

Taiwan's Indigenized Constitution: What Place for Aboriginal Formosa?*

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Abstract

Since the beginning of President Chen Shui-bian's second term in 2004, there has been great controversy about plans to rewrite or revise the national constitution and what that new constitution should include. Although it is largely seen as a declaration of Taiwanese sovereignty, one important area of constitutional reform concerns human rights for the over 400,000 Aboriginal people of Austronesian descent on the island and their communities. In the summer of 2004, a series of public consultations were held at the Indigenous Peoples Council in Taipei to debate how indigenous rights should be incorporated into the new constitution. After a long process of debate in Taiwan as well as studies of similar cases in Canada, Latin America, New Zealand and elsewhere, a series of clauses on indigenous rights were drafted and submitted for deliberation at higher levels. These included demands on such issues as return of traditional lands, regional autonomy, and increased representation in the central government. This article, based on participation in those consultations and analysis of other policy documents, written in the context of ongoing ethnographic research with the Taroko tribe, looks at the meaning of these political changes for aboriginal Formosa. To provide a more global framework, it also analyzes these constitutional debates in light of recent anthropological discussions on indigeneity, human rights, and collective identity. What might Formosan indigenous communities gain from expanded recognition of their collective rights in a revised constitution? What does state acceptance of these demands mean in Taiwan's contemporary political context?

Keywords: Taiwan, indigenous peoples, indigenous rights, constitutional revision

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In Taiwan's 2004 presidential and legislative elections, one of the most controversial electoral platforms was President Chen Shui-bian's promise to revise the nation's constitution. The regime in Beijing and other members of the international community reacted strongly against the possibility of constitutional change; with China even warning that changing the Constitution could bring China and Taiwan to the brink of war (Laliberté, 2005). Since the Republic of China (ROC) Constitution used on Taiwan has been revised several times since it was first promulgated in China in 1947, however, China is clearly not alarmed by constitutional revisions alone. Most likely, China distrusts Chen and suspects that he will use constitutional reforms to officially declare the "independence" of Taiwan from the People's Republic of China, to which (despite Beijing's belligerent claims) it has never belonged.

A study of the new constitution, however, shows that the proposed revisions do not merely constitute an assertion of Taiwanese sovereignty, which in any case has been clear in the constitution since the revisions of 1992 (Laliberté, 2005). More importantly, perhaps, is that the proposed revisions reflect Taiwan's deepened democratization and the nation's acceptance of evolving international standards in human rights, including the demands of indigenous peoples as expressed in such documents as the *Draft Declaration on Indigenous Rights* (UNHCHR, 1994), *ILO Convention 169* (ILO, 1989) and *Agenda 21* of the UN Conference on Environment and Development. Proposed amendments to the constitution would include collective rights for indigenous peoples, making Taiwan one of the most progressive countries in the world in that respect. If the Republic of China on Taiwan were to emerge as a leader in human rights, there would be little that the PRC can do to take Taiwan without the islanders' consent; at least not without provoking a strong reaction from the global community. Even if Taiwan were to opt for unification with China, a strong human rights record would give its government greater leverage in eventual negotiations. Self-determination for indigenous peoples on the island is thus a necessary step toward the self-determination of all people on Taiwan.

In the summer of 2004, just three months after the incumbent DPP

president Chen Shui-bian was re-elected to a second term, a series of public consultations were held at the Indigenous Peoples Council in Taipei to debate how indigenous rights should be incorporated into the new constitution. The discussions themselves were based on Chen's electoral promises, in which he said that Taiwan's relationship with its indigenous peoples should be a "quasi-nation to nation relation" (準國與國關係). After a long process of debate about the situation in Taiwan as well as studies of similar cases in Canada, Latin America, New Zealand and elsewhere, a series of clauses on indigenous rights were drafted and submitted for deliberation at higher levels. These included demands on such issues as return of traditional lands, regional autonomy, and increased representation in the central government (see appendix). The challenge for Taiwanese policy makers is to understand the extent to which these emerging international norms may apply to Taiwan. Successful implementation in Taiwan, moreover, may contribute to the global legal framework for indigenous rights as other countries learn from its example.

In Taiwan, as internationally, the very intellectual foundation of indigenous rights is hotly contested. Even in Canada, some academic and policy actors have called for a liberal understanding of indigenous rights, through which indigenous rights are protected like those of other minority groups through affirmative action programs intended to assimilate them into society at large (Flanagan, 2000). In Taiwan, this kind of assimilationist policy has already been implemented by the KMT for decades and has contributed to aboriginal welfare. Aboriginal individuals, for example, have benefited from affirmative action policies in university admissions. Compared with other countries, however, Taiwan still lags behind in terms of indigenous human rights (Shih, 2005a).

Through such documents as the *ILO Convention 169*, the *UN Draft Declaration on Indigenous Peoples*, the *Rio Convention on Biodiversity*, as well as legal decisions made in Canada and elsewhere, an international consensus has begun to form around the idea that indigenous peoples are entitled to more than individual rights as citizens. They also have inherent collective rights due

to their early residence and special relationship to the land. This perspective, which asserts indigenous peoples have a natural right to sovereignty based on prior occupation of a territory before the arrival of a nation-state from elsewhere, is known as indigenism (Niezen, 2003). This international movement, if it succeeds in making indigenous self-determination into a global norm, may be the final step of decolonization.

This brief essay looks at the evolving discourse on indigenous peoples in Taiwan, and at the place that they may have in the new constitution. What might Formosan indigenous communities gain from expanded recognition of their collective rights in a revised constitution?¹ What does state acceptance of these demands mean in Taiwan's contemporary political context? First of all, however, it is important to put Formosan indigenous peoples' relations with the modern nation-state in historical context.

A Place for Indigenous Formosans in the Taiwanese Nation

Like indigenous peoples in North America, the indigenous peoples of Taiwan came under the administrative gaze of the modern nation-state as Europe colonized much of the globe and later as Japan extended its power in Asia.² The indigenous peoples of the eastern and central Taiwan, known largely by Manchurian Ch'ing Dynasty administrators before 1895 for their fierce head-hunting practices, were brought into the administrative reach of the modern nation-state only under Japanese administration from 1895 to 1945. The Japanese were the first to conduct comprehensive land and population surveys in many indigenous areas, as well as to implement modern systems of social

¹ In this essay, "Formosa" and its derived forms refers to the island and its indigenous inhabitants independent of their relationship with the colonial and nation-building projects of Japan, China, and Taiwan.

² Of course, the indigenous peoples of western Taiwan were incorporated into the area of the Dutch East Indian Company, whose areas in southwestern Taiwan later were taken over by Ch'ing Dynasty China. Those indigenous peoples for the most part intermarried with Han settlers from China. Their descendents are the present-day "Native Taiwanese." See Brown 2004 and Shepherd 1993.

control including police stations, military outposts, schools and medical clinics. When the Republic of China came to Taiwan in 1945, the new Chinese state inherited this system of administration. With adaptations through time, especially further limitations on aboriginal use of land, these institutions have continued to the present day (Yan and Yang, 2004).

Taiwan now has a population of approximately 400,000 indigenous people belonging to twelve officially recognized tribes: the Amis, Atayal, Truku, Paiwan, Rukai, Bunun, Siasiat, Puyuma, Tsou, Sao, Ketagalan, and Tau. Formosan indigenous peoples are by no means “victims of progress” (Bodley 1982); rather they are proud survivors of domination by subsequent colonial states. Formosan Austronesian languages are spoken in the villages; religious rituals, crafts, and other important elements of their cultures are still a part of daily life in those communities. These communities have faced many challenges due to their increasingly close relations with the nation-state – specifically the Republic of China since 1945. Since democratization in the 1990s, however, they have been increasingly able to make demands of their own on the state (Allio, 1998).

The constitution brought to Taiwan by the Republic of China in the 1940s was ill-suited to the situation in Taiwan; but apparently the ruling KMT was so concerned with taking back China that they scarcely noticed. The constitution, in fact, mentioned Tibet and Mongolia, but remained silent on indigenous rights.³ Taiwan's indigenous peoples were incorporated into the ROC constitution very belatedly – and only due to the activism of the indigenous social movement after the lifting of martial law in 1987. It was after President Lee Teng-hui's election as Taiwan's first democratically elected president in 1996 that the Indigenous People's Council was founded, institutionalizing a new relationship between the ROC state and indigenous Formosa. Shortly afterwards, on June 16, 1997, indigenous people demonstrated in front of the

³ While ignoring the needs of indigenous communities in Taiwan, the ROC state had long given generous funding to the Tibet and Mongolia Commission, in spite of the fact that they did not in fact govern those areas.

National Assembly in Taipei demanding that indigenous rights be incorporated into the ROC constitution. Article 10, among the many revisions passed on July 18 of that year, declared that:

The State affirms cultural pluralism and shall actively preserve and foster the development of indigenous languages and cultures. The State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the indigenous peoples. The State shall also guarantee and provide assistance and encouragement for indigenous education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare, measures for which shall be established by law. The same protection and assistance shall be given to the people of the Penghu, Kinmen, and Matsu areas (Office of the President ROC, 2004a).

These amendments also created a system in which aboriginal legislators were eventually guaranteed ten seats in the National Assembly. It is worth noting that these additional articles already used the collective term *yuanzhu minzu*, (indigenous peoples) which draws attention to collective rights, rather than *yuanzhu min* (aboriginal people) which implies individual rights in a liberal framework. The inclusion of the Han inhabitants of Taiwan's off-shore islands, however, shows that these additional articles are not based on international ideas of indigenous human rights as much as they are on identifying the rights of people who live in peripheral areas of Taiwan. Nonetheless, they provided a legal reference for further indigenous demands. The DPP, which emerged in the 1980s as an opposition party closely linked to social movements, was the first party to pro-actively define a policy on indigenous rights.

The 2000 DPP White Paper on Indigenous Rights

With its roots in the democratic social movements, it is not surprising that the DPP has been supportive of the demands of indigenous peoples.⁴ When Chen Shui-bian was mayor of Taipei, for example, he established the Taipei

⁴ For an overview, see Shih (2005b).

Municipal Aboriginal Affairs Council, the first institution set up explicitly to serve the needs of aboriginal people. He also renamed a major boulevard in front of the Presidential Building Ketagalan Boulevard in honor of the indigenous peoples who once inhabited the Taipei Basin. The street's original name was Jie Shou, meaning "Long Life to Chiang Kai-shek."

On September 10, 1999, as part of his electoral campaign, Chen Shui-bian signed a "New Partnership between Indigenous Peoples and the Taiwan Government" on Orchid Island. In that document, he used the legal term "natural sovereignty" (自然主權) to recognize that the indigenous peoples were the original owners of Taiwan and have rights that precede the arrival of the state on Formosa. These include the right to high level autonomy (see Office of the President ROC, 2004b). These electoral promises were further refined and discussed in the 2000 DPP White Paper on Aboriginal Policy (DPP, 2000). As a policy white paper, it merely highlighted the guiding principles of the party's platform. In many ways it was a "wish list" of ideals, written for the purposes of a political campaign rather than for concrete administration. It does, however, reflect how aboriginal people and/or indigenous peoples are incorporated into DPP discourse; and it has been subsequently used by indigenous activists lobbying for expanded indigenous rights.

The very first paragraph of the White Paper outlines the DPP's historiography of Taiwan: "Ever since the KMT government moved to Taiwan, policy planning aimed at Taiwan's indigenous peoples, in addition to continuing the 'Administering Barbarians Policy' from the period of Japanese Rule, has made evident its feeling of superiority of Greater Chinese Chauvinism."⁵ Throughout the document, the KMT is depicted as just one more colonial power in Taiwan, following subsequent regimes by the Spanish, the Dutch, Koxinga, the Ch'ing Dynasty, and Japan. The White Paper is progressive in many aspects, including explicit recognition that indigenous peoples have been harmed primarily by loss of territory and involuntary incorporation into the global

⁵ 「自國民黨政府遷台以來，對台灣原住民的政策規劃，除了延續日治時期的「理蕃政策」之外，更將其大中國沙文主義的優越意識表露無遺。」

capitalist system. This theme, reiterated throughout the White Paper, shows that the DPP frames aboriginal poverty in terms of destitution, or loss of their original means of subsistence.⁶

The problem is that indigenous lands have been lost to colonial powers, including institutions originally founded by the Japanese and subsequent KMT states such as the Forestry Bureau. The preferred solution is thus to return indigenous lands to rural communities. Even after the end of martial law, when social movements pressured the government to better protect indigenous interests, the problem remained a lack of “mutual inter-subjectivity” (互為主體), leading to marginalization of indigenous peoples and damage to their social systems. The white paper thus proposes policies related to, in the following order: sovereignty; rights to participation in policy-making, administration and politics; rights to subsistence and development, land rights, social welfare rights, education and cultural rights, and women’s rights. In each of these sections, indigenous subjectivity is central to the argument, as the policies should come from the indigenous communities themselves rather than being imposed from outside. The proposed solution is a “new partnership” between the Taiwanese state and indigenous peoples.

Written as it is within a decolonization framework, the central concept in the White Paper is inherent sovereignty (宗主權). With all of its discussion of indigenous sovereignty and self-determination in terms of land rights and economic development, however, the main problem still comes down to Taiwan’s sovereignty from China. The White Paper clearly asserts, “Amidst Taiwan’s struggle between unification and independence, we must establish a relationship of common destiny with the indigenous peoples. The promotion and declaration of sovereignty is the only way to declare Taiwan’s national status to international society.”⁷ It states further that “The promotion and

⁶ For a discussion of different types of poverty, including destitution as defined here, see Sachs 1990.

⁷ 「台灣在統獨爭議中，必須與原住民族建立生死與共的生命共同體關係，宗主權的主張與宣示，視為一向國際社會宣告台灣國家定位確立的路徑。」

declaration of sovereignty is the only possibility of breaking of relations with China; it is even through this that international recognition of legal status and qualifications can be gained.”⁸ The policy is even based on “the recognition that Taiwan is a multi-ethnic, independent state.”⁹ The 2000 DPP White Paper was thus framed within the discourse of Taiwanese independence and promoted indigenous self-determination as a means toward that goal.

In terms of its “imagined community” (Anderson 1983), the Taiwanese nation envisioned in the White Paper is one composed of indigenous peoples and so-called “New Taiwanese.”¹⁰ The first section on sovereignty explains that the vast majority of Taiwanese are actually métis, descendents of aboriginal women and migrant men from China. They are thus “new Taiwanese created by the intermarriage, métissage, assimilation and incorporation of ‘Tang Mountain fathers and non-Tang Mountain mothers.’”¹¹ The nationalist ideology of the White Paper thus included a partnership of indigenous peoples and Native Taiwanese, yet implicitly excludes the Mainlanders who are associated with a KMT colonial regime. By making them the “poster children” of Taiwanese Independence, the White Paper thus tries to incorporate indigenous peoples into a national imagination not of their own making. This is the underlying rationale and interest of the DPP in creating a progressive policy for indigenous peoples.

The DPP’s instrumental support of indigenous peoples was clearly evident in 2000, when the White Paper was published. After Chen won the election, he began his inauguration ceremony with aboriginal singers and dancers, followed by Hakka and Holo music. He invited an aboriginal pop singer to sing the ROC National Anthem. To Chen’s credit, the relationship of the Taiwanese state to

⁸ 「宗主權的主張與宣示，是切斷與中國關係唯一可能，甚至可由此取得國際認定的合法地位與資格。」

⁹ 「台灣是多民族的獨立國家。」

¹⁰ This definition of “New Taiwanese” is different from the better known use of the term to refer to Mainlanders who identify with Taiwan, as was used in Ma Ying-jeou’s campaign for Taipei mayor in 1998 (see Corcuff 2002: 186-189).

¹¹ 「『唐山過台灣，沒有唐山母』所造成的雜交，混血，同化，融合的新台灣人。」

indigenous peoples has been more than just singing and dancing. In the summer of 2004, indigenous leaders and academics, wearing suits and ties rather than indigenous costume, met over several months in Taipei to discuss the institutional framework for a new partnership between Taiwan and indigenous Formosa.

Indigenous Issues and Taiwan Independence

These consultations at the Indigenous Peoples Council, in principle open to any interested parties, brought together high-ranking officials of the Indigenous Peoples Council, government officials working with indigenous people, social activists, and both indigenous and non-indigenous scholars. The agenda included such topics as (1) why indigenous peoples should be included in the constitution; (2) why indigenous peoples have inherent sovereignty; (3) the meaning of indigenous peoples' natural sovereignty; (4) the legitimacy of indigenous self-determination; (5) why indigenous peoples want autonomy; (6) the organization of indigenous autonomy in unitary/federal systems; (7) the organization of indigenous representation and effective political participation; (8) the relationship between traditional territory and land, natural resource, fishing and hunting rights; (9) indigenous judicial rights and customary law; (10) including indigenous financial administrative rights into the constitution; (11) quasi-nation-to-nation relations in the perspective of nationalities' treaties; and (12) constitutional problems of an aboriginal clause in the constitution (Shih, 2004).¹²

Each session began with a scholar or activist presenting a position paper on the week's topic. On this basis, the group was able to discuss the inclusion of indigenous rights in the constitution from a number of perspectives including the evolution of natural and inherent sovereignty in western political thought, the Canadian example of the Assembly of First Nations, the necessity of

¹² The minutes of these meetings were published as Xianfa Yuanzhu Minzu Zhengce Zhixian Tuidong Xiaozu, *Yuanzhu minzu xianfa zhuanzhang huiyi shilu*.

indigenous rights for effective sustainable development, the history of the colonization of indigenous lands in Formosa, and the achievements of the international indigenous rights movement. Throughout the sessions, Canada was held up as a model for what Formosan indigenous peoples could hope for in a new constitution, especially since Canada's 1982 constitution was the first to specifically incorporate collective indigenous rights at that level.

Without a doubt, the sessions were the official culmination of a long dialogue between indigenous and Taiwan Independence Movement activists.¹³ One of the most outspoken participants, in fact, was Tamkang University professor Shih Cheng-feng, who has long militated for Taiwan independence. Links between the constitutional sessions and the Taiwan Independence Movement were further evident in the fact that the constitution under discussion was an outgrowth of the "Republic of Taiwan (ROT) Constitution" first drafted by Hsu Shi-kai (許世楷) in 1993 and a subsequent version by Huang Chao-tang (黃昭堂) in 1998. The drafts of these and other proposed versions of the Republic of Taiwan constitution were distributed as background materials. It is thus important to look at the Taiwan Independence Movement as one of the philosophical currents that has inspired the indigenous rights movement in Taiwan. Illustrating well the role of indigenous peoples in the philosophy of the Taiwan Independence Movement, the 1993 Draft Republic of Taiwan Constitution began with the preamble:

Our Malay-Polynesian ancestors, in the past lived in the wilderness of Taiwan in freedom and peace. Our Han ancestors, in order to escape bad governance, war, chaos and famine in China; in search of freedom, peace and a better life, migrated to Taiwan. But we Taiwanese often saw our freedom, peace, and lives trampled upon by foreign powers. We have thus decided to gather our forces to protect our own freedom, peace and live; we unite together to establish

¹³ For some of the publications that have come out of this dialogue, see Shih, Hsu and Bu-hsing (2002), as well as Hsu, Shih and Bu-hsing (2001). For a discussion on the constitutional meaning of the Taiwanese indigenous peoples' movement, see Lin 2000.

an independent Republic of Taiwan (Hsu 1993).¹⁴

Clause 3 of this constitutional draft defined the citizens of Taiwan as belonging to four distinct “cultural” groups categorized according to language and time of migration to Taiwan. These are the “Malay-Polynesian language family, the Fulao language family, the Hakka language family, and the Beijing language family” (Hsu 1993).¹⁵ Although the linguistic categorization of these groups lacks a solid anthropological base, it is important as a founding document in the ideology of Taiwan as constituted by four ethnic groups.

It is equally important to note that the natural sovereignty rights of indigenous peoples were not mentioned in this draft constitution, which defined rights in the liberal tradition of individual rights. It was only in the 1990s and early 2000s that international organizations and many countries, including Taiwan, began paying more attention to the natural sovereignty of indigenous peoples and the ways in which their rights had been neglected in the process of decolonization. Due to the pressure of indigenous social movements, the formation of the Indigenous Peoples’ Council, and ongoing dialogue between indigenous scholars and the Taiwan Independence Movement, those rights were eventually incorporated into Chen Shui-bian’s campaign promises, the 2000 DPP White Paper and in 2004 into the proposed constitutional revisions. The consensus began to emerge in the social movements and ruling government that Formosan indigenous peoples in the past four centuries have seen their lands taken away without their permission by Chinese settlers in the Ch’ing Dynasty, by the Japanese imperial government and by the Republic of China on Taiwan. Because the indigenous peoples had already been living on Taiwan for over 6000 years, they have a natural right to the land and to a high level of self-determination.

¹⁴ 「我們的馬來玻里尼西亞語系祖先，過去在台灣的原野自由、和平地生活著。我們的漢語系祖先，爲了逃避中國的惡政、戰亂與飢餓；追求自由、和平與較好的生活，移住來台灣。但是，我們台灣人的自由、和平與生活，仍時常受到外來政權的蹂躪。因而，我們決意以自己的力量，來維護自己的自由、和平與生活；因此，我們結合，以創設獨立的台灣共和國。」

¹⁵ 「第3條：台灣共和國的國民，由於語言以及移住時期等的不同，可以分爲馬來玻里尼西亞語系、福佬語系、客家語系、北京語系，四文化集團。」

Largely due to indigenous input, the proposed indigenous clauses in the proposed new constitution thus begin with explicit recognition of the natural sovereignty of indigenous peoples and their desire for self-determination, with autonomy for each tribe. This autonomy extends to the use of traditional lands, economic development, language, traditional knowledge, customary law, and other expression of collective cultural rights. By far the most explicit recognition of indigenous sovereignty, however, is the provision that Taiwan should have two vice-presidents and one of them should be an aboriginal individual (Shih, 2004, included here as Appendix 1). After the talks were concluded, President Chen Shui-bian was thus able to announce to Rukai leaders in Pingtung that the government was mapping traditional indigenous territory and planning on incorporating indigenous rights into the constitution on the basis of “nations within a nation” (國中有國) (Kuo, 2004). If put into place, these principles articulate strongly with the legal principles enshrined in the UN Draft Declaration on the Rights of Indigenous Peoples: “Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (Article 3 of the *Draft Declaration on the Rights of Indigenous Peoples*).

Closing Observations

More cynical observers, including opponents of the Taiwan Independence Movement, may object that Taiwan's concern with indigenous rights in its early stages was largely instrumental as an ideological tool to justify their own rise to power. That ideology, expressed in only rather rudimentary form in early Taiwan Independence Movement documents, however, led Taiwanese independence supporters to engage in a real dialogue with indigenous peoples. Since Taiwan's indigenous peoples constitute only 2% of the island's population and tend at any rate to vote for “pro-unification” pan-blue parties (Wang 2005: 695), however, there is little electoral advantage to be gained from the propositions raised in those dialogues. Some of the proposed constitutional

clauses, especially territorial autonomy and a guaranteed place for an indigenous vice-president, are even likely to alienate non-indigenous voters unfamiliar with the legal arguments for indigenous rights.

In conclusion, therefore, it seems more likely that the interface between Taiwan Independence advocates in the Chen administration and indigenous intellectuals has actually given indigenous peoples a chance to influence policy. The acceptance of such basic legal principles as indigenous natural sovereignty that precede any state on Taiwan is the product of the work of Taiwan's indigenous rights activists. It was, however, only possible due to the end of KMT rule, because the old KMT had an ideology that Taiwan is essentially Chinese, and that human rights are best protected as individual rights in the liberal political tradition. Before KMT Lee Teng-hui became president, at least, indigenous peoples had virtually no political voice in Taiwan.

Indigenous activists in Taiwan are sometimes called "urban hunters" and for good reasons. Like hunters, who must often wait patiently for the prey to enter their hunting territory, the activists who have entered into dialogue with the Taiwan Independence Movement and the Chen administration have taken advantage of conjunctural circumstances to achieve their goals. For now, the prey is in sight, but the hunt has not ended. A new constitution has not yet been adopted, and the Legislative Yuan has even failed to draft laws to implement indigenous self-government as promised in the 2005 Basic Law on Indigenous Peoples (see Simon, 2006). The 2008 presidential election is rapidly approaching, and no-one can predict if the DPP will stay in power long enough to implement its progressive indigenous policy. Indigenous people will have to negotiate with whichever party is in power in Taipei, and KMT support for their demands is far from certain. The unpredictable course of events in Taiwan and beyond will thus determine if the hunters can ultimately bring back the spoils of the hunt in the form of substantial indigenous autonomy.

Appendix 1: Indigenous Peoples' Council, "Special Clause for Indigenous Peoples in Taiwan's New Constitution"

(原住民族委員會『台灣新憲原住民族專章』)¹⁶

總綱 Preamble:

第一條 台灣為多元民族國家，各民族基於平等原則組成民有、民治、民享之民主共和國。

Taiwan is a state of pluralistic nationalities. All nationalities, based on principles of equality, constitute a democratic republic of the people, by the people and for the people.

第 章 原住民族 Indigenous Nations

第 條 國家承認原住民族之自然主權，並尊重其自決意願。

The state recognizes the natural sovereignty of indigenous nations and respects their will to self-determination.

第 條 各原住民族有依其意願與程序，決定組織與代表以行使自治權，並參與於其權益相關之國家機關之權利。

Each indigenous nation, according to its own will and order, will determine its organization and representatives to exercise the right to autonomy, and participate in national organs related to its rights.

第 條 各原住民族成立自治區，實行民族自治。原住民族自治制度，由總統與各原住民族簽署自治協約，經立法院追認後行之。

Each indigenous nation will establish an autonomous district and exercise national autonomy. Systems of indigenous national autonomy will be established by treaties between the president and each indigenous nation and will be come into effect after ratification by the Legislative Yuan.

自治區之自治事項如下：

Autonomous districts will exercise autonomy in the following areas:

- 一、自治組織。 Autonomous organization
- 二、民族外交。 National diplomacy
- 三、環境管理。 Environmental management

¹⁶ Source: Shih (2004) [<http://mail.tku.edu.tw/cfshih/seminar/20040722/20040722.htm>, last accessed March 12, 2005].

- 四、公共工程。 Public works
- 五、身分認定。 Determination of identity
- 六、交通水利。 Transportation and water
- 七、社會福利。 Social welfare
- 八、傳統領域土地。 Traditional territories
- 九、原住民族習慣法。 Indigenous customary law
- 十、傳統智慧創作。 Creation of indigenous knowledge
- 十一、漁、獵、農、牧。 Fishing, hunting, agriculture and animal husbandry
- 十二、.... (其他項目) (additional areas)

非經自治區居民公民投票同意，中央不得立法限制自治區之自治事項及權限；中央法規命令牴觸自治區為辦理自治事項訂定之自治法規者，無效。

Without obtaining the consent of the residents of autonomous districts through public referendum, the central government may not establish laws to limit autonomous districts' items of autonomy or the bounds of such rights. Central laws and orders that contradict laws established by autonomous districts to implement items of autonomy are invalid.

第 條 各原住民族傳統領有或所使用之土地、水域、動植物群及其他自然資源，屬於各原住民族，並有決定其管理組織與發展策略之權利。國家之任何措施，明顯影響各原住民族傳統領有或所使用之土地、水域、動植物群及其他自然資源者，應得相關原住民族自由意志及充分資訊下之協商同意後為之，並應予參與實施或為適當補償。

All land, waters, animals, plants, and additional natural resources possessed or used in the traditional territories of each indigenous nation belong to that indigenous nation, which has the right to determine its management organization and development strategy. Any government action that has an obvious impact on indigenous traditional territory or the land, waters, animals, plants and additional natural resources it possesses or uses must be negotiated after obtaining the free and informed consent of the concerned indigenous nation; and must give participatory management or appropriate compensation.

第 條 各原住民族語言亦為該族自治區域內之公務語言。

The language of each indigenous nation shall be the official language of that tribe's autonomous region.

第 條 各原住民族之傳統知識或智慧財產權應受保障。

The traditional knowledge or intellectual property rights of each indigenous nation shall receive protection.

第 條 本章以外之國民權利義務與社會制度，應兼顧各原住民族特殊需求，適

用於各原住民族之成員。

Citizen rights and responsibilities and social systems not included in this clause shall consider the special needs of each indigenous nation and be appropriate to the members of each indigenous nation.

第 條 司法機關於原住民相關案件之審理，應探求並尊重各原住民族習慣法，必要時應設原住民族法院。

Judicial organs judging cases related to aborigines shall explore and respect the customary law of each indigenous nation and when needed shall establish indigenous legal courts.

第 條 原住民族立法委員之選舉以各族為選區，其席次分配由各原住民族協商定之。

Indigenous legislators will be elected with each tribe as an electoral district; the distribution of seats will be made through negotiations with each indigenous nation.

第 條 凡各原住民族文化上之其他集體權利及固有權利，不妨害社會秩序、公共利益者，均受憲法之保障。

Additional collective and determined rights in the cultures of all and any indigenous nations, that do not endanger social order or public interest, shall receive constitutional protection.

第 條 以上各條列舉之原住民族集體權利，除為防止妨礙他人自由、避免緊急危難所必要者外，不得以法律限制之。

All collective rights of indigenous nations mentioned in the above laws, unless they obstruct the freedom of other people, or when necessitated to prevent emergency and danger, shall not be limited by law.

第 條 國家應採取有效制度並提供訴訟救濟，以確保各原住民族集體權利之落實。

The state shall adopt an effective system and provide litigation relief, in order to guarantee the implementation of the collective rights of each indigenous nation.

總統 President

第 條 副總統為備位元首，設二名，其一應由原住民族成員出任，但總統為原住民族成員時，不在此限。

The vice-president being second in order to the head of state, there are two, one of whom is a member of an indigenous nation; but if the president is a member of an indigenous nation, this limitation does not apply.

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台灣憲法的本土化——原住民族的地位

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摘 要

自陳水扁總統 2004 年連任以來，修憲或制憲的計畫以及其新憲內容為何，一直是具有爭議性的議題？雖然多數人都能認為台灣主權獨立，然而，而在憲法上，一個重要且同時需要考量的即是有關台灣四百萬南島語系之原住民族權利。原住民族委員會於 2004 年夏季舉行一連串座談會，討論與辯論有關原住民族權利入憲的問題，並由一連串專家學者的諮詢與研究加拿大、拉丁美洲、紐西蘭等國之個案後，而產生了原住民族憲法專章草案呈送相關單位，草案內容包括要求歸還傳統領域、設立自治區以及增加原住民的中央政府代表性及參與。本文依據作者參與一連串諮詢座談會與分析相關政策資料，長期的參與太魯閣族田野工作，試圖探討這些政治上的改變，對於台灣原住民族的意義。為提供更多有關國際性視野，本文亦從政治人類學觀點提供有關憲法上的原住民性權利與集體認同之相關論述與爭議。台灣原住民族究竟能從新增的憲法專章得到何種集體權利？而接受這些新憲所賦於的權利又如何表徵台灣的當今政治體制？

關鍵字：台灣原住民族、原住民權利、修憲