

# International Perspective on the Constitutionality of Indigenous Peoples' Rights

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## Abstract

The Taiwan Government proposed a new partnership with indigenous peoples in 2002 and further in 2004 announced that it would structure its relations with indigenous peoples on a "Nation-to-Nation (guo yu guo)" basis. This paper analyzes the effect of current legal framework and the constitutional reform on the existence and legal status of indigenous peoples in Taiwan. The paper first briefly presents a history of the status of indigenous peoples and a discussion of the interrelationship between indigenous peoples and different external forces. Next, the paper provides a summary of the international indigenous movements and its influences on Taiwanese indigenous groups. Finally, the paper urges that Taiwan government to uphold the UN Draft Declaration on the Rights of Indigenous Peoples by demonstrating a "constitutionalizing" of indigenous rights or an "indigenizing" of dimension of juridical-political framework.

This paper aims to draw more attention to Taiwan's indigenous peoples' rights and seeks to empower the constructive formation of democratic institutions for Taiwanese indigenous tribes. It will, in addition, promote the interdisciplinary study of indigenous law for Taiwan as well as help enlarge the research field of legal studies in Taiwan. Most important all, it will tell us that a new paradigm in the Taiwan legal system is needed for indigenous peoples.

**Keywords:** indigenous rights, indigenous movements, constitutionalization, empowerment

## I. Introduction

Modern state-building irrevocably changed indigenous peoples' life. Under colonial regimes, indigenous peoples could coexist as autonomous, political communities. In modern states, this was no longer the case. For examples, the modern states that emerged in Canada after Confederation in 1867, and in Scandinavia after the union of Sweden and Norway in 1814 possessed a universalizing political logic that compelled the state to pursue assimilationist policies concerning the indigenous peoples living in its domain (Gilbert, 2003: 199-238). The aim of these policies was to eliminate aboriginal ways of life and to incorporate indigenous peoples into the fabric of the dominant state and society. In addition, those states held little regard for diversity in culture; thus, in their legal framework, indigenous peoples were either legislated out of existence or ignored altogether.

The effort of modern political theory to understand multiculturalism has brought about a variety of responses that depend on the theoretical tradition, such as liberalism and communitarianism, and the nature of the group, such as indigenous peoples and descendants of slaves. It has been widely recognized that indigenous peoples are the "first" inhabitants of colonized lands, including in Taiwan. Nonetheless, indigenous peoples have an ambiguous status, alternatively considered to be "quasi-sovereign nations," like Indians (Native Americans) in the United States<sup>1</sup> and the First Nations in Canada,<sup>2</sup> and

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<sup>1</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832), at 519. According to the Court, Indian nations are "distinct, independent political communities" with powers of self-government by reason of their original tribal sovereignty.

<sup>2</sup> Section 35(2) of the 1982 Canadian Constitution, "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

considered to be “tribes” or “ethnic minorities,” like other indigenous peoples in colonized lands.<sup>3</sup> Fortunately, a new political accommodation with the “national sovereign” has been reached between most indigenous groups and their colonizers. Examples can be found in the Canadian Inuit’s Nunavut government and the Hopi Indian Nation in the United States (Hamley, 1995: 221-34; Rusco, 2006: 49-82).<sup>4</sup> Considering the success made for the indigenous peoples around the world, the progress of establishing indigenous rights in Taiwan still remains fixed in early colonial ideology. The belief in the inferiority of indigenous peoples, in addition to lack of consultation on matters that affect them, remains deeply embedded in the legal, economic and social fabric of Taiwan and has resulted in the dispossession and destruction of indigenous territories and resources, political, religious and social systems, but nothing beyond.

The Taiwan Government proposed a treaty-like document declaring a new partnership with indigenous peoples in 2002.<sup>5</sup> The government pledged to

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<sup>3</sup> E.g., U.N. Doc. E/CN.4/AC.2/1992/4, *Thailand government statement: Hill-Tribe Welfare and Development* (1992). As indicated in its communication to the *ad hoc* Committee of the Commission on Human Rights, Thai Government articulated the view that “hill tribe” peoples are ethnic groups but “are not considered to be minorities nor indigenous people but as Thais who are able to enjoy fundamental rights ... as any other Thai citizen.”

<sup>4</sup> In the case of the Canadian Nunavut government, the participation of the administration is not limited to the native peoples. The Inuit people accepted a public form of government in Nunavut, which is a distinct political and legal territory that governs all residents of that territory. In the context of the U.S., Hopi Indian Nation was established under the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, which aimed to restore Indian governance within Indian country. Since its passage, more than hundred Indian nations have adopted IRA constitutions. A number of other Indian tribes, for example the Navajo Nation, have not to this date adopted a written constitution. It lies beyond the scope of this research, however, to outline this debate in detail.

<sup>5</sup> In 1999 Mr. Chen Shui-bian, the then presidential candidate of the Democratic Progressive Party, signed a partnership agreement with leaders of Taiwan indigenous tribes for his campaign. After his election in 2002, President Chen signed another agreement with these leaders and reconfirmed his administration to honor the commitments in the earlier agreement.

ensure that indigenous peoples would have the tools to become self-sufficient and self-governing by recognizing indigenous rights to land and self-government.<sup>6</sup> After being re-elected for the second term in 2004, President Chen declared that the government would commit to a government-to-government relationship with indigenous tribes and add a special indigenous chapter to the R.O.C. Constitution. The idea of Taiwanese indigenous sovereignty had been included in a number of government's discussions (Task Force, 2005). For instance, *Taiwan xinxian yuanzhuimn zhuanzhang caoan* [draft indigenous chapter of Taiwan new Constitution] stipulates that, "State shall recognize the inherent sovereignty of indigenous peoples, and respect the will of indigenous peoples for self-determination" (Task Force, 2005: 791-95). Nonetheless, our history of law-making and policy implementation has been the cause of significant bitterness and frustration for indigenous peoples. Despite policy developments and emerging aboriginal legislation, indigenous rights still lack substantiation (Liu, 2005: 31-32).

This paper analyzes the effect of current legal framework and the constitutional reform on the existence and legal status of indigenous peoples in Taiwan. At the outset, the active presentation of the history of indigenous status under different dominating regimes will be critical to a constructive formation of indigenous relationship with the Taiwan government. Next, the comparison of Taiwanese indigenous developments with international indigenous movements will provide a contrasting view of indigenism to illustrate the meaning of constitutionalism in an indigenous context. Finally, the paper urges

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<sup>6</sup> See The Agreement of A New Partnership Between the Indigenous Peoples and the Government of Taiwan (<http://www.apc.gov.tw/chinese/indexMain.jsp>)(2007/7/19). Article 1 affirms that the government shall recognize the inherent sovereignty of Taiwan's indigenous peoples. And, article 2 stipulates that the government shall promote and implement the indigenous self-government.

that Taiwan government to uphold the United Nations Declaration (draft) on the Rights of Indigenous Peoples (Indigenous Declaration) by demonstrating a “constitutionalizing” of indigenous rights or an “indigenizing” of dimension of juridical-political framework.

Comparing the indigenous rights perspectives with extant international standards of indigenous human rights will further elaborate an understanding of tribal constitutionalism in the legal framework of Taiwan. In addition, the constructive and cooperative negotiation of a government-to-government framework in Taiwan is heavily dependent on all parties having a clearly understood perspective and explanation of their view of democratic institutions and democratic values. This paper will provide these explanations from the indigenous perspective. Most important of all, it will tell us that a new constitutional paradigm in Taiwan legal system is needed for indigenous peoples.

## II. Historical Discourse of Taiwan Indigenous Peoples

Taiwan is an immigrant state like Australia, Canada, New Zealand, and the United States. According to the official reports, there are currently thirteen distinct peoples indigenous to Taiwan recognized by the government.<sup>7</sup> Indigenous peoples of Taiwan have lived on the island for at least five thousands years (Nobuto, 1985: 40). Niclas S. Ericsson suggests that the other

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<sup>7</sup> In order of population size, these are: Amis (A-mei), Paiwan (Pai-wan), Atayal (Tai-ya), Bunun (Bu-nong), Truku (Tai-lü-ge), Rukai (Lu-kai), Puyuma (Bei-nan), Tsou (Zou), Saisiyat (Sai-xia), Tao/Yami (Da-wu/Ya-mei), Kavalan (Ge-ma-lan), Ita Thao (Shao), and the Sakizaya, recognized just recently. (Source: Council of Indigenous Peoples, Executive Yuan. Because some tribal names are in the process of changing so their names have been combined to avoid confusion (e.g. Yami call themselves Tao, so as a people they are referred to as the Tao/Yami.))

inhabitants of the Island now include *Ben-sheng ren*, descendents of Chinese settlers from the 1600s to the present, the *Wai-sheng ren*, Mainlanders who were survivors or descendents of those who fled mainland China after 1949, and the *Ke-jia-ren*, know as the Hakka community that migrated from the mainland of China since the 1600s (Ericsson, 2004). The indigenous peoples make up almost 2% of the overall population of Taiwan.

This section explores the relationships between Taiwanese indigenous peoples and various colonial regimes. Most non-indigenous Taiwanese believe that the development of indigenous peoples has progressed along with the mainstream Taiwanese society, through centuries of colonization. Very much alike to other indigenous peoples across the globe, aboriginal history in Taiwan has been written largely from this inaccurate, non-aboriginal point of view (North, 2006: 1).<sup>8</sup> History is a process of re-presentation of the past. Thus, it is not possible to understand indigenous peoples in their contemporary setting without first gaining some knowledge of their history as it has been formed and shaped by the indigenous experience with western colonization. Briefly, the history of Taiwan indigenous peoples is one of colonization and exploitation by external forces, chronologically by Spain, Dutch, Zheng Cheng-Gong, Qing Dynasty, Japan Empire, the Kuomintang Government, and currently the Democratic Progressive Party Government. I then develop my arguments by examining the following four stages of relations between indigenous peoples and colonial powers:

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<sup>8</sup> This colonial perception of aboriginal history is also reflected in the Native Americans' experiences. As noted by Douglas C. North, "The history of Native American has been fundamentally colored by the perceptions—or the belief systems if you will—of the writersf ... Whether written as a story of conquest, exploitation, paternalism, or greed, it deserves a better story. It requires a far richer understanding of the complex nature of human cultures, and equally, of the fundamentals of economic and societal change than we have possessed."

## 1. Stage One: Separate World – Before 1554 A.D.

There is no written record regarding prehistoric indigenous peoples in Taiwan. Knowledge of the past is found in archaeological evidence and aboriginal oral traditions, which have been handed down from generation to generation. Indigenous peoples of Taiwan predate, by thousands of years, the formation of modern states and the arrival of colonial settlers. Aboriginal communities have governed themselves from time immemorial and have maintained independent institutions, cultures, and territories (Li, 1998; Liu, 2002). Indigenous tribes throughout Taiwan have their own unique creation stories, cultural beliefs, political institutions, community relations, and property systems (Huang & Li, eds., 1995; Li, 1982: 381-93).

Prior to the 16th century, Taiwan was isolated and virtually unknown to the outside world. From the viewpoint of the new settlers, Taiwan was unoccupied and without sovereign government. It was not until the arrival of Dutch colonists in the mid-16th century that a formal, central political power was established on parts of island (Yang, 2000). The European occupation of Taiwan marked the end of the pre-contact era and the beginning of a new era, in which Taiwan entered the international community.

## 2. Stage Two: Contact and Co-operation

During this early contact and cooperation era from 17th century to the end of 19th century, Taiwan experienced four changing colonial authorities. The Dutch (1624 – 1662 A.D.) were the first to colonize Taiwan, followed by the Spanish (1626 – 1642 A.D.) and the Zheng Cheng-Gong conquest (1662 – 1684 A.D.), and finally the Qing dynasty (1684 – 1895 A.D.).

European exploration of Taiwan was aimed at promoting mercantilism

(Yang, 2000; Kang, 2005). Initially, relations between the Europeans and the indigenous peoples were generally hospitable and based upon understanding the terms of trading for food, axes, cloth, and artifacts<sup>9</sup> (Blussé *et al.* eds., 1999: 37-39). These relations became hostile as indigenous peoples realized that their land and resources were heavily disrupted by the on-going presence of new settlers (Shepherd, 1993).<sup>10</sup>

Under Zheng's reign, Zheng's authority did not view Taiwan as a permanent home. Instead, Taiwan was merely a temporary military base while Zheng awaited the chance to recover the Mainland. In its dealings with indigenous nations, Zheng's policy was not much different from that under Dutch rule. Zheng's government carried out large-scale military colonization on plains lands, leaving the eastern mountainous aboriginal territories untouched (Harrison, ed., 2001).

By the time Zheng's authority surrendered to the Qing, the Qing unilaterally declared authority over Taiwan, but without actual administration. Indeed, the government had no intent to civilize the island. They simply wished to retain it as it was, uncultivated and primitive, because it was against the Qing's interests to see a well-developed Taiwan that might cause a resurgence of anti-imperialism (Shepherd, 1993). In 1874, an international conflict between the Qing and the Japan, which was caused by a Japanese shipwreck on

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<sup>9</sup> One of the interesting institutions of the Dutch period was the 'landdag,' an annual gathering of village elders before the Dutch governor. The Dutch gave each leader a black velvet cape, a silver tripped rattan staff and a flag representing the Prince of Orange to prove allegiance to the Dutch East India Company (*Vereenigde Oost-Indische Compagnie* or VOC). In turn the aborigines presented the Dutch with potted palms to show submission.

<sup>10</sup> During the intercourse between Europeans and plains indigenous peoples, Europeans initially obtained aboriginal lands by purchasing those lands from the original inhabitants. In later years, European colonizers began to use military powers to force indigenous peoples to make land cessions.



the east coast, made the Qing change this policy and explore the mountainous area in order to comfort the indigenous peoples. However, faced with fiery resistance by indigenous tribes, the Qing never successfully extended its force into the mountainous aboriginal territory before Japan took over Taiwan in 1895 (Faure, 2001: 6, 26; Wolf, 1982).<sup>11</sup>

During the 280 years which have passed from the commencement of the Dutch occupation down to the time before Japanese Empire, none of the colonial regimes occupying Taiwan ever declared sovereign authority or exercised jurisdictional power over Taiwan indigenous peoples.<sup>12</sup> On the eve of the Sino-Japanese War, about 45 percent of the island was governed by the Qing authority (mostly the western plains of the island), and the remaining regions were under the control of various indigenous nations (Yosaburo, 1996: 212).<sup>13</sup>

### 3. Stage Three: Displacement and Assimilation

When the Qing dynasty lost the war with Japan in 1895, the people and territory of Taiwan were transferred to Japan by virtue of the Treaty of

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<sup>11</sup> As Faure commented, "Qing dynasty county administration covered essentially only the area to the west of the Central Taiwan Range: 18th and early 19th-century Chinese maps of Taiwan leave as blank the eastern portion of the island." He further states, "It should be clear ... that for most of the period under consideration, the Qing government did not succeed in establishing its rule among most mountain villages." According to Wolf, Austronesian groups were first incorporated into the world system only after Japan took over administration of Taiwan in 1895.

<sup>12</sup> For example, in 1874 an international conflict happened between the Mudan indigenous tribes and the Japan, the Qing officials claimed that Mudan was not within its authority. Japan hence dispatched its troops to invade Mudan. This is a well-known international historical event, *Mudan she shi jian*.

<sup>13</sup> Yosaburo noted that, "The entire area of Formosa is estimated at about 14,000 square miles, of which nearly half is still in the hands of the savages, outside the reach of our Government."

Shimonoseki.<sup>14</sup> Since Qing sovereignty never extended to most of Taiwan's aboriginal territories, Japan initially only took over the areas that had been occupied by the Qing dynasty (See Figure One) (Yosaburo, 1996: 218).<sup>15</sup>

### (1) Japanese Rule

Japanese colonial policies were based on the colonial purposes of protection, assimilation, and recognition, and policies toward indigenous peoples were justified as being “for their own good” (Fu, 1997: 5-7, 39; Lamley, 2006: 201-60).<sup>16</sup> The Japanese government believed that these policies served the practical purpose of converting indigenous peoples to civilized ways, thereby keeping them under control (Wang, 1980: 41-43).

The perception of indigenous peoples as savages, in practical effect, provided “legal” ground for certain actions by the Japanese government. In 1874, Japan claimed that Taiwan was savage territory, not under the Qing's sovereignty, and as such could properly be claimed by whomever occupied it (Harrison, 2001: 53).<sup>17</sup> This was the same justification that originated in the western colonialism carried out by the British in the “New World,” known as

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<sup>14</sup> Treaty of Shimonoseki, signed at Shimonoseki 17 April 1895, entered into force 8 May 1895 by the exchange of the instruments of ratification at Chefoo.

<sup>15</sup> Yosaburo noted that, “By the time Japanese Empire took over the island, the people (Chinese/ non-Aboriginals) who have accepted its rule numbered some 3,000,000 and occupied only about one-third of the whole area of Formosa, while the remaining two-thirds of the island was all in the hands of the savages (Aboriginals) who numbered about 100,000, and who never tolerate any intrusion upon their territory.”

<sup>16</sup> 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).

<sup>17</sup> According to Harrison, the then Japanese military counselor C.W. Le Gendre, who is an American, provided the Japanese government with an idea of “*fandi wuzhu lun*” (Savage land is without the lord), which is based on the American colonial experiences, to justify its military action.

the doctrine of discovery (Miller, 2005). After seizing sovereignty over Taiwan, the Japanese government adopted the discovery doctrine, proposed by the U.S. Consul J.W. Davidson, and declared aboriginal territories *terra nullius*. Thus, Japan dispossessed aboriginal peoples of the ownership of their lands and declared that aboriginal lands were state-owned (Chen, *et al.* trans., 1997: 185-86).<sup>18</sup> Identifying Taiwanese indigenous peoples as savages gave the Japanese colonial government the right to occupy their land (Chen, *et al.* trans., 1997: 182-86; Fu, 1997: 157). This was a widely-shared ideology among the major colonial powers at that time (Chen, *et al.* trans., 1997: 180-81; Porter, 2005).

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<sup>18</sup> According to the Sōtokufu Counselor Mochiji Rokusaburou, “When the Empire acquired the sovereignty of Taiwan, these savage peoples (*shengfan*) never submitted to the authority; they continued to rebel against the Empire’s sovereign power. The State has the legal right to subdue these defiant savages, and this right is within State’s jurisdiction and sovereign power.”

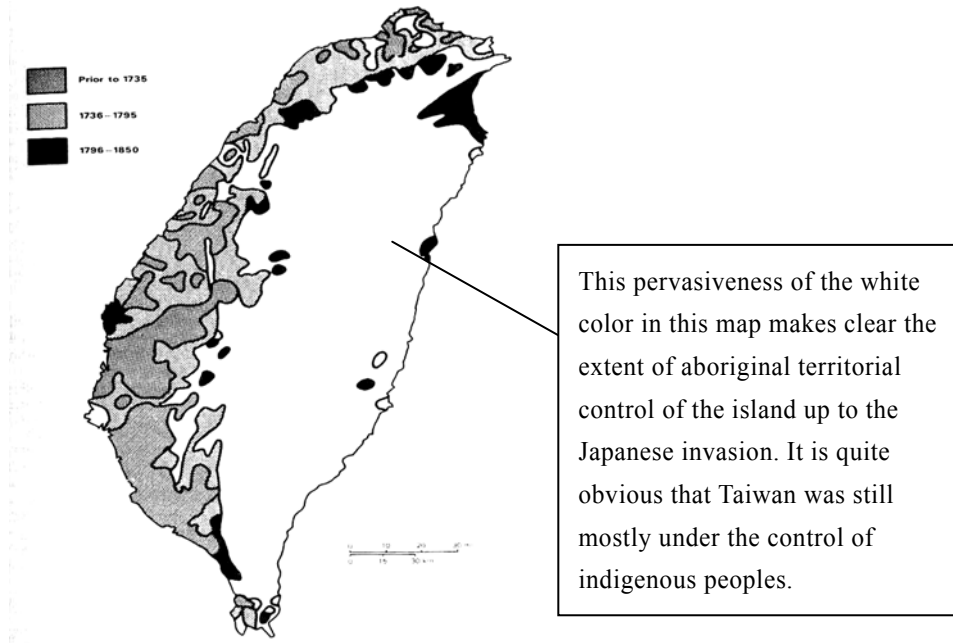


Figure 1: Expansion of Chinese Settlement (Knapp, ed., 1980: 37)<sup>19</sup>

In 1930, after intermittent warfare with indigenous peoples (Deng, 2000),<sup>20</sup> Japan extended its authority into aboriginal territories by conquest and carried out the first complete, extensive colonization of the whole island<sup>21</sup> (Moser, 1982: 24; Simon, 2005). The colonial government contained indigenous peoples within reservations, but recognized aboriginal title and restricted rights to the land. Aboriginal property interests were usufruct or

<sup>19</sup> During the Qing period, indigenous peoples were considered as outside the touch of civilization and the Qing's policy adopted towards them may well be understood as "Govern them by leaving them strictly alone."

<sup>20</sup> 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 (*Musha Jiken*) led by Mona Rudo in 1930.

<sup>21</sup> 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."

“occupancy in fact” and did not include underlying title.<sup>22</sup>

## (2) Chinese Rule

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 (Huang, 2005).

In terms of aboriginal policy, the KMT 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” (*shandi pingdihua*)—in other words, to assimilate indigenous peoples (Pu, 1996: 55-59). 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 (Harrison, 2001: 67-68; *Taiwansheng jingwuchu*, 1953).<sup>23</sup>

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<sup>22</sup> Similar to the early findings of the U.S. and Canadian Courts’ opinions - In 1823, the U.S. Supreme Court ruled in *Johnson v. McIntosh* (21 U.S. 543), that tribes did not own fee title to their lands, but held a lesser interest that the court characterized as a right of occupancy, U.S. had exclusive right to purchase or extinguish Indian title; in 1984, the Supreme Court of Canada ruled in *Guerin et al v. The Queen* ([1984] 2 S.C.R. 335), that Aboriginal title is an inherent and *sui generis* right, the underlying title belonging to the Crown.

<sup>23</sup> In 1951, as noted by Harrison, the R.O.C. government launched the so-called “*shandi renmin shenghuo gaijin yundong*” [Mountain People’s Lifestyle Improvement Movement], which stated that “The aim of these policies ... appeared to be similar to Qing dynasty policies which encouraged sinicization (*hanhua*). This movement aimed to change language, clothing, food, housing, daily life, and customs. Many of the practices addressed were ones which had long defined people as non-Han ... while campaigns to encourage an “economic outlook” were primarily intended to increase the material wealth of indigenous communities, they also addressed stereotypes of ethnic difference, and were thus part of the general assimilationist policy.”

Initially, aboriginal land management under the R.O.C. continued former Japanese land management systems. The R.O.C. government declared indigenous lands as national land through the power of eminent domain, and taken from the indigenous peoples without compensation. In 1947, the R.O.C. government renamed these indigenous lands as “*Shandi baoliudi*” (mountain reservation land), merely to eliminate any vestiges of Japanese colonial authority (Kao, 1984). The R.O.C. government under the KMT administration did not recognize indigenous peoples as the holders of legal title to their lands within the national framework. Rather, the KMT government considered “*shanbao*” as “citizens of distinctive lifestyles” and continued attempts to convert them through assimilation and sinicization (*hanhua*). The government’s attitude regarding the status of aboriginal land would adjust based on the needs of national forestry, agriculture and tourism. On one hand, the government undertook the full control of mountain forests via state-operated enterprises. On the other hand, it opened the reservation land for Han settlement and economic exploitation. Furthermore, the government engaged in a series of institutional reforms and land clearances three times from 1958 to 1985. These reforms legalized previously unlawful Chinese occupation of reservation land and converted Chinese lessees to fee simple owners (Yan & Yang, 2004).

### (3) Summary

The foregoing discussions have shown that the Japanese and Chinese states had differing policies, both of which were aimed toward assimilating indigenous peoples. Under Japanese rule, indigenous peoples had land rights and limited rights to self-government (Chan, 2001: 130-31; Wang, 1980: 44-45).<sup>24</sup> Under the R.O.C. (KMT government) control, the forces of

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<sup>24</sup> Based on Chan’s analysis, “Following the pacification campaigns in the first decade of their

assimilation were found in education programs, land redistribution, and efforts to incorporate indigenous peoples into the market-based economy (Chan, 2001: 131; Taiwan Provincial Government Civil Division, 1961).<sup>25</sup> Later on, the KMT 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 (Shih, 2005a). The values and institutions of indigenous peoples, however, were generally ignored in the earlier Japanese unified and the latter KMT multicultural national models. Neither the unified nor the multicultural national model had a place for aboriginal 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 (Anaya, 2004: 55-56).<sup>26</sup> 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

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rule, the Japanese colonial regime implemented a new system of local government in which a civil administration was established side-by-side with the traditional chieftain system. On the one hand, the chieftains were given official title as government agents, and on the other hand, civil servants, such as teachers and policemen, were stationed in tribal settlements.”

<sup>25</sup> 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.”

<sup>26</sup> The most representative example has been the adoption of the 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 June 26, 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.

on the cultural and territorial frontiers of Taiwan (Taiwan Provincial Government Civil Division, 1961).

#### 4. Stage Four: Negotiation

For a long time, the right to decide priorities and determine aboriginal policies and the forms of indigenous institutions was the exclusive authority of the Taiwanese government. The rights of indigenous peoples within the R.O.C. framework can be jeopardized by the compulsory imposition of alien cultures and rules (Daes, 1996). In most cases, the indigenous peoples of Taiwan have not been consulted and have not participated in the making of the R.O.C. Constitution and indigenous legislation (Shih, 2006). Indigenous constitutional reform is a topic that has received considerable attention in recent years in Taiwan. Despite all this attention, the issue remains little understood by the general public. What is indigenous constitutional right? Why is the Taiwan government negotiating constitutional arrangements with indigenous groups?

From 2000 to 2004, the aboriginal political discourse in Taiwan underwent a great transition from a “New Partnership with Indigenous Peoples” in 2000 to a “government-to-government relationship” in 2004. The Taiwan government has repeatedly stated its commitment to protecting indigenous human rights in a number of official pronouncements, as well as through negotiation and legislation. These actions started a new aboriginal rights dialogue between indigenous peoples and the Taiwan government. It has been acknowledged that indigenous peoples and their rights have constitutional interests which entitle them to represent themselves in negotiations with the government (Lin, 2000). One of the results of this negotiation process in Taiwan was the enactment of Indigenous Peoples Basic Law in 2005. Nevertheless, the Basic Law merely provides abstract recognition of these rights. The actual content and application



of these rights remains uncertain and open to interpretation.<sup>27</sup> In the following sections, this research attempts to clarify the content of constitutionality of indigenous rights from the perspectives of international human rights discourse.

### III. International Indigenous Movements and Development of Indigenous Rights

#### 1. International Organizations and the Protection of Indigenous Rights

In the 1960s, the wave of de-colonization in the third World aroused sympathy for ethnic groups that had been under control of the colonial regimes (Hannum, 1996: 11; Tomuschat, 1993). During this period, the United Nations (U.N.) adopted a resolution proclaiming that all peoples have the right to self-determination, meaning that peoples have the right to freely determine their political status and pursue their social, economic and cultural development (Tomuschat, 1993; Franks, 1994).<sup>28</sup> In effect, this resolution opened the door for the consideration of indigenous peoples' rights to be raised as a separate issue within the U.N. (Anaya, 2004).

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<sup>27</sup> Recent case delivered by the Hsinchu district court regarding three indigenous Smangus peoples is the best example. In that case, those indigenous peoples were arrested by the local police while they were practicing traditional activities of gathering and collecting toppled forest on their traditional territory, which are recognized and protected by the Indigenous Peoples Basic Law and the Forestry Act. The district court judge ruled that these Smangus tribesmen were held guilty for the charge of "burglary of primary forest products and by-products" because indigenous rights stipulated in the Basic Law need further substantiation by the implementing legislations. See 臺灣新竹地方法院刑事判決，96 年度易字第 4 號。

<sup>28</sup> U.N. G.A. resolution 1514 (XV) of 14 December 1960.

In the 1970s, an international indigenous rights movement emerged within various international, regional and transnational organizations (Niezen, 2003). That is to say, international law in the 20th century has shifted to support indigenous peoples' demands (Anaya, 2004: 4).<sup>29</sup> The emergence of the international indigenous rights movements has proved to be a major factor in the reformation of international discourse on indigenous peoples (Niezen, 2003; Turpel, 1992).<sup>30</sup> Over the last several years, the international system, particularly as embodied in the U.N. and other international institutions, has exhibited a renewed and increasingly heightened focus on the concerns of indigenous peoples. This transition also fosters the evolution of international indigenous rights movements. The U.N. and the International Labour Organization (ILO) are the two most important international organizations in the protection of indigenous peoples' rights. These organizations have adopted several influential international law instruments of which the U.N. Indigenous Declaration and ILO Convention No. 169 represent the two most important international instruments in the protection of indigenous rights of the 21st century. *See Table 1.* The U.N. Indigenous Declaration is constructed upon principles of partnership, consultation and cooperation between indigenous peoples and nation-states.<sup>31</sup> The right to self-determination, as the core spirit of the U.N. Indigenous Declaration, plays a vital role that could allow the

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<sup>29</sup> Anaya observes that, "international law, although once an instrument of colonialism, has developed and continues to develop ... to support indigenous peoples' demands."

<sup>30</sup> Niezen claims that four factors can explain the origins of the international indigenous movement: 1) the struggle against fascism led to a concern for the protection of minorities; 2) decolonization led to an awareness of cultural suppression; 3) the failure of assimilation policies pointed both to their futility and caused the unintended consequence of fostering inter-tribal identity; and 4) The growth of NGOs led to a mechanism for participation.

<sup>31</sup> U.N. Human Rights Council Resolution 2006/2, June 29, 2006. *See also* Office of High Commissioner for Human Rights, *Fact Sheet No. 9 (Rev.1), The Rights of Indigenous Peoples* (<http://www.unhcr.ch/html/menu6/2/fs9.htm>)(2007/7/19).

formation of new partnerships between indigenous peoples and the States in which they live (Pitty, 2001: 44-71; Lawlor, 2003: 351-69). Extensive discussions and negotiations over the past two decades and the current consensus within the Human Rights Council provide legitimate grounds for the adoption of the U.N. Declaration on the Right of Indigenous Peoples (Anaya, 2004; Aikio & Scheinin, eds., 2000).

Table 1: International Indigenous Peoples Human Rights Instruments

Year	Title of Instrument
1939	ILO Convention Concerning the Regulation of Written Contracts of Employment of Indigenous Workers
1945	Charter of the United Nations
1947	ILO Convention Concerning the Maximum Length of Contracts if Employment of Indigenous Workers
1948	Universal Declaration of Human Right
1957	ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal Populations or Semi-Tribal Populations in Independent Countries
1965	International Convention on the Elimination of All Forms of Racial Discrimination
1966	International Covenant on Civil and Political Rights
1966	International Covenant on Economic, Social and Cultural Rights
1986	Declaration on the Rights to Development
1989	ILO Convention Concerning the Protection of Indigenous Tribal Peoples in Independent Countries (ILO Convention No. 169)
1994	Draft Declaration on the Rights of Indigenous Peoples
2006	UN (Draft) Declaration on the Rights of Indigenous Peoples

#### IV. Indigenous Movements and Its Influences on Legislative Reforms in Taiwan

Indigenous movements in Taiwan since 1983 have undergone the transitions from “individual indigenous advocates” to “collective indigenous movement.” It also incorporates the concept of collective rights—the rights to self-determination, the right to development, the rights of dignity and survival—into the implementation of indigenous collective rights (Lin, 2000).

As indigenous peoples became increasingly conscious of their own status and rights in society, various reforms gradually picked up pace. Since 1990s, communications between the government authority, mainstream society, and indigenous peoples have allowed the Taiwanese government to gradually detect the bottom line of aboriginal rights in the political framework of Taiwan (Lin, 2000). In other words, the government is finally beginning to realize that the public authority and mainstream society have repeatedly failed to recognize aboriginal rights. After four constitutional amendments, aboriginal collective rights finally achieved constitutional status with the entrenchment of the Aboriginal Article in 1997.<sup>32</sup> Despite the apparent limitations on indigenous rights, the concept of collective rights is conceptually broad enough to encompass protection of civil and political rights and liberties, especially in the absence of authoritative interpretation of the collective rights (Lin, 2000). Lastly, the enactment of the Indigenous Peoples Basic Law in 2005 has brought

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<sup>32</sup> Article 10, para. 12 of the 1997 Additional Articles of the R.O.C. Constitution: The State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the aborigines. 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.

Taiwan to a new phase of the “New Aboriginal Rights Advancement.”

Indigenous movements and its claims on various rights have institutionally challenged the foundations of customary and traditional nation-state's law and order, including the concepts of human rights, environment, and the treatise on nation-state. Upon the reception of indigenous article in the 1997 constitution amendment, it remains in doubt whether the tide of indigenous movements has successfully challenged current constitutional framework and political system. Nonetheless, the unstable political environment in Taiwan could hardly afford a forum with sufficient participation and effective expression to a well-developed civil society so as to reconsider the core values of interracial justice and civil engagement.

As mentioned at outset, the issue of indigenous rights has gained increasing attention in the eyes of the public and government officials in Taiwan. As a result, indigenous peoples have become emboldened to raise the issue of constitutional recognition of indigenous rights in the national arena. Over the last half-century, indigenous rights have acquired significant legal prominence in international human rights discourse and are increasingly institutionalized through a burgeoning body of international law (Anaya, 2004; Wiessner, 1999: 100-09). While indigenous peoples' rights continue to grow, they have also faced opposition from the nation-states, especially on the issue of whether sovereignty and self-determination are applicable to indigenous peoples (Iorn, 1992: 235-67), which are the two core elements of the new indigenous chapter of the Taiwanese Constitution. Aiming to provide legal justification for the constitutional recognition of indigenous right, this research takes the normative approach to the realization of constitutionality of indigenous rights in Taiwan.

## V. Normative Justification of Constitutionalizing Indigenous Rights

Since the birth of indigenous rights, indigenous movements in Taiwan center their advocacy on the rights to self-government, to land, to strengthen the representations, and to establish the concentrated and exclusive indigenous governmental office (Lin, 2000). These propositions are not only the core belief of indigenous constitutionalism, but also are supported by different political parties with the incorporation of indigenous rights into its political platform (Democratic Progressive Party, 2000). In addition, it results in enormous pressures upon the transformation and reformation of the holistic governmental structure. In response to indigenous movements, the governmental structure reforms, including the guarantee seats of indigenous representatives in the Legislative Yuan and the establishment of Indigenous Ministry in the Cabinet, nonetheless show that government's standpoint towards indigenous issues still embraces generalization, de-politicization, and de-tribalization. Consequently, under current governmental structure, which shares inadequate powers with indigenous peoples, it is highly suspicious that indigenous peoples would have effective power of self-government and participation of policy-making.

The general law plays an important role in recognizing and protecting indigenous rights in Taiwan, because aboriginal rights are not enshrined in the Constitution. During the early 20<sup>th</sup> century, both the Japanese and the R.O.C. governments rejected any constitutional rights of indigenous peoples. Furthermore, the government continues to limit the rights of indigenous peoples to reservation land even after the enactment of the Indigenous Peoples Basic

Law.<sup>33</sup> Therefore, the types and enjoyment of indigenous rights have been subject to the pleasure of the government (Hawkes, 1985: 22). Without a doubt, the most secure basis for indigenous rights has to do with the constitutional entrenchment (Macklem, 2001: 174-80). In the meantime, Taiwan is facing a huge controversy over whether to enact a new Constitution or reform the existing Constitution, because the original Constitution does not effectively reflect society's current expectations (Liu, 2005: 25-27; Shih, 2005b).

Influenced by the development of international laws, these debates have been extended to indigenous law jurisprudence as a means of defining the constitutional position of indigenous peoples. In the framework of Taiwan, the original R.O.C. Constitution made no mention of indigenous peoples. Furthermore, indigenous peoples were excluded from the process of constitutional development (Simon, 2005; Shih, 2006). Starting from 1970s, there was a substantial body of international law establishing the formal basis for relations between the indigenous peoples and colonizing nations by way of constitutional recognition and/or treaties (Wiessner, 1999: 57-128). Nevertheless, the 1997 constitutional reform fails to see the difference between the indigenous peoples and other geographical minorities by regulating them in

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<sup>33</sup> The 2003 census indicated that 256,979 hectares of land had been demarcated as indigenous reservation lands. However, 40% of those are within the water resources conservation zones and 4% are located in the national parks. These reservation lands are under the control of different government agencies. Indigenous peoples thus have the land title only on paper. On 25 May 2005, the R.O.C. Executive Yuan proposed the Regulation of the National Land Restoration and Conservation aimed at the recovery of the national land from natural hazards, *e.g.* earthquake, typhoons, landslides and mudflows. This regulation prohibits any economic activity in the region over 1,500m altitude and forbids new economic development in the region over 500m altitude. As a matter of fact, most indigenous communities are located in these regions and dependent upon land use for their survival. This regulation disregards indigenous concerns and persuades communities to abandon their traditional lands and relocate to lower plains areas.

one way, fails to recognize the distinct characteristics of indigenous peoples, and fails to comply with the international laws and standards that have form the basis for the recognition of indigenous human rights.

In an independent state like Taiwan, the central government maintains jurisdiction in areas that pertain to the integrity of the nation-state.<sup>34</sup> Local governments have legislative autonomy in areas of more local concern.<sup>35</sup> However, in Taiwan, there are some gray areas. Indigenous policy is one such gray policy area. Despite the mechanics of nationalism that are meant to allow multiple routes of political representation and participation, the history of Taiwan has demonstrated that indigenous peoples have not fared well under the Taiwan system (Simon, 2005; Shih, 2003). This is clearly serious given the colonial legacies of the central government's power to legislate for indigenous peoples and lands reserved for them. Indigenous peoples have not been considered an equal political partner in Taiwan, and have often been misrepresented by nationalism.

Constitutionalism is a "way of political life in which a people constitute themselves as a community, conducting their affairs in accordance with fundamental principles and through prescribed forms, procedures and primary rules of obligation, in order to achieve the ends and purposes that define their corporate existence" (Belz, 1997: 209-11). Like other indigenous nations across the globe, Taiwan's indigenous peoples have endured oppression and discrimination, and they were stripped of many of their fundamental rights. As discussed above, a series of high profile international indigenous movements have led to greater public awareness and sensitivity, and enlightened legislation. In the face of constitutionalizing indigenous rights, this paper offers three

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<sup>34</sup> Article 107 of the R.O.C. Constitution.

<sup>35</sup> Articles 109 and 110 of the R.O.C. Constitution.



normative justifications for indigenous rights: cultural diversity, aboriginal prior occupancy, and preservation of minority culture. Each perspective expresses unique truths about the constitutional nature of indigenous rights.

## 1. Cultural Diversity<sup>36</sup>

Cultural rights encompass the creative self-expression as well as the more fundamental acknowledgement of cultural authenticity and its connection to development (Tsosie, 2003: 357-404). The broader conception of cultural rights has gained heightened resonance with the increased international focus on cultural pluralism. For instance, the major concern of a resolution by the 14th General Conference of the U.N. Education, Scientific and Cultural Organization (UNESCO) was the affirmation of the world's diverse cultures. In addition, the 1966 UNESCO Declaration of the Principles of International Cultural Cooperation proclaims that,<sup>37</sup>

- (1) Each culture has a dignity and value which must be respected and preserved.
- (2) Every people has the right and the duty to develop its culture.
- (3) In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

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<sup>36</sup> In the United Nations, the term "cultural difference" is used. See the U.N. Draft Declaration on the Rights of Indigenous Peoples, HRC res. 2006/2, June 29, 2006. (*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.)

<sup>37</sup> 1966 UNESCO Declaration of the Principles of International Cultural Cooperation, 14th Sess., Nov. 4, 1966, art. 1, reprinted in United Nations, Human Rights: A Compilation of International Instruments at 409, U.N.Doc. ST/HR/ 1/rev. 3, U.N. Sales No. E.88.XIV.1 (1988).

Furthermore, the International Covenant on Civil and Political Rights declares explicitly that “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>38</sup> There has been a trend that this cultural norm played as the basis of decisions favorable to indigenous peoples by the U.N. Human Rights Committee and the Inter-American Commission on Human Rights of the Organization of American States.<sup>39</sup> Both bodies also demonstrate that culture includes economic or political institutions, land use patterns, as well as language and religious practices.<sup>40</sup>

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<sup>38</sup> ICCPR, G.A. res. 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. (Article 27).

<sup>39</sup> For example, Res. No. 12/85, Case No. 7615 Inter-Am. C.H.R. 24 (1985) in Annual Report of the Inter-American Commission on Human Rights 1984-85, OEA/Ser.L./V/II.66, Doc. 10 Rev. 1 (1985) – Citing Article 27 of the ICCPR, the Commission held that “international law in its present state ... recognize the right of ethnic groups to special protection on the use of their own language, for the practice of their own religion, and in general, for all those characteristics necessary for the preservation of their cultural identity”. A similar extensive view taken by the U.N. Human Rights Committee in *Ominayak and the Lubicon Lake Band v. Canada* (Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).)– The Committee construed the cultural rights guarantees of article 27 of the ICCPR to extend to “economic and social activities” upon which the Lubicon Lake Band relies as a group. The Committee acknowledged that the Band’s survival as a distinct cultural community was bound up with the sustenance that it derived from the land.

<sup>40</sup> The U.N. Human Rights Committee has confirmed that indigenous peoples are minorities for the purpose of article 27 in a number of cases discussed above. The Committee has also recognized that special place of land rights within indigenous cultures, and that this “does not prejudice the sovereignty and territorial integrity of a State party.” Within the framework of the ICCPR, indigenous traditional land tenure systems are recognized as part of indigenous cultures and as such are protected by the ICCPR. For case readings, see *Kitok v. Sweden*, Communication 197/1985, U.N. Doc. A/43/40, Annex 7(G), opinion approved in 1988; *Jouni E. Länsman et al. v. Finland*, Communication 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, opinion approved 8 November 1994.

Briefly speaking, indigenous peoples are not merely referred to those that were there before outside immigrants, but also referred to peoples that clearly distinguish themselves in a socio-cultural context from the surrounding population (Anaya, 2004).<sup>41</sup> Indigenous peoples are in the first place characterized by a common culture and language, common spiritual ideas, an identifiable territory and a certain economic structure (Cobo Report, 1986).<sup>42</sup> Normally, they form clearly distinguishable groups.

The environment for indigenous human rights in Taiwan is severely polluted by the continuing colonialism and neo-colonial social and economic relationships with non-indigenous society at large. In this historical context, Taiwan is at present going through a necessary phase of consolidating the fabric of national identity and unity of all their peoples. These historical factors are crucial in pursuing the development of human rights of indigenous peoples. What is more, nearly 500 years of colonialism has left a legacy of very unequal access to development. It has in turn created wide disparities in participation in the apparatus of the state and national economy for indigenous peoples. There is hardly any charter of rights that gives recognition to the existing indigenous cultural diversity.

In another aspect, indigenous cultural practice presents particular cultural and social value to communities, which does not fall within the conventional protection regime of law. As declared by the U.N. Convention on Biological Diversity, the Convention recognizes “the close and traditional dependence of

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<sup>41</sup> U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, José Martínez Cobo, Special Rapporteur, E/CN.4/Sub.2/1986/7.

<sup>42</sup> Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, E/CN.4/Sub.2/2001/21, 11 June 2001.

many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.”<sup>43</sup> Clearly, conventional legal regime does not accommodate ongoing cultural preservation in a model where private property rights serve as the fundamental framework. Potential protection is found through a reconsideration of cultural knowledge and a paradigmatic shift, whereby constitutionalizing indigenous customary law is a necessary means for preserving indigenous interests through biological diversity and international obligations.<sup>44</sup>

## 2. Aboriginal Prior Occupancy

Perhaps the most common claim in relation to Taiwanese indigenous rights is that indigenous peoples ought to enjoy indigenous rights because they lived on and occupied Taiwan before external contact (Porter, 2002: 123-75; Macklem, 2001). A claim of prior occupancy suggests that, all other things

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<sup>43</sup> In the follow-up program of action for the Rio Conference on the Environment (1992), *Agenda 21* includes important provisions which relate to recognizing and strengthening the role of indigenous peoples, as well as the role of indigenous people in land management and environmental protection. Chapter 26 in particular notes that “in view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of Indigenous peoples, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of Indigenous people and their communities.”

<sup>44</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Mis.13/Rev.4 (1997). (“4. The Committee calls in particular upon States parties to: ... (d) ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decision directly relative to their rights and interests are taken without their informed consent.”)

being equal, a prior occupant of land possess a stronger claim to that land than subsequent arrivals (Macklem, 2001: 78; Porter, 2002). In other words, aboriginal rights stem from this prior occupancy; they are the rights holders held as a result of longstanding use and occupancy of the land (Macklem, 1995; Becker, 1977).

Taking indigenous people in the United States (Native Americans) as an example, the U.S. Supreme Court Chief Justice John Marshall in *Johnson v. McIntosh* (1823) held that subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, “the rights of the original inhabitants were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it (land), and to use it according to their own discretion.”<sup>45</sup> In Canadian Supreme Court’s *Van der Peet* decision, the nature and extent of aboriginal rights essentially emerge from the fact of prior occupation of the land, as Chief Justice Lamer clarifies,

[W]hen Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.”<sup>46</sup>

Chief Justice Lamer further acknowledged in Canadian Supreme Court’s *Delgamuukw* decision that aboriginal title is derived from “the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law ... What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas

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<sup>45</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823), at 574.

<sup>46</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at 30.

normal estates, like fee simple, arise afterward.”<sup>47</sup>

Historically, aboriginal title has been recognized as pre-existing rights which cannot be affected by the assertion of sovereignty of colonial power (Ülgen, 2002: 144-46; Asch & Zlotkin, 1997: 210-11).<sup>48</sup> Unlike other land titles which usually originate in governmental grants, since indigenous peoples were there in Taiwan before the colonial power asserted sovereignty, their aboriginal title is derived from the dual source of their prior occupation and their pre-existing systems of law (Daes, 1996). As in the United States, the theory of aboriginal rights originates with 16th and 17th century international law and theorists such as Francisco de Vitoria, who has been recognized as the real founder of modern international law. Vitoria set forth the important principle that “the consent of Indian tribes was required before Europeans could legally acquire Indian land or political domination over them” (Vitoria, 1917: 86, 128, 134).

Aboriginal title is inextricably interconnected with international instruments. We can observe a pattern of activity by the U.N. bodies and other international organizations, such as the OAS, in conjunction with numerous state practices. According to Robert A. Williams Jr., “The international norms that recognize rights based on indigenous peoples’ traditional landholdings and resource use are increasingly incorporated and reflected in the domestic legal practice of states throughout the American region and the world” (Williams, 1996). These activities demonstrate a steadily broadening consensus that

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<sup>47</sup> Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at 114.

<sup>48</sup> *Id.* ([T]itle arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown’s underlying title ... Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.)

aboriginal title is a rule of customary international law (Wiessner, 1999: 109).<sup>49</sup>

### 3. Preservation of Minority Culture

Aboriginal rights in general have been defended as a means of protecting aboriginal cultural differences from assimilative tendencies of more dominant cultures (Tsosie, 2003). Protection of minority cultures is not alien to Taiwan constitutional traditions.<sup>50</sup> According to the R.O.C. Constitution, the diversity of languages and cultures are critical to the state's spirit. In many part of the country, indigenous peoples still suffer discrimination. Their cultures are considered inferior to the dominant Han culture. Despite that the R.O.C. Constitution affirm the value of cultural diversity, indigenous peoples are seeing their traditions and cultures wither away. The best solution seems to be for authorities to channel resources directly to the indigenous peoples. In this light, aboriginal rights can be viewed as part of broader national and international efforts to preserve not only the cultural integrity of indigenous peoples, but also the cultural integrity of other peoples whom were threatened by dominant assimilative forces in modern nation-states (Macklem, 2001; Jung, 2003).

Moreover, several international legal norms support claims of cultural

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<sup>49</sup> As Wiessner concludes, "Today, many of these proposed or actual prescriptions, coinciding, as they do, with domestic state practice ... have created a new set of shared expectations about the legal status and rights of indigenous peoples that has matured and crystallized into customary international law."

<sup>50</sup> Article 169 of the R.O.C. Constitution –The State shall, in a positive manner, undertake and foster the develop of education, culture, communications, water conservancy, public health and other economic and social enterprises of the various racial group in the frontier regions. With respect to the utilization of land, the State shall, after taking into account the climatic conditions, the nature of the soil, and the life and habits of the people, adopt measures to protect the land and to assist in its development.

integrity of minorities within nation-states.<sup>51</sup> The primary and the first international body of human rights standards established in 1948 is the Universal Declaration of Human Rights.<sup>52</sup> It does not address indigenous people directly, but has provisions for group rights and protections available to indigenous peoples under Article 27 (on minorities),<sup>53</sup> as interpreted by the supervisory committees that monitor the declaration's conventions. In a follow-up Declaration adopted by the World Conference on Human Rights, held in June 1993 in Vienna, States are obliged to "ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities."<sup>54</sup> Also, States are requested "to

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<sup>51</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Mis.13/Rev.4 (1997). The CERD Committee calls upon the states to provide indigenous peoples with conditions allowing for sustainable economic and social development compatible with their cultural characteristics, and to ensure that indigenous peoples can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and practice their language. See also U.N. Human Rights Committee, *General Comment No. 23 (50) (CCPR-27)*, adopted on April 6, 1994

<sup>52</sup> U.N. G.A. res. 217 A (III) of 10 December 1948.

<sup>53</sup> *Universal Declaration of Human Rights*, Article 27 – "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

<sup>54</sup> *The Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993, part I, para. 19 – "Considering the importance of the promotion and protection of the rights of persons belonging to minorities and the contribution of such promotion and protection to the political and social stability of the States in which such persons live. The World Conference on Human Rights reaffirms the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law in accordance with the Declaration on the Rights of Persons



take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and to recognize the value and diversity of their distinct identities, cultures and social organization.”<sup>55</sup> Additionally, article 27 of the International Covenant on Civil and Political Rights recognizes rights of members of “ethnic, religious or linguistic minorities ... to enjoy their own culture, to profess and practise their own religion [and] to use their own language.” The U.N. Convention on the Prevention and Punishment of the Crime of Genocide provides added support for the concept of cultural autonomy.<sup>56</sup> Also, the UNESCO Declaration of the Principles of International Cultural Cooperation affirms a right and duty of all peoples to protect and develop minority cultures throughout the world. Lastly, the UN International

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Belonging to National or Ethnic, Religious and Linguistic Minorities. The persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.”

<sup>55</sup> *The Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993, part I, para. 20 – “The World Conference on Human Rights recognizes the inherent dignity and the unique contribution of Indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of Indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of Indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of Indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.”

<sup>56</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1961. Article II defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such....”

Convention on the Elimination of All Forms of Racial Discrimination calls for positive governmental action to “ensure the adequate development and protection of certain racial groups or individuals belonging to them.”<sup>57</sup>

## VI. Comparative Studies

Early colonial views of indigenous rights, during the fifteenth and sixteenth centuries, were largely based on the pre-Columbian Catholic conceptualization of the rights of non-Christian peoples (Miller, 2005: 2; Russell, 2005). Robert A. Williams, Jr., in his book, *The American Indian in Western Legal Thought*, traced the western world’s “discourse of conquest” to at least the 13th century, when Pope Innocent IV (1243-1254) asked about the Crusades whether it is “licit to invade a land that infidels possess, or which belongs to them?” The Pope considered two opposing positions. The first view is that indigenous peoples, as “infidels, by virtue of their nonbelief, possessed no rights to dominium that Christians were required to recognize.” The other view, which upheld the aboriginal right, held that “infidels possessed the natural-law right to hold property and exercise lordship.”<sup>58</sup> Columbus and the

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<sup>57</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, art.2, para. 2, opened for signature March 7, 1966, 660 U.N.T.S. 195, entered into force January 4, 1969.

<sup>58</sup> In another of his writings, *Columbus’s Legacy*, Robert A. Williams, Jr. expanded this colonial legacy by providing that, “Columbus and the other Europeans who followed him from the Old World carried the firm belief that Christian European culture and its accompanying religious forms, patterns of civilization and normative value structure were all superior to the diverse ways of life practiced and lived by the indigenous tribal peoples they encountered in the New World. This Old World belief was part of a venerable legal tradition which justified denying the rights of self-rule to peoples whose cultures and religions were different from Christian Europeans that was already nearly 400 years old by the time Columbus reached the New World.” See Robert A. Williams, Jr., *Columbus’s Legacy: Law As An Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of*

other Europeans who followed him from the Old World carried the firm belief that Christian European culture and its accompanying religious forms, patterns of civilization and normative value structure were all superior to the diverse ways of life practiced and lived by the indigenous tribal peoples they encountered in the New World (Miller, 2005). This Old World belief was part of a venerable legal tradition which justified denying the rights of self-rule to peoples whose cultures and religions were different from Christian Europeans that was already nearly 400 years old by the time Columbus reached the New World (Russell, 2005).

Western legal doctrines of “discovery and conquest” concerning indigenous rights 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 (Williams, 1990: 96-107). As a result, in the context of colonial international law, the sovereign status of indigenous peoples were denied by a process of legal rationalization that is underpinned by the assumption that indigenous peoples were inferior and incapable of legal entitlements.

## 1. United States of America

In the landmark “Marshall Trilogy” cases,<sup>59</sup> Chief Justice John Marshall of the U.S. Supreme Court established foundations for the development of U.S. Federal Indian Law and Policy. Justice Marshall laid out a couple of doctrines that formed the grounds of his decisions concerning Indian rights, including

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*Self-Determination*, 8 Ariz. J. Int’l & Comp. L. 51, 56 (1991).  
<sup>59</sup> Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. 530 (1832).

“Doctrine of Discovery<sup>60</sup> and Conquest” (Miller, 2005: 5-8; Williams, 1990: 6),<sup>61</sup> “Aboriginal title,”<sup>62</sup> “Diminished Tribal Sovereignty,”<sup>63</sup> and “Congress Plenary Power Doctrine.”<sup>64</sup>

American Indians' plight presents a typical circumstance that worldwide indigenous peoples have been experienced after contacting outside invaders. Retrospectively, American Indian colonial history involves different periods. The impact of colonization has had profound negative effects on indigenous identity and social, and economic circumstances which have in-turn created a cycle of social disorder and poverty as evident in the contemporary indigenous circumstances (Miller, 2005: 7; Williams, 1986: 247-52).<sup>65</sup> During the early stage of Indian dealings with colonial powers, their interactions have been recognized as international relations (Miller, 1993: 144; McHugh, 2004: 103).<sup>66</sup> In its early contact with American Indian Nations, Spanish colonizers deployed a discourse, which had been conducted successfully during the medieval

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<sup>60</sup> Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823). Doctrine of Discovery – discoverer acquires title against all other Europeans but does not perfect title against original inhabitants.

<sup>61</sup> Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823). Doctrine of Conquest – it can perfect title against original inhabitants, and must be taken and held by force. In his decision of *Johnson v. McIntosh*, Justice Marshall stated, “Conquest gives a title or right that the courts of the conqueror cannot deny”.

<sup>62</sup> Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823). Justice Marshall coined term “aboriginal title” in defining what property interests of Indians were.

<sup>63</sup> Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Justice Marshall defined the Cherokee Nation as “domestic dependent nation” because under Treaty of Hopewell they do not have right to carry out foreign relations. “Diminished Sovereignty”, Marshall analogized their status to that of “ward and guardian”.

<sup>64</sup> Lone Wolf v. Ethan A Hitchcock, 187 U.S. 553 (1903).

<sup>65</sup> Miller observes that, “The political and economic aspects of the (colonial) Doctrine were developed to serve the interests of European countries in an attempt to control European exploration and conflict over non-European areas.”

<sup>66</sup> As indicated by Dr. Paul G. McHugh, “whatever *imperium* was asserted over Indians rested on their agreement rather than the fact of their forced submission.”

Crusades to the Holy Land, asserting that American Indians were non-Christian peoples; thus, they could be justly conquered and Christian Europeans could legitimately confiscate their lands (Williams, 1990: 13-15; Miller, 2005: 8).<sup>67</sup> Briefly, the early debate regarding the rights of non-Christian peoples to the “lands newly discovered” involved two schools of thought:

- There were jurists and scholars who, believing that the non-Christian indigenous peoples of America were nothing more than beasts, that they could not therefore be regarded as capable of holding land in any civilized sense (Newcomb, 1993: 316).<sup>68</sup>
- The other school of thought, influenced significantly by the evolving principles of Natural Law and secularism, held that non-Christian indigenous peoples have the capacity to reason and are therefore capable of holding land (Miller, 2005: 9).

Since British colonialism, goal of Indian policy has been to solve the “Indian problem” whether by conquest or negotiation (Deloria & Lytle, 1983). Each succeeding policy is laid on top to form strata that swings between autonomy for the Indians and assimilation. In the beginning, Indian cultures were not thought to have legal systems/laws because it was believed that they did not have concept of private property, and led to a clash of world-views/cultures (Bobroff, 2001: 1559-1623). According to Vine Deloria and Clifford M. Lytle, in respect of resolving “American Indian problem”, it

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<sup>67</sup> Miller describes that “The Doctrine has been traced as far back as medieval and the Crusades to recover the Holy Lands in 1096-1271. Even before that time, however, the Church and various popes had established the idea of a “universal papal jurisdiction” which “vested a legal responsibility in the pope to realize the vision of the universal Christian commonwealth.”

<sup>68</sup> According to Newcomb, “Christians simply refused to recognize the right of non-Christians to remain free of Christian dominion.”

involved six periods of federal Indian policy characterized by the impact of federal actions (Deloria & Lytle, 1983). The first phase 1532-1828 termed “Discovery, Conquest and Treaty-making,” Indian people were recognized as “legitimate entities capable of dealing with the European nations by treaty” and this became the basis for defining legal and political relationships among the parties (Anderson *et al.* eds., 2005).<sup>69</sup> The second period 1828-1887 termed “Removal and Relocation,” began when the Indian Removal Act of 1830 was passed for the purpose of moving Indian people westward away from the approaching white civilization. During this period, various treaties began establishing reservation. The structure of these agreements was repeatedly violated by westward expansion, however, and these violations led to the next period of “Allotment and Assimilation” 1887-1928. During this period two-thirds of the reservation lands were reduced through allotment; jurisdiction over felony crimes became federal; the boarding school system was developed and other legislation was passed to promote assimilation. The following stage 1928-1945, termed “Reorganization and Self-Government,” brought an assessment of social and economic status of Indian people under the “Meriam Report.” Recommendations from this report eventually became legislation. The Indian Reorganization Act of 1934 (IRA) passed to end the allotment policy and “to enable tribes to organize for their common welfare and to adopt Federally approved constitutions and bylaws.” Nevertheless, the constitutions were new and strange to most tribes and comprised a restructuring of their traditional

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<sup>69</sup> Several different kinds of treaty provisions demonstrate that Indian treaties are similar in many respects to international treaties. Until the last decade of the treaty-making period, terms familiar to modern international diplomacy were used in Indian treaties. The capacity of Indian tribes to make war was frequently recognized. Many of the very early treaties were treaties of peace and friendship ... Indian treaties also typically included provisions fixing boundaries between tribes and the United States. Some treaties included provisions providing for passports, extradition, and relations with other sovereigns.

ways.

The next phase 1945-1961 is termed “Termination” period (Getches *et al.*, 2005).<sup>70</sup> In 1949, Hoover Commission issued its report on Indian Affairs and recommended, “complete integration of Indians should be the goal so Indians would move into the mass of the population as full, taxpaying citizens” (Getches *et al.*, 2005).<sup>71</sup> Federal government sought to eliminate Indians by policy, such as: give legislative and judicial responsibility to States, end trust relationship, end of tax exemption, discontinue special federal programs such as housing and training, and end tribal sovereignty (Getches *et al.*, 2005).<sup>72</sup> It was a period that saw the termination of several tribes by the passage of congressional resolutions and legislation. The reason for the termination policy was to reduce and eventually eliminate the Federal budget for Indian people. The era of relocation and termination petered out during Kennedy and Johnson periods, but they put nothing in place to replace it. The last period 1961-Present termed “Self-Determination” is a time in which many major pieces of legislation were enacted. “By the late 1960’s, the policy of termination was largely regarded as a failure, and the assimilationist ideal began to fade” (Canby, 2004). In July of 1970, President Nixon issued a Special Message to Congress in which he made his Indian policy clear. After a stark repudiation of termination, the President asserted that: “This, then, must be the goal of any ... national policy toward the Indian people: to strengthen the Indian’s sense of

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<sup>70</sup> In 1961 John F. Kennedy stops “Termination and Relocation”, but doesn’t fix the problem and reinstate “terminated” tribes.

<sup>71</sup> Termination stands as a chilling reminder to Indian peoples that Congress can unilaterally decide to extinguish the special status and rights of tribes without Indian consent and without even hearing Indian views.

<sup>72</sup> Termination was a policy that had to be followed up by individual Congressional acts for each tribe followed by a termination plan that transferred land into private ownership.

autonomy without threatening his sense of community” (Getches *et al.*, 2005).<sup>73</sup> President George W. Bush reaffirmed the Federal government’s recognition of tribal sovereignty. He stated, “... the existence and durability of our unique government-to-government relationship is the cornerstone of the Administration’s policy of fostering tribal self-government and self-determination.”<sup>74</sup>

To give a short summary, American Indian Law has always been heavily intertwined with federal Indian policy. The development of U.S. federal relationship with Indians encompassed the following four elements. First, the tribes are independent entities with inherent powers of self-government (Anderson *et al.* eds., 2005).<sup>75</sup> Second, the independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes.<sup>76</sup> Third, the power to deal with and regulate the tribes is wholly

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<sup>73</sup> President Nixon proposed a number of legislative measures to bolster tribal self-rule, cultural survival, and economic development. These included the restoration of the sacred lands of Blue Lake to Taos Pueblo (a substantive act of justice as well as a symbolic gesture of good faith), measures for placing greater control of education in the hands of Indian communities, and legislation defining procedures by which tribes might assume administrative control of federal programs without extinguishing the trust relationship.

<sup>74</sup> In 2004, President Bush confirmed U.S. adherence to the government-to-government relationship and support for tribal sovereignty and self-determination in Executive Order 13336, entitled American Indian and Alaska Native Education.

<sup>75</sup> The recognition of Indian nations’ independency and sovereign powers was firmly established in the first great act of the U.S. Congress, the Northwest Ordinance of July 13, 1787. This was just the re-echo of the Bull *Sublimis Deus* in 1537 by Pope Paul III: ... the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should be in any way enslaved; should the contrary happen, it shall be null and of no effect.

<sup>76</sup> *Lone Wolf v. Ethan A Hitchcock*, 187 U.S. 553 (1903). The Supreme Court stated “the plenary power of Congress over the tribal relations and lands ... could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress... [P]lenary power over the tribal relations of the Indians has been exercised by



federal; the states are excluded unless Congress delegates power to them (Anderson *et al.* eds., 2005).<sup>77</sup> Fourth, the federal government has a responsibility for the protection of the tribes and their properties, including protection from encroachments by the states and their citizens.<sup>78</sup>

## 2. Canada

Basically, aboriginal people refer to the indigenous (pre-European) populations in Canada. Under the Canadian Constitution, aboriginal peoples include status Indians, non-status Indians, Métis and Inuit peoples.<sup>79</sup> First Nations is an alternative term for Indians and is used politically to step away from the confines of the Indian Act.

Looking at the development of indigenous rights in Canada, the Supreme Court of Canada had set up a series of cases in defining aboriginal title since the 1888 case of *St. Catherine's Milling and Lumber Company v. The Queen*.<sup>80</sup> In *St. Catherine's Milling Company*, the Supreme Court of Canada stated that

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Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”

<sup>77</sup> A proof of the U.S. intent of “Federalization/Federalism” over Indian issues was seen in the “*Recognition of Indian Commerce/Trade Clause*” of the Indian Trade and Intercourse Act of 1790.

<sup>78</sup> Section four of the *Indian Trade and Intercourse Act of 1790*, 25 U.S.C. §177 (1790): [n]o sale of lands made by and from Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or person, or to any state, whether having the right of pre-emption to such land or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

<sup>79</sup> Section 35(2) of the 1982 Canadian Constitution ([http://laws.justice.gc.ca/en/const/annex\\_e.html#II](http://laws.justice.gc.ca/en/const/annex_e.html#II))(2007/7/19).

<sup>80</sup> 14 A.C. 46 (J.C.P.C.). A huge area of land was reserved for aboriginal peoples by the Royal Proclamation 1763 and other reserves were established in various other ways before and after Confederation. These lands come within section 91(24) of the Constitution, which enables the federal government to administer and control the lands. Legislative power does not, however, carry with it proprietary rights over the subject matter of the power. This principle was established by the Privy Council in the *St. Catharine's Milling* case.

the Royal Proclamation of 1763 gave rise to aboriginal title.<sup>81</sup> The nature of Aboriginal interest in land was described as a personal and usufructuary interest that operated as a burden on the Crown's underlying title. Further, the right of possession was said to be dependent on the express recognition by the Crown. The Supreme Court of Canada revisited aboriginal title in the 1973 case of *Calder v. Attorney General of British Columbia*.<sup>82</sup> This high Court decided Aboriginal title is a historic title and inherent right which is not reliant on the Royal Proclamation of 1763. In other words, Aboriginal title is not dependent on the "good will" of the Crown. It is an independent interest. Additionally, it was the first time Aboriginal title determined by a high court where Aboriginal people is a party to case. Soon after *Calder* in 1985, the Supreme Court of Canada explored the source of the Crown's fiduciary obligation towards Aboriginal Peoples in the case of *Guerin et al v. The Queen*.<sup>83</sup> According to Royal Proclamation 1763, it provisioned that the Crown was obligated to deal on Indian's behalf when land was surrendered. It further stipulated that Indians could only surrender their lands to the Crown to prevent exploitations.

Before the Supreme Court of Canada's judgment in *Calder*, Aboriginal rights were referred to the rights that Aboriginal peoples possess by virtue of their original occupancy of the land. In the past, Aboriginal title was seen by the courts as a protected "possessory" right, a burden upon the "ultimate" Crown title that could be purchased to perfect that future interest. The justification for this burden was the fiduciary interest of the sovereign toward Aboriginal rights. The *Calder* case established aboriginal title in Canada and

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<sup>81</sup> The British Crown issues a Royal Proclamation recognizing Aboriginal sovereignty and title to land.

<sup>82</sup> [1973], 34 D.L.R. (3d) 145 (S.C.C.) The Supreme Court of Canada agrees that Aboriginal title exists and is a right inherent to Aboriginal peoples.

<sup>83</sup> [1985] 1 C.N.L.R. 120 (S.C.C.)

re-opened the door to treaty negotiations. As the first major court decision of its kind in the Commonwealth, the Calder case also set precedents for New Zealand, Australia and many other countries worldwide. Although this split decision was not definitive, it was the first aboriginal title to be brought to court by a First Nation regarding aboriginal title in British Columbia.<sup>84</sup> The Calder case affirmed that Aboriginal title is a legal concept that exists in Canada.

Historically, Canadian constitutional law and legal development have been slowly equalizing authority between Aboriginal peoples and the colonists. The Supreme Court of Canada has noted that before the constitutional reform of 1982, the courts ignored Aboriginal and treaty rights.<sup>85</sup> In the *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec*,<sup>86</sup> the court commented that the constitutional reforms changed this legal context:

the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The “promise” of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with

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<sup>84</sup> The court held that the Nisga'a Aboriginal Title in B.C. was not extinguished (3 judges) while others held that it was extinguished (3 judges) and one did not provide any comments on the grounds of a technicality. But, all six judges agree that Aboriginal title is an inherent right capable of recognition by the common law.

<sup>85</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>86</sup> [1998] 2 S.C.R. 217.

minorities, reflects an important underlying constitutional value.<sup>87</sup>

In the *Delgamuukw* case,<sup>88</sup> the Lamer Court, on the question of the content of Aboriginal title, provides the first clear, definitive legal definition, such as: “Aboriginal title is a *sui generis* right in land, something between fee simple title and a personal and usufructuary right. Aboriginal title is inalienable, except to the Crown.” “Aboriginal title has its legal source in prior occupation of the land.” The *Delgamuukw* decision recognized that Aboriginal land tenure systems have always existed in North America (Henderson *et al.*, 2000).<sup>89</sup>

Aboriginal interests and customary laws survived the assertion of sovereignty by the Crown, and were elevated to constitutional status by section 35 of the Constitution Act, 1982. Aboriginal rights were constitutionally entrenched but not specified in the Constitution Act of 1982.<sup>90</sup> Section 35 of the Constitution provides:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

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<sup>87</sup> *Id.*

<sup>88</sup> *Delgamuukw v. British Columbia*. [1997] 3 S.C.R. 1010.

<sup>89</sup> As Professor Henderson commented, “The *Delgamuukw* guidelines affirm and recognize that Aboriginal tenure is *sui generis* tenure: a self-generating system of land tenure protected by section 35(1) of the Constitution Act, 1982. The sources, content, and meaning of a *sui generis* tenure exist in Aboriginal world-views, languages, laws, perspectives and practices. A *sui generis* tenure does not take its source or meanings from European, British, Canadian law or practice, and exists independently of recognition of the tenure.”

<sup>90</sup> In its decision of *Van der Peet*, [1996] 2 S.C.R. 507, the Canadian Supreme Court set out general principles for interpreting s. 35 of the Constitution Act 1982: (1) S. 35 should be interpreted as a means to reconcile the interests of Aboriginal peoples with Canadians generally; (2) It should be interpreted in a purposive manner and the words should be given a generous, liberal interpretation.

- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

### 3. Summary

Dating from the late 15th century onward, indigenous peoples in the New World subjected to European colonization have strived to focus national and international attention on their subjugation and dispossession. These various movements, primarily in Australia, Canada, New Zealand, South America, and the United States, began in different places at different times. The legal debate over indigenous rights has evolved and drifted across the globe over the past two centuries, beginning as early as 1823 with the first American judicial decision recognizing common law aboriginal title,<sup>91</sup> and continuing to the present day in decisions such as the 2001 international judgment affirming aboriginal right to lands and natural resources.<sup>92</sup>

Indigenous constitutional rights shape one of the most intriguing and rapidly developing areas of national law in most pre-colonized States. Based on the foregoing accounts, the highest courts in the U.S. and Canada have debated issues of nature, proof, recognition and extinguishment of indigenous rights. Initially, indigenous and European governments and legal systems were

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<sup>91</sup> Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823).

<sup>92</sup> Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R., (Ser. C.) No. 79 (Judgment on merits and reparations of Aug. 31, 2001). For abr. version, see 19 Ariz. J. Int'l & Comp. L. 395 (2002).

autonomous and independent of each other. However, as a result of a number of factors, including disease and European political attitudes towards non-Christian peoples, the English and subsequent U.S. and Canadian colonial governments began to successfully assert legal jurisdiction over the governments and legal systems of the indigenous peoples (Borrows & Rotman, 1998: 4-11). After colonization of the continent, indigenous peoples in the North America forcibly accepted certain limitations on their sovereignty and significant losses of lands in exchange for treaty agreements. These treaties and subsequent judicial decisions recognized the Indian right of self-government and the constitutionality of indigenous rights (Williams, 1996).

## VII. Conclusion

A constitution is a general summary of present policy. Laws are more particularized statements of policy. For this reason, an ideological statement is even more important than a concrete statement of economic or social policy because it serves as the basis of such policies. This research contends that fundamental change is required in order to recognize and protect indigenous rights, partly because the current Constitution was established without the participation of the indigenous peoples. In the discourse towards the constitutionalization of indigenous rights, indigenous peoples must have a secure place in the R.O.C. Constitution. Only constitutional recognition of indigenous right will permit and facilitate government-to-government negotiations about the form and substance of the by-laws governing indigenous communities (Hawkes, 1985: 71). This is essential to securing the empowerment of indigenous peoples.

While advocating tribalism from indigenous peoples' perspective, we

usually have to confront a counter power from the mainstream government's side that promotes de-tribalization under the cover of the belief of civilization and assimilation (Tsosie, 2003). The conflict resides among tribalism, constitutionalism and cultural Pluralism. Can tribal cultural and political identity be reconciled within the larger incarnations of nation-state of Taiwan? Further, as we argue for indigenous human rights issues at the Constitution level, we will face an ironic belief, held by the majority of society, which refers to rights reside in individuals, but the sense of community is represented politically (Porter, 2002). The constitutional reform on indigenous rights is important because it reflects an understanding that the collective rights of indigenous peoples require special recognition. It is justified on the basis of their unique identity and is necessary to the preservation of that identity.

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## 從國際法的觀點看原住民族權利的憲法意義

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### 摘 要

陳水扁總統在 1999 年總統競選期間，曾遠赴蘭嶼與原住民族各族代表共同簽署「原住民與台灣製府建立新的夥伴關係」，內容包括承認台灣原住民族之自然主權、推動原住民族自治、與台灣原住民族締結土地條約、恢復原住民族部落及山川傳統名稱、恢復部落及民族傳統領域土地、恢復傳統自然資源使用以促進民族自主發展、原住民族國會議員回歸民族代表等七項。本文意識到在推動一個新型態、去殖民化、納入原住民族法概念的法律制度，在現今臺灣的法律制度下，必然會招致來自於非原住民族社會的反彈。猶甚者，原住民族必須面對的挑戰是積習已深的制度性法制障礙與歧視性的社會區隔，就像是現今臺灣原住民族正同時處於漢民族中國思想與臺灣思想的再殖民化過程。對於臺灣原住民族的權利發展，本文將引發國際與國內更多的注意與關心。除此以外，本文旨在促進臺灣原住民族法律在學術領域的發芽與成長。最重要的是，本文將提醒社會大眾一個去殖民化思想、納入原住民族傳統文化與世界觀的法律制度，對於臺灣原住民族的發展有其迫切的需要。

關鍵字：原住民（族）權利、原住民族運動、憲法化、賦權