MOTHER OR FATHER: WHO RECEIVED CUSTODY? THE BEST INTERESTS OF THE CHILD STANDARD AND JUDGES’ CUSTODY DECISIONS IN TAIWAN

HUNG-EN LIU *

ABSTRACT

In 1996, Taiwan adopted the best interests of the child standard to substitute for the presumption of paternal custody. This thesis is an empirical and descriptive study of how Taiwan’s judges explain and apply the new law. The hypothesis is that cultural and social circumstances may significantly influence judges’ explanations of what is best for the child. Seventy cases of an urban district court and a rural district court were collected and analysed. The findings attest that Taiwan’s court decisions of child custody cases actually reflect many cultural ideas, such as stereotyped gender roles, a sense of ‘face’, and the tradition of parents’ long-term financial support for their children. Meanwhile, the varying socio-economic climate of Taiwan across districts and the lack of public welfare programmes also clearly affect judges’ custody decisions. Moreover, this study finds that since 1996, custody has been overwhelmingly awarded to mothers, whereas before 1996 fathers were favoured by the courts. This change of court preference was not only caused by the gender-neutral standard and the influence of the women’s movement, but it was also caused by the influence of traditional ideas and social customs on judges. Judges prefer the ‘all-or-none custody’ arrangement that imposes a double burden on single mothers. This decision pattern undermines both gender equality and the child’s best interests and further worsens the economic status of post-divorce single-mother families. This study argues that judges should stop using economic competence as a necessary factor in determining custody. Both public welfare programmes and private child support from the non-custodial parent should be implemented to assist the custodial parent if she or he is the more suitable but economically less competent parent. In addition, judges should give visitation orders more often and pay attention to the child’s psychological and emotional needs.

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1. INTRODUCTION

A. The Emergence of the ‘Best Interests of the Child’ Standard in Taiwan

In 1994, the Grand Justices (Constitutional Court) of Taiwan declared unconstitutional the rule of preference for fathers’ parental rights because it violated the fundamental right of equal protection irrespective of gender. In response to this important decision and pressure from Taiwanese women’s movement groups, the Legislative Yuan (Congress of Taiwan) began amending the Family Book of the Civil Code. Finally, the ‘best interests of the child’ standard for child custody cases was promulgated in 1996.

For several decades before 1996, there had been the presumption of paternal custody for custody disputes in Taiwan. During this period, in some 80–90 per cent of all custody cases the custody was awarded to fathers, and the court even tended to enforce the gender-biased presumption of paternal custody. Both women’s rights and children’s well-being were ignored. The best interests of the child standard was therefore enacted to eliminate the gender inequality and the disregard of child welfare in Taiwan’s child custody cases.

Although Taiwanese law has contained the best interests of the child standard, ‘law in books’ is not equated with ‘law in action’. In Taiwan, it is not unusual to find that while the ‘law in books’ is almost perfect and completely logical, it just does not work in reality, especially when the law was transplanted from other countries. Sometimes changes in written law do not necessarily change judicial attitudes.

The basic belief of this study is that the effective date of a new law makes possible the inauguration of a series of empirical investigations for evaluating legal policy. We could and should re-examine the assumptions of the law, research its application in judicial and enforcing processes, and detect its effects to find out the extent to which it has improved the situation or created new problems that need to be settled. Based on this point of view and the fact that there is a lack of this kind of research, this thesis is intended to be an empirical and descriptive study on ‘law in action’ of the ‘best interests of the child’ standard in Taiwan.

The ‘best interest of the child’ has become the governing legal standard for determining child custody cases in many countries around the world. For instance, in the United States, all states have recognized that the child’s welfare or best interests should be the paramount concern in custody decisions. According to this standard, the child’s best interests supersede the parents’ legal rights; the focus of custody disputes following divorce has been shifted from the issue of who has the right to custody to what kind of custody arrangements will serve the child’s best interests. Nowadays very few would disagree that ‘a child is not a chattel to be disposed of according to the wishes of either or
both of his parents but is a human being and personality and is to be treated as such.\textsuperscript{6}

However, a child’s ‘best interests’ are difficult to define, and there is no consensus as to what constitutes a child’s best interests. Although many of the countries adopting this standard have tried to list the factors that a court should ponder in determining the child’s best interests, these factors are not decisive and not exclusive. In fact, in addition to the factors listed in the law, usually judges are required to consider ‘all relevant factors’.\textsuperscript{7} Therefore, judges have wide discretion to excise their own viewpoints on what is best for the child. This vague standard makes court custody decisions susceptible to judges’ personal values, beliefs, and biases.

Because judges’ values, beliefs, and biases usually come from their socialization processes and life experiences, and also because this standard was transplanted from the West and relatively new to Taiwan’s society, how judges explain and apply the law may reflect the social and cultural influence of the society in which they are on the bench.\textsuperscript{8} In order to describe and assess the application of the ‘best interests of the child’ standard in Taiwan, it is necessary to put the study in Taiwan’s social and cultural context.

B. Chinese/Taiwanese Concepts of Parenthood and Childhood

Traditional Chinese or Taiwanese society was based on the family and on networks of relatives and personal relationships. The family and the networks provided individuals with a safety net; the well-being of children and other family members was mainly conceived as a family matter, which was supposed to be managed by the family itself.\textsuperscript{9} On the one hand, the Government seldom provided public assistance to individuals; on the other hand, the Government rarely intervened in family matters. Some commentators believe it related to the influence of the ‘Wu Wei’ (‘nonstriving’ or ‘non-purposeful action’) philosophy of Lao Tzu.\textsuperscript{10}

Several popular phrases and old sayings in Chinese societies can reflect this tradition. For example, ‘Qing Guan Nan Duan Jia Wu Shi’ means that even honest (and smart) government officials will find it very difficult to judge and decide on family matters. It implies that the Government should leave families alone to manage their own household affairs, including childrearing. ‘Jia Ting Zi Zhi’ or ‘Jia Zu Zi Zhi’ means family autonomy or clan autonomy; in fact, in traditional Chinese/Taiwanese societies, it resulted in the autonomy of patriarchal/masculine ruling.\textsuperscript{11} Another phrase, ‘Fa Bu Ru Jia Men’, tells us that the law ends at the family threshold; it clearly indicates how the Government did not want to intervene in families.\textsuperscript{12}

As to Chinese/Taiwanese parenting styles, many empirical studies consistently confirm that the differences between parental roles, which
can be captured in the old saying ‘Yan Fu Ci Mu’ (stern father and kind mother), are still deep-rooted in today’s Chinese societies – including Taiwan, mainland China, and Hong Kong. According to Chinese/Taiwanese culture, mothers are assumed to adopt an expressive role and to be the caregivers of children, while fathers are not supposed to express their affection directly to children and are responsible for teaching discipline. Not surprisingly, Berndt et al find that in Chinese societies mothers generally are perceived as warmer and less controlling than fathers. Shek’s study shows that, across different socio-economic classes, fathers are always perceived to be relatively more restrictive and show less concern for their children than do mothers. However, it is noteworthy that, because of the influential philosophy of Chung Yung (the Doctrine of the Mean, also known as Zhong Yong), traditionally even mothers are not supposed to express affection to their children too directly or obviously.

Another popular saying relating to the differences between parental roles is ‘Nan Zhu Wai, Nu Zhu Nei’, which means that males dominate the sphere outside families, while females dominate the domestic sphere. That is, women are assumed to care for family members and do household chores. Partly because of the influence of Confucianism, this gender stereotyping is still deep-seated in today’s Chinese societies. Some empirical studies find that many women themselves also agree with this tradition. However, in Taiwan these traditional ideas have been slowly changing. We will discuss this further in a later section.

In traditional Chinese/Taiwanese society, children were required to be extremely obedient and dutiful to their parents. The influential stories of ‘Twenty-four Models of Filial Piety’, which have prevailed in Chinese/Taiwanese society for hundreds of years, clearly indicate that children were supposed to obey and care for their parents even though the parents had abused them or had been unreasonably harsh to them. Along with obedience to their parents, Chinese/Taiwanese children also were supposed to be dependent on their parents; parents usually prepared their needs or directed them where and how to pursue their needs.

Indeed, a lot has changed in today’s Taiwanese society. However, people still use ‘Guai’ or ‘Xiao Shun’ (well-behaved because of being obedient to parents) as one of the best terms with which to compliment a child. Another example of cultural and traditional influence relates to a striking phenomenon in the Chinese/Taiwanese parent–child relationship. Chinese/Taiwanese parents usually emphasize children’s education very much and often require their children to pursue higher education as far as possible, and they will provide all support to, as well as put all pressure on, the children. In today’s Taiwan, a very large proportion of college students depend almost totally on their parents for financial needs. In fact, many of their parents will keep supporting
them for graduate studies. Because of this tradition and parenting style of the long-term support for children, even after they have reached the age of majority, it is often emphasized that parents should save as much money as possible for their children.

C. Overview of the Thesis
The main purpose of this thesis is to conduct an empirical and descriptive study in order to see how Taiwan’s judges apply the ‘best interests of the child’ standard and whether Taiwan’s social and cultural circumstances affect judges’ application of the new law. Afterwards, based on the empirical findings, this thesis makes an assessment of the current system and judicial practices. Finally, some policy recommendations are provided to redress the defects of the current system and judicial practices.

To begin with, the first section of part 2 advances several hypotheses based on the above discussion of Taiwan’s social and cultural context. Hypothesizing that social and cultural circumstances may influence judges’ perception of what the child’s best interests should be, this study predicts that court decisions of child custody may reflect Chinese/Taiwanese concepts of parenting and childrearing.

Next, this study collects a sample of court decisions of divorce cases involving custody disputes. Decisions of both an urban district court and a rural district court are collected. By adopting the method of content analysis, the sample of cases is analysed and categorized in order to test the hypotheses. Details of the sample and the methodology, findings of the empirical examination, and explanations of the findings will be discussed in the other sections of part 2.

Lastly, based on the findings and the explanations, this research assesses the current legislation and judicial practices to explore whether the current system has adverse effects and, if so, what may cause these effects. The satisfaction of the child’s needs, gender equality, and the economic security of single-parent families are three main criteria of the assessment. Following an analysis of the changing society and the changing culture of Taiwan, this study argues that we should reform the current system and judicial practices in order to pursue the child’s best interests and gender equality, as well as to meet the social needs of a rapidly changing Taiwan.

2. EMPIRICAL EXAMINATION OF THE APPLICATION OF THE BEST INTERESTS OF THE CHILD STANDARD IN TAIWANESE COURT DECISIONS

A. Hypotheses
As mentioned above, the best interests of the child standard was passed in 1996 to substitute for the presumption of paternal custody. Because
the new law has been in effect for more than three years, now we can obtain sufficient data, and it is time to ask the following questions in order to assess the new law. Will the empirical analysis of court decisions show that judges have changed their preference for paternal custody? How do judges apply the new law in each actual case? Can their application of the new law accomplish its legislative purposes, or do the application and the new law cause some new problems?

Based on the discussion of the social and cultural context in the preceding chapter, and also based on research the author conducted in Taiwan before 1996, this study advances the following hypotheses:

— First, although we can anticipate that judges will award custody to mothers more often than previously, it is still possible that judges will tend to award custody to fathers more often than mothers. This study hypothesizes this because gender biases and inequality are still widespread in Taiwan; moreover, the author’s previous research had found a conservative tendency of Taiwanese judges.

— Second, court decisions may reflect some concepts of parenthood or child-parent relationship in Chinese/Taiwanese culture, as discussed in the preceding chapter. For example, we might find the ideas of ‘Yan Fu Ci Mu’ (stern father and kind mother) and ‘Nan Zhu Wai, Nu Zhu Nei’ (males dominate the sphere outside families, and females dominate the domestic sphere) from the rationale of judges’ decisions.

— Third, there might be some differences between the decisions of rural district courts and urban district courts. This study hypothesizes that the decisions of urban district courts would reflect more modernized values, such as the stress on child welfare, gender equality, and individualism. The differences might also reflect the discrepancies of social development, attitudes about parenthood and childrearing, and life styles between rural and urban areas in Taiwan.

— Fourth, though the new law has made a list of factors that judges should take into account to decide the best interests of the child, judges might tend to consider only part of these factors and ignore some others. Judges also might consider some factors not listed in the law. This study hypothesizes that they tend to consider the tangible factors because it is simpler, and that they tend to consider the factors reflecting some traditional ideas or stereotypes of parenthood and childrearing in our society.

— Fifth, based on the author’s legal aid experience and preliminary research, this study suspects that ‘occupation and economic resources of the parents’ has become one of the factors considered most often by Taiwanese courts in child custody cases. A related issue is child support following parents’ divorce. Some studies before
1996 found that in very few divorce cases had judges and participants considered this question. This study suspects that both judges and participants still tend to overlook this important issue.

In addition to these hypotheses, it is important to know, in order to decide the best interests of the child, whether judges have taken into account any factors not listed in the new law, and if so, how and why they use them. Moreover, this study wants to discover whether there has been any decision involving an arrangement of joint custody, because the new law also introduced this form of custody along with the best interests of the child standard. At the same time, a provision of visitation rights was first introduced to Taiwan too; this study also plans to reveal how this new provision has been applied in practice.

B. Methodology

In order to discover how judges have applied the best interests of the child standard, we need to collect and analyse a sample of court decisions involving divorce and child custody arrangements. Taiwanese court decisions can be obtained on the Internet because the Judicial Yuan has been developing the Judicial Data Search System and the Trial Court Decisions Search System for several years. According to the statement at the Judicial Yuan’s web site, all trial court decisions have been put in the database since 1998.

Pingtung District Court and Taipei District Court were chosen to ensure a representation of both urban and rural court data on divorce and child custody. Pingtung is one of the most rural counties in Taiwan; 44 per cent of the employed people are farmers and fishermen. By contrast, Taipei is the capital and largest city of Taiwan; no city in Taiwan is more industrialized or modernized than Taipei.

After inputting the key words ‘divorce’ and ‘child custody’ to the Trial Court Decisions Search System, forty-one decisions were obtained from Pingtung District Court and 139 decisions were obtained from Taipei District Court. All these decisions were made during the period from 27 April 1998 to 27 January 2000. However, not all these decisions were proper subjects for this research because many of them only ‘mentioned’ the keywords in their contents but in fact were not decisions about divorce and child custody. Therefore, each case had to be reviewed to keep the proper ones. The caseload of Pingtung is small, so every case was examined and finally this study obtained twenty-nine cases. In Taipei, the caseload is much heavier, and hence half of the 139 cases were taken at random; then this study reviewed every case in the sample and finally obtained forty-one cases. Finally, a total of seventy cases involving divorce and child custody were obtained for further analyses.
Table 1. All Cases by Final Custodian

<table>
<thead>
<tr>
<th>Final Custodian</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father receives custody</td>
<td>20</td>
<td>28.6</td>
</tr>
<tr>
<td>Mother receives custody</td>
<td>50</td>
<td>71.4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>70</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

Next, by adopting the method of content analysis, this study analysed these cases and categorized them by final custodian (father or mother received custody), by proceeding, and by district. Furthermore, this study analysed and categorized each of these cases by the factors that have been considered by judges to decide the child’s best interests, in order to discover how the court took into account different factors and whether there were discrepancies between decisions of Pingtung and Taipei.

C. Findings

(i) Father or mother: who received custody?

Surprisingly, viewing the result as a whole, custody was awarded to mothers more often than fathers. In fact, in 71.4 per cent of all cases mothers received custody, and only in 28.6 per cent of all cases fathers did (see Table 1).

Moreover, when we distinguished the cases by district, we found that judges in Taipei were much more likely to grant custody to mothers than were judges in Pingtung (see Table 2). In fact, while in Taipei custody were overwhelmingly awarded to mothers (87.8 per cent), in Pingtung the cases awarding custody to fathers were still more than the cases awarding custody to mothers (51.7 per cent and 48.3 per cent respectively). It seems plausible to suggest that judges in Pingtung made decisions more traditionally and conservatively. The findings support the third hypothesis as stated above.

However, a large part of these cases were ex parte divorce cases involving decisions about child custody (see Tables 3 and 4), and in most of them the situation was that one spouse deserted the family or had disappeared for more than three years. In Pingtung, in most ex parte divorce cases, custody was awarded to fathers; but in Taipei, custody was overwhelmingly awarded to mothers in ex parte divorce cases (see

Table 2. All Cases by Final Custodian and District

<table>
<thead>
<tr>
<th>Final Custodian</th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Father receives custody</td>
<td>15</td>
<td>51.7</td>
</tr>
<tr>
<td>Mother receives custody</td>
<td>14</td>
<td>48.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>29</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>
CUSTODY DECISIONS IN TAIWAN

Table 3. All Cases by Proceeding

<table>
<thead>
<tr>
<th>Description</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex parte divorce involving decisions about child custody</td>
<td>26</td>
<td>37.1</td>
</tr>
<tr>
<td>Two-party litigation involving child custody dispute</td>
<td>44</td>
<td>62.9</td>
</tr>
<tr>
<td>Total</td>
<td>70</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 4. All Cases by Proceeding and District

<table>
<thead>
<tr>
<th>District</th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Ex parte divorce involving decisions about child custody</td>
<td>13</td>
<td>44.8</td>
</tr>
<tr>
<td>Two-party litigation involving child custody disputes</td>
<td>16</td>
<td>55.2</td>
</tr>
<tr>
<td>Total</td>
<td>29</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 5. Cases of Ex Parte Divorce by Final Custodian and District

<table>
<thead>
<tr>
<th>District</th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Father receives custody</td>
<td>8</td>
<td>61.5</td>
</tr>
<tr>
<td>Mother receives custody</td>
<td>5</td>
<td>38.5</td>
</tr>
<tr>
<td>Total</td>
<td>13</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 6. All Cases by Final Custodian and Proceeding

<table>
<thead>
<tr>
<th>Description</th>
<th>Number of cases</th>
<th>Percentage</th>
<th>Number of cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father receives custody</td>
<td>9</td>
<td>34.6</td>
<td>11</td>
<td>25.0</td>
</tr>
<tr>
<td>Mother receives custody</td>
<td>17</td>
<td>65.4</td>
<td>33</td>
<td>75.0</td>
</tr>
<tr>
<td>Total</td>
<td>26</td>
<td>100.0</td>
<td>44</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 5). Further exploration shows that, in Pingtung, many more ex parte cases were petitioned because wives abandoned their family or disappeared; but in Taipei, almost all ex parte cases were petitioned because husbands abandoned their family or disappeared. This is a very intriguing phenomenon which needs further research on the social context in order to explain it.41

Because the ex parte cases are non-contentious, and it is apparent judges usually do not need to discuss the custody arrangement in detail, in order to observe how judges apply the best interests of the child standard it is better to focus on the cases of two-party litigation involving child custody disputes (see Tables 6 and 7).
### Table 7. Cases of Two-Party Litigation by Final Custodian and District cases

<table>
<thead>
<tr>
<th></th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td>Percentage</td>
</tr>
<tr>
<td>Father receives custody</td>
<td>7</td>
<td>43.8</td>
</tr>
<tr>
<td>Mother receives custody</td>
<td>9</td>
<td>56.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>16</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

As shown in Table 7, in the cases of two-party litigation involving child custody disputes, it was still very obvious that Taipei judges were more likely to grant custody to mothers than were Pingtung judges.

(ii) Factors in deciding the best interests of the child

Article 1055–1 of the Civil Code is the core of the 1996 Amendments with regard to the best interests of the child. According to this article, the court shall, but is not limited to, consider the following factors to decide a custody arrangement for the child's best interests: (1) age of the child; (2) sex of the child; (3) number of children of the parents; (4) health of the child; (5) wishes of the child; (6) needs of the child’s personality development; (7) age of the child’s parents; (8) occupation and economic resources of the parents; (9) moral character and performance of the parents; (10) health of the parents; (11) living conditions of the parents; (12) wishes and attitudes of the child’s parents as to his custody; (13) parent–child relationship and affection; (14) relationship and affection between the child and other people who live with him.

In addition, the article provides that the court could consider the review report of social workers. However, it is not clear whether judges are required to take into account all the factors in each case.

In fact, viewing the result as a whole, the results of our empirical analysis show that the court tended to consider only some of these factors, such as 'interview report of social workers', 'occupation and economic resources of the parents', 'wishes of the child', and 'age of the child' (Table 8). By contrast, the court seldom or never considered some factors such as 'age of the child’s parents', 'health of the child', 'living condition of the parents', 'sex of the child', 'number of children of the parents', 'needs of the child’s personality development'. The findings support the fourth hypothesis in part, ie judges tend to consider only some of the factors and ignore others.

The findings also verify the fifth hypothesis – ‘occupation and economic resources of the parents’ has become one of the factors considered most often by courts. In fact, it was the factor most often considered in addition to ‘interview report of social workers’. This is an important finding to which we shall return later.


Moreover, the results show that many judges had considered several factors, such as the ‘continuity or stability of care’ and ‘support from relatives’, factors that are not listed in the law. Analyses of these factors in detail will be discussed in the next section.

Further exploration reveals three intriguing phenomena:

— First, in all the twelve decisions that had considered ‘age of the child’, judges awarded custody to mothers. This finding is very similar to the ‘tender years doctrine’ of custody cases in the legal history of the United States, a doctrine which believed that the mother is the parent ideally and inherently suited to care for children of a ‘tender age’. As analysed in the preceding section, in Chinese/Taiwanese society, the role of mothers has always been defined as natural and ideal caregivers of children.

— Second, in all the eleven cases in which judges had considered ‘parent-child relationship and affection’, the custody was awarded to mothers. In other words, no relationship and affection between fathers and their children had ever been taken into account to decide the child’s best interests. This finding verifies the second hypothesis that the decisions may reflect some concepts of parenthood or child–parent relationship in Chinese/Taiwanese culture. As
discussed in the previous section, according to Chinese/Taiwanese culture, mothers are assumed to adopt an expressive role and to be the caregivers of children; on the other hand, fathers are not supposed to express their affection directly to children and are responsible for teaching discipline. The popular saying ‘Yan Fu Ci Mu’ (stern father and kind mother) clearly describes this situation. Therefore, it is usually with the mother the child forms an intimate bond and attachment. Not only can we find a great number of examples of it in Chinese/Taiwanese history and literature, we can also find many empirical studies which have verified it.43

— Third, whenever judges took account of ‘wishes of the child’, they made decisions in accord with the child’s wishes as to his/her custodian. Strikingly, among all the fourteen cases in which judges took account of the child’s wishes, only in one case did the child want to live with the father. In other words, when judges took into account the children’s wishes, the custody was disproportionately often awarded to the mothers. The reason why children almost always chose mothers may be similar to the reason of the phenomenon discussed in the preceding paragraph – based on the culture, mothers almost always adopt an expressive role and it is usually with the mother the child forms an intimate bond and attachment.

It is noteworthy that there is a new law, enacted in 1999, which provides that judges shall consider the child’s wishes when he/she is over seven years old.44 However, among the sample of seventy cases, there still were some decisions made after the new law was passed that did not take into account the child’s wishes, even though the child had been over seven years old.45 Apparently, they are decisions contrary to the law, and thus appeals may be filed.46

Once again, when we further distinguished the cases by district, we found some very intriguing discrepancies between how Pingtung District Court and Taipei District Court applied these factors (see Table 9).

First, while judges in Taipei considered ‘wishes of the child’ in more cases than did judges in Pingtung (35.7 per cent and 25.0 per cent respectively), the Pingtung judges considered ‘wishes of the parents’ in more cases than did judges in Taipei (25.0 per cent and 7.1 per cent respectively). Meanwhile, in determining the child’s best interests in each case, Taipei judges tended to take into account more factors than did Pingtung judges. This finding suggests that the court in Taipei respected the child more and saw the child more as an individual than did the court in Pingtung. Just as predicted in the third hypothesis, judges in Pingtung were more traditional and conservative. Further discussion will be presented in a later section.
## Table 9. Cases of Two-Party Litigation Involving Child Custody Disputes by Factors Considered and District

<table>
<thead>
<tr>
<th>Factor Considered</th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
<th>Number of Cases</th>
<th>Percentage</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Age of the child</td>
<td>3</td>
<td>9</td>
<td>18.8</td>
<td>32.1</td>
<td>2</td>
<td>7.1</td>
</tr>
<tr>
<td>2. Sex of the child</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>7.1</td>
</tr>
<tr>
<td>3. Number of children of the parents</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>7.1</td>
</tr>
<tr>
<td>4. Health of the child</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3.6</td>
</tr>
<tr>
<td>5. Wishes of the child</td>
<td>4</td>
<td>10</td>
<td>25.0</td>
<td>33.7</td>
<td>2</td>
<td>7.1</td>
</tr>
<tr>
<td>6. Needs of the child’s personality development</td>
<td>1</td>
<td>2</td>
<td>6.3</td>
<td>7.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Age of the child’s parents</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3.6</td>
</tr>
<tr>
<td>8. Occupation and economic resources of the parents</td>
<td>5</td>
<td>12</td>
<td>31.3</td>
<td>42.9</td>
<td>4</td>
<td>14.3</td>
</tr>
<tr>
<td>9. Moral character and performance of the parents</td>
<td>2</td>
<td>4</td>
<td>12.5</td>
<td>14.3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. Health of the parents</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>10.7</td>
</tr>
<tr>
<td>11. Living condition of the parents</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3.6</td>
</tr>
<tr>
<td>12. Wishes and attitudes of the child’s parents as to his custody</td>
<td>4</td>
<td>2</td>
<td>25.0</td>
<td>7.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>13. Parent-child relationship and affection</td>
<td>3</td>
<td>8</td>
<td>18.8</td>
<td>28.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>14. Relationship and affection between the child and other people who live with him</td>
<td>2</td>
<td>5</td>
<td>12.5</td>
<td>17.9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15. Interview report of social workers</td>
<td>4</td>
<td>16</td>
<td>25.0</td>
<td>57.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>16. Other factors (not listed in the law):</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Continuity or stability/primary caretaker</td>
<td>5</td>
<td>10</td>
<td>31.3</td>
<td>35.7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2) Housing and living environment</td>
<td>1</td>
<td>2</td>
<td>6.3</td>
<td>7.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(3) Support from relatives to care for the child</td>
<td>1</td>
<td>9</td>
<td>6.3</td>
<td>32.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(4) Spouse abuse behavior</td>
<td>1</td>
<td>2</td>
<td>6.3</td>
<td>7.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(5) Child abuse behavior</td>
<td>1</td>
<td>1</td>
<td>6.3</td>
<td>3.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(6) Parent is in jail</td>
<td>3</td>
<td>4</td>
<td>18.8</td>
<td>14.3</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Number of total cases: Pingtung District Court - 16, Taipei District Court - 28

Second, the court in Taipei considered the report of social workers much more often than did the court in Pingtung. In fact, some Taipei judges required the social workers’ report even if they were hearing _ex parte_ divorce cases. This can be partly explained by the discrepancy of availability of social worker services between rural areas and urban areas. In 1990, only 12 per cent of the population of Taiwan lived in Taipei, but 27.5 per cent of all social workers in Taiwan worked in...
Meanwhile, the phenomenon that Taipei's judges considered experts' opinions more often may again suggest that the court in Taipei decided child custody more carefully than did the court in Pingtung.

Third, the court in Taipei stressed the 'support from relatives to care for the child' much more often than did the court in Pingtung. This can be explained by the discrepancy of social/family situation that many more married women are employed in Taipei, and therefore they need more help from their relatives (usually the grandparents of the child) to help them care for their child while going to work.

However, there also were some similarities between the decisions of the two district courts (see Table 9). First, both in Pingtung and Taipei, the 'occupation and economic resources of the parents' was one of the factors most often stressed by judges. In fact, Pingtung judges took into account this factor, as well as the 'continuity or stability', more often than any other factors; at the same time, Taipei judges considered this factor most often in addition to social workers' reports. The findings verify the fifth hypothesis as discussed above. This study will make a further analysis on this issue in a later section.

Second, the factors seldom or never considered were the same in Taipei and Pingtung. Some of these factors are vague and abstract (e.g., needs of the child's personality development), and some others seem not directly relevant to the child's best interests (e.g., the number of children of the parents). However, it is also possible that they were not considered only because, according to the case facts, it was not necessary. For example, health of the child was seldom considered only because we can anticipate that most children were healthy.

Third, though this phenomenon was more obvious in Taipei, generally speaking, social workers' reports seemed to play an important role in judges' decision-making process. In all the seventy cases almost half of the judges had considered social workers' reports; all of them except one adopted (at least part of) the suggestions in the reports. This phenomenon might be attributed to the lack of objective legal criteria and the vagueness of what the best interests of the child should be. We will discuss this in a later section.

(iii) Other factors not listed in the law

As discussed above, the law has listed fifteen factors that judges should consider in order to pursue the child's best interests. However, the results show that many judges still considered other factors not listed in the law. These factors are noteworthy because they might reflect these judges' views of what the child's best interests should be; they took into account these factors even though they could not find them in the law.

(a) Continuity, stability, and primary caretaker: In the US and Germany, continuity and stability of care, relationships, and social milieu have
been recognized as central concerns for a custodial arrangement by many scholars and judges.51 There is plenty of psychological research verifying the importance of continuity and stability for children’s personality development and health.52 Based on the proposition that continuity and stability are paramount, the ‘primary caretaker’ presumption in determining custodial arrangements has been adopted or at least considered by many states in the US.53 Under this presumption, courts will award custody to the parent who has been the child’s primary caretaker, i.e. the parent ‘who has performed a substantial majority of the caregiving tasks for the child that involve intimate interaction with the child’.54

In Taiwan, before 1996, there had been a few court decisions in which the factor of continuity, stability, or primary caretaker was considered.55 During the process of amending the Family Book of the Civil Code, the Xin Qing draft lobbied by women’s movement groups also included this factor.56 However, without too much discussion, it was finally excluded after the representative of the executive branch suggested that this factor was relatively abstract.57

Yet the results show that in more than a third of the cases judges still took into account this factor to determine the child’s best interests (see Table 8). In fact, viewing the result as a whole, the ‘continuity, stability, or primary caretaker’ was the factor most often considered in addition to the ‘report of social workers’ and ‘occupation and economic resources of the parents’.58 In Pingtung, this and ‘occupation and economic resources’ were the factors considered more often than any other ones (see Table 8). The findings suggest that the exclusion of this factor is not necessary; judges still emphasized this important factor based on psychological research, some precedents, and several commentators’ introduction or advocacy.59

There were fifteen cases in which judges considered the factor of continuity, stability, or primary caretaker.60 Further analysis shows that in more than 73.3 per cent of these cases mothers received custody. In other words, when judges considered this factor they tended to grant custody to mothers. The findings are very similar to the results of research on the application of ‘primary caretaker’ standard in the US, results which showed that under this standard mothers received custody more often because usually they were the children’s primary caretakers.61

(b) Support from relatives to care for the child: As mentioned above, many judges – especially the judges in Taipei – considered the ‘support from relatives to care for the child’ to determine which parent would be granted custody.62 Almost all studies on single-parent families in Taiwan have proved that most single parents count on their parents or relatives to care for their children while they are at work; not only that, they count on their parents or relatives for financial support too.63
These phenomena clearly reflect the important role of private welfare system in Taiwan, a system that is based on a family unit or a network of relatives; they also reflect the insufficiency of Taiwan's public welfare system.

As to the phenomenon that Taipei judges stressed this factor much more often than did the court in Pingtung, it can be explained by the discrepancy of social/family situation between these two areas. Many more married women are employed in Taipei, and therefore they need more help from their relatives (usually the child’s grandparents) to help them care for their children while they go to work. An official survey shows that while 50.3 per cent of Taipei’s married women are employed, only 40 per cent of married women are employed in Pingtung. The fact that Taiwan’s employed women need their relatives to help them may be attributed to the lack of public child care centres and the expensiveness of private daycare programs.

(c) The parent is in jail: In all the cases in which one parent – it was always the father – was in jail, judges had taken this factor into account and awarded the custody to the mother. The reason was apparent – it was impossible for the parent in jail to care for the child; all the decisions included this reasoning. Some few judges also thought that this factor was related to the ‘moral character and performance’ factor listed in the law.

(d) Domestic violence: Many studies, which analysed the court decisions made before 1996, revealed that Taiwanese judges had a tendency not seriously to consider husbands’ violent behaviour against their wives in divorce or child custody cases. Judges also tended to put an excessively heavy burden of proof on the victims of spouse abuse. Several customs and traditional ideas, such as ‘Fa Bu Ru Jia Men’ (the law ends at the family threshold) and ‘Jia Ting Zi Zhi’ (family autonomy – in fact the autonomy of patriarchal/masculine ruling), might lead to judges’ conservative and reluctant attitudes in considering the factor of domestic violence in divorce or custody cases.

By contrast, in the US, at least thirty-three states and District of Columbia have statutes requiring judges to take into account evidence of domestic violence while determining custody and visitation. Some state statutes even provide the presumption that the abusive parent (in either spouse abuse or child abuse cases) should not be awarded custody, unless he/she could prove that it is in the child’s best interests to let the child be with him/her. This kind of legislation is based on social science findings, findings that the child not only suffers from the violence against him but also suffers from witnessing spousal abuse, learned patterns of behaviour, and overlap between spousal abuse and
Table 10. Cases Involving Domestic Violence by District, Abuse Type, and whether the Court has considered Domestic Violence

<table>
<thead>
<tr>
<th></th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Has the judge considered the domestic violence? (number of cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Cases involving spouse abuse</td>
<td>1</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Cases involving child abuse</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Subtotal</td>
<td>8</td>
<td>8</td>
<td>16</td>
</tr>
</tbody>
</table>

The results of this research show that Taiwanese judges still did not consider the factor of domestic violence often in determining custody. Of all the seventy cases investigated, sixteen contained domestic violence incidents; among these sixteen cases, fourteen were spouse abuse cases and two were child abuse cases (see Table 10). However, in only five cases did the judges take into account the history of domestic violence while determining custody. Further exploration found the following: in both the cases involving child abuse incidents, judges had considered this factor and awarded custody to the non-perpetrators; but in only three out of the other fourteen cases involving spouse abuse incidents, did the judges consider this factor while determining custody.

Meanwhile, judges still granted custody to the perpetrators in five spouse abuse cases – all these five cases were made by Pingtung judges (see Table 11). For instance, in Pingtung District Court 87 Hun 152 decision, the Court recognized that the defendant had continually severely abused the plaintiff; however, without any further discussion of the child’s best interests and only based on the parents’ wishes and the mother’s financial difficulties, the Court awarded custody to the father – the perpetrator.

By contrast, even though there were five cases in which Taipei judges had not discussed the domestic violence issue in deciding the child’s

Table 11. Cases Involving Domestic Violence by District, Abuse Type, and Final Custodian

<table>
<thead>
<tr>
<th></th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Spouse abuse</td>
<td>Child abuse</td>
<td>Spouse abuse</td>
</tr>
<tr>
<td>Perpetrator receives custody</td>
<td>5</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Non-perpetrator receives custody</td>
<td>2</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Subtotal</td>
<td>8</td>
<td>8</td>
<td>16</td>
</tr>
</tbody>
</table>

child abuse. These findings imply that it is not in the child’s best interests if the abusive parent receives custody.
best interests, in all these five cases custody was granted to non-perpetrators on other rationales, such as child’s wishes, social worker’s report, support from relatives to care for the child, and primary caretaker. This finding again suggests that Taipei judges tended to consider more factors in determining the best interests of the child than Pingtung judges. While Pingtung judges put more emphasis on the parents’ wishes or factors relating to the parents’ situation, Taipei judges more often took account of factors directly relating to the children’s needs and situation.

It is noteworthy that the Congress of Taiwan has made a very clear policy decision in the 1998 Law for the Prevention and Cure of Domestic Violence, which provides a rebuttable presumption that it is not in the child’s best interests to award custody to the abusive parent – no matter whether he/she is the perpetrator of spouse abuse or child abuse. However, this law was not in effect until June 1999; all of the decisions mentioned above, which contained domestic violence incidents, were made before the effective date. Therefore, we can not analyse the effects of this statute on judges’ decisions of child custody cases.

(e) Housing and living environment – the famous story of ‘Meng Mu San Qian’
Although only a few judges specifically mentioned the factor of housing and living environment (see Table 8), it is worth discussing because we can find a cultural reason behind this consideration. While the factor is not listed in the law, the phenomenon that some judges still considered it may reflect the influence of this cultural reason. ‘Meng Mu San Qian’ – the mother of Mencius changed her abode three times in order to avoid any bad influence on her son – has been a very well-known story to Chinese society for thousands of years. Mencius lost his father as a child and was reared by his mother, who, in Chinese folklore, is synonymous with maternal devotion. The story of ‘Meng Mu San Qian’ clearly describes how a wise mother should do everything for the healthy growth of her children, and the healthy growth would have to be based on a nice neighbourhood and living environment.

(iv) Related decisions: visitation and joint custody
In addition to the best interests of the child standard, the 1996 Amendments also introduced two new provisions regarding child custody – the arrangement of joint custody and the non-custodial parent’s visitation right. Before 1996, no empirical research had ever found any court decision settling the arrangement of joint custody or non-custodial parent’s visitation following divorce. Meanwhile, legal scholars did not pay much attention to these issues either; in fact, some authoritative textbooks of family law never even mentioned them.

Several reasons can explain why Taiwanese courts and legal scholars tended to ignore the issues of joint custody and visitation. To begin
with, Taiwanese judiciary and legal academia have a long rooted tradition of legal positivism, that is, a tradition of making decisions and discussions based only on statutes. Many civil law countries have the similar tradition, but it seemed that Taiwanese judges more firmly insisted on not creating or supplementing law themselves than did judges in other civil law countries. While there was no law regarding joint custody and visitation, judges just did not touch related issues, even though the litigants had disputed about them.

Secondly, before 1996, along with the presumption of paternal custody, the law and judicial precedents also set a very strict rule on seeking alimony and thus most women could not obtain it. Consequently, fathers seldom needed to agree with mothers’ proposals of joint custody or visitation arrangements, because mothers did not have many bargaining chips to trade for fathers’ concession. Predictably, knowing that it was very difficult to receive joint custody or visitation – both inside and outside courtrooms – many mothers just never tried to raise these issues in the first place.

Finally, there are some cultural factors. Traditional Chinese or Taiwanese society was characterized by dense networks of personal relationships. It has been very important to allow everyone to maintain a sense of ‘face’ (Mianzi or Lian); to have ‘face’ is to impress others as being a successful, responsible person. In Chinese or Taiwanese society, divorce means ‘tearing face’ (Si Po Lian) and ‘losing face’ (Diu Lian), and it is a dishonourable and unpleasant incident for both spouses and their families. Usually, after divorce ex-spouses do not contact each other; the non-custodial parent will just leave the custodial parent alone to be completely responsible for the child, and the custodial parent will not want to ask assistance from the ex-spouse. Results of empirical research clearly show the practice of this cultural tradition. According to a national survey, as many as 96.2 per cent of divorced parents never or seldom contacted their ex-spouses; only 16.2 per cent of non-custodial parents visited their children about once a month or more frequently, and 81.6 per cent of them never or seldom visited their children.

The results of this research indicate that, after 1996, Taiwan’s judges still never awarded joint custody and seldom made decisions regarding visitation. Among the sample of seventy decisions, none of them awarded joint custody, and only thirteen of them had determined visitation. According to the new law, the court, at the request of either party or on its own discretion, may determine a joint custody or visitation arrangement. However, among the seventy cases, only in six had the litigants requested visitation decisions, and only in seven cases had the judges determined visitation arrangements on their own discretion. No litigant ever requested a joint custody arrangement. In other words, viewing the result as a whole, neither judges nor litigants often consid-
Table 12. Number of Court Decisions that have determined Visitation Arrangements

<table>
<thead>
<tr>
<th></th>
<th>Pingtung District Court</th>
<th>Taipei District Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Determined at a party’s request</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Determined on the court’s own motion</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Subtotal</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>13</td>
<td></td>
</tr>
</tbody>
</table>

Note: The table shows the number of court decisions that have determined visitation arrangements in Pingtung and Taipei districts. The decisions are categorized as per the request of the party or determined by the court on its own motion.

Nevertheless, when we distinguished the cases by district, we found that Taipei’s judges determined visitation arrangements on their own discretion much more often than did Pingtung’s judges. All the seven decisions in which the courts had determined visitation arrangements on their own discretion were decided by Taipei’s judges (see Table 12).

(v) Judges’ consideration of economic resources in determining custody and child support award

(a) Judges’ consideration of economic resources in determining custody: Before 1996, several studies consistently suggested that there had been very few court decisions regarding child support following divorce. In fact, many researchers found that judges usually awarded custody to the parent with more economic resources, and that might explain why judges thought it was ‘not necessary’ to consider a child support award. Or we can say it conversely, when judges did not plan to award a child support (whatever the reason was), they thought it was necessary to take account of the prospective custodian’s economic status. Not surprisingly, in this decision pattern, judges were more likely to award custody to fathers because usually fathers had more economic resources.

One focus of this research is whether the new law has changed this kind of decision pattern. According to the new law, judges shall consider many factors in addition to economic resources in order to decide a custody arrangement for the child’s best interests. However, as we have seen, no matter whether we view the results as a whole or we analyse them by district, it is clear that ‘occupation and economic resources of the parents’ (hereinafter ‘economic resources’) was still the factor most often mentioned by judges, in addition to social works’ reports.

If we analyse the sample of cases by final custodian (ie whether the father or the mother received custody), among all the cases in which judges had considered the economic resources, in 79 per cent of them mothers received custody and in 21 per cent of them fathers received it. At first glance it appears that judges did not consider this factor in the father’s favour. However, if we further explore whether judges considered this factor in awarding custody to fathers and in awarding custody to mothers respectively, the findings are noteworthy and they may have some policy implications.
The findings show that among the cases in which judges decided to award custody to fathers, in only 27 per cent of them had judges considered this factor; but in the cases judges decided to award custody to mothers, in more than 42 per cent of them judges had taken account of it. Namely, it seems that judges often needed or wanted to ‘make sure’ that mothers had enough economic resources before awarding custody to them, but judges usually did not need or not want to make sure of it before awarding custody to fathers.

Judges’ hesitation or further consideration in awarding custody to mothers may reflect the unequal economic status between men and women in reality; it may also imply the possible disadvantage to the mother and the child. For instance, in several problematic cases, judges awarded custody to the possibly unfit fathers (e.g. a perpetrator of family violence) and refused to award custody to the more competent mothers merely because she did not have enough economic resources; in fact, some of these problematic decisions never even mentioned the ‘best interests of the child’, and they only based their custody decisions on the parents’ economic status and wishes. Without mentioning that they are possibly unfair to mothers, these decisions could be highly dangerous to the children’s safety and health. Did they really make the custody decisions on the basis of the best interests of the child?

(b) Child support award and the decision pattern of ‘all-or-none custody’: As discussed above, before 1996, judges tended to use finances as a necessary factor in custody decisions; at the same time, they seldom – if ever – awarded child support in divorce cases. We have seen that these two decision patterns were intertwined. Moreover, in the last few sections, we have also found that, after 1996, judges dramatically more often awarded custody to mothers, but they still tended to consider the factor of finances more often than any other factors while deciding custody. Now the next question would be: what is judges’ decision pattern of awarding child support in divorce cases after 1996? While they grant custody to mothers more often, do they award child support to the custodial mothers more often too, or do they still seldom award child support?

We should note that, along with the best interests of the child standard, the Congress also passed another new provision in 1996. This provision stipulates that each parent’s obligations to support the child would not be changed after divorce, even though he or she is not awarded custody. The new law also raises two research questions. Have judges, lawyers, and disputants applied the new provision to award or to seek an award of child support? Has this new provision affected the decision pattern and litigation in practice?

To answer these questions, this study once again used the Trial Court Decisions Search System of Taiwan ROC and chose decisions
of Pingtung District Court and Taipei District Court during the same period from 27 April 1998 to 27 January 2000. After inputting the key words ‘divorce’ and ‘child support’ to the search system, only four relevant decisions were obtained. Namely, there were very few cases involving a child support award following divorce. Moreover, of these four cases, only in one of them did the judge award child support along with the decree of divorce and the custody arrangement at the same time; in all the other cases the litigations of seeking child support were petitioned by mothers several years after divorce.

Evidently, since the era of the old law, Taiwan’s judges have always had a decision pattern of ‘all-or-none custody’. That is, judges tend to grant custody to only economically competent parents and would not award child support to them at the same time. The court supposes that the parent who receives custody should be the one – and the only one – who has the obligations to support the child. Usually, the custodial parent has all parental rights and obligations, while the non-custodial parent has none of them. Judges never awarded joint custody and seldom gave visitation orders. Even though there has been a new law providing that each parent’s obligations to support the child will not be changed after divorce, and there has been another new law introducing the possibility of joint custody and visitation arrangements, still this decision pattern has not been changed.

Another noteworthy phenomenon could be found if we examine the sample of seventy divorce cases in the previous section. The results show that not only did judges almost never consider awarding child support in custody decisions, but lawyers and litigants also seldom – if ever – petitioned for the child support in divorce cases. In fact, of the seventy cases of divorce involving custody disputes, in only one case had the litigant (the mother) pursued the child support award in the court. If we consider this phenomenon along with the above findings, the whole result may reflect the legal culture, social customs, and people’s life experiences and common sense regarding how things actually work in our society, that is, the ‘all-or-none custody’.

3. **Further Discussion**

A. Why Many More Judges Award Custody to Mothers than Before

One of the most striking findings of this research is that, after 1996, judges dramatically more often awarded custody to mothers than fathers. As we have seen, in 75 per cent of all contentious cases judges awarded custody to mothers. Given that in some 80–90 per cent of cases prior to 1996 custody was granted to fathers, this overwhelming preponderance of preference for mothers can not be explained merely by the enactment of the new law. Indeed, the new law abrogates the
presumption of *paternal* custody, but it never adopts a presumption of *maternal* custody to substitute for it. While the new law merely adopts a *gender-neutral* standard (i.e., the best interests of the child), why is there an overwhelming preference for mothers?

The cause of the phenomenon many people would think of first is the influence of the Taiwanese women’s movement. Admittedly, women’s groups have had a significant impact on the legislation and judicial practice in custody arrangements. From the beginning, it was women’s groups raising the issues regarding the necessity to amend the law. Many leaders and active participants of these groups were female lawyers. They banded together in 1990 to promote the abrogation of the paternal presumption and to offer a draft of amendments. Then they made a lecture circuit of Taiwan to disseminate their ideas in different communities. They also lobbied the Ministry of Justice and the Congress to amend the law; however, except for a few Congresswomen and very few Congressmen, they did not receive much positive response. Feeling disappointed, the women’s groups launched a street movement to put pressure on the Government.

At the same time, along with some Congresswomen, they decided to file a petition to request the Grand Justices (Constitutional Court) to review the constitutionality of the law. Shortly afterwards, the Grand Justices declared the law unconstitutional because it violated the equal protection clause in the Constitution, and this declaration forced Congress to amend the law immediately. Again, during the legislative process, the women’s groups and the Xin Qin draft written by the women’s league played a key role. In brief, there is no doubt that without the efforts of women’s groups, there would not have been the new law in 1996.

However, the key role of women’s groups in the legislative process, as described above, still cannot completely explain why judges awarded custody to mothers much more often than fathers after 1996. Not only is the new law merely gender-neutral, but the women’s groups have never promoted a maternal preference. The role of women’s movement and women’s higher status in society than before may explain the fact that custody is granted to mothers more often than previously, but it cannot explain why it becomes so disproportionately more often. While women have only asked for *equality*, and the new law has merely adopted a *gender-equal* standard, why have judges changed their decision pattern from a paternal preference to the exactly opposite maternal preference?

The results of this research suggest that judges’ perception of the gender-stereotyped role of women, along with the developing emphasis of child welfare, may have had a significant influence on the phenomenon. Specifically, since the new law required judges to pursue the best interests of the child, judges gave custody to mothers based on the view
that placing children in their mothers’ care is the most ‘natural’ and the best for children. In fact, in the sample of seventy cases, many judges explicitly mentioned the importance of a ‘loving mother’ or ‘mother’s love and care’ in their decisions, but no decision mentioning ‘loving father’ or ‘father’s love and care’ has been found.

Several findings of this research can support this explanation. For instance, we have seen that in all the decisions that had considered ‘age of the child’, judges granted custody to mothers. In the meantime, in all the decisions that had considered ‘parent–child relationship and affection’, the custody was awarded to mothers too. Apparently, these decision patterns are in accord with the traditional idea of women’s role as a natural loving mother fittest to care for the child, especially the child of tender years.

As we have discussed, in Chinese/Taiwanese culture and tradition, mothers are always assumed to adopt an expressive role and to be the caregivers of children; the assumption is that mothers are better suited to nurture and raise children, because of women’s innate qualities. Even in today’s society, the gender stereotyping and women’s assumed duty to care for children are still deep-seated. Some empirical studies find that many women themselves also agree with this tradition and assumed duty. For example, according to an official survey conducted by Taiwan Province Government in 1993, 45.2 per cent of women agreed or strongly agreed the traditional idea of ‘Nan Zhu Wai, Nu Zhu Nei’ (males dominate the sphere outside families, and females dominate the domestic sphere), while only 29.1 per cent of women disagreed or strongly disagreed it. Another official survey conducted by Ministry of Interior indicates that 64.1 per cent of women agreed that ‘managing household affairs and caring for children are women’s natural duty’, while only 6.5 per cent of women thought this statement is unfair to women.

It is noteworthy, however, that the younger the women are, the higher their education is, and the more industrialized the areas in which they live are, the less the women agreed with the traditional ideas of gender stereotyping and the assumed duty to care for children.

In reality, in 1998, among all Taiwan’s nuclear families in which only husbands were breadwinners, in 94.51 per cent of them wives were mainly in charge of household affairs (including caring for children). Among the nuclear families in which the couple were both employed, still, in 90.52 per cent of them were wives mainly responsible for household affairs. Only 31.61 per cent of fathers spent more than three hours each day with their children between six and twelve years old, while 66.19 per cent of mothers did so. Just as many researchers stress, even though more and more Taiwanese women have had a job outside their homes, they are still assumed to perform their duties in household affairs and child care. In other words, because the gender
stereotyping is so ingrained, women’s labour force participation and concomitant economic independence do not necessarily enable them to be liberated from the duty of caring for children; instead, many of today’s Taiwanese women bear a double burden – they have to perform their duties both inside and outside their homes.122

Moreover, Taiwan’s legal system and governmental policy always intentionally reinforced the perception of women’s inherent role of being a mother and nurturing children. Legislation and policy continually connected women with child welfare; this policy has even been directly stipulated in Constitution. The article 156 of the Constitution explicitly states, ‘[t]he State, in order to consolidate the foundation of national existence and development, shall protect motherhood and carry out the policy of promoting the welfare of women and children.’123 This is the only article mentioning ‘child welfare’ in the Constitution, and clearly the Constitution makers believed that child welfare directly relates to motherhood. Not surprisingly, no ‘fatherhood’ is ever mentioned in the Constitution; in fact, no ‘fatherhood’ is mentioned in any legislation.

Another intriguing example is regarding national holidays in Taiwan. Before 1991, Women’s Day and Children’s Day were separated (8 March and 4 April respectively). However, while Taiwan’s Government wanted to merge some holidays together in order to reduce the number of national holidays, these two days were immediately linked to each other because the Government believed that they were ‘similar in essence’.124 The result was that since then there is now only one ‘Women and Children’s Day’ on 4 April. Certainly, the Government has never considered merging Father’s Day with Children’s Day. Again, it is evident that Taiwan’s Government believed that child welfare is closely related to motherhood – the inherent role of mothers.

It should be noted that, before 1996, even though custody was mostly granted to fathers, in many cases, de facto, it was still non-custodial mothers who cared for their children. In other words, while fathers received custody legally, they were not necessarily the parents, in reality, responsible for nurturing their children.125 One reason of this phenomenon was that, due to the ‘presumption’ of paternal custody, many fathers received custody automatically following divorce, even if they had not petitioned for it.126 Hence, we could not say the prevailing paternal custody prior to 1996 did not reflect the stereotyped gender role of women as caretakers of children. On the contrary, it was reflected in reality – ‘law in action’ – though not directly reflected in the ‘law in books’.

After 1996, this traditional perception and stereotype of women’s role as an inherent better caretaker, associated with the best interests of the child standard, led to the phenomenon that judges much more often awarded custody to mothers. Combined with the tradition of con-
considering economic competence as a necessary factor in deciding custody, they caused judges to grant custody to mothers more often but at the same time worsened the problem of women's double burden. Namely, economically competent mothers, usually the ones who are employed, would be more likely to be awarded custody because of the stereotyped gender role of being a better caretaker; therefore, they may need to both work outside their homes and take care of their children. From many judges' point of view, this double burden may be the best arrangement, because it accords with both their belief of women's inherent qualities of being a better caretaker and their stress on the importance of economic resources – both comprise a main part of their ideas of what the best interests of the child should be.

The fact that many more mothers receive custody than do fathers is not absolutely good news for women. On the contrary, it may represent a start of the nightmare of the double burden requirement to many women. The courts increasingly award children to their mothers not merely because of mothers' rights, but also because of mothers' inherent duty to be caretakers of the children. The disproportionate preference for mothers may not really be a victory for women; instead, through the appearance of the emphasis on the best interests of the child, it may tie women more tightly to their stereotyped social role and thus limit their career possibilities. We will discuss this further in a later section.

B. The Explanation of the Discrepancies between Pingtung and Taipei

Another intriguing finding of this research is the discrepancies between decisions in Pingtung and Taipei. We have seen that Taipei's judges were more likely to grant custody to mothers and they took into account more factors in deciding custody. Taipei's judges also seemed to respect the child more and see the child more as an individual; they considered experts' opinions more often, and it appeared that they decided child custody more carefully than did the court in Pingtung. As to the consideration of the factor 'support from relatives to care for the child', Taipei's judges tended to stress it more often than did Pingtung's judges. Meanwhile, Pingtung's judges tended to ignore the possible danger of awarding custody to the perpetrator of spousal abuse, but Taipei’s judges might not. Taipei’s judges also determined visitation arrangement on their own discretion much more often than did Pingtung’s judges. It appears that Pingtung’s judges were more likely to cling to the traditional idea of not intervening in family affairs.

Several reasons may explain these discrepancies. To begin with, to determine custody arrangements, it is certain that, in each case, judges would have to consider each litigant's life status and socio-economic
background relevant to the factors listed in the new law of the best interests of the child standard. Naturally, the life status and socio-economic background of litigants in a rural area, such as Pingtung, are different from those of the litigants in a highly industrialized area, such as Taipei. Meanwhile, the types of cases going to courts in different districts may also be different in the first place. These reasons can explain, for example, the fact that Taipei’s judges took account of the factor ‘support from relatives to care for the child’ more often than did Pingtung’s judges.

Secondly, judges in different districts may have different levels of resources. This fact may lead to a difference in judges’ possibilities to consider some factors. For instance, the fact that Taipei’s judges took account of social workers’ opinions much more often than did Pingtung’s judges may be partly due to the insufficiency of social workers in rural areas.

Thirdly, judges’ gender, age, educational background, and other attributes may have influences on their decisions. Unfortunately, due to the limitation of available data, we can not clearly depict the differences of attributes between judges in Taipei and judges in Pingtung. The only available attribute is judges’ possible gender; however, we can only make conjecture based upon their names, and it may not be accurate. Nonetheless, it appears that almost all decisions of Pingtung District Court in the sample were made by male judges; but at Taipei District Court, about half of the decisions were made by female judges. We may need to conduct further research to reveal the correlation between judges’ gender and the discrepancies mentioned above.

Fourthly, the newly developing theory of ‘frame switching’ and ‘multicultural minds’ in cultural psychology and cognitive psychology may render a valuable possible explanation. According to this theory, traditional Chinese/Taiwanese values emphasized in judges’ socialization processes and life experiences are still embedded in their minds, along with legal norms learned afterwards. In response to and being triggered by different social environment, they may shift to different cultural frames to decide their cases, although not intentionally or consciously. While the social environment in Pingtung is obviously more traditional and conservative than is Taipei, it is predictable that Pingtung’s judges may be influenced – or more precisely, their inner traditional and conservative minds may be triggered – by the outer environment in which they work. Therefore, they may have a tendency to make some more conservative decisions in accord with traditional ideas.

C. Judges’ Reliance on Social Workers

As stated above, judges frequently relied upon the reports of social workers. In all the cases almost half of the judges had considered social workers’ reports; all of them except one adopted (at least part
of the suggestions in the reports. This phenomenon might be attributed to the lack of objective legal criteria and the vagueness of what the best interests of the child should be; judges did not feel confident or competent in decision-making and therefore sought aids from experts.

We have seen that Taipei’s judges took account of social workers’ opinions much more often than did Pingtung’s judges (57.1 per cent and 25.0 per cent respectively). On the one hand, as discussed in the preceding section, this phenomenon may again reflect that Taipei’s judges determined the child’s best interests more carefully than did Pingtung’s judges. On the other hand, this phenomenon may be partly due to the insufficiency of the available social workers in rural areas. In fact, the imbalance of social service resources between rural areas and urban areas in Taiwan is very evident. To pursue the best interests of the child in both rural areas and urban areas in Taiwan, it is necessary to expand rural areas’ social service resources. The new law stipulating that judges may consider social workers’ reports is merely a ‘law in books’ and it cannot work without sufficient trained and experienced social workers.

One problem of the law is that it restricts judges to considering only social workers’ reports. Compared to many other countries, the extent of experts whom judges can consult is quite limited. For instance, in the US, mental health professionals including psychologists, psychiatrists, and social workers can all be called upon to conduct custody evaluations of the parents and children in custody disputes. It is noteworthy that even Taiwan’s social service agencies themselves also acknowledge that they may not offer enough social workers to conduct custody evaluations. Given that custody evaluations are much based on psychological knowledge, it is believed that we should amend the law again to expand the range of mental health professionals who can be consulted by judges, in order to determine the best interests of the child.

D. The Explanation of the ‘All-or-None Custody’ Tradition

We have seen that Taiwan’s judges tended to use economic resources as a necessary factor in custody decisions, and this tendency has not been changed since the new law was enacted. This emphasis on economic resources may relate to some cultural reasons, such as the tradition of parents’ long-term financial support for their children and the possibility that parents chose to use the support to show their concern for their children because they were not supposed to express their affection directly. The tendency to award custody to only economically competent parents, along with some cultural reasons, led to the fact that judges almost never awarded child support in custody decisions, and they adopted a tradition of ‘all-or-none custody’. Several factors may explain this ‘all-or-none custody’ tradition.
First, conceiving of child support as a family matter, judges might adopt the traditional ideas of ‘Fa Bu Ru Jia Men’ (the law ends at the family threshold) and ‘Jia Ting Zi Zhi’ (family autonomy). Namely, judges hesitated to intervene in family affairs. This might also explain why judges rarely determined visitation arrangement on their own discretion.

Second, before 1996, in most cases it was the father who received custody. Because fathers usually had more economic resources, the custodial father did not need to seek a child support award. At the same time, the courts thought it was not necessary to award child support.

Third, before 1996, the law regarding child custody was extremely disadvantageous to women; it was very difficult for women to receive custody. One of the few possible ways to receive custody was to reach an agreement with their husbands. If they wanted to receive custody, usually they must make concessions in property division, alimony, and child support. This could be a typical example of ‘bargaining in the shadow of the law’. Even after 1996, because the courts still tend to use finances as a necessary factor in custody decisions and usually fathers have higher income, men and women still do not have equal bargaining chips. Inside courtrooms, women may not want to raise the child support issue because it will ‘remind’ the court they are economically less competent. Outside courtrooms, in bargaining, women may make concessions in child support in order to receive custody.

Fourth, before 1996, there was no law which stipulated non-custodial parents’ obligations of child support following divorce. Given that Taiwan is a civil law country that tends to cling to statutes, not surprisingly, judges seldom awarded child support in divorce cases. In fact, not only was there no provision regarding the obligations, but there were some judicial precedents which tended to negate the obligations and tended to adopt the concept of “all-or-none custody”. Therefore, mothers would not try to seek a child support award because they believed (and it might be the fact) they had no chance of receiving it.

Fifth, even though after 1996 there has been a new law which stipulates non-custodial parents’ obligations of child support, there is no special design for the enforcement of a child support award. After obtaining a child support award from the court, the custodial parent still has to collect the support by herself/himself on a case-by-case basis. That is, if the non-custodial father does not pay, the mother has little choice but to hire a lawyer to take him to court. Not only is the litigation usually inefficient, but it is common that the mother could not afford a lawyer, and she does not have enough legal knowledge and skills to go to court by herself either. Therefore, a child support award may not be meaningful to mothers.

Sixth, after 1996, in terms of the new law, most attention has been given to the new provision of the ‘best interests of the child’ standard;
very few commentators or media have discussed or reported the provision of non-custodial parents' obligations following divorce. It is possible that many litigants have not known about this new law.

Seventh, as discussed in a previous section, we must consider some cultural factors. Because of the ‘face’ (Mianzi or Lian), which is very important in Taiwan’s society, usually, after divorce ex-spouses do not contact each other. The non-custodial parent will just leave the custodial parent alone to be completely responsible for the child, and the custodial parent will not want to ask for assistance from the ex-spouse. In other words, the custodial parent is supposed to receive all parental rights and to assume all obligations at the same time. In fact, these cultural factors can also explain why visitation and joint custody have been seldom discussed or adopted in Taiwan.

In short, the ‘all-or-none custody’ tradition reflects Taiwan’s social, legal, and cultural environment. The fact that judges still follow this tradition and tend to disregard the new law of child support clearly indicates that ‘law in books’ does not equate with ‘law in action’. As will be discussed in the next section, the judicial practices have some very adverse effects, which should be eliminated by necessary policy reform.

E. Adverse Effects of the Current Judicial Practices

As we have seen, judges usually emphasize the economic resources of the parents and adopt the ‘all-or-none custody’ decision pattern. These judicial practices are problematic for many reasons. To begin with, using parents’ economic resources and occupation as a necessary factor in determining custody is unfair to mothers not only because the structural wage gap in society, but also because many women have sacrificed their career opportunities to raise their children and take care of family. The economic criterion improperly ignores married women’s contributions to their families other than wage earning. According to official surveys, in 1998, while the labour force participation rate of married men (spouse present) and cohabiting men was 80.9 per cent, the rate of married women (spouse present) and cohabiting women was only 46.5 per cent. More than 76.8 per cent of unemployed women were not employed because they needed to ‘take care of family’ or ‘look after household affairs’ (46.9 per cent and 29.95 per cent respectively). To be more specific, 38.7 per cent of married women (spouse present) did not go to work because they need to take care of their children.

In addition to the unfairness to women, using the economic criterion may harm the child’s best interests too. This criterion disregards the importance of the psychological and emotional needs of the child. By using economic resources as a necessary factor, custody may be awarded to an unfit or even dangerous father only because the mother does not
have enough income, even though she has better parenting capability. Moreover, because the ‘all-or-none custody’ decision may cause the child to totally lose contact with the non-custodial parent, it may harm the child’s psychological development.

The deficient legislation and judicial practice also have very adverse effects outside courtrooms. In Taiwan, a large percentage of divorce and relevant custody disputes have never entered any court, because consensual divorce only has to be registered at administrative agencies; in this case, parents can decide their own custody arrangements by an agreement. However, just as Mnookin and Kornhauser suggest, ‘the legal rules . . . give each parent certain claims based on what each would get if the case went to trial’ and ‘the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips’. Many studies attest that the phenomenon of ‘bargaining in the shadow of the law’ is also apparent in Taiwan. For example, several studies prior to 1996 indicate that the old law obviously put wives at a great disadvantage in seeking divorce and child custody outside courts, as well as inside courts.

The decision pattern of ‘all-or-none custody’, a pattern that uses finances as a necessary factor, disproportionately reduces the mother’s bargaining power. Because the mother usually has fewer economic resources than does the father, it is highly predictable that the mother would avoid entering a court and make concessions in property division and alimony to receive custody. The mothers who care about and love their children the most will be most willing to accept an inferior bargain; ie they will be ‘punished’ the most. While divorce typically leads to a decline of economic status, this decision pattern further reduces the mother’s opportunity to receive fair property division and alimony. The welfare of both the mother and the child in a divorced single-mother family may be severely damaged because of the concomitant financial difficulties.

Moreover, because they are afraid of losing their children, many mothers who do not have enough economic resources may give up the idea to seek divorce in the first place, even if they are victims of spousal abuse or their marriages have become intolerable. The mothers for whom their children matter most might be punished by losing the opportunity to improve their well-being or to merely protect themselves. Many Taiwan’s researchers and lawyers have attested to this phenomenon.

Some may argue that this study’s explanations are somewhat self-contradictory, because while this study has proved that mothers usually have fewer economic resources and that judges tend to use finances as a determinative factor in deciding custody, this does not explain why judges award custody to mothers much more often than fathers. However, this specious critique misreads this study’s findings and explana-
tions. On the one hand, the findings do not indicate, and this study has never so argued, that judges tended to use finances as a determinative factor; but the findings do show that judges tended to use finances as a necessary factor. Namely, parents who had more economic resources than did their ex-spouses did not necessarily always receive custody, but, it is clear that judges tended to not award custody to the parents who did not have enough finances. In many judges’ consideration, having enough economic resources was not sufficient, but it was necessary.

On the other hand, the result of a ‘double burden’ on women can rebut the seemingly plausible critique. As has been discussed, the ‘double burden’ means that women need to work outside their home to ensure their financial ability and to play the role of inherent caretakers of their children at the same time. From many judges’ point of view, this double burden may be the best arrangement, because it accords with both their belief of women’s inherent qualities of being a better caretaker and their stress on the importance of economic resources in deciding custody. Not only so, but the whole legal system and governmental policy tended to reinforce this double burden on women, due to traditional ideas and the resort to the private welfare system based on a family unit.

However, this double burden on mothers obviously limits women’s choice and possibilities in their life and careers. Just as Margaret Mead comments, the emphasis on the concept of mother-child’s relationship is ‘a mere and subtle form of anti-feminism which men are tying women more tightly to their children than has been thought necessary since the invention of bottle feeding and baby carriages’. This double burden also marginalizes women in the labour market and thus limits their abilities to improve economic status, because they usually need to be involved in informal employment to take care of their children. Many empirical studies consistently attest that the consideration of caring for children significantly affects women’s choice of job; women tend to work informally when they have young children. Women’s double burden is even worsened by the lack of public child-care centres and the expensiveness of private daycare programmes. Usually, women need to rely on their relatives (in most cases it is the child’s grandparents) to care for their children while they are at work. As we have seen, judges’ decisions also considered and reflected this social reality.

4. CONCLUSION

Cultural and social circumstances may significantly influence judges’ explanations and applications of the best interests of the child standard. The findings of this study attest that Taiwan’s court decisions of child custody cases actually reflect many cultural ideas, such as ‘Yan
Fu Gi Mu’ (stern father and kind mother), ‘Fa Bu Ru Jia Men’ (the law does not intervene with family autonomy), ‘Nan Zhu Wai, Nu Zhu Nei’ (males dominate the sphere outside families, and females dominate the domestic sphere), ‘Mianzi’ (a sense of ‘face’), and the tradition of parents’ long-term financial support for their children. Meanwhile, social and economic backgrounds of Taiwan, such as the social custom of ‘all-or-none custody’, the different social conditions and resources in different districts, and the lack of public welfare programmes, also clearly affect judges’ custody decisions.

After the best interests of the child standard substituted for the presumption of paternal custody in 1996, predictably judges awarded custody to mothers much more often. In fact, the change has been so dramatic that nowadays custody is overwhelmingly awarded to mothers, a development in stark contrast with the preference for paternal custody before 1996. This study argues that judges predominantly award custody to mothers not only because of the gender-neutral standard and the influence of women’s movement, but also because judges combine the traditional ideas and social customs with the explanation of the best interests of the child. On the one hand, judges tend to adopt the stereotyped gender roles and assume that women are the inherent better caretakers of children. On the other hand, many judges cling to the tradition of considering economic competence as a necessary factor in deciding custody, a tradition that has been adopted since the era of the old law. In the meantime, this study finds that judges rarely award child support to the custodial parents, never grant joint custody, and seldom give visitation orders. Even though there has been a new law providing that each parent’s obligations to support the child will not be changed after divorce, and even though there has been another new law introducing the possibility of joint custody and visitation arrangements, still this ‘all-or-none custody’ decision pattern has not been changed.

The predominant preference for mothers in custody decisions may not really be a victory for women. Judges’ preference for the gender-stereotyped role of women, along with the stress on economic competence, imposes a double burden on women. Nowadays, divorced single mothers are expected to assume the role of an inherent caretaker of children and to work outside home to support the family single-handedly since judges rarely order child support and alimony from non-custodial fathers. From many judges’ points of view, this double burden on single mothers may be the best arrangement because it accords with both their belief of women’s inherent qualities of being a better caretaker and their stress on the importance of economic resources – both comprise a main part of their ideas of what the best interests of the child should be.
However, these judicial practices (i.e. the preference for a double burden on single mothers and the ‘all-or-none custody’ decision pattern) have very adverse effects on gender equality and the child’s well-being. Appearing to emphasize the best interests of the child, these practices tie women more tightly to their stereotyped social role and thus limit their career possibilities. While divorce typically leads to a decline of economic status, given that there is a gender wage gap and that Taiwan still has very few public welfare programmes to support single-parent families, these practices further worsen post-divorce single-mother families’ economic status. Since the divorce rate is increasingly high and nowadays judges overwhelmingly award custody to mothers, the problem of divorced single-mother families’ economic insecurity will be seen more often. Moreover, these practices also cause the child to lose all contact with the non-custodial parent and thus may harm the child’s psychological development.

This study suggests that in order to ensure divorced single-mother families’ well-being, Taiwan should develop both a public welfare system and an institution of child support from non-custodial parents to assist them. To pursue both the child’s best interests and gender equality, judges should stop using economic competence as a necessary factor in determining custody. If the more suitable parent is economically less competent, we should use both public welfare programmes and private child support from the non-custodial parent to assist her or him. Moreover, judges should determine visitation arrangements more often and pay attention to the child’s psychological and emotional needs in addition to material needs.

NOTES

1 Unlike the US system, in Taiwan ROC, judicial review cannot be exercised by ordinary courts, but only by the Grand Justices. Fifteen Grand Justices are nominated by the President and approved by the Legislative Yuan (Congress of Taiwan). Both governmental organs and individuals may apply for a constitutional interpretation. Distinct from the Grand Justices is the Supreme Court, which is the final court of appeal in criminal and civil cases that do not implicate a constitutional question. Taiwan ROC Const. articles 78, 79, amended by Taiwan ROC Const. amend 5.


3 Taiwan’s legal education and academia mainly focus on logic, abstract concepts, and law codes. The effectiveness of legal rules at solving social problems, the process of their enforcement, and the relevant empirical research have often been neglected. The policy designers and legislators in Taiwan are not adequately informed on the feasibility, application in reality, and impact of legislation, a phenomenon that is one of the consequences of insufficient policy-oriented legal and judicial research. See A. H. L. Shee (1998) *Legal Protection Against Sexual Exploitation of Children in Taiwan: A Socio-Legal Perspective* at 3; S.-L. Liu (Apr. 1994) ‘Transplantation of law and social change’, *Taipei BJ* at 7, 8; T. Lin (Aug. 1999) ‘The importance of judicial sociology to Taiwan’s judicial reform’, *Taiwan BJ* at 21, 30.
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6 Davis v. Davis, 159 SW2d 999, 1001 (Ky Ct App 1942).

7 Bucher and Gerard, above n 4 at 44; D. L. Chambers (1984) ‘Rethinking the substantive rules for custody disputes in divorce’, 83 Mich LR 477, 479. For example, the article 402 of the Uniform Marriage and Divorce Act provides that:

‘The court shall determine custody in accordance with the best interest of the child. The Court shall consider all relevant factors including: (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.’


10 Lao Tzu was a quasi-historical Chinese philosopher of the sixth century BC. Lao Tzu emphasized the value of ‘Wu Wei’, by which one can return to the primitive state closer to the ‘Tao’ (the way), a stage of creative possibility similar to the state of a child or an uncarved block. Lao Tzu also promoted a laissez-faire approach to government. The religion of ‘Tao’ – Taoism – has been one of the major religions in China. See H.-T. Fei (1953) Chinese gentry, 76–78 The Columbia Encyclopedia 3d edn (Columbia University, 1993).


12 Ibid.


14 Berndt et al, above n 13 at 156, 161.


16 Chung Yung, a philosophical section from Li Chi (the Book of Rites), advocates maintaining a mental state of equilibrium between extreme emotions. It is one of Ci Shu (the Four Books) very important to Confucianism.

17 Chung Yung states that ‘when joy, anger, sorrow and pleasure have not yet arisen, it is called “chung”’ (equilibrium, centrality, or mean); when they arise to their appropriate levels, it is called ‘Ho’ (harmony). See Doctrine of the Mean, trans C. Muller (1995) (visited 25 April 2000) <http://www.human.toyogakuen-u.ac.jp/~acmuller/contao/docofmean.htm>; Li, above n 13 at 39.


19 See below nn 112–16 and accompanying text.

20 See below text accompanying n 117.


24 Li, above n 13 at 10; Yang, above n 21 at 385–404.

Li, above n 13 at 22.

For example, see ‘The financial plan a father should have’, Industry & Commerce Times (Taiwan, 8 Aug. 1998) at 14.

Because [JLPF] could not carry such a long piece, the last part (the assessment of the current system and policy recommendations for its reform) of this study has been shortened or discarded in this article. If interested in the full discussion of this part, please see H.-E. Liu (2000) Mother or Father: Who Received Custody? – The Best Interests of the Child Standard and Judges, Custody Decisions in Taiwan, 78–97 (unpublished JSM thesis, Stanford Law School).

See above n 28.

Liu, above n 2 at 37–182. In this research the author reviewed 53 court decisions, which were made between July 1990 to June 1995, regarding divorce and child custody. The author found that, at a rough estimate, in some 80–90 per cent of these cases the custody was granted to fathers. In fact, because there was a rule of prima facie custodian right of the father, even if fathers did not claim for it, the custody was still awarded to fathers ‘automatically’ without discretion. Although there had been two pieces of legislation, the Adolescent Welfare Act of 1989 and the 1993 Child Welfare Amendment Act, which had partly revised the presumption of paternal custody and had authorized judges to award custody according to the best interests of the child, very few judges had ever applied these two pieces of legislation while making decisions. The author concluded, therefore, it was not only that the law had defects, but that the judges had a conservative tendency to consider the child’s interests.

Ibid.

See above n 2 and accompanying text.


This research only used court decisions for these analyses. However, as pointed out by an anonymous referee, it is worth further research to reveal ‘whether the justifications cited in documents written by judges are actually indicative of judges’ states of mind and the factors which led them to their conclusions, or whether they demonstrate the socially acceptable justifications that judges are required to articulate if their decisions are to be treated as legitimate and properly reasoned’. In fact, the author will conduct interview or survey research to collect more information directly from Taiwan’s judges in the near future.

Civil Code, article 1052 (Taiwan ROC).

In fact, desertion has always been the top one reason for filing divorce suits in every district court. See Judicial Yuan Taiwan ROC (1998), Judicial Statistics 274–7. It should be noted that this kind of cases are not likely to be collusive divorce, which have been seen in some legal systems only recognizing fault-based divorce, because Taiwanese law recognizes free consensual divorce that does not need to enter any court. Civil Code, articles 1049, 1050 (Taiwan ROC); see also L. M. Friedman (1983) A History of American Law 2d edn, 204–8.


See above nn 13–15 and accompanying text.

Non-Contentious Matters Law, article 71–6 (Taiwan ROC).

For example, see 87 Hun 132 (Pingtung District Court, 1999) and 87 Hun 229 (Pingtung District Court, 1999).

Code of Civil Procedure, articles 437, 467 (Taiwan ROC).

See, for example, 87 Hun 219 (Taipei District Court, 1998); 87 Hun 268 (Taipei District Court, 1998).


See Table 9.

87 Hun 401 (Taipei District Court, 1999).
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53 See, for example, Garska v McCoy, 167 W Va 59, 278 SE2d 357 (W Va, 1981). See generally Mason, above n 42 at 132; Goldstein et al, above n 51 at 193.

54 Chambers, above n 7 at 562.

55 See, for example, 82 Taishang 2275 (Taiwan Supreme Court, 1993); 82 Taishang 2371 (Taiwan Supreme Court, 1993); 84 Jiasu 22 (Taipei Shilin District Court, 1995). As to empirical analysis of relevant court decisions prior to 1996, see Liu, above n 2 at 150.

56 ‘Xin’ stands for the Xin Zhi Women’s Awakening Foundation, and ‘Qing’ stands for the Wan Qing Post-Divorce Women’s Association. As to the content of the Xin Qing draft, see Ministry of Justice (1996), The Drafting Process of the 1996 Amendments to the Family Book of the Civil Code 14 (Taiwan ROC).

57 In fact, the representative of the executive branch only stressed that the ‘stability’ was abstract without mentioning the ‘continuity’ or ‘primary caretaker’. Nevertheless, the whole provision including all of them were excluded. See Ministry of Justice (Taiwan ROC), above n 56 at 163.

58 See Table 8.


60 See Table 8.

61 Maccoby, above n 5 at 55-62; Liss and McKinley-Pace, above n 52 at 344.

62 See Tables 8 and 9.


67 87 Hun 511 (Taipei District Court, 1998); 87 Hun 196 (Pingtung District Court, 1998).


69 Ibid.


71 For instance, the Louisiana Post-Separation Family Violence Relief Act provides that:

There is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children. The court may find a history of perpetrating family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence. The presumption shall be overcome only by a preponderance of the evidence that the perpetrating parent has successfully completed a treatment program as defined in R.S. 9:362, is not abusing alcohol and the illegal use of drugs scheduled in R.S. 40:964, and that the best interest of the child or children requires that parent’s participation as a custodial parent because of the other parent’s absence, mental
illness, or substance abuse, or such other circumstances which affect the best interest of the child or children. The fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody.'


76 Ibid, but see P. E. Federico and R. Kinscherff (Sept./Oct. 1996) ‘Custody of Vaughn: impact of domestic violence on child custody’, Boston BJ at 6, 22. (‘The divorce research literature strongly indicates that – all other things being equal – children do better over time when they have access to both parents and when the post-separation or divorce relationships are relatively unconflicted.’)

77 87 Hun 115 (Pingtung District Court, 1998); 88 Hun 64 (Pingtung District Court, 1999); 87 Hun 132 (Pingtung District Court, 1999); 88 Hun 9 (Pingtung District Court, 1999); 87 Hun 145 (Pingtung District Court, 1998).

78 88 Hun 290 (Taipei District Court, 1999); 87 Hun 348 (Taipei District Court, 1999); 87 Hun 339 (Taipei District Court, 1998); 87 Hun 274 (Taipei District Court, 1998); 87 Hun 40 (Taipei District Court, 1998).

79 See above pp 196–8.

80 Mencius (Meng-tse) 371?–288? BC, was a Confucian philosopher and his work is considered second only to that of Confucius in traditional Chinese culture.

81 Civil Code, article 1055 (Taiwan ROC).

82 See, for example, Chen, above n 33 at 202–3; Liu, above n 2 at 165. However, the fact that no such court decision existed does not mean that there was no joint custody or visitation arrangement at all. Most divorces in Taiwan are divorces of mutual consent; this kind of divorces can be directly reached by spouses themselves. Some divorces of mutual consent have arranged joint custody or non-custodial parent’s visitation. See Ministry of Justice (Taiwan ROC), above n 56 at 200.


84 Chen, above n 33 at 283–8; Liu, above n 2 at 163–7, 181–2. This phenomenon might be due to the following reasons: first, the underdeveloped judiciary within the semi-authoritarian government until 1980s; second, the insufficient resources distributed to the judiciary and the excessively heavy caseload of judges. See J. K. Winn (1994) ‘Relational practices and the marginalization of law: informal financial practices of small businesses in Taiwan’, 28 L & Soc Rev 193, 201–5; Liu, above n 2 at 166–7.

85 Liu, above n 2 at 165.


87 See below nn 151–3, 167–71 and accompanying text.


90 Civil Code, article 1055(1)(5) (Taiwan ROC).

91 This might reflect the traditional ideas of ‘Fa Bu Ru Jia Men’ (the law ends at the family threshold) and ‘Jia Ting Zi Zhi’ (family autonomy). Judges hesitated to intervene in family affairs because of these tradition ideas. See above nn 9–12 and accompanying text.


94 Ibid.

95 See Tables 8, 9 and accompanying text.

96 For example, see 87 Hun 152 (Pingtung District Court, 1999) and 88 Hun 9 (Pingtung District Court, 1999).

97 See above nn 68–73 and accompanying text.

98 Civil Code, article 1116-2 (Taiwan ROC).

99 See above n 35.

100 See above text accompany nn 82–90 and Table 12.

101 See above nn 37–8 and accompanying text.

102 See Table 6.
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105 Ibid.

106 Ibid; Lee, above n 103.

107 See above n 56.


109 For example, see 87 Qin 94 (Taipei District Court, 1999), 87 Hun 348 (Taipei District Court, 1999), 86 Qin 63 (Taipei District Court, 1998), and 87 Hun 196 (Pingtung District Court, 1998).

110 See above text accompanying n 42.

111 See above text accompanying nn 42–3.

112 Zhong, above n 18 at 363.

113 See above nn 115–16.

114 ‘Nuclear family’ here refers to a household composed of a couple or a couple with at least one unmarried child. In Taiwan, about 60 per cent of all households are nuclear families. See Executive Yuan (1998) Survey of Social Development and Tendency 6–7 (Taiwan ROC).

115 Taiwan Province Government, above n 63 at 70.

116 Ministry of Interior (1989) Survey of Women’s Life Status in Taiwan Area 110 (Taiwan ROC); cf. Ministry of Interior (1993) Survey of Women’s Life Status in Taiwan Area 304 (Taiwan ROC) (indicating that the percentage of women who agreed the statement declined but the idea still prevailed among women).

117 See above nn 115–16.

118 See above n 42.

119 See above p. 204–5.


136 See above n 131.

137 See below text accompanying nn 142–3.

Constructivist Approach to Culture and Cognition 5 (unpublished manuscript, on file with the American Psychologist).

140 See above nn 47, 50 accompanying text and Table 8.

141 Ibid.


143 Ministry of Justice (Taiwan ROC), above n 56 at 115.

144 See above n 93 and accompanying text.

145 Ibid.

146 See above text accompanying nn 47–8.

147 See above text accompanying nn 99–101.

148 See above nn 9–12 and accompanying text.

149 See above text accompanying nn 91 and accompanying text.

150 See above nn 9–12 and accompanying text.


154 In fact, it seems that Taiwanese judges insisted on not creating or not supplementing law by themselves more often than did judges in other civil law countries. See above n 84.

155 Ministry of Interior (1993) Survey of Women’s Life Status in Taiwan Area 188 (Taiwan ROC).

156 According to an official survey conducted by Ministry of Justice, while confronting disputes, 68 per cent of people did not plan to retain a lawyer or go to a court, because it is ‘too expensive, too complicated, and too time-consuming’. See W.-L. Wang, ‘The results of MOJ survey of people’s ideas regarding law’, China Times On-Line (Taiwan) (visited 20 Apr. 2000) <http://www.chinatimes.com/news/can/123453R.htm>.

157 An empirical study shows that only 16.6 per cent of divorced or separated single parents were willing to let their ex-spouses to help them care for children. See Chang, above n 89 at 124.

158 An empirical study shows that only 16.6 per cent of divorced or separated single parents were willing to let their ex-spouses to help them care for children. See Chang, above n 89 at 124.

159 Ministry of Interior (1990) Survey of Women’s Life Status in Taiwan Area 86 (Taiwan ROC).

160 Ministry of Interior (1993) Survey of Women’s Life Status in Taiwan Area 188 (Taiwan ROC).

161 As for the gender wage gap, in 1998, the average monthly income of female employees was NT 27,401 dollars, while male employees’ average monthly income was NT 37,596 dollars. See Executive Yuan, Taiwan ROC, above n 63 at 128–9.

162 See above n 96–7 and accompanying text.

163 Researchers find that, after their parents’ divorce, children may be able to adjust better if there is continued contact between the non-custodial parents and them. See Clay, above n 52 at 432; E. E. Maccoby and R. H. Mnookin (1992) Dividing the Child: Social and Legal Dilemmas of Custody 287–8.

164 Civil Code, article 1050 (Taiwan ROC).

165 Ministry of Interior (1998) Survey of Women’s Life Status in Taiwan Area 96 (Taiwan ROC).


170 See above n 152 at 968.


172 Civil Code, article 1050 (Taiwan ROC).

173 See also Rei, above n 153 at 268.
174 See above text accompanying nn 126–8.
175 See above text accompanying nn 109–28; see generally Lee, above n 122 at 422–39 (discussing in detail on how and why Taiwan’s governmental policy resorted to a family unit as a private welfare system).
179 See above text accompanying nn 62–6.