court is divided into several divisions,<sup>62</sup> and among the five judges in each, two must have served as judges in other courts.<sup>63</sup> This requirement ensures that each division includes persons with both judicial and civil service experience.

Any individual who feels that his rights or interests have been infringed upon through an unlawful or improper administrative order may bring a petition against that authority to the immediately superior authority.<sup>64</sup> If the ruling is unsatisfactory, the petitioner may reappeal to the next level of the agency. If he is still not satisfied with the decision of the reappeal, his last resort is the Administrative Court.

Originally, the court's jurisdiction was limited to the legality of administrative orders, and cases relating to administrative discretion were excluded.<sup>65</sup> In 1975, however, the jurisdiction of the Administrative Court was extended to include abuse of administrative discretion or public power.<sup>66</sup> Moreover, the amendment also provided that if a government agency does not act upon a petitioner's appeal within three months, the law will presume the request denied and administrative litigation will proceed upon the complaint.<sup>67</sup> This amendment is to ensure an individual's right to pursue a judicial solution without delay.

Although current administrative procedure provides an individual with three opportunities to challenge a questionable administrative decision, the first two appeals are conducted within the administrative hierarchy, and thus only the litigation before the Administrative Court may be termed an impartial and objective judicial review. As officials tend to defend their own or their subordinates' actions against criticism, a two-trial (one appeal) administrative litigation procedure has been proposed in an amendment drafted by the Judicial Yuan. The Yuan is currently in consultation with the Executive Yuan regarding this proposal.

### *D. The Commission on the Discipline of Public Functionaries*

Another organ which is on a par with the Administrative Court in the Judicial Yuan is the Commission on the Discipline of Public Functionaries. Like judges in the regular courts and the Administrative Court, its members enjoy life tenure.<sup>68</sup> Two-thirds of the members are required to be drawn from the

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judiciary.<sup>69</sup> The major function of the Commission is to handle impeachments submitted by the Control Yuan. The process is ordinarily conducted by the submission of a brief, and the defendants may be summoned for questioning when the Commission deems it necessary.<sup>70</sup>

### *E. The Ordinary Courts*

#### 1. The Supreme Court

The function of the Supreme Court is to hear those civil and criminal cases that are appealed from the lower courts, cases concerning the Constitution and administrative law being excluded. Occasionally, the court may entertain an extraordinary appeal filed by the Procurator General when he considers a final criminal judgment to be contrary to law.<sup>71</sup>

Although the scope of its jurisdiction seems narrower than that of the U.S. Supreme Court, the volume of civil and criminal cases it handles every year and the total number of judgments are both substantial. The basic reason for this is that there are few limitations imposed on cases appealed from below. Among civil cases, only those in which the benefit accruing from such an appeal would not exceed NT\$300,000 (approximately US\$12,000) are barred from appeal to the Supreme Court.<sup>72</sup> Petty offences, those which usually carry a sentence of three years or less, are also limited to one appeal: from the District Court to the High Court.<sup>73</sup> Consequently, most cases enjoy the fullest protection of the Constitution which guarantees the people's right to litigation,<sup>74</sup> regardless of the caseload of the judiciary in general or the Supreme Court in particular.

In each of the several divisions of the Supreme Court there are five judges, one of whom is the chief judge.<sup>75</sup> Unlike the lower courts, which can review both fact and law, the Supreme Court is limited to questions of law only.<sup>76</sup>

#### 2. The High Court

The Constitution stipulates that a High Court be established in each province of the ROC, and if the province is particularly large, several associated courts may be added. The Taiwan High Court has its seat in Taipei, as well as four branches in the central (Taichung), southern (Tainan and Kaohsiung), and eastern (Hualien) parts of the island. There is also a Fukien High Court Amoy Branch exercising appellate jurisdiction over cases arising on the ROC-controlled islands of Quemoy (Kinmen) and Matsu.

The High Court serves principally as an appellate court. Except for criminal cases relating to internal or external security or foreign relations,<sup>77</sup> which are tried by the High Court as the court of first instance,<sup>78</sup> almost all civil and criminal cases reach the High Court through appeal. Election and recall disputes concerning national and provincial representatives, city mayors, or county magistrates, and suits for nullifying the election or recall of county or city councillors are also under the primary jurisdiction of the High Court.<sup>79</sup>

The prescribed style of the High Court is three judges sitting in council.<sup>80</sup> Both fact and law may be fully reconsidered before the High Court, and the proceedings are usually open to the public. Oral arguments are conducted, as in the District Court.

#### 3. The District Court

For most people, entry into the court system is through the District Court, which is at the bottom of the judicial hierarchy and serves as the court of first instance in most civil and criminal cases.<sup>81</sup> In principle, each *hsien* (county)

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and city should establish a District Court. The jurisdiction of the court may extend to several counties or cities, or additional branches may be added according to the amount of territory involved.<sup>82</sup> There are now 16 District Courts and two branch courts in Taiwan, and one District Court on both Quemoy and Matsu.

At the District Court level, cases are usually tried before a single judge without popular participation, either in the form of a jury (as in the United States) or as lay judges (as in Germany).<sup>83</sup> However, three judges sitting in council may be assigned to handle important and complicated cases.<sup>84</sup>

In addition to the usual civil and criminal divisions, several new divisions have been established in the District Court in recent years: a traffic division, tax division, family division, and juvenile delinquency division. Election and recall disputes concerning county or city councillors and members of town and village councils,<sup>85</sup> and cases of state compensation,<sup>86</sup> both of which are within the domain of public law and should be under the jurisdiction of the Administrative Court according to the current court structure, are nevertheless handled by the District Court. This is because the process of litigation conducted in the District Court is considered fairer, and its decision may also have more persuasive power over the litigants.

### V. Other Methods of Dispute Resolution

#### A. Mediation

As mentioned above, the Chinese have in the past tended to prefer mediation to litigation, and this traditional attitude towards the law remains to some extent the same today. Among the methods available for resolving disputes, mediation, either in or outside the court, is probably the most popular. These methods, and the degree to which they are employed in disputes involving foreign interests, are described in more detail in Chapter 29.

According to the Statute of Mediation in Villages, Towns, and Cities, all civil cases and those criminal cases that are instituted only upon complaint, such as libel, slander, trespass, and rape, are eligible for mediation under the jurisdiction of the local Mediation Committee.<sup>87</sup> This committee consists of between seven and fifteen 'men of justice' who have legal knowledge and whose trustworthiness and impartiality are widely acknowledged.<sup>88</sup> They are recommended by the local administrative head and accountable to the local representative body. Usually, at least one-third of the committee members must be present to conduct mediation, but a single member may also preside over the process if the parties agree.<sup>89</sup> An application for mediation may be made at any time before the conclusion of oral argument in court.<sup>90</sup>

An agreement reached by the parties under mediation, and later approved by the court, carries the same force as a final judgment.<sup>91</sup> Since mediation is informal and less expensive, and yet carries the same force as a judgment, more extensive use will substantially relieve the courts of their heavy caseload.

In contrast with out-of-court mediation which requires the consent of the parties or the victim, some civil cases are required to undergo mediation conducted by a judge before litigation is initiated. This requirement is enforced in cases involving property worth less than NT\$30,000 (approximately US\$1,100).<sup>92</sup> Cases involving landlord-tenant disputes, employer-employee disputes where the performance of the contract involved may be achieved in less than one year, and disputes involving hotels, restaurants, or carriers over

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charges or loss are also subject to compulsory mediation unless there is no chance of an agreement, or the parties have already failed to reach an agreement elsewhere. In other cases, court mediation is at the discretion of the parties involved.<sup>93</sup>

### *B. Settlement*

In order further to minimize lawsuits, another in-court process, settlement, may be employed whenever there is hope that it will succeed.<sup>94</sup> Settlement differs from mediation in that it is employed only after the case is formally under way. However, like mediation, a settlement reached in court proceedings has the same effect as a final judgment.<sup>95</sup>

Of course, the parties may always reach a settlement without the involvement of a court. Unless the defendant has already made oral arguments, when his consent is then required, the plaintiff may withdraw the action at any time before the judgment becomes final.<sup>96</sup>

### *C. Arbitration*

The process of arbitration may also be employed in commercial disputes, though it must have been stipulated in writing beforehand.<sup>97</sup> The qualifications required to be an arbitrator are the possession of legal or other specialized knowledge and a reputation for truthfulness and impartiality.<sup>98</sup> To be specific, lawyers, accountants, and those having practical business experience or knowledge and experience of commercial arbitration are qualified.<sup>99</sup> They must register with their local arbitration association, which is established jointly by the local chamber of commerce and the industrial association.<sup>100</sup>

Although awards decided through arbitration have the same effect as a final judgment, they may not be enforced directly, as those resulting from mediation or settlement may be, but require an application to the court for an execution order. As for arbitration awards decided overseas, recognition of the execution order is also required before compulsory execution can be carried out.<sup>101</sup>

### *D. Public Notarization*

The status of the Chinese notary as an official of the court is perhaps unique in the world. Its functions can be divided into two categories: execution of certification of authentication and acknowledgement of private instruments. Papers with either form of notarization can thus be treated as *prima facie* evidence of the fact sought to be established.<sup>102</sup>

However, only under certain conditions can a certificate of authentication include a compulsory execution clause without first obtaining a court order. In short, the party may apply directly to the court for execution only by invoking this stipulation. Such cases are usually those concerning the presentation of a certain amount of money or other substitutes or valuable securities, the presentation of specific movables, the return of a leased or borrowed house when the period agreed upon expires, and the return of leased or borrowed land, which has not been used for farming or construction, when the period expires.<sup>103</sup> This provision saves time and expense in litigation and thus constitutes the main attraction of the notarial system.



## VI. Legal Education

In 1950-1 there were about 200 law students in Taiwan's only university with a law department — National Taiwan University. At present there are roughly 5,000 law students in ten university or college law departments, with more than 1,000 such students graduating annually. Since there are generally only 300 openings annually for judges, procurators, and lawyers, most of these graduates must find work in related fields within the public or private sectors. Master of Law degree programmes have been established in these ten universities or colleges. In addition, National Taiwan, National Chengchi, and National Chungshin universities, as well as Fu Jen, Soochow, and two private universities, also offer doctoral programmes in law.

What might first strike an American lawyer as the main difference in legal education between civil law countries and the American legal system is the close government supervision over education in general and legal education in particular.<sup>104</sup> The case of the ROC is no exception, and it goes even further than most. Strict uniformity is the rule in both public and private schools. The curricula must be approved by the Ministry of Education, and the certification of professorship,<sup>105</sup> course load,<sup>106</sup> total credit hours for graduation,<sup>107</sup> and even the total number of students are also subject to the Ministry's regulation. Under such a rigid system, any experimentation or innovation, even if it is limited to a single school, seems difficult, if not impossible.

Unlike legal education in the United States, which is generally professionally oriented, Chinese legal education is conducted at the undergraduate level. It thus tends to be more general, similar to other undergraduate degree programmes. There are two important features of legal education in the ROC. First, the time for specialized legal training is limited, since normal undergraduate courses providing the necessary background for law must also be taken during that four-year period. Second, it is inappropriate or even undesirable to put too much emphasis on the cultivation of skills of litigation and advocacy, because many Chinese law students will become public officials or employees of private companies after graduation. Therefore, legal instruction emphasizes the understanding of the fundamental principles of law, and is characterized by abstractness and generality. The primary teaching materials are systematic treatises and the annotated code. Typically, a professor lectures, rather than engaging in discussion with the class, as the overriding purpose is to convey information to the students. As a result, the students are generally concerned with questions of a philosophical or theoretical nature rather than with those of immediate practical importance. The discussion of possible solutions to social problems is also out of place.

In short, current policy and other practical considerations are not essential parts of Chinese legal education. This explains why the government had to set up the Institute for Training Judicial Officials (discussed in the next section), for training future judges and procurators. However, some changes have been made in recent years. Not only has the case method been adopted in some courses, particularly at the graduate level, to supplement the traditional theoretical teaching, but hypothetical cases are more commonly used as examination material.

The legal aid programme run by law students is another development which has had a significant impact upon legal education. While seeking solutions to concrete legal problems from various sources, the students immediately realize the inadequacy of limiting themselves to a purely theoretical approach.

They may then have the chance to shift their emphasis. This programme was pioneered at National Chengchi University in 1970 and has now been extended to all universities which have law departments.

## VII. The Legal Profession

### A. *The Judge and Procurator*

Unlike the situation in common law countries, where most judges were distinguished practitioners of law before their appointment, the ROC has a career judiciary. Law graduates may enter the judiciary while they are in their twenties and work their way up to the Supreme Court. Lateral entry into the judiciary at any level has been unknown for many years. The judiciary is an exclusive group, with a uniform background of practical training and work experience. Most members are recent graduates from law departments who have passed the annual Special Examination for Judicial Officials.

Due to the rapid increase in the caseload and the number of judges resigning to go into private practice, the demand for more judges and procurators has widened the door for young aspirants. The success rate in the examination has been roughly 4 per cent in recent years, though in the period 1978–81 it jumped to 8 per cent, and in 1989 soared as high as 14.06 per cent.<sup>108</sup> Successful candidates are given 18 months of practical training. The first ten months are spent at the Institute for Training Judicial Officials, which is under the supervision of the Ministry of Legal Affairs, where emphasis is put on the practical application of legal theories and provisions, and case study is the primary teaching method. All students are then sent to District Courts and procurators' offices for a period of six months for field training. Under the supervision of these courts and offices, students attend trials and draft indictments and judgments. In the remaining two months, the field work is reviewed and summed up.<sup>109</sup>

The Chinese Constitution explicitly provides that judges shall hold office for life. No judge shall be removed from office unless he has been found guilty of a criminal offence, is subject to disciplinary sanctions, or is declared to be under interdiction. Nor shall judges be suspended or transferred or have their salaries reduced except in accordance with the law.<sup>110</sup> Because of this constitutional protection, judges, unlike other civil servants, are exempt from compulsory retirement at 65, although they may apply to retire voluntarily at that age.<sup>111</sup> Some older judges who are no longer fit for the job still insist on deciding cases, which affects the quality of judgments. In order to cope with this problem, the Judicial Yuan enacted the Act on Judicial Personnel on 22 December 1989,<sup>112</sup> which provides that a judge should cease to handle cases and transfer to do research work on reaching the age of 70. The caseload for a judge may be reduced when he reaches 65 years of age. However, if the physical condition of a 65-year-old judge is so poor that he is incapable of doing his work, then he should cease to handle cases. In either case the judge's salary and other benefits remain the same.<sup>113</sup>

A procurator of the appropriate grade is attached to every court. The Chinese procurator has no exact equivalent in the American legal system. The procurator's authority is extensive, as he performs the duties of both the American prosecutor and the grand jury, having the power to conduct a preliminary examination of the accused and witnesses so as to decide whether the case should be prosecuted. In exercising this power, he may summon,

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arrest, and detain the accused without the prior approval of a judge; he may also compel a witness to appear and make such searches and investigations as may serve to throw light on the case.<sup>114</sup> In addition, under the amended general part of the civil code which became effective on 4 January 1983, the Chinese procurator is entitled to intervene as the representative of the public interest<sup>115</sup> in certain civil cases, such as an application to have a missing person declared dead,<sup>116</sup> an application for interdiction for unconsciousness or feeble-mindedness,<sup>117</sup> an application for appointing liquidators when a dispute arises after the dissolution of a juristic person,<sup>118</sup> an application for the dissolution of an association,<sup>119</sup> or an application for the modification of the organization of a foundation.<sup>120</sup>

Since the procurator's qualifications and training are the same as those of a judge and transfers between the two positions are routine, particularly on the bottom rungs of the career ladder,<sup>121</sup> the procurator enjoys almost the same constitutional protection as a judge, except in questions of assignment to different locations. He is guaranteed life tenure, cannot be suspended or dismissed without legal cause, and his salary is fully protected.<sup>122</sup> In short, he is not only a civil servant who has to obey directives issued from above, but also a member of the judiciary.

### *B. Lawyers: The Chinese Bar and the Regulation of Foreign Attorneys and Law Firms*

There are two main ways to become a lawyer in the ROC. One may take the High Examination (Bar Examination) conducted annually by the Examination Yuan. The examination's low success rate is unparalleled. The average pass rate between 1950 and 1980 was 2.99 per cent.<sup>123</sup> In some years, the rate even dropped below 1 per cent.<sup>124</sup> However, the trend appears to be changing towards a greater openness to the bar. According to informal discussions with officials at the Ministry of Examination and Selection of the Examination Yuan, the pass rate has increased to 4.81 per cent over the last decade. The relaxation is best illustrated by the recent success rates: 14.06 per cent in 1989, 10.39 per cent in 1990, 11.14 per cent in 1991, and 10.59 per cent in 1992.

Despite the recent favourable trend, faced with such formidable odds, many capable law school graduates still seek other careers which do not involve the delays and obstacles of the bar examination. This fact further contributes to the non-professional emphasis of the university law departments. There is, however, another and slightly easier route into the law profession. Judges, procurators, associate professors of law, professors of law, and military judges with the rank of lieutenant may apply to the Ministry of Examination and Selection to be certified as lawyers.<sup>125</sup> For judges, procurators, law professors, and military judges with the rank of colonel, all forms of examination are waived.<sup>126</sup> For others, a modified examination must be passed. According to the newly promulgated Lawyers Law, attorneys, except those who have been judges, procurators, or military judges, must receive training before they can register with the bar association and practise law.<sup>127</sup>

There are now roughly 1,700 practising attorneys in the ROC — one for every 12,000 residents. Compared to the ratio in the United States — one for every 400 people — this figure seems very low. However, if one considers that Japan, an advanced Asian country, has almost the same ratio (one for every 10,000 citizens),<sup>128</sup> cultural and historical factors appear to be the primary explanation. Because of the non-litigious character of Chinese

society and its emphasis on informal, personal means of resolving disputes, the attorney's skill has, historically, been neither especially needed nor valued. Traditionally, Chinese attorneys were even termed 'tricksters' or 'stirrers-up of litigation', both appellations unlikely to lift the social standing of the lawyer or inspire bright students to join the profession.<sup>129</sup> Although the recent industrialization and urbanization have produced a more competitive and complex society, people still maintain, to a certain extent, a traditional attitude towards the law and the legal system.<sup>130</sup> Moreover, many legal transactions, such as contracts and real estate transactions, are handled by *tai-shu* (literally, one who writes legal documents for others) and not by lawyers. A *tai-shu* does not have to be a law graduate, neither does he have to pass a specific examination. Chinese attorneys usually engage in general practice. Yet, as the volume of foreign transactions has grown over the past decade or so, a handful of firms have emerged as specialists in such areas as international trade and foreign investment.<sup>131</sup>

In contrast to the single, unified legal profession of the United States, where judges, prosecutors, attorneys, and legal scholars are all drawn from the same pool and there is a high degree of contact between them, the legal profession in civil law countries tends to be 'Balkanized' as a result of the necessity of making early career choices and the difficulty of transferring from one branch to another.<sup>132</sup> The natural consequence of this is a lack of communication among the different branches of the profession. The ROC went even further by explicitly forbidding social contact between judicial officials and attorneys within the same jurisdiction in order to prevent corruption. This rule was amended in 1982 to forbid only 'improper' social connections.<sup>133</sup>

A lawyer must join the local bar association before he can practise. The bar association is under the supervision of the Ministry of Legal Affairs and the chief procurator of each area. Attorney discipline is the responsibility of the Committee on the Discipline of Attorneys, which is composed of the three judges and one procurator of the High Court and five attorneys.<sup>134</sup> Disciplinary action may be initiated by a procurator or by a bar association.<sup>135</sup> There are four kinds of sanction at the disposal of the Committee: warning, reprimand, suspension from practice for periods ranging from two months to two years, and disbarment.<sup>136</sup> Both parties may appeal the decision to the Re-examination Committee on the Discipline of Attorneys, which is composed of four judges and two procurators of the Supreme Court, two legal scholars, and five attorneys.<sup>137</sup> In view of the division between judges and attorneys, the presence of attorneys and scholars on the Committee allows it to consider the case from different perspectives and take into consideration the defendant's background. These recent amendments are thus a step in the direction of a more balanced handling of such cases.

To date, only a handful of foreign lawyers have entered the Taiwan market. The demand for foreign lawyers has certainly grown over the past decade; however, a lack of clear-cut rules governing foreign lawyers' and law firms' activities in Taiwan has been a major impediment to integration in this area. Foreign nationals may take the lawyers examination if their country of origin allows Chinese lawyers to do the same.<sup>138</sup> Those foreigners who pass the examination must then obtain a special permit from the Ministry of Legal Affairs.<sup>139</sup> Probably on account of the language barrier and the intrinsic difficulty of the examination, no foreigner has yet been admitted to practise in Taiwan.

Despite the absence of any foreign attorneys being licensed to practise in Taiwan, foreign attorneys and law firms have entered the market through a

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variety of means. As foreign economic contacts increased between Taiwan and the outside world in the 1960s and 1970s, local firms that emerged as specialists in the international area began to take on foreign attorneys (mostly from the United States) in a variety of capacities. Some firms largely circumscribed the role of such lawyers to translation and editing, while others fully integrated the foreign attorney into the local practice in so far as the attorney was able to assist in a given matter. Thus, none of these foreign attorneys practised local law *per se*, but rather advised on the foreign law aspects of a legal issue or provided advice based on general international practice.

In the 1970s international firms (mostly from the United States, but some from Hong Kong, Canada, Europe, and Japan) began to recognize the growth potential of the Taiwan market. Some firms began to make inroads in order to capture the big-ticket multinational corporation inbound investment work, or to act as a marketing arm for their head offices which could provide advice on outbound trade and investment matters. These firms have adopted a variety of approaches to entering the market. Some have built comprehensive practices by having a core group of Taiwan attorneys who provide advice on local law, as well as a group of foreign or foreign-trained attorneys who can assist in the foreign aspects of a matter and general international practice. Firms not committed enough to make the large capital investment needed to open an office in Taipei (a rising star among the most expensive cities in the world in which to maintain an office) have formed all sorts of affiliations with local Taiwan firms.

The lack of clear-cut rules regulating foreign law firms, while providing flexibility, presents problems for firms interested in operating in Taipei for the long term. Local and provincial bar associations have discussed proposed rules in this area that are modelled after the Japanese-style framework for foreign law firms.<sup>10</sup> This framework essentially allows a foreign firm to open an office through foreign attorneys licensed by the Ministry of Legal Affairs according to certain professional competence (for example, five years' experience of practising in the home jurisdiction, no ethical violations, and so on). This attorney would then be entitled to advise on home country law only, and could not hold himself out as simply a 'lawyer', but, if from the United States, a 'U.S. lawyer', if from Hong Kong, a 'Hong Kong lawyer', and so on.<sup>11</sup> It is unclear how issues such as foreign firm employment of local lawyers (a very sensitive issue in Hong Kong) and fee sharing between local and foreign lawyers would work. The above proposal is not provided in the newly amended 1992 Lawyers Law. Article 48 prohibits persons lacking qualifications from handling litigious matters for profit unless permitted by law and order. It is unclear whether this article may be interpreted as allowing non-lawyers to handle non-litigious matters. If so, it might resolve some problems regarding foreign lawyers practising law in the ROC. However, foreign attorneys still cannot establish offices and employ attorneys to engage in professional activities (article 51). Thus, this lack of rules governing foreign attorneys provides a degree of flexibility to foreign and Chinese firms, enabling them to adopt creative methods for affiliations, but it also presents obstacles to effective long-term planning because of the numerous unknowns.

### VIII. Conclusion

The Chinese legal system has its own set of unique characteristics which challenge all the more the foreign investor and its legal counsel. A rich history

and culture, regionally diverse and complex language, an entrenched bureaucracy, a developing legal system based in part on foreign law but with Chinese characteristics, and a rigid legal education system make operating in this legal system and concluding a legal transaction in this environment all the more challenging. Success for the foreign investor and its legal counsel will therefore require at least a fine appreciation of these factors, an understanding of the various components of the legal establishment, and a good dose of patience and perseverance.

## Notes

\* This is a revised and updated version of the authors' contribution to Kenneth Robert Redden, ed., *Modern Legal System Cyclopaedia*, Vol. 2, Buffalo, N.Y.: William S. Hein, 1984, pp. 602-62.

1. For example, Confucius said, 'If a ruler himself is upright, all will go well without orders. But if he himself is not upright, even though he gives orders they will not be obeyed.' Cited in William Theodore de Bary, *Sources of Chinese Tradition*, Vol. II, New York, N.Y.: Columbia University Press, 1964, p. 32.

2. For example, as Han Fei Tzu said, 'Rewards should be rich and certain so that the people will be attracted by them; punishments should be severe and definite so that the people will fear them; and laws should be uniform and steadfast so that the people will be familiar with them. Consequently, the sovereign should show no wavering in bestowing rewards and grant no pardon in administering punishment, and he should add honor to rewards and disgrace to punishment. . . .' See Bary, *Sources of Chinese Tradition*, Vol. I, p. 133, note 1 above.

3. See Lewis Gen, 'Some Characteristics of the Ancient Chinese Law', *Asiatic Review*, Vol. 48 (1952), pp. 156 and 159, summarized in Jyh-pin Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, Baltimore, Md.: Occasional Papers/Reprints Series in Contemporary Asian Studies, 1980, pp. 16-17.

4. The most recent of the imperial Chinese codes is that of the Ch'ing dynasty (1644-1911), which was compiled in definitive form in 1740 and consists of 436 sections. See Han-p'ing Ch'iu, *Li-tai hsing-fa chih* [Legal Treatises of Successive Dynasties], Taipei: Reprint of 1938 Changsha Commercial Press edition, 1965, pp. 617-18. This code, like those of previous dynasties, is primarily based on this 500-article code of the T'ang dynasty which was compiled in AD 653. No codes from before this date survive, although they are quoted in other books and documents. See Han-p'ing Ch'iu above, pp. 338-40. Recently, some parts of the Ch'in dynasty code were discovered in China, revealing a wealth of information on the legal system of the dynasty that first unified the country. See *Shui-hu-ti Ch'in-mu chu-chien* [Bamboo Writings from the Ch'in Dynasty Grave at Shui-hu-ti], Peking: Wen-wu Press, 1978. China also produced a voluminous literature on the law and a substantial collection of cases. For example, see the bibliography of Derk Bodde and Clarence Morris, *Law in Imperial China*, Philadelphia: University of Pennsylvania Press, 1973, pp. 565-8.

5. Lo Chih-yuan, *Chin-tai chung-kuo fa-chih yen-pien yen-chiu* [A Study of the Development of the Modern Chinese Legal System], Taipei: Cheng-chung Book Co., 1976, p. 188.

6. See, generally, John King Fairbank, *The United States and China*, Cambridge, Mass.: Harvard University Press, 1971, pp. 117-23.

7. There are code provisions punishing 'litigation tricksters' (*sung-kun*, 'litigation sticks'). See cases reported in Bodde and Morris, *Law in Imperial China*, pp. 413-17, note 4 above.

8. See George W. Keeton, *The Development of Extraterritoriality in China*, Vol. II, London: Longmans, Green & Co., 1928, p. 2.

9. See Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, pp. 30-1, note 3 above.

10. George W. Keeton, 'The Progress of Law Reform in China — II', *Journal of Comparative Legislation 3d ser.*, Vol. 20 (1938), pp. 210 and 220; see also Chung-hui

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Wang, 'Revision of the Chinese Criminal Code', *Illinois Law Review*, Vol. 13 (1918), pp. 213-33.

11. See Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, pp. 34 and 63-4, note 3 above.

12. For details, see Herbert H. P. Ma, 'General Features of the Law and Legal System of the Republic of China', in Herbert H. P. Ma, ed., *Trade and Investment in Taiwan*, 2nd ed., Taipei: Institute of American Culture, Academia Sinica, 1985, pp. 17-20.

13. Ma, *Trade and Investment in Taiwan*, p. 16, n. 58, see note 12 above.

14. See L. S. Tao, 'Reform of the Criminal Procedure in Nationalist China', *American Journal of Comparative Law*, Vol. 19 (1971), pp. 747 and 748.

15. ROC Constitution, article 170.

16. ROC Constitution, article 171, para. 1.

17. ROC Constitution, article 172.

18. ROC Constitution, article 58, para. 2.

19. ROC Constitution, article 87.

20. Article 7 of the Regulations on Deliberation of the Legislative Yuan as amended on 13 July 1989 (hereinafter cited as the 'Regulations on Deliberation').

21. Shih-tzu No. 3 (21 May 1952), *Ssu-fa yüan ta-fa-kuan hui-i chieh-shih hui-pien* [A Collection of Interpretations of the Council of Grand Justices of the Judicial Yuan], Taipei: Judicial Yuan, 1980, pp. 25-7. For the English text, see *China Handbook 1956-1957*, Taipei: China Publishing Co., 1957, p. 139.

22. Shih-tzu No. 175 (25 May 1982), *Ssu-fa yüan kung-pao* [Gazette of the Judicial Yuan], Taipei: Judicial Yuan, June 1982, pp. 5-6.

23. Regulations on Deliberation, article 29, para. 2, note 20 above.

24. Regulations on Deliberation, article 29, para. 3, note 20 above.

25. Regulations on Deliberation, article 30, para. 2, note 20 above.

26. Regulations on Deliberation, article 31, para. 1, note 20 above.

27. Regulations on Deliberation, article 37, para. 1, note 20 above.

28. Regulations on Deliberation, article 34, note 20 above.

29. Regulations on Deliberation, article 35, note 20 above.

30. ROC Constitution, article 57, para. 1, sec. 3.

31. ROC Constitution, article 170.

32. Rolet Chih-shih Chen, *An Introduction to the Government of the Republic of China*, Taipei: Centre for Public and Business Administration Education, National Chengchi University, 1983, p. 25. Another constitutional scholar, Ying-chou Hsieh, maintains that there is only political responsibility involved — see Ying-chou Hsieh, *Chung-hua min-kuo hsien-fa lun* [On the Constitution of the Republic of China], 15th ed., Taipei: 1976, p. 169.

33. Regulations on Deliberation, article 8, note 20 above.

34. Shih-tzu No. 38 (27 August 1954), *A Collection of Interpretations of the Council of Grand Justices of the Judicial Yuan*, pp. 60-3, see note 21 above. For the English text, see *China Handbook 1956-1957*, p. 142, note 21 above.

35. For the Chinese text, see *A Collection of Interpretations*, pp. 365-71, note 21 above.

36. See, generally, Yuch-sheng Weng, 'Judicial Review of Administrative Regulations', in *Hsing-cheng-fa yü hsien-tai fa-chih kuo-chia* [Administrative Law and Modern Rule-of-Law Countries], 3rd ed., Taipei: National Taiwan University, 1979, pp. 119-25. On the Council of Grand Justices action, see *A Collection of Interpretations*, Third Supplement, Taipei: 1988, pp. 196-208, note 21 above.

37. This part of the status of treaties is summarized from Hungdah Chiu, 'The Position of Customary International Law, Treaties, Agreements and Semi-official or Unofficial Agreements in Chinese Law', in *Chinese Yearbook of International Law and Affairs*, Vol. 7 (1987-8), pp. 1-22.

38. See Chiu, pp. 11-12, note 37 above.

39. See *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829); and *Whitney v. Robertson*, 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386 (1888).

40. See 'Act for Implementing the Conversion on the Settlement of Investment

Disputes between States and Nationals of Other States', *Fa-ling yüeh-kan* [The Law Monthly], Vol. 20, No. 2 (1969), p. 15.

41. See 'Act Governing Criminal Cases Involving United States Military Personnel during the Period of Sino-American Mutual Defense', T'ao Pai-ch-uan, ed., *Tsui-hsin liu fa ch'üan-shu* [The Complete Book of Six Laws], Taipei: San Min Book Co., 1968, p. 325.

42. See Chiu, pp. 229-30, note 37 above.

43. 22 U.S.C. § 3301 et seq. (1982 and Supp. V).

44. See Hungdah Chiu, Rong-jye Chen, and Tzu-wen Lee, 'Contemporary Practice and Judicial Decisions of the Republic of China relating to International Law', *Chinese Yearbook of International Law and Affairs*, Vol. 2 (1982), pp. 256-7.

45. ROC Constitution, article 4.

46. ROC Constitution, article 58, para. 2.

47. ROC Constitution, article 63.

48. ROC Constitution, article 38.

49. See Kuo-tung Yang, *Chung-hua min-kuo t'iao-yüeh yü hsieh-ting ti p'i-chun chih-tu* [The System of Treaty and Agreement Ratification of the Republic of China], Taipei: Taiwan Commercial Press, 1973, pp. 20 and 116-19.

50. Law of the Court Organization, article 57, para. 1.

51. ROC Constitution, article 80.

52. ROC Constitution, article 79, para. 2; and the Amendment to the Constitution, article 13.

53. Organic Law of the Judicial Yuan, article 5, para. 1.

54. Organic Law of the Judicial Yuan, article 4. In fact, senior judges and professors as well as politicians were the main constituents — see, generally, Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, pp. 74-6, note 3 above.

55. Law of the Council of Grand Justices of the Judicial Yuan, article 3.

56. ROC Constitution, article 44.

57. Law of the Council of Grand Justices of the Judicial Yuan, article 8.

58. Law of the Council of Grand Justices of the Judicial Yuan, article 4, para. 1. For details, see Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, pp. 86-7, note 3 above.

59. Law of the Council of Grand Justices of the Judicial Yuan, article 13, para. 2.

60. Organic Law of the Judicial Yuan, article 6, para. 1; and Law of the Council of Grand Justices of the Judicial Yuan, article 13, para. 1.

61. Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, pp. 89-90, see note 3 above.

62. Organic Law of the Administrative Court, article 3, para. 1.

63. Organic Law of the Administrative Court, article 4, para. 2.

64. Law of (Administrative) Petition, article 3.

65. Law of Administrative Proceedings, article 1, para. 1.

66. Law of Administrative Proceedings, article 1, para. 2.

67. Law of Administrative Proceedings, article 1, para. 1.

68. Shih-tzu No. 162 (25 April 1980), *Ssu-fa yüan ta-fa-kuan hui-i chieh-shih hsü-pien* [A Sequel Collection of Interpretations of the Council of Grand Justices of the Judicial Yuan], Taipei: Judicial Yuan, 1981, pp. 157-60.

69. Organic Law of the Commission on the Discipline of Public Functionaries, article 3, para. 2.

70. Law on the Discipline of Public Functionaries, article 20.

71. Code of Criminal Procedure, article 441.

72. Code of Civil Procedure, article 466.

73. Criminal Code, article 61; and Code of Criminal Procedure, article 376.

74. ROC Constitution, article 16.

75. Law of the Court Organization, article 3, para. 3.

76. Code of Civil Procedure, article 467; and Code of Criminal Procedure, article 377.

77. Criminal Code, articles 100-19.



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78. Code of Criminal Procedure, article 4; and Law of the Court Organization, article 32, sec. 1.
79. Election and Recall of Public Officials Law, article 108, para. 1, secs. 1 and 2.
80. Law of Court Organization, article 3, para. 2.
81. Law of Court Organization, article 9.
82. Organic Law of Courts, article 8.
83. See George E. Glos, *Comparative Law*, Littleton, Colo.: Fred B. Rothman & Co., 1976, p. 301.
84. Law of Court Organization, article 3, para. 1.
85. Election and Recall of Public Officials Law, article 108, para. 1, secs. 2 and 3.
86. State Compensation Law, articles 11 and 12.
87. Statute of Mediation in Villages, Towns, and Cities, article 1.
88. Statute of Mediation in Villages, Towns, and Cities, article 3.
89. Statute of Mediation in Villages, Towns, and Cities, article 6.
90. Statute of Mediation in Villages, Towns, and Cities, article 9, para. 3.
91. Statute of Mediation in Villages, Towns, and Cities, article 24.
92. Code of Civil Procedure, articles 403, para. 1 and 427.
93. Code of Civil Procedure, article 404.
94. Code of Civil Procedure, article 377.
95. Code of Civil Procedure, article 380, para. 1.
96. Code of Civil Procedure, article 262, para. 1.
97. Statute of Commercial Arbitration, article 1, para. 2.
98. Statute of Commercial Arbitration, article 5, para. 2.
99. Regulation on Organization of Commercial Arbitration Associations and Arbitration Fees, article 14.
100. Statute of Commercial Arbitration, article 5, para. 1.
101. Statute of Commercial Arbitration, articles 21 and 30, para. 2.
102. *A Brief Introduction to the Judicial System of the Republic of China*, Taipei: Taiwan High Court, 1980, p. 9.
103. Law of Public Notarization, article 11, para. 1.
104. See John Henry Merryman, 'Legal Education There and Here: A Comparison', *Stanford Law Review*, Vol. 27, pp. 859 and 861-71, quoted from John Henry Merryman and David S. Clark, *Comparative Law: West European and Latin American Legal Systems*, Charlottesville, Va.: Bobbs-Merrill Co., 1978, p. 408.
105. Regulations on the Examination of the Qualifications of Teachers in Universities and Colleges, articles 2, 9, 10, 11, 12, and 13.
106. Full-time teachers are required to teach from eight to ten hours a week according to their status — see Regulations on the Employment and Remuneration of Teachers in Universities and Colleges, article 11, para. 1.
107. Students have to complete at least 128 credit hours before graduation — Regulation of Universities, article 27.
108. Ministry of Examination and Selection, *Chung-hua min-kuo k'ao-hsüan t'ung-chi* [Statistics on Examination and Selection of the Republic of China], August 1981, pp. 89-93. In the period from 1940 to 1988 there were 36,938 persons who took the bar examination and of these 782 passed, giving an average pass rate of 2.12 per cent. The 1988 average rose slightly higher to 3.42 per cent. Then, in 1989, 288 out of 2,040 persons passed, giving an average pass rate of 14.06 per cent. See Nigel N. T. Li, 'Regulation of Foreign Lawyers in the Republic of China', unpublished paper, p. 8 (copy on file with the authors).
109. For details, see Chung-sen Yang, 'Career Judiciary in the Republic of China', *Cheng-ta fa-hsüeh p'ing-lun* [Chengchi Law Review], Vol. 2 (1970), pp. 130-1.
110. ROC Constitution, article 81.
111. Law on the Retirement of Public Officials, article 5, para. 1 and article 16.
112. Lin Chi-tung, Chang Yu-po, Ts'ai T'un-ming, and Ku Teng-mei, eds., *Hsin-pien liu-fa ts'an-chao fa-ling p'an-chieh ch'üan-shu* [Newly Compiled Complete Book on Six Codes in Reference to Laws, Decrees, Judicial Precedents, and Interpretations], Taipei: Wu-nan Book Co., 1979, 2nd supplement (June 1990), pp. 11-14.

113. Act on Judicial Personnel, article 40.
114. Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, p. 32, see note 3 above.
115. Civil Code, Book of General Principles, article 8, para. 1.
116. Civil Code, article 14, para. 1.
117. Civil Code, article 38.
118. Civil Code, article 58.
119. Civil Code, article 63.
120. John Henry Merryman, *Civil Law Tradition*, Stanford: Stanford University Press, 1969, p. 111.
121. In fact, the transfer is encouraged by giving priority to those who have had experience in both posts when appointing a President of the Court or chief judge — Measures on the Transfer between the Posts of Judge and Procurator, article 7. Other civil law countries also permit the transfer — see Mary Ann Glendon, Michael W. Gordon, and Christopher Osakwe, *Comparative Legal Tradition*, St. Paul, Minn.: West Publishing Co., 1982, pp. 84–5.
122. Shih-tzu No. 13 (31 January 1953), *Ssu-fa yüan ta-fa-kuan hui-i chieh-shih hui-pien* [Collection of Interpretations of the Council of Grand Justices of the Judicial Yuan], Taipei: Judicial Yuan, 1977, pp. 34–5.
123. Ministry of Examination and Selection, ed., *Chung-hua min-kuo k'ao-hsüan t'ung-chi* [Statistics of Examination and Selection of the Republic of China], August 1981, p. 43.
124. For example, 0.75 per cent in 1979 — see Ministry of Examination and Selection, ed., *Chung-hua min-kuo k'ao-hsüan t'ung-chi* [Statistics of Examination and Selection of the Republic of China], 1980, pp. 48–9.
125. Lawyers Law, article 3.
126. Regulation on the Certification of Attorneys, articles 2, 3, and 4, to be amended according to the 1992 Lawyers Law.
127. Article 7 of the Lawyers Law, promulgated on 14 November 1992. *Gazette of the Presidential Office*, 16 November 1992 (No. 5644), p. 1.
128. Based on strict calculations, there are roughly 11 lawyers for every 100,000 citizens in Japan. This number does not, however, include legal professionals who perform work conducted by lawyers in other jurisdictions, such as *zeinishi* (tax agents), *benrishi* (patent agents), *shiho shosi* (judicial scriveners), and *gyosei shoshi* (administrative scriveners). See Mark A. Levin, 'What Statistics on Japan's Lawyers Mean', *The New York Times*, 23 August 1991, p. A26.
129. Fa, *A Comparative Study of Judicial Review under Nationalist and American Constitutional Law*, pp. 71 and 161, note 3 above.
130. The case of Japan may also be cited to support this view — see Hattori, pp. 144–5, note 127 above.
131. Ma, *Trade and Investment in Taiwan*, p. 49, see note 12 above.
132. Merryman, *Civil Law Tradition*, pp. 109–10, see note 120 above.
133. Lawyers Law, article 32, now article 33 in the 1992 amendment.
134. Lawyers Law, article 41.
135. Lawyers Law, article 40.
136. Lawyers Law, article 44.
137. Lawyers Law, article 43.
138. Lawyers Law, article 45, para. 1; and Statute Governing the Taking of Professional and Technical Examinations by Foreign Nationals, article 3.
139. Lawyers Law, article 45, para. 2.
140. For a comprehensive summary of the law and developments relating to the Japanese system, see John O. Haley, 'The New Regulatory Regime for Foreign Lawyers in Japan: An Escape from Freedom', *UCLA Pacific Basin Law Journal*, Vol. 5, No. 1 (1986), pp. 1–15.
141. See General Notes on Taipei Law Society's Proposed Amendments to the Lawyers Law (with comparative charts of Existing Statute, Executive Yuan Version, and Law Society Comments) (undated and unpublished) (copy on file with the authors).

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