Conflict and Reconciliation of State's Civil Law and Indigenous Legal Traditions: Case of Land Governance

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Foreword

It has been a huge debate on the protection of indigenous rights in the context of legal reform. One of the focal point lies at how and to what extent the State's legal system and social transformation construct indigenous cultural development and needs. This deliberation embedded with academic and practical values, which not merely manifests on the study of legal history. In actuality, from a wider research framework based on law and society and law and cultures, this paper is significant because it triggers academic community involvements into legal transformations within post-colonial discourse since legal reception of western idea of State law. A number of issues have been examined and widely discussed across the globe in terms of indigenous jurisprudence, such as indigenous traditional organization, conceptualizations of indigenous dispute resolution, and establishment of relational cultural/legal pluralistic-based judicial system.

Since the inception of Indigenous Peoples Basic Law in February 2005, Taiwan's indigenous jurisprudence are embedded with two basic theory and principle, which has been stipulated in Article 30 paragraph 1: The government shall respect tribal languages, traditional customs, cultures and values of indigenous peoples in implementing judicial and administration remedial procedures for the purpose of protecting the lawful rights of indigenous peoples. Alternatively, one is indigenous cultural integrity and self-government, and another is indigenous effective participation.

Comprehensively speaking, the conflict and reconciliation of State's laws with indigenous legal traditions have revealed in both civil and criminal cases. Although there exists different reasoning, both civil and criminal cases involved indigenous claims are constructed upon the concepts of "indigenous legal traditions" and "cultural integrity". In the case of indigenous hunting, fishing and gathering practices, it has been recognized that indigenous defendant could claim cultural defenses before the criminal court. On the other hand, a number of indigenous civil law suits were brought to the court by virtue of indigenous legal traditions and cultural claims.

In responding to the constitutional entrenched value of multiculturalism and the recognition of indigenous sui generis status and legal rights, starting from January 1 2013, the Judicial Yuan set up the *ad hoc* Chamber of Indigenous Courts[1]. Indigenous cases are assigned to the

[1] The *ad hoc* Chamber of Indigenous Courts were first set up in 9 districts, including Taoyuan, Hsinchu, Miaoli, Nantou, Jiayi, Kaohsiung, Pingtung, Taitung and Hualien. Since September 2014, it has been widely designated across Taiwan, excluding the outer island and the Supreme Court.

chamber in accordance to the following rules: (1) criminal cases: all the case are tried by the chamber with the indigenous defendant; (2) civil cases: cases involving litigants as indigenous individuals, *buluo* (community) or indigenous peoples; cases related the specific claims[2] involving one party as indigenous individuals, *buluo* (community) or indigenous peoples; (3) cases not included in the prescribed category involving one party as indigenous individuals, *buluo* (community) or indigenous peoples who has petitioned for the trial by the *ad hoc* Chamber with the District Court's approval .

One statistic report shows that civil lawsuits involving indigenous litigants are mostly in the case of land disputes, such as returning land or house, retroceding land, excluding infringement, verifications of land or house ownership, verifications of superficies or cultivation rights, cancellations of cultivation or superficies, partition of the thing held in indivision, boundary affirmation, transferring house, etc.[3]

Based on the foregoing deliberations, this paper focuses on the analysis and implementation of indigenous legal traditions in the case of indigenous land governance. Dwelled upon the existing legal concepts of custom, this paper takes on particular court decisions and literature reviews on indigenous customary norms to explore alternative deliberations facilitating judicial branch to participate at the investigation, contextualization and encoding of indigenous legal traditions. Furthermore, to substantiate the existing integral and unitary legal order become sustainable diversity in law or rule of laws embedded with indigenous legal traditions.

Indigenous relationship with the State

Everything about indigenous peoples is inextricably interwoven with, and connected to, the land. In most of the "New World" modern states, indigenous rights have been at issue for more than hundreds of years. The indigenous struggles for basic human rights has largely been defined by the common law doctrine of "discovery and conquest" and the doctrine of "*terra nullius*".[4] Briefly speaking, doctrines of "discovery and conquest" and "*terra nullius*" concerning indigenous rights to land are rooted in notions developed by the medieval Church's understanding of the status of non-Christians, which in turn justified and impelled Spanish, English, and American conquests of the New World.[5] As a result, in the context of colonial international law, the sovereign status and indigenous rights were denied by a process of legal rationalization that is underpinned by the assumption that indigenous peoples were inferior and incapable of legal entitlements.

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[2] Civil claims for returning land, compensations of torts and non-performance debts, performing or terminating contract or lease, third party objection, returning Unjust Enrichment, excluding infringement, verifications of land or house ownership, verifications of superficies or cultivation rights, verification of lease, cancellations of cultivation or superficies, partition of the thing held in indivision, boundary affirmation, transferring house, debtors' objection suit.

[3] Awi Mona, Heng-da Hsu, and Chinwen Wu, *guunei yuanzhuminzu zhongyao panjue zhi bianji ji jiexi dierji* (國內原住民族重要判決之編輯及解析第二輯, Compilation and Analyses of Domestic Indigenous Important Judicial Decisions, Vol. 2) 15-17 (New Taipei City, Council of Indigenous Peoples, 2016).

[4] James Tully, *Aboriginal Property and Western Theory: Recovering a Middle Ground*, in *Property Rights* 158-169 (Ellen Frankel Paul et al. eds., Cambridge University Press, 1994).

[5] Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 325-328 (Oxford University Press, 1990)

Historically speaking, the existence of indigenous peoples in Taiwan was not given sufficient attention by the public authority or society in general. In a similar fashion, Taiwan indigenous peoples have been identified with a discriminatory symbol of *fan* (番, savage). In retrospect, since early 16th century Europeans arrival at Taiwan till present day, the successive ruling political entities adopted different usages to describe "indigenous peoples" as follows:

Phase I: *fan ren* (蕃/番人, savage peoples) pre 1930s

Phase II: *gāoshāzú* (高砂族, Takasago) 1930-1945

Phase III: *shanbao* (山胞, mountain compatriots) post WWII-1994

Phase IV: *yuanzhuminzu* (原住民族, indigenous peoples) 1997-present

The political relationship between the ruling regimes and indigenous people is a legal anomaly in Taiwan. Japanese colonial government used the concept of *terra nullius*, the legal myth that *fan di* (番地, indigenous lands) had no previous owners thus far to be demarcated as State land. In more details, Japanese colonial government promulgated two major laws in managing indigenous lands, (1) Guanyou linye ji zhangnao zhizaoye qudi guize (官有林野及樟腦製造業取締規則, Regulations of National Forests Management and Camphor Production) of October 1896, and (2) Law No. Seven: Provisions of Occupying Aboriginal Lands (蕃地占有ニ關スル律令) of February 1900. These two laws officially declared and affirmed that indigenous lands without title deeds were state-owned and excluded non-indigenous peoples from occupying/obtaining indigenous lands[6].

In addition, the legal status of indigenous peoples during Japanese rule was marked by the Japanese view of the indigenous as savages. The Japanese colonial government in 1899 issued an internal instruction (蕃人ノ犯罪事件ラ起訴セントスルキノ心得内訓) to the attorney general's office indicating that general Criminal Law and the public prosecution process did not apply to savage criminals.[7] Savage offenders were not regulated within the general legal systems, but according to the flexible administrative orders.[8]

From these aforementioned laws and ordinances, we can see that the Japanese colonial government considered indigenous peoples as 'uncivilized savages', 'without knowledge of criminal laws' and 'without land property regime because they did not practice fixed farming'.[9] Consequently, the possibility that indigenous peoples could claim their legal rights to lands was out of question and ignored by the colonial government.[10] Even though with the passage of the Law 63, which signified the principle of Motherland Extension (内地延長主義), the Japanese government aimed to incorporated Taiwan into framework of the

[6] Ordinance No. 30 (蕃地出入取締ノ府令) required that all persons wishing to enter the Savage Border should obtain permission from the Chief of the Pacification Office.
[7] Lifan zhigao [Records of Aboriginal Administration] 153 (Jin-tian Chen et al. trans., Taiwan Historical Research Commission, Nantou, 1997). (蕃人ノ犯罪事件ヲ起訴セントスルトキハ檢察官長ハ臺灣總督ニ具申シ其ノ指揮ヲ受クベシ)
[8] Qi-yi Fu [藤井志津枝], *Rizhi shiqi taiwan zongdufu lifan zhengce* [Aboriginal Policy Under Japanese Colonial Rule] 34-35 (Taipei: Wen Ying Tang Publisher, 1997).
[9] Records of Aboriginal Administration, *supra* note 6, at 177-187.
[10] Fu, *supra* note 7, at 157.

Constitution of the Great Japanese Empire. Nevertheless, the so-called constitutional principle of rule of law was manipulated to authorize a special legal system for ruling Taiwan and only manifested its formal effecter. As a result, the substantial effect of the rule of law was effectuated based upon the degree of enculturation which excluded indigenous peoples from legal recognition.

After WWII the R.O.C. came to Taiwan and brought the Constitution which was promulgated in the Mainland China and had nothing to do with Taiwan since then the island was occupied by the Japanese colonial government. Therefore, the R.O.C. Constitution has no space and any consideration for indigenous peoples. Only in the civil and political scheme, the Taiwan Provincial government positioned indigenous peoples with the idea of "people in interior areas with special living and habits (內地生活習慣特殊國民)[11]" and termed as *shanbao*. However, in the core issues such as national structures and organizations as well as the relationship of State and peoples, *shanbao* had always been the one out of the game. Even though the R.O.C. Constitution had gone through 4 times reforms with the inclusion of additional articles 11 and 12, most scholarship and judicial decisions tend to see these two articles are fundamental national policies without enforcement power. In other words, since the Japanese reception of westernized legal regime till the construction of the R.O.C. democratic Constitution, indigenous peoples have encountered double constitutional exclusions.

Paring the interactions between State and indigenous peoples across globe, the dispossessions of indigenous rights in general are rooted in the savage imaginations created by the colonial legal thoughts[12]. International law was, at crucial junctures of its history, a form of cultural imperialism. In the context of prescribed legal imagination, the State combined theory of species evolution (物種進化論, *wuzhong jinhualun*) with classifications of cultural developments. With the formations of legal reasoning, the State began with the defamation of indigenous cultures and followed by the affirmation of colonizers' superiority over indigenous peoples. To conclude, the very purpose of State's actions actually represents the two sides of a coin. One is the denigration of indigenous culture and another is the stigmatization of indigenous cultural differences[13].

Indigenous Land Rights: the Prototype

The forgoing discussions have shown in the early State's position toward indigenous peoples was manifested in its conceptualized classifications, i.e. wild men, barbarians and savages, which uses naming as a legal tool with political aim. In actuality, the perception of indigenous peoples as savages or culturally inferior, in practical effect, provided "legal" ground for certain actions by both the Japanese and the R.O.C. governments.

Japanese colonial policies were based on the colonial purposes of protection, assimilation, and

[11] R.O.C. Constitution Article 135, The number of delegates to the National Assembly and the manner of their election from people in interior areas, who have their own conditions of living and habits, shall be prescribed by law.

[12] Robert A. R Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 So. Cal. L. Rev. 1 (1983).

[13] Ronald G. Knapp, & Laurence M. Hauptman, *Civilization over Savagery: The Japanese, the Formosan Frontier, and United States Indian Policy, 1895-1915*, 49 Pacific Historical Review 647 (1980).

recognition, and policies toward indigenous peoples were justified as being "for their own good"[14]. The Japanese government believed that these policies served the practical purpose of converting indigenous peoples to civilized ways, thereby keeping them under control.[15] In 1930, after intermittent warfare with indigenous peoples[16], Japan extended its authority into aboriginal territories by conquest and carried out the first complete, extensive colonization of the whole island[17]. The Japanese colonial government contained indigenous peoples within reservations, which after WWII comprised the bases of the indigenous reserved lands in the R.O.C.

In 1945, upon Japan's surrender to the Allies at the end of World War II, Taiwan reverted to Chinese control. Following the Communist victory on the mainland in 1949, the R.O.C. regime led by the Nationalist Party (KMT) General Chiang Kai-shek fled to Taiwan and established a democratic government. The KMT's aboriginal policy was the direct heir of its totalitarian Japanese predecessor, and indeed surpassed the latter in planning and implementing its goal of assimilating indigenous people. The KMT's overall goal was to "make the mountains like the plains" (山地平地化, *shandi pingdihua*)—in other words, to assimilate indigenous peoples. The KMT promoted its overarching goal of assimilation primarily through three objectives: 1) to create a national outlook through promoting the Mandarin language; 2) to create an economic outlook by teaching production skills; and 3) to create good customs through emphasizing hygiene[18]. To maintain political control and restore peace in the early post-war era, the R.O.C. government adopted very much the same policy as the Japanese colonial authority, including the following rules: 1) non-indigenous peoples were not allowed to enter into mountainous areas without obtaining government permission; 2) indigenous lands were alienable only between indigenous tribal members; 3) if abandoned, indigenous lands would return to state ownership and be held as public indigenous reservation lands. In order to put reservation lands to effective use, the R.O.C. central government created a program to accelerate the development and utilization of mountain reservation land by aborigines (促進山胞開發利用山地保留地計畫, c*ujin shanbao kaifa liyong shandi baoliudi jihua*). The program had three primary aspects: 1) to make land allotments to adult aboriginal individuals; 2) to grant derivative land rights to individual tribal members; 3) to transfer fee simple land title to previous aboriginal occupants of the reservation land. In addition, the

[14] Fu, *supra* note 7, at 5-7, 39. *See* also Harry J. Lamley, *Taiwan Under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism*, in *Taiwan: A New History* 201-260 (Murray A. Rubinstein, ed., M.E. Sharpe, 2006). Lamley classified Japanese occupation into four periods: 1) Annexation and Armed Resistance (1895-1897); 2) Colonial Reforms and Taiwanese Accommodation (1897-1915); 3) Colonial Governance and Peacetime Experiences (1915-1936); and 4) War time (1937-1945).

[15] I-shou Wang, *Cultural Contact and the Migration of Taiwan's Aborigines: Ahistorical Perspective*, in China's Island Frontier: Studies in the Historical Geography of Taiwan 41-43 (Ronald G. Knapp, ed., University of Hawaii Press, 1980).

[16] Aboriginal resistance to the Japanese policies of assimilation and pacification continued to the early 1930s. The last and the biggest rebellion against Japanese colonial authority was the Sediq peoples' Wūshé incident (霧社事件, *Musha Jiken*) led by Mona Rudo in 1930.

[17] Michael J. Moser, *Law and Social Change in a Chinese Community: A Case Study from Rural Taiwan* 24 (Oceana Publications, 1982). Moser states, "The period of Japanese occupation was marked by sweeping institutional changes which had the effect of subjecting the region for the first time to the effective penetration of state power."

[18] *Taiwansheng jingwuchu* [Police Department of Taiwan Province], *Taiwansheng shandi jingzheng yaolan* [Review of the Taiwan police administration], Taiwan Provincial Government. *See* also Mu-zhu Xu & Hai-yuan Qu, *Shanbao fudao cuoshi jixiao zhi jiantao* [Review of the efficiency of official aboriginal measures], Research, Development, and Evaluation Commission, Executive Yuan, Taipei, 1992.

policy encouraged the investment and development of indigenous reservation lands in the mountain regions by the non-indigenous Han Chinese.[19] The 1960 Procedure was amended in 1966 to loosen the restriction of non-indigenous use of public indigenous reservation lands. In accordance with article 24, non-indigenous peoples could apply for a special permit to lease public indigenous reservation land for economic development. The 1966 amendment revoked the ban on non-indigenous access to mountainous region and indigenous lands, and liberally allowed the granting of non-indigenous land lease applications.

Under the R.O.C. government, the forces of assimilation were found in education programs, land redistribution, and efforts to incorporate indigenous peoples into the market-based economy[20]. School systems were designed to teach mainstream values and lifestyles, and encouraged abandonment of indigenous cultures, values, and ways of life[21]. Tribal language, culture, religion, and values were discouraged, and non-indigenous Chinese cultures were encouraged. Later on, the R.O.C. government gave way to more multicultural models of national culture and community, but the emphasis remained on acceptance of and participation in national culture, political institutions, and laws[22]. The values and institutions of indigenous peoples, however, were generally ignored in the earlier Japanese unified and the latter R.O.C. multicultural national models. Neither the unified nor the multicultural national model had a place for indigenous rights to land, self-government, and cultural preservation.

The process of building a modern state in Taiwan had direct consequences for indigenous peoples. The modern state logic was to universalize society through assimilationist policies toward indigenous peoples living in its domain[23]. The modern state has attempted to culturally assimilate indigenous peoples through education programs and other forms of socialization. The goal of the state was to incorporate indigenous peoples and their lands into the dominant state and society, so they would no longer remain on the cultural and territorial frontiers of Taiwan.

Three Waves Indigenous Movements

The aforementioned has indicated that indigenous peoples historically have been excluded from any meaningful input into how, when, and why governmental policies concerning their

[19] Taiwan Provincial Government Civil Division, *Fazhan zhong de Taiwan shandi xingzheng* [Progressing Taiwan mountain administration] (Nantou: Taiwan Provincial government, 1961).

[20] Kai-yiu Chan, Costumes, *Beads and Business in Pingtung: The Changing Economic Life of the Paiwan and the Rukai*, in In Search of the Hunters and Their Tribes: Studies in the History and Culture of the Taiwan Indigenous People 131 (David Faure, ed., Shung Ye Museum of Formosan Aborigines, Taipei, 2001). Chan noted that, "By the 1950s, the Nationalist government in Taiwan took local government a step further by introducing elections at the district level. That opened the arena for a restructured local leadership which did not always depend on hereditary status."

[21] Cheng-Feng Shih, *Taiwan yuanzhuminzu zhengzhi yu zhengce* [Taiwan indigenous peoples politics and policy] (Taichung: Xinxin Taiwan Culture Education Foundation, 2005).

[22] *Id*.

[23] International Labour Organization Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted on 26 June 1957 (entered into force on 2 June 1959). Although Convention No. 107 includes provisions on the protection of the rights and tribal peoples, the Convention has been severely criticized for aiming, in its Preamble, at the "national integration" and "progressive integration" of those groups "into the life of their respective countries. For a general discussion, *see* S. James Anaya, *Indigenous Peoples in International Law* 55-56 (Oxford University Press, 2nd ed., 2004).

affairs are implemented. However in the contemporary era, indigenous inherent sovereignty and self-determination have become major issues on the national and international stage. Since the 1990s, the indigenous movements in Taiwan have concentrated on two interlocking goals related to inherent sovereignty and self-determination: self-government rights and land rights. Specifically speaking, the first wave indigenous movement in the 1990s focused on Name Rectification, Return Our Land, Anti-Nuclear Waste Dump-site, and Anti-Water Dam, which led to twice constitutional reforms and the establishment of cabinet-level ministry on indigenous affairs. More importantly, by the introduction of additional articles 11 and 12 of the R.O.C. Constitution, the Legislative Yuan passed the first Indigenous legislation as Education Act for Indigenous Peoples in 1998.

In 1999, during Taiwan's presidential campaign, Mr. Chen Shui-bian, a Presidential Candidate at that time, signed the semi-official alliance treaty, "A New Partnership between Indigenous Peoples and the Taiwanese Government"[24] with 11 major indigenous representatives, during his campaign in Lanyu. This paper identified the second wave indigenous movement as the first changing of power in 2000 when Mr. Chen won the election. The salient features marking the advancement of indigenous rights during this changing political context include official announcements of a "new partnership" in 2002 and a "government-to-government relationship" in 2004 with indigenous peoples. Finally, a milestone accomplishment for indigenous rights was reached when President Chen signed the Indigenous Peoples Basic Law in January 2005, which is recognized as the most comprehensive legal foundation to implement indigenous human rights.

On the 1st of August 2016 the incumbent President Tsai Ing-wen delivered a national apology to indigenous peoples to call upon our entire society to come together and get to know our history, get to know our land, and get to know the cultures of our many indigenous peoples and get to work towards reconciliation, a shared existence and shared prosperity, and a new future for Taiwan[25]. A complete observation of President Tsai's apology could be summarized as follows. Historically, indigenous peoples in Taiwan have been subjected to a variety of Han culture-based governmental policies designed to radically transform indigenous societies at both individual and collective levels. As evidenced by the forced removal policy of the early twentieth century, the privatization of indigenous reserved land and forced assimilation education policies of the mid-twentieth century, indigenous peoples have long been a primary focus of Taiwan's social engineering agenda. Even in the present day, Taiwan's colonizing practices have continued, more intensely in some cases due to internal as well as external developmental impetus. Against this backdrop, this paper finds that one of the main purposes of the National Apology is to re-orient indigenous policy and legal constructions to envision and carry out from equal protection and anti-discrimination of individual rights towards indigenous self-determination and self-government. In approaching this objective, this paper argues that President Tsai's apology to indigenous peoples signifies the third wave of indigenous movements, which laid out three important paths: (1) to introduce a new legal

[24] The New-Partnership between Indigenous Peoples and Taiwanese Government was signed on September 10, 1999 between 11 major Aboriginal representatives and the DPP Presidential Candidacy, Mr. Chen Shui-bian. These electoral promises were further refined and discussed in the 2000 DPP White Paper on Aboriginal Policy (*Yuanzhuminzu zhengce baipishu*). On October 19, 2002, President Chen reconfirmed the treaty; thus becomes an official document which highlights the guiding principles of the government platform.

[25] An official apology issued by President Tsai, available at https://indigenous-justice.president.gov.tw/EN/Page/42

paradigm; (2) To actualize indigenous legal traditions; and (3) to constitutionalize indigenous rights.

Nevertheless, President Tsai made a specific point regarding the implementations of indigenous laws by indicating that,

> After the democratic transition, the country began to respond to the appeals of indigenous movements. The government made certain promises and efforts. Today, we have an Indigenous Peoples Basic Law that is quite advanced. However, government agencies have not given sufficient weight to this law. Our actions have not been fast enough, comprehensive enough or sound enough. For this, I apologize to the indigenous peoples on behalf of the government[26].

In an effort to build up comprehensive legal constructions for indigenous rights, indigenous peoples have sought constitutional, legislative, and policy reforms. In appearance, Indigenous Peoples Basic Law (IPBL) seems out of step with the bulk of traditional Taiwanese law, because it singles out a segment of society on the basis of race. Nevertheless, the IPBL is not a legislation enjoyed majority support. The majority of opponents tend to be non-indigenous who demand the IPBL be abolished because it violates normative standards of equality. Exploring the roots of the controversies, the IPBL removes significant portions of indigenous property from the commercial mainstream and gives the Council of Indigenous Peoples and other government officials a degree of discretion that is not only intrusive but also offensive to other non-indigenous members of the society. For example, the exercise of indigenous hunting rights within the national parks has created tension between groups advocating the preservation of indigenous culture and environmental conservation groups[27]. Furthermore, the IPBL requires that any economic or development activity within indigenous lands proposed by the government or a non-indigenous party must be approved by, and share its benefits with, the local indigenous community[28]. Most importantly, the IPBL actually created a new concept of land rights, the rights to *yuanzhuminzu tudi jí ziranziyuan* (原住民族土地及自然資源權利, indigenous peoples land and natural resources rights)[29]; and to be more specific as referred to the *yuanzhuminzu chuantong lingyu tudiquan* (原住民族傳統領域土地權, indigenous peoples traditional territorial land right), which is sui generis in nature.

Case Discussions

Indigenous claims for **traditional** territorial land right in the legal disputes are not limited to particular litigation, such as civil, criminal or administrative. For examples, both the 2005 Qalang Smangus (司馬庫斯, *simakusi*) case in violation of the Forestry Act[30], and the 2013 kaTipuL (卡地布, *kadibu*) case of obstructing official duties[31] claimed not guilty based on their strong claims on traditional territorial land right. Even though either case ended with a

[26] *Id*.
[27] Article 19 of the Indigenous Peoples Basic Law.
[28] Articles 21 and 22 of the Indigenous Peoples Basic Law.
[29] Article 19 of the Indigenous Peoples Basic Law.
[30] Taiwan Gaodeng Fayuan (臺灣高等法院, Taiwan High Court], Xingshi (刑事, Criminal Division), 98 Shang gengyizi No. 565 (98 年度上更（一）字第 565 號刑事判決) (2010).
[31] Taiwan Taitung Difang Fayuan (臺灣臺東地方法院, Taitung District Court], Xingshi (刑事, Criminal Division), 102 Yuanyi Zi No. 93 (102 年度原易字第 93 號刑事判決) (2015).

not guilty judgement, nonetheless, neither one of the court had taken traditional territorial land right claim into account.

In the Qalang Smangus case, the defendant claimed that the cultural practice was carried out within their traditional territorial land. Pursuant to article 20 paragraph 1 of the IPBL, the defendant's cultural practices should be recognized as affirmative defense and are immune from criminal penalty. It is worth noting that in the lower court levels, both district and high court in their first trials had disregard indigenous claim on traditional territorial land right. Both courts indicated that article 20 of the IPBL could not be a positive right with legal effect. Moreover, the right enshrined in article 20 could become crystalized with an implementing bylaw.

Alternatively, there have been a series of cases involving indigenous lands developments in the administrative litigation. One of the well-known case is Mira Bay resort in Taitung. Mira Bay resort is a land development project located and adjacent to Amis local indigenous community. This project triggered multi-dimensioned controversies of environmental, ecological, economical, and cultural concerns. One of the approach dealing with this litigation was indigenous claims for traditional territorial land right pursuant to articles 20 and 21 of the IPBL. Even though the Council of Indigenous Peoples had call upon the court with its statement of "Mira Bay resort development project should respect local indigenous peoples' opinions", the Supreme Administrative Court only reviewed the case in the context of environmental impact assessment without any consideration on the indigenous rights claims[32].

Apart from the criminal and administrative cases, there is a huge number civil lawsuits involved indigenous litigants. One of the primary reasons lies at article 1 of the Civil Code, which stipulates that "If there is no applicable act for a civil case, the case shall be decided according to customs. If there is no such custom, the case shall be decided according to the jurisprudence". In addition, article 30 of the IPBL affirms that "The government shall respect tribal languages, traditional customs, cultures and values of indigenous peoples in implementing judicial and administration remedial procedures for the purpose of protecting the lawful rights of indigenous peoples". By putting aforementioned two articles together, it seems to give indigenous peoples a "legal ground" for customary practices.

In the Family and Succession Law, the mostly-seen litigations are marriage and succession. For examples, the marriage litigations related to indigenous claims are mainly about conclusion and efficacy of marriage and divorce. Also, the succession lawsuits concerning indigenous legal traditions are related to the inheritance heirs order and the partition of inheritance. Nonetheless, these two areas of litigations do not come to the same end. Most courts dealing with indigenous legal traditions on conclusion and efficacy of marriage and divorce would accord with freedom of contract and self-rule of private law[33]. On the other hand, when the court facing indigenous litigation on the succession, such as inheritance heirs order or principle of heirs to property, it is common to see the court would disregard the

[32] Zuigao Xingzheng Fayuan (最高行政法院, Supreme Administrative Court), 101 Pan Zi No. 55 (101 年度判字第 55 號行政判決) (2012).

[33] Taiwan Nantou Difang Fayuan (臺灣南投地方法院, Taiwan Nantou District Court], 101 Hun Zi No. 24 (101 年度婚字第 24 號) (2012); Taiwan Gaodeng Fayuan Kaohsiung Fenyuan (臺灣高等法院高雄分院, Taiwan High Court Kaohsiung Branch Court), 100 Jiashang Zhi No. 23 (100 年度家上字第 23 號) (2011).

indigenous claims based on their legal traditions[34].

In the area of indigenous land disputes, it is not uncommon to see the indigenous litigants bring their claims based on indigenous legal traditions. Indigenous land disputes are not so much modern issues as historical roots. The preceding discussions of successive external impact on the indigenous peoples can be best symbolized as a historical root of convergence, thus reflecting their forced assimilation into the Han-dominated society. Generally speaking, indigenous land disputes before the operation of the *ad hoc* Chamber of Indigenous Courts, most cases were decided pursuant to the principles of Civil Code without taking indigenous legal traditions into consideration. For example, in a case of returning unjust enrichment involved an Atayal indigenous defendant[35]. The plaintiff stated that he acquired the land property by way of court auction. As a proprietary right holder, the plaintiff claimed the defendant was an unlawful possessors and demanded for returning unjust enrichment. On the other hand, the defendant argued the land was passed down from ancestors thus confirmed his right to occupation. Further, the Atayal defendant had presented Atayal legal traditions for land management and those legal traditions have been acknowledged and followed by Atayal peoples. However, the Court's position toward societal customs maintained statutory principles enshrined in the Civil Code. That is, societal customs are not parts of the state law unless recognized as "customary law" or "factual customs" in the positive law. Even though article 757 open a window for the inclusion of rights in rem created by customs. Indigenous legal traditions are still left out of the loop. In addition, article 758 affirms that "the acquirement, creation, loss and alternation of rights in rem of real property through the juridical act will not effect until the recordation has been made". According to the principal of public summons of right in rem, the Court eventually rendered its judgment and dismissed defendant's arguments on Atayal legal traditions.

The foregoing discussions have shown that the application of indigenous legal traditions in accordance with Taiwan juridical practice revealed a gap between Family and Succession Law. The significance of this legal gap can be best understood as an internal dimension to the integration of indigenous legal traditions. Pursuant to article 2 of the Civil Code, only those customs which are not against public policy or morals shall be applied to a civil case. Further, article 72 states that a juridical act which is against public policy or morals is void. In other words, the existing integral and unitary legal order has continued to build up psychological barriers which refuse to acknowledge and apply indigenous legal traditions within State's legal systems.

Conclusion: constitutionalization of indigenous legal traditions on land governance

Taiwan's Supreme Court delivered a landmark decision on December 3, 2009 regarding indigenous right of customary practices in gathering forestry yields. Precedent T.S.T. No. 7210 (Sup. Ct., 2009) states that "indigenous peoples' traditional customs have their own historical origins and cultural significances, in accordance with inter-ethnic equality,

[34] Taiwan Pingtung Difang Fayuan (臺灣屏東地方法院, Taiwan Pingtung District Court], 93 Jia Su Zi No. 25 (93 年度家訴字第 25 號) (2004); Taiwan Gaodeng Fayuan Hualien Fenyuan (臺灣高等法院花蓮分院, Taiwan High Court Hualien Branch Court), 99 Shang Geng Yi Zhi No. 1 (99 年度上更（一）字第 1 號) (2010).

[35] Taiwan Gaodeng Fayuan Taichung Fenyuan (臺灣高等法院臺中分院, Taiwan High Court Taichung Branch Court), 98 Shang Yi Zhi No. 151 (98 年度上易字第 151 號) (2009).

sustainable development, taking the viewpoints of multiculturalism and cultural relativism, to achieve the mutual benefits for ethnic relations, indigenous peoples rights in undertaking traditional customary practices within a reasonable ambits in their traditional territory should be appropriate respect in order to safeguard indigenous peoples' basic rights." Since this decision involved the conceptualization of indigenous traditional customary practices, as well as on the affirmation and recognition of indigenous rights to traditional territory; thus dragged in justice and human rights concerns, especially on indigenous legal traditions.

The 2005 Indigenous Peoples Basic Law is aimed to protect, promote, and enhance indigenous rights. Article 20 affirms that "the government recognizes indigenous peoples' rights to land and natural resources." Nevertheless, indigenous rights to land and natural resources, including the concept and type of control, manage, use, and profit from the indigenous traditional territory, indigenous reserved land and other accompanying rights, thus far have not had any concrete legislations. In addition, there are not enough court's judgments, precedents, and theoretic viewpoints to substantiate indigenous rights' concretization. As a result, indigenous legal traditions which built up indigenous land tenure systems have not accord a legitimate title for indigenous peoples.

In the contexts of Additional Articles 11 and 12 to the R.O.C. Constitution and Indigenous Peoples Basic Law, both legislations affirmed the legal status of contemporary indigenous rights are based upon the ideas of collectivity and sui generis. Furthermore, since the two international human rights covenants have been incorporated into domestic laws through legislation, it is important that the application and interpretation of indigenous legal traditions concerning indigenous land tenures should comply with the two international covenants pursuant to the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[36].

UN Human Rights Committee General Comment 23 clarifies that Article 27 specifically protects indigenous peoples as well as their traditional territorial lands. Additionally, Comment 23 states that States must enact "positive measures" to protect this right, likely including the enactment of domestic legislation, maintenance of a functioning judicial system, and respect of treaty rights. The Committee has also issued its interpretation of Article 27 under its communications procedure. Under George Howard v. Canada, States may regulate activities integral to a cultural practice of a minority group, such as indigenous fishing practices. To prevail, an indigenous claimant must show that the State regulation rises to the level of a *de facto* denial of his/her right to enjoy their culture. Under Angela Poma Poma v. Peru, a *de facto* denial may be demonstrated by showing substantial interference in this right together with a lack of effective participation by the indigenous community in decision-making and a lack of proportionality in the State regulation. In brief, the terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the

[36] Article 2: Human rights protection provisions in the two Covenants have domestic legal status.
Article 3: Applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee.
Article 4: Whenever exercise their functions all levels of governmental institutions and agencies should confirm to human rights protection provisions in the two Covenants; avoid violating human rights; protect the people from infringement by others; positively promote realization of human rights.

times and, specifically, to current living conditions.

So defined in proceeding paragraphs, this paper argues that an effective understanding of indigenous traditional territorial land rights should resort to article 15 of the R.O.C. Constitution, which states “The right property shall be guaranteed to the people”. This article surely also protects indigenous people’s property rights. Moreover, article 15 and additional articles 11 and 12 of the Constitution establish direct guarantees for such rights of indigenous peoples, with no need for subsequent specification.

Lastly, judicial work on the understanding, interpretations and translations of indigenous rights cannot be detached from the conditions of the indigenous legal traditions in which it takes place. This paper argues that the meaningful conceptualization of indigenous traditional territorial land rights depends upon engaging in a process of indigenization, the active pursuit of a distinct development path, culture, and identity. Now is both an exciting and frightening time for the indigenous peoples in Taiwan. In light of the third wave indigenous movement led by the National Apology to Indigenous Peoples, an evolutionary interpretation of right to property both in the Constitution and the general laws should be adopted. The threshold purpose of this paper is to stimulate critical thinking about the future of indigenous traditional territorial rights in Taiwan and to promote alternative deliberations facilitating interested parties to participate at the investigation, contextualization and encoding of indigenous legal traditions. Then, to substantiate the existing integral and unitary legal order become sustainable diversity in law or rule of laws embedded with indigenous legal traditions. It is the opinion of this paper that article 20 of the IPBL protects indigenous right to land and natural resources in a sense which includes, among others, the rights of members of the indigenous peoples within the framework of communal property, which is also recognized by the Constitution of Taiwan.

原住民族民事法律規範的衝突與調和：以土地治理爲例

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中文摘要

《原住民族基本法》第 30 條第 1 項明定「政府處理原住民族事務、制定法律或實施司法與行政救濟程序、公證、調解、仲裁或類似程序，應尊重原住民族之族語、傳統習俗、文化及價值觀，保障其合法權益，原住民有不諳國語者，應由通曉其族語之人為傳譯」。換言之，原住民族之傳統習俗、文化及價值觀涵蓋實體面及程序面之規範作用，除指引司法部門於訴訟程序中探尋原住民族法律傳統作為裁判的參據，並指導未來的立法依實際需要，採取將原住民族法律傳統內容作為法律條文，或於法律中規定某事項依原住民族法律傳統。這也反映出原住民族權利相關法令之特殊性，對於例如原住民保留地開發管理辦法、原住民身分法、原住民族傳統智慧創作保護條例、原住民族工作權保障法等基於原住民族之法律傳統與文化所訂定之特殊民族法制，若非依上述適用原則，即無法妥當加以解釋與適用。

回顧臺灣的歷史發展，規範權力始終掌握在強勢漢人社群所組成的政治組織中，司法權力當然也不例外，戰後移植到臺灣的《民法》第 1 條規定：「民事，法律所未規定者，依習慣；無習慣者，依法理」。此處之習慣，並未被解釋包括原住民族的法律傳統與習慣在內。當原住民族個人基於其傳統生活經驗所累積之習慣，與實定法對於特定民事關係之明確規範相違

背時，即不被承認。然而，不論是傳統土地之利用、不動產所有權之移轉等涉及財產權之權利行使與變動之行為，抑或婚姻締結之儀式與繼承制度，司法實務必須常面對是否承認原住民族有別於我國實定法之法律傳統與習慣的議題。

植基在文化差異、民族自決與自治之原住民族權利主張，在我國法政發展上的論辯，確立在 1997 年憲法增修條文第 10 條的內容中，並且自《原住民族基本法》完成立法後，匯集了更為厚實的理據與社會力量。因此，當前原住民族法律傳統面對的核心問題在於國家法律如何理解原住民族傳統習慣與文化，進而作為爭端解決機制的實體內容，相對的也必須在某種程度上使原住民族法律傳統與社會規範能夠被作為司法實務審理的準據法。