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CONCEPTUALIZING INDIGENOUS HISTORICAL JUSTICE TOWARD A MUTUAL RECONCILIATION WITH STATE IN TAIWAN

Awi Mona (Chih-Wei Tsai)**

Abstract: Transitional justice has received considerable attention in recent years in Taiwan. Despite all this attention, transitional justice is an issue that remains incomplete without addressing justice for indigenous peoples. This paper aims to focus on the essential characteristics of indigenous justice against the successive alien regimes. Though the fact that the national apology to indigenous peoples may have broken new ground in the government's relationship with indigenous peoples, the common understanding of transitional justice has caused significant bitterness and frustration for indigenous peoples. Until the core significance of indigenous justice is essentially resolved, the existing uncertainty about reconciliation with indigenous peoples will continue.

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I. FOREWORD

In the lead-up to her 2016 presidential victory in Taiwan, President Tsai Ing-wen made a campaign pledge to issue a national apology to indigenous peoples on behalf of the government.¹ As her foundational indigenous policy, this pledge actually triggered a series of questions that were not so encouraging. Questions like: Who are the indigenous peoples? Why does Tsai want to apologize, and for what reasons? Did Tsai do anything bad to indigenous peoples?

Transitional justice has received considerable attention in recent years in Taiwan.² According to the United Nations, transitional justice can be understood as “the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”³

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¹ Tsai Ing-wen & Chen Chien-jen, *Policy Paper on Indigenous Peoples*, LIGHT UP TAIWAN, Aug. 1, 2015, <http://iing.tw/posts/46>.

² A recent controversial issue is the *Dong Chang* (東廠), the Ming Dynasty-era secret police and spy agency, incident which involved a potential breach of neutrality by the Transitional Justice Commission. For further report, see generally Sean Lin, *Lai apologizes over justice incident*, TAIPEI TIMES, Oct. 3rd, 2018, <http://www.taipeitimes.com/News/front/archives/2018/10/03/2003701618>.

³ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict*

Traditionally the framework involves four types of approaches: truth-seeking, reparations, reform of laws and institutions, and reconciliation. In the past two decades, two successive ruling parties (i.e., the Nationalist Party, KMT, and Democratic Progressive Party, DPP) have shown parochialist positions towards the idea, extent, and scale of transitional justice legislation.⁴ Despite all this attention, transitional justice is an issue that remains incomplete without addressing the last piece of the jigsaw puzzle: justice for indigenous peoples. As Caldwell observed, the narrowness of the Act on Promoting Transitional Justice (cujin zhuanxing Zhengyi tiaoli, 促進轉型正義條例) had left many unresolved issues related to indigenous claims for transitional and historical justice.⁵

Historically, the non-recognition of indigenous political status and lack of legal entitlement to indigenous lands have gradually devastated indigenous communities and social structures. The most updated indigenous policy proposed by President Tsai Ing-wen has broken new ground in the government's relationship with indigenous peoples. That is, the national apology to indigenous peoples delivered by President Tsai on August 1, 2016, the Indigenous Peoples' Day of Taiwan.⁶ Nevertheless, compared to the two transitional justice legislations, Taiwan's history of law-making and policy implementation has caused significant bitterness and frustration for indigenous peoples.⁷ In addition to the institutional defects of the two transitional justice legislations,⁸ the prospect that indigenous peoples will find remedies for their problems under the existing transitional justice framework is not a promising one.

Can a state treat indigenous peoples differently from non-indigenous peoples in the context of transitional justice? Should indigenous peoples be treated differently from the general public for purposes of transitional and historical justice? As of today, the national law's answers to these and similar questions seem to be passive and negative. Taking the example of the scope

Societies, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

⁴ For a detailed discussion, see generally Ernest Caldwell, *Transitional Justice Legislation in Taiwan Before and During the Tsai Administration*, 27 WASH. INT'L L.J. 449 (2018).

⁵ *Id.* at 480.

⁶ Presidential Office Indigenous Historical Justice and Transitional Justice Committee, *An official apology issued by President Tsai* (Aug. 1, 2016), <https://indigenous-justice.president.gov.tw/EN/Page/42>.

⁷ One is the Act Governing the Handling of Ill-gotten Properties by Political Parties and Their Affiliate Organizations of 2016 and the other is the Act on Promoting Transitional Justice of 2017.

⁸ See Caldwell, *supra* note 4, at 481.

and language of the Act on Promoting Transitional Justice, it purports to deal only with the period post-WWII up to the complete lifting of martial law in Kinmen and Matsu on November 6, 1992.⁹ However, indigenous peoples have argued that this temporal scope would preclude numerous indigenous claims sourced back to earlier times and that this may even erase the indigenous existence prior to that period.¹⁰

As aforementioned, President Tsai fulfilled her pledge to deliver the national apology to indigenous peoples on behalf of the government. This apology officially commenced the project on indigenous transitional and historical justice. However, compared with the understanding of transitional justice during the authoritarian period, whether in civil society, governmental sectors, or academic circles, people seemed quite unconcerned with indigenous transitional justice. At best, the national apology merely denoted the dialogue between the government representative of the ruling party and the indigenous society. Furthermore, most media sources presented President Tsai's apology in a single news event. This limited news coverage might suggest that the public is indifferent to indigenous rights and may also weaken indigenous peoples' special relationship with state transitional and historical justice.¹¹

To illustrate the very different doctrinal contours of indigenous legal frameworks and the consequences of invoking indigenous justice claims, it is useful to reconsider President Tsai's official apology:

I know that even now, there are some around us who see no need to apologize. But that is the most important reason why I am representing the government to issue this apology today. *To see what was unfair in the past as a matter of course, or to treat the pain of other ethnic peoples as an unavoidable part of human development*, this is the first mindset that we, standing here today,

⁹ Period of authoritarian rule means the period from August 15, 1945 to November 6, 1992. See Cujin Zhuanxing Zhengyi Tiaoli (促進轉型正義條例) [Act on Promoting Transitional Justice] (promulgated by the Executive Yuan, Dec. 27, 2017, effective Dec. 27, 2017), art. 3, ¶ 1, FAWUBU QUANGUO FAGUI ZILIAOKU (法務部全國法規資料庫) [LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA].

¹⁰ Yabung & Chia-rong Hsu, *Transitional Justice Bill Unhook Indigenous Peoples*, TITV DAILY NEWS (July 28, 2016), <http://titv.ipcf.org.tw/news-22791>.

¹¹ Vanessa Lai, *Women dui xiaoying xiangyuanmin daoqian lenggan* (我們對小英向原民道歉冷感) [*We felt apathetic towards Xiaoying's apology to indigenous peoples*], MATATAIWAN (Aug. 3, 2016), <https://www.matataiwan.com/2016/08/03/country-people-reconciliation-president-tsai-indigenous-aboriginal/>.

resolve to change and overturn.¹²

In order to construct a solid foundation for achieving indigenous transitional and historical justice, it is in the best interests of both indigenous peoples and the general public to explore the sources of indigenous justice. Until this issue is essentially resolved, the existing uncertainty about reconciliation with indigenous peoples will continue.

Based on the foregoing discussions, this paper aims to focus on the essential characteristics of indigenous justice against the successive alien regimes. This paper begins by introducing the historical origins between indigenous peoples and external forces in Taiwan. The historical non-recognition of indigenous sovereign status and the lack of legal entitlement to indigenous land both have gradually devastated indigenous peoples and social structures. Next, this paper examines the dominant relationship maneuvered by successive nation-states to gain control over indigenous peoples. Following this, the paper continues to discuss the influences brought by indigenous movements upon the national apology delivered on August 1, 2016. Despite the fact that the national apology may have broken new ground in the government's relationship with indigenous peoples, the common understanding of transitional justice has caused significant bitterness and frustration among indigenous peoples. Lastly, the paper dwells upon the core significance of indigenous justice, which differs from transitional justice in Taiwan.

II. HISTORICAL CONTEXT

The indigenous peoples of Taiwan are an enigma to most other Taiwanese.¹³ According to the oral traditions of Taiwan's indigenous peoples, they have inhabited the island of Taiwan since the beginning of time.¹⁴ Anthropological research regarding the origins of Taiwan indigenous peoples

¹² See Presidential Office Indigenous Historical Justice and Transitional Justice Committee, *supra* note 6.

¹³ For the purpose of this paper, I refer to Taiwanese, according to language and time of migration to Taiwan, as including the Fulao language groups, the Hakka language groups, and the Mandarin language groups.

¹⁴ For general discussion on the ancestry myths and legends of indigenous peoples, see Hui-ping Liu, *Imagination and Fact: The Historical Memory and Race Group Approval about Taiwan Aborigines "Brother First Ancestor Myth and Legends"*, 6 TAIWAN LITERARY STUD. 12, 12–18 (2008).

is inconclusive and controversial.¹⁵

It is worth noting that President Tsai's Indigenous Policy first emphasized that "Indigenous peoples are the original owner of Taiwan," and followed with the announcement to deliver a national apology. The message brought about a debate on the actual meaning of "original owner." However, it is not possible to understand the contemporary situation of Taiwan's indigenous peoples without knowing the history of indigenous peoples, and the transformations of indigenous status over time. Consequently, one must retrace the historical interactions between successive colonial powers and Taiwan's indigenous peoples.

Taiwan is an immigrant state like Australia, Canada, New Zealand, and the United States. Since time immemorial, and long before foreign settlers and subsequent immigrants started arriving in Taiwan about five centuries ago, various indigenous peoples already lived in Taiwan.¹⁶ As a result, indigenous peoples in Taiwan and those in other nation-states share a common history of oppression by different colonizers. "Discovery and conquest" and enormous settlements have substantially displaced indigenous peoples from their traditional lands. Thus, indigenous peoples gradually had to either assimilate into the settlers' society or move to remote areas.

In the context of U.S. law, American Indians are recognized as sovereign nations having a direct relationship with U.S. federal government.¹⁷ For populations like the American Indians in the United States, "indigenous peoples" is a term with political characteristics rather than mere racial characteristics.¹⁸ In comparison, does the status of "original owner" equate with an American Indian sovereign nation in the Taiwanese context? Moreover, does the concept of indigenous peoples situate them differently

¹⁵ Cheng-hwa Tsang, *Once Again on the Austronesian Origin and Dispersal*, 3 AUSTRONESIAN STUD. 87, 88–91 (2012).

¹⁶ *Id.* at 99–101.

¹⁷ See *Worcester v. Georgia*, 31 U.S. 515, 520 (1832). The U.S. Supreme Court affirmed American Indian tribes' status as governments with retained inherent powers to regulate their members and territory. Also see *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). The Court denominated Indian tribes "domestic dependent nations" based on their status as unique sovereign entities within the U.S. legal framework. For further scholarly discussions, see CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 54–63 (1987).

¹⁸ See *Morton v. Mancari*, 417 U.S. 535, 553–55 (1974); see also William C. Canby, Jr., *The Concept of Equality in Indian Law*, 85 WASH. L. REV. 13, 16 (2010) (arguing "The Court upheld the preference, holding that the preference did not constitute racial or ethnic discrimination, but was a political classification reflecting the relationship between the federal government and recognized Indian tribes").

from other mainstream or minority groups in the legal framework of Taiwan?

Briefly speaking, the history of Taiwan's indigenous peoples is one of colonization and exploitation by external forces. Most non-indigenous Taiwanese believe that the development of indigenous peoples has progressed along with mainstream Taiwanese society through centuries of colonization. Indigenous history in Taiwan has been written largely from this inaccurate, non-indigenous point of view. History is a process of re-presentation of the past.¹⁹ Thus, it is not possible to understand indigenous peoples in their contemporary setting without gaining knowledge of their history as it has been formed and shaped by the indigenous experience with western colonization.

Traditionally, the existence of indigenous peoples in Taiwan was not given sufficient attention by the public authority or society in general.²⁰ Prior to contact with colonial settlers, indigenous territories were under the sole control of Formosa indigenous peoples. First named *Ihla Formosa* by Portuguese mariners, Taiwan has been colonized by the Dutch (1624-1662), the Spanish (1626-1642), Zheng Cheng-Gong (1662-1683), the Qing dynasty (1663-1895), the Japanese (1895-1945), and the Republic of China (1945 to the present).²¹ Today Taiwan is claimed by the People's Republic of China, the Republic of China, and Taiwanese Minnan-speaking nationalists who seek independence. Not surprisingly, laws of "discovery," "conquest," and "*terra nullius*" were used to effectuate dispossession not only in the New World, but also in Taiwan.²² Colonial governments simply used these concepts in

¹⁹ This colonial perception of aboriginal history is also reflected in the Native Americans' experiences. "The history of Native American has been fundamentally colored by the perceptions—or the belief systems if you will—of the writers. . . . 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." SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 1 (Terry L. Anderson et al. eds., 2006).

²⁰ See, e.g., Danxin dangan (淡新檔案, Danxin Archives), Taiwan Sōtokufu dangan (臺灣總督府檔案, Archives of the Governor-General Office of Taiwan). Two major colonial historical documents of Taiwan, mainly contributed to the collections and records of non-indigenous social, cultural and legal developments; rarely devoted to the indigenous peoples. It was not until the latter half of the Japanese occupation, the colonial government began to investigate the traditional indigenous social, cultural, and legal structures.

²¹ FAZHAN ZHONG DE TAIWAN SHANDI XINGZHENG (發展中的臺灣山地行政) [PROGRESSING TAIWAN MOUNTAIN ADMINISTRATION] 20–23 (Taiwanshengzhengfu mingzhengting (臺灣省政府民政廳) [Taiwan Provincial Government Civil Division] ed., 1961).

²² Henrietta Harrison, *Changing Nationalities, Changing Ethnicities: Taiwan Indigenous Villages in the Years after 1946*, in IN SEARCH OF THE HUNTERS AND THEIR TRIBES: STUDIES IN THE HISTORY AND CULTURE OF THE TAIWAN INDIGENOUS PEOPLE 53 (David Faure ed., 2001) [hereinafter IN SEARCH OF THE HUNTERS]. According to Harrison, the Japanese military counselor C.W. Le Gendre, an American, provided the Japanese government with an idea of "*fandi wuzhu lun* (蕃地無主論, Savage land is without the lord)", which is based on the American colonial experiences, to justify military action.

affiliation with naming to revoke or extinguish indigenous land ownership. Recognizing these historical events, this paper argues that we should look beyond restrictive understandings of indigenous naming and, instead, reconstruct the special status of indigenous peoples in the context of transitional and historical justice in Taiwan.

III. IDENTIFICATION AS “SAVAGES” UNDER JAPANESE COLONIAL LEGAL DISCOURSE

Prior to the sixteenth century, Taiwan was isolated and virtually unknown to the outside world. From the viewpoint of the new settlers, Taiwan was unoccupied and without a sovereign government. The European occupation of Taiwan in the mid-sixteenth century marked the end of pre-contact era and the beginning of a new era in which Taiwan entered the international community.

Under pre-Japanese colonial regimes, indigenous peoples could coexist as autonomous political communities. In the early contact periods, it was never considered an option to treat indigenous societies as though they did not exist. Both Dutch and Spanish settlements, from the earliest efforts in the early seventeenth century, depended on successful intercourse with indigenous peoples. Such intercourse was often amicable and mutually beneficial.²³ The interactions between settlers and indigenous peoples throughout the seventeenth and eighteenth centuries facilitated mostly peaceful coexistence. After periodic outbreaks of violence and warfare, relations would be temporarily restored through treaty-like agreements.²⁴

It was not until the arrival of Japanese colonists in the late-nineteenth century that a formal, central political power was established on the island. At the commencement of Japanese rule there existed, broadly speaking, two kinds of inhabitants: those of Chinese origin whose ancestors had immigrated from the Chinese mainland since the seventeenth century, and indigenous peoples who were referred to in historical documents as “savages” or “barbarians.”²⁵

²³ See THE FORMOSAN ENCOUNTER: NOTES ON FORMOSA’S ABORIGINAL SOCIETY: A SELECTION OF DOCUMENTS FROM DUTCH ARCHIVAL SOURCES 48–50 (Leonard Blussé et al. eds., 1999).

²⁴ *Id.* at 49–53.

²⁵ See Tay-sheng Wang, *Indigenous Peoples in the Legal History of Taiwan: Being a Special Ethnic Group, Territory and Legal Culture*, 44 NTU L. J. 1639, 1660–61 (2015).

The reception of western law in Taiwan under Japanese colonial rule initiated the institutionalization of indigenous peoples. Japanese colonial policies toward indigenous peoples were justified as being “for their own good” and to promote protection, assimilation, and recognition.²⁶ In actual practice, indigenous peoples were classified into different levels of savage status: *shengfan* (生番, raw savages), *huafan* (化番, semi-sinicized savages), and *shufan* (熟番, cooked savages).²⁷ The perception of indigenous peoples as savages, in practical effect, provided “legal” grounds for actions by the Japanese government. After seizing sovereignty over Taiwan, the Japanese colonial government adopted the “discovery doctrine,” proposed by the U.S. Consul James W. Davidson, and declared indigenous territories *terra nullius*.²⁸ Thus, Japan dispossessed indigenous peoples of their lands and declared them state-owned. According to the Sōtokufu Counselor Mochiji Rokusaburo, “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 the State’s jurisdiction and sovereign power.”²⁹

Territorial acquisition of indigenous lands through forced cession was intended but did not come to pass. What, then, actually happened to the indigenous territory? What truly occurred can be described as a process of institutional solidification of State laws. The Governor-General Office of Taiwan promulgated two major laws in managing indigenous lands: (1) *Guanyou linye ji zhangnao zhizaoye qudi guize* (官有林野及樟腦製造業取締規則, Regulations of National Forests Management and Camphor Production) of October 1896, and (2) Law No. Seven: Provisions of Occupying Savage Lands (蕃地占有ニ關スル律令) of February 1900.³⁰ These two laws officially declared and affirmed that indigenous lands were state-owned. The laws denied indigenous rights to land unless proven with a

²⁶ See Harry J. Lamley, *Taiwan Under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism*, in *TAIWAN: A NEW HISTORY* 201–60 (Murray A. Rubinstein ed., 2006). Lamley classified Japanese occupation into four periods: 1) Annexation and Armed Resistance (1895-1897); 2) Colonial Reforms and Taiwanese Accommodation (1897-1915); 3) Colonial Governance and Peacetime Experiences (1915-1936); and 4) War time (1937-1945).

²⁷ See Wang, *supra* note 25, at 1661.

²⁸ QI-YI FU, *THE ORIGINS OF MODERN SINO-JAPANESE RELATIONS* 205 (1992) (Chinese).

²⁹ *RECORDS OF SAVAGE ADMINISTRATION* 185–86 (Governor-General Office of Taiwan ed., Jin-tian Chen et al. trans., 1997).

³⁰ *Id.* at 125–26.

title deed³¹ and restrained Han peoples from obtaining indigenous lands.³² Law No. Seven stands squarely for the proposition handed down in three Western landmark cases of indigenous jurisprudence: America's *Johnson v. McIntosh*,³³ Canada's *Delgamuukw v. British Columbia*,³⁴ and Australia's *Mabo*³⁵ decision. These three cases all described aboriginal title to land as inalienable to any party other than the Crown.

Alternatively, in line with general colonial policies towards indigenous peoples, the "Comment on the Savages Policy" (蕃政問題ニ關スル意見) stated that, "We only talk about savage lands here. The Empire sees savage lands, but no savage peoples. Savage lands must be regarded from an economic point of view and managed with financial strategies."³⁶ Accordingly, it was in the interests of the colonial government to maintain the savage status of the indigenous peoples who might otherwise have laid claim to ownership of Taiwan's richest natural resources. Identifying indigenous peoples as savages gave the colonial government the right to occupy their land. This was a widely-shared ideology among the major colonial powers at that time.³⁷ Like the British colonizers' view of aboriginal land in Australia as *terra nullius*, the Japanese government perceived the savages of Taiwan as non-legal entities lacking knowledge of property ownership, and claimed their lands as government property.

In sum, the framework of National Forests Regulations and Law No.

³¹ "官有林野及樟腦製造業取締規則第一条には、「所有權ヲ証明スヘキ地券又ハ其他ノ確證ナキ山林原野ハ總テ官有トス。」

³² YOSABURO TAKEKOSHI, JAPANESE RULE IN FORMOSA 211 (1996). Yosaburo stated, "In February 1900, the authorities promulgated Law No. 7. This law states that nobody except savages may, under any pretext whatever, occupy or use any portion of the Savage Territory, nor lay any claim whatever to it." *Id.*

³³ *Johnson v. McIntosh*, 21 U.S. 543, 567–69 (1823).

³⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

³⁵ *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1 (Austl.).

³⁶ Governor-General Office of Taiwan, *supra* note 29, at 180 ("持地參事官ノ蕃政問題ニ關スル意見 - 予ハ茲ニ蕃地問題ト云フ何トナレバ帝國主權ノ眼中蕃地アリテ蕃人ナケレバナリ蕃地問題ハ宜シク經濟的見地ヨリ解決スルヲ要ス而シテ其經營ハ須ラク財政の方策ナラザルベカラズ蓋シ國家諸般ノ問題其歸スル所ハ皆經濟的財政的問題ニアラザルハ莫キノミナラズ殖民地經營ニ至リテハ特ニ經濟的財政的見地ヨリ諸般問題ヲ解決スルヲ必要トスレバナリ。")

³⁷ Governor-General Office of Taiwan, *supra* note 29, at 180–81 ("持地參事官ノ蕃政問題ニ關スル意見 - 蕃地問題ハ國家問題ナリ殖民地經營問題ナリ予輩ハ人道問題トシテ之ヲ解決セント欲スルモズ這ハ世ノ宗教家慈善家ノ本務ナリ予輩ハ國權問題トシテ解決セント欲スルモノニアラズ何トナレバ禽獸ニ均シキ彼レ蕃人ニ對シテ皇化ノ普及國威ノ宣揚ヲ絶叫スルノ必要ナケレバナリ。蕃地問題ハ實地問題ナリ … 夫レ法律上ヨリ蕃人蕃地ヲ解決スルハ甚ダ難カラズ何トナレバ國法上蕃人ナク蕃地ナケレバナリ又社會上ヨリ蕃人蕃地ヲ解決スルモ容易ナリ何トナレバ劣等人種ノ優等人種ト相接觸スルセ其生存競争ノ結果ハ劣等人種ガ優等人種ノ為メニ族滅セラレ若クハ同化セラルハニ歸スルハ歴史ノ證明スル所ナレバナリ。")

Seven shows that the colonial government considered indigenous peoples as “uncivilized savages” and “without land tenure systems.” Consequently, the possibility that indigenous peoples could claim their legal rights was out of the question and ignored by the colonial government.

IV. LEGAL FICTION OF MOUNTAIN COMPATRIOTS UNDER R.O.C. AUTHORITARIAN RULE

In 1945, upon Japan’s surrender to the Allies at the end of World War II, Taiwan reverted to Chinese (Republic of China, R.O.C.) control. Following the Communist victory on the mainland in 1949, the R.O.C. regime led by the Nationalist Party (Kuomintang, KMT) General Chiang Kai-shek fled to Taiwan and announced the imposition of martial law on May 19, 1949. From that point in 1949 to 1987, Taiwan was under KMT authoritarian rule.³⁸ The KMT’s indigenous policy was the direct heir of its totalitarian Japanese predecessor, and indeed surpassed the latter in planning and implementing its goal of assimilating indigenous people. For the purpose of eliminating the peoplehood of indigenous peoples, the R.O.C. government issued an order to rename *Gaoshanzu* (高山族, High-mountain peoples) as the *Shanditongbao* (山地同胞, mountain compatriots).³⁹ The government used the term “mountain compatriots” to emphasize that they are just like common peoples, but also to feature both their economically-disadvantaged status and residential remoteness. A basic formula can be understood as, “you (*Shanditongbao*) are strangely different, I (the government) came to make you normal like the Hans.” In other words, the government manipulated the idea of compatriot under the disguise of policy discrimination for the purpose of assimilation. Nonetheless, the underlying reason for the renaming was to justify the superiority of the Han majority and strengthen their dominant relationship over indigenous peoples.

In its early authoritarian rule, the KMT government’s overall goal was “*shandi pingdihua*” (山地平地化, make the mountains like the plains)—in other words, to assimilate indigenous peoples. The government promoted its overarching goal of assimilation primarily through three objectives: 1) to

³⁸ By 1987, in response to the changing political context, the R.O.C. government lifted martial law and moved towards democratization. See EXECUTIVE YUAN, THE REPUBLIC OF CHINA YEARBOOK 88–89 (2016), <http://ws.ey.gov.tw/001/Eyupload/oldfile/UserFiles/YB%202016%20all%20100dpi.pdf>.

³⁹ TAIWANSHEG GONGBAOZHONG YOUGUAN YUANZHUMIN FAGUIZHENGLING HUIBIAN 1 (臺灣省公報中有關原住民法規政令彙編 1) [COMPILATION OF INDIGENOUS REGULATIONS IN THE TAIWAN PROVINCIAL GAZETTE VOL. 1] 58 (Bao-yu Fu et al. eds., 1998).

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.⁴⁰ In 1951, the Taiwan Provincial government launched a series of assimilation policies titled, *Shandi renmin shenghuo gaijin yundong* (山地人民生活改進運動, Mountain Peoples' Lifestyle Improvement Movement). These policies served as the focal point of *Shandi shizheng yaodian* (山地施政要點, Key Points of Mountain Administration) which affirmed the core values of integration and expediency.⁴¹ As observed by Henrietta Harrison:

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. . . . [W]hile 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.⁴²

During the first fifty years under the Chinese Nationalist Party, the Taiwan government engaged in a series of inappropriate policies designed to control, subjugate, and assimilate indigenous peoples. Further, social science scholarship outlines the condition of Taiwan indigenous peoples as marginalized and largely disenfranchised in relation to the majority Chinese population.⁴³ The ethno-oriented study of indigenous peoples has led to important findings on issues of representation,⁴⁴ indigenous social

⁴⁰ TAIWANSHENG JINGWUCHU (臺灣省警務處) [POLICE DEPARTMENT OF TAIWAN PROVINCE], TAIWANSHENG SHANDI JINGZHENG YAOLAN (臺灣省山地警政要覽) [REVIEW OF THE TAIWAN POLICE ADMINISTRATION] 40–41 (1953).

⁴¹ See Yao-feng Wu, *The Evolution and Development of Taiwan's Aboriginal Administration Policy*, in THE PARTICIPATION REPORT OF CONFERENCE ON NATIONAL POLICY AND MINORITY CULTURES HOSTED BY THE EAST-WEST CENTER 89–90 (1986).

⁴² See Harrison, *supra* note 22, at 67–68. For detail information on the implementation measures of Main Action Guidelines of Aboriginal Administration, see Taiwanshengzhengfu mingzhengting, *supra* note 21, at 24–26.

⁴³ See Harrison, *supra* note 22, at 78; see also Kai-yiu Chan, *Costumes, Beads and Business in Pingtung: The Changing Economic Life of the Paiwan and the Rukai*, in IN SEARCH OF THE HUNTERS, *supra* note 22, at 130–32.

⁴⁴ See MELISSA J. BROWN, IS TAIWAN CHINESE?: THE IMPACT OF CULTURE, POWER, AND MIGRATION ON CHANGING IDENTITIES 13–16, 223 (2004).

movements,⁴⁵ and ethnic relations.⁴⁶ Even so, there is still little research regarding indigenous jurisprudence, polity characteristics, and their relationship with the Taiwanese government.

By maneuvering the term “*shanbao*” in land administration, the R.O.C. government under the KMT administration did not recognize indigenous peoples as the holders of legal title to their lands. The R.O.C. government did not take the same position as the Japanese colonial government to treat indigenous peoples as non-legal subjects without legal personality. Rather, the R.O.C. government considered “*shanbao*” as “citizens of distinctive lifestyles” who were inferior in essence and the R.O.C. continued attempts to convert them through assimilation and sinicization (*hanhua*).⁴⁷ Initially, indigenous land administration under R.O.C. continued former Japanese land management systems, declared indigenous lands as national land through the power of eminent domain, and had taken land from indigenous peoples without compensation.

V. FROM EXCLUSION TO INCLUSION

Starting in the 1980s and accelerating through the 1990s, indigenous peoples in Taiwan have endeavored to revive their rights and the R.O.C. government has been increasingly engaged in indigenous social reforms. Since 1983, communications between the government authority, mainstream society, and indigenous peoples have allowed the Taiwan government to gradually detect the bottom line of aboriginal rights in the political framework of Taiwan.⁴⁸ In other words, the government is finally beginning to realize that the public authority and mainstream society have repeatedly failed to recognize indigenous rights. After four constitutional amendments in the 1990s, the political status as indigenous collectivity finally acquired constitutional recognition with the enactment of the Indigenous Article in

⁴⁵ See Alliance of Taiwan Aborigines, *Report of the Human Rights Situation of Taiwan's Indigenous Peoples*, in *INDIGENOUS PEOPLES OF ASIA* 357–72 (Robert H. Barnes et al. eds., 1995).

⁴⁶ See Cheng-Feng Shih, *Jiangou taiwan zhengzhishi de changshi: you creole dao mestizo de kenzhi shehui* (建構台灣政治史的嘗試—由 creole 到 mestizo 的墾殖社會) [*An Attempt to Construct Taiwan's Political History*], in *THE TAIWAN NATIONALISM* 23–26 (2003).

⁴⁷ Heng-chan Ku, *Writing without a Subject: A Historical Survey of the Aboriginal Discourse in Taiwan after WWII (1945-1955)*, 9 *MONUMENTA TAIWANICA* 83, 93–99 (2014).

⁴⁸ Pei-Lun Chen Chang, *A Theory of Affirmative Action for Group Development and Indigenous Peoples*, 47 *J. PHIL. STUDY PUB. AFF.* 1, 35–37 (2013).

1997.⁴⁹

In 2000, the DPP won the presidential election, which replaced KMT's long-term rule and marked the first party alternation in the history of Taiwan. The salient features of DPP's policy advancing indigenous rights included official announcements of a "new partnership,"⁵⁰ including a "government-to-government relationship" with indigenous peoples, and the legislative enactment of the Indigenous Peoples Basic Law.⁵¹ These political commitments restructured official relationships with indigenous peoples. This period signified the high point of indigenous sovereign existence.⁵² However, social and political contexts at that time revealed ordinary peoples' negligence and lack of concern towards indigenous rights, and the political structure of party opposition. Additionally, the above-mentioned political commitments are rooted in the common law regime's Indigenous/White relationship. Nevertheless, domestic normative and structural difficulties reduce the likelihood that the government-to-government relationship will be internalized and institutionalized in the legal framework of Taiwan. Consequently, applying these principles and concepts to the implementation of Taiwanese Indigenous policies would come up against political, social, and cultural obstacles. After all, during the DPP's rule, a "government-to-government relationship" with indigenous peoples never came into practice.

The enactment of the Indigenous Peoples Basic Law (原住民族基本法, *Yuanzhuminzu jibenfa*) in January 2005 represented a milestone accomplishment for indigenous rights. The Basic Law seems out of step with

⁴⁹ "The State shall, in accordance with the will of indigenous peoples, safeguard the status and political participation of indigenous peoples. The State shall also guarantee and provide assistance and encouragement for indigenous education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare, measures for which shall be established by law." ZHONGHUA MINGUO XIANFA ZENGXIU TIAOWEN (中華民國憲法增修條文) [ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE ROC] art. 10, ¶ 5, *translated in* <https://english.president.gov.tw/Page/95>.

⁵⁰ The New Partnership between Indigenous Peoples and Taiwanese Government (原住民族和台灣政府新的夥伴關係) was signed on September 10, 1999, between eleven major Indigenous representatives and the DPP Presidential Candidacy, Mr. Chen Shui-bian. These campaign promises were further refined and discussed in the 2000 DPP White Paper on Indigenous Policy. On October 19, 2002, President Chen reconfirmed the treaty; thus becoming an official document which highlights the guiding principles of the government platform.

⁵¹ Yapasuyongu Poiconu, *U.N. Declaration on the Rights of Indigenous Peoples and Taiwan Indigenous Rights Protection*, 2 TAIWAN INDIGENOUS STUD. REV. 141, 164–65 (2007).

⁵² Ta-chuan Sun, *Bei bangjia de zhuti? Taiwan yuanzhuminzu fazheng cunzai de fazhan* (被綁架的主體? —臺灣原住民族法政存在的發展) [*A Kidnapped Subject? Legal Existence Development of Taiwan Indigenous People*], 20 FOUNTAIN OF YOUTH 46, 52 (2008).

the bulk of traditional Taiwanese law, because it singles out a segment of society on the basis of peoplehood.⁵³ In terms of land management, the Basic Law removes significant portions of indigenous property from the commercial mainstream and gives government officials a degree of discretion that is not only intrusive but also offensive to other members of the society. For example, the exercise of indigenous hunting rights within the national parks has created tension between groups advocating the preservation of indigenous culture and environmental conservation groups.⁵⁴ Furthermore, the Basic Law requires that any economic or development activity within indigenous lands proposed by the government or a non-indigenous party must be approved by, and share its benefits with, the local indigenous community.⁵⁵ The Basic Law has been criticized in every aspect. The majority of opponents tend to be non-indigenous people who demand that the Basic Law be abolished because it violates normative standards of equality.

Taking one of the bylaws as an example to illustrate general public's resistance towards indigenous rights protection, specifically the protections for the traditional intellectual creations of indigenous peoples. Article 13 of the Basic Law stipulates that "The government shall protect indigenous peoples' traditional biological diversity knowledge and intellectual creations, and promote the development thereof. The related issues shall be provided for by the laws."⁵⁶ Nonetheless, it was not until eight years later that the bylaw was finally promulgated by the Council of Indigenous Peoples in January 2015.⁵⁷ Two years later the first exclusive right was granted by the aforesaid

⁵³ Chris C. C. Huang, *Xianfa jieshi yu yuanzhumin quanli* (憲法解釋與原住民權利) [*Constitutional Interpretation and Indigenous Rights*], in *XIANFA JIESHI ZHI LILUN YU SHIWU DILIUJI* (憲法解釋之理論與實務第六輯) [THEORY AND PRACTICE OF CONSTITUTIONAL INTERPRETATION VI] 430–31 (Fort Fu-Te Liao ed., 2009).

⁵⁴ Indigenous persons may undertake the following non-profit seeking activities in indigenous peoples' regions and the sea areas be promulgated by the central indigenous competent authority: 1) Hunting wild animals; 2) Collecting wild plants and fungus; 3) Collecting minerals, rocks and soils; 4) Utilizing water resources. *Yuanzhuminzu jibenfa* (原住民族基本法) [The Indigenous Peoples Basic Law], FAWUBU QUANGUO FAGUI ZILIAOKU (法務部全國法規資料庫) [LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA], art 19, ¶ 1.

⁵⁵ When governments or private parties engage in land development, resource utilization, ecology conservation and academic research in indigenous land, tribe and their adjoin-land which owned by governments, they shall consult and obtain consent by indigenous peoples or tribes, even their participation, and share benefits with indigenous people. *Id.* art. 21, ¶ 1.

⁵⁶ *Yuanzhuminzu jibenfa* (原住民族基本法) [The Indigenous Peoples Basic Law], FAWUBU QUANGUO FAGUI ZILIAOKU (法務部全國法規資料庫) [LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA], art 13.

⁵⁷ *Yuanzhuminzu chuantong zhihui chuanguo baohu shishi banfa* (原住民族傳統智慧創作保護實施辦法) [Implementation Measures for the Protection of Traditional Wisdom of Aboriginal People], COUNCIL

competent authority after all.⁵⁸

The government officials held not only a negative attitude but also an offensive position towards the implementation of the Basic Law and its related regulations. One of the most recent controversial issues was the revocation of Thao peoples' traditional territorial demarcation in Nantou County's Yuchih Township. The issue was regarding the application of Article 21 of the Basic Law in a planned resort and other development projects. Nantou county government, Yuchih township office and land developers filed an administrative appeal against the Council of Indigenous Peoples' decision to reinstate the territory.⁵⁹ The Executive Yuan's Petition and Appeals Committee ruled that the Thao peoples' traditional territorial demarcation is invalid because of the procedural flaw and that due process of law is required in the demarcation mechanism.⁶⁰ One response to these offensive arguments is illustrated by President Tsai's remarks in a national apology to indigenous peoples:

Today, we have an Indigenous Peoples Basic Law that is quite advanced. However, government agencies have not given sufficient weight to this law. Our actions have not been fast enough, comprehensive enough or sound enough. For this, I apologize to the indigenous peoples on behalf of the government.⁶¹

Indigenous rights to land and natural resources are entrenched in the Basic Law,⁶² and the government is obliged to delimit the area of indigenous land for the application of indigenous right to consultation and informed consent.⁶³ Alternatively, indigenous peoples' claim to reinstate the traditional

OF INDIGENOUS PEOPLES: LAWS AND REGULATIONS RETRIEVING SYSTEM, <https://law.apc.gov.tw/LawContent.aspx?id=GL000210>.

⁵⁸ Press Release, Council of Indigenous Peoples (Oct. 25, 2017), <https://www.apc.gov.tw/portal/docDetail.html?CID=35AE118732EB6BAF&DID=0C3331F0EBD318C28A63E32117CF322C>.

⁵⁹ Administrative Appeal Decision Taisuzhi No. 1080162600, Petitions and Appeals Committee, Executive Yuan (Jan. 25, 2019) (Taiwan).

⁶⁰ For a relevant report, see Ann Maxon, *Council Promises to Reinstate Thao Territory*, TAIPEI TIMES (Jan. 29, 2019), <http://www.taipeitimes.com/News/taiwan/archives/2019/01/29/2003708853>.

⁶¹ See Presidential Office Indigenous Historical Justice and Transitional Justice Committee, *supra* note 6.

⁶² The government recognizes indigenous peoples' rights to land and natural resources. The Indigenous Peoples Basic Law, *supra* note 54, art. 20, ¶ 1.

⁶³ The central indigenous competent authority shall stipulate the regulations for delimiting the area of

territorial lands is a statutory right endowed with constitutional protection. In the absence of adequate official support, fuller political enforcement is needed to effectuate indigenous rights as envisioned in the Basic Law.

The foregoing discussions have shown that the Japanese and Chinese states had differing policies, but both were aimed toward assimilating indigenous peoples. One of the first policies for managing indigenous issues of Japanese government was premised on the belief that indigenous peoples would have to be educated and turned into small farmers.⁶⁴ Under the R.O.C. (KMT government) control, the forces of assimilation were found in education programs, land redistribution, and efforts to incorporate indigenous peoples into the market-based economy. Indigenous languages, cultures, religions, and values were discouraged, and Chinese cultures were encouraged. 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. The values and institutions of indigenous peoples, however, were generally ignored in the earlier Japanese unified model and the latter KMT multicultural national models. Neither the unified nor the multicultural national model had a place for indigenous *sui generis* status.

Understandably, the process of building Taiwan as a modern state had direct consequences for indigenous peoples. The modern logic of both Japan and R.O.C. was to universalize society through assimilationist policies toward indigenous peoples living in its domain. The goal of the state was to incorporate indigenous peoples and their lands into the dominant state and society, so they would no longer remain on the cultural and territorial frontiers of Taiwan. In essence, the State's adopted theory of species evolution and cultural class differentiation that applied to the national legal framework, began with the defamation of indigenous culture so as to establish the superiority of the dominant peoples; as a result, indigenous difference has been stigmatized as primitive and inferior. The truth is, there exists an unfinished story behind the government's naming of indigenous peoples. Although successive ruling regimes have developed different dominating

indigenous land, tribe and their adjoin-land which owned by governments, procedures to consult, to obtain consent by indigenous peoples or tribes and to participate and compensation to their damage by restrictions in preceding three paragraph. *Id.* art. 21, ¶ 4.

⁶⁴ See TAKEKOSHI, *supra* note 32, at 216. Japanese authority said, as noted by Yosaburo, "that all hunting was contrary to the principles of humanity, and the savages should, therefore, turn their attention instead to tilling the land and growing corn and potatoes. In this way the Government hopes to reduce them to impotence and force them to take up gentler ways of living."

structures over indigenous peoples, the underlying colonization goal has never changed. Japanese colonial government identified indigenous peoples as savages to exclude and eliminate their potential legal claims. The R.O.C. renamed indigenous peoples mountain compatriots in order to eliminate indigenous peoplehood and to include indigenous issues within the sociolegal category of race.

Due to this lack of knowledge on the aforementioned indigenous relationships with State, indigenous rights claims are often analyzed through the lens of race-based affirmative actions. It is worth bringing the Interpretation No. 719 of the Judicial Yuan (R.O.C.) into discussions. J.Y. Interpretation No. 719 is the case concerning the mandatory requirement for government-procurement-winning bidders to employ a certain percentage of indigenous people. This requirement was challenged by non-indigenous petitioners, including Sinon Corporation, Next Media Ltd., Apply Daily Ltd., and Taiwan High Speed Rail Corporation.⁶⁵ The issue under constitutional review is whether it is unconstitutional to require a government-procurement-winning bidder hiring more than one hundred employees to recruit a certain percentage of indigenous people, and to make the substituting payment for failing to comply.⁶⁶ A short version of the issue of law in J.Y. Interpretation No. 719 can be understood as whether an indigenous employment preference has constitutional legality and legitimacy.

The Constitutional Court in the J.Y. Interpretation No. 719 declared that:

[The requirements] are not inconsistent with the principle of equality under Article 7, and the principle of proportionality under Article 23 of the Constitution and are consistent with the constitutional protections of the right to property, and the right of individuals to freely operate business, the essence of the right to work, under Article 15 of the Constitution.⁶⁷

By focusing on the principle of race-based affirmative actions, the Constitutional Court reasoned that “the objective of the regulations in dispute

⁶⁵ Sifa Yuan Dafaguan Jieshi No. 719 (司法院大法官解釋第 719 號 解釋) [Judicial Yuan Interpretation No. 719] (Apr. 18, 2014) (Case Concerning Mandatory Requirement for Government Procurement Winning Bidders to Employ a Certain Percentage of Indigenous People) [hereinafter Interpretation No. 719].

⁶⁶ *Id.*

⁶⁷ *Id.*

is to maintain a paramount public interest and therefore is justifiable.”⁶⁸ Additionally, the State is charged with the obligation to protect, assist, and promote the development of indigenous peoples based on article 10, paragraph 12 of the Additional Articles of the R.O.C. Constitution⁶⁹ along with the support from ILO Convention No. 169 (article 20, paragraph 1)⁷⁰ and the United Nations Declaration on the Rights of Indigenous Peoples (article 21, forepart of paragraph 2).⁷¹ The Constitutional Court further reasoned that:

There should be a reasonable connection between the differential treatment and the achieving of the objectives thereof. Since the level of the indigenous people’s education and professional skill is by and large relatively weak as opposed to the competitiveness of the job market, their living conditions are thus affected. The classification adopted by the regulations in dispute has therefore established a reasonable connection with the objectives anticipated to be achieved. Consequently, the regulations in dispute are not in conflict with the principle of equality under Article 7 of the Constitution.⁷²

Comparing with American jurisprudence, the U.S. Supreme Court in *Morton v. Mancari*⁷³ ruled that American Indian employment preferences were based on a political rather than racial classification. Instead of taking affirmative action as the basis of American Indian rights, the U.S. Supreme Court held that the sui generis of “Indianness” were the legal roots of tribes’ sovereign status.⁷⁴ On the other hand, in J.Y. Interpretation No. 719, even though substantive equality doctrine recognizes indigenous people as a racial-minority-disadvantaged classification, the privileging of indigenous sui generis status obscures the significant influences of racialization.⁷⁵ This

⁶⁸ *Id.*

⁶⁹ ZHONGHUA MINGUO XIANFA ZENGXIU TIAOWEN (中華民國憲法增修條文) [ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE ROC] art. 10, ¶ 5, *translated in* <https://english.president.gov.tw/Page/95>.

⁷⁰ Int’l Labour Org. [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, C169 - Indigenous and Tribal Peoples Convention (No. 169), at art. 20, ¶ 1 (June 27, 1989).

⁷¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 21 (Dec. 10, 1948).

⁷² *Id.*

⁷³ *Morton v. Mancari*, 417 U.S. 535 (1974).

⁷⁴ Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 963–65 (2011).

⁷⁵ *See* Interpretation No. 719, *supra* note 65. The Constitutional Court indicated that, “Where there are several alternative measures by which the state may take to achieve the objective to protect, assist and promote the development of indigenous peoples, the measure adopted by the regulations in dispute to require

indigenous sui generis status can be understood by Addie C. Rolnick's political classification doctrine, which emphasized that "Indian law focuses on the group rights of political entities, and racial scholarship focuses on the individual rights of racial minorities."⁷⁶

It is agreed from the historical context as well as international law doctrines that indigenous sui generis status stemmed from their precontact existence as independent political entities.⁷⁷ In actuality, the concept, meaning, and legal status of the term "indigenous people" are unfamiliar, fragmentary, and incomplete for Taiwanese society. Yet most non-indigenous people continue to comprehend "indigenous peoples" through the imagined community depicted by national racial minorities' policy. According to the foregoing discussions, it is the standpoint of this paper to emphasize that one of the main obstacles for the general public to differentiate indigenous justice from transitional justice is the knowledge gap in indigenous sui generis status.

VI. CONCLUSION: REFRAMING TRANSITIONAL JUSTICE

More than 560,000 people⁷⁸ living in Taiwan are descendants of the Austronesian people who had a rich, self-sufficient culture on the island until Europeans started arriving in the seventeenth century. These indigenous peoples established their own sovereignty and operated as an independent political entity. In 1895, these independent political entities were conquered by the Japanese Empire, and fifty years later they were annexed by the Republic of China.⁷⁹ The successive changing of colonial regimes has had its toll on indigenous peoples and resulted in the loss of most of their lands. Ever

that the award-winning bidder shall employ a certain percentage of indigenous people during the term of contract performance also constitutes one of such alternative measures. Nevertheless, given most of the available jobs are more short-term or require non-technical skills, it may be difficult to enhance the long-term, stable employment opportunity and professional skills. Consequently, the state shall actively through substantive policies and measures realize the objective contemplated by the above-mentioned Amendment to the Constitution to protect indigenous peoples' right to work, and regularly review and revise such policies and measures based on the time and environment of the state and the society, as well as the need for the protection over the indigenous people's right to work."

⁷⁶ See Rolnick, *supra* note 71, at 965.

⁷⁷ Kristen A. Carpenter & Angela Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 175–83 (2014).

⁷⁸ As of December 2018, demographic statistics of indigenous peoples is 565,561. See COUNCIL OF INDIGENOUS PEOPLES, INDIGENOUS POPULATION STATISTICS, <https://www.apc.gov.tw/portal/docDetail.html?CID=940F9579765AC6A0&DID=2D9680BFECBE80B612B8800B244DD7F4>.

⁷⁹ Awi Mona (Chih-Wei Tsai) & Scott Simon, *Imagining First Nations: from Eeyou Istchee (Québec) to the Seediq and Truku on Taiwan*, 47 ISSUES & STUD. 29, 49–51 (2011).

since Taiwan became a part of the R.O.C. in 1945, and particularly beginning in the 1970s, an indigenous movement has been underway, and indigenous peoples now want to regain control over their land and their right to govern themselves through the implementation of transitional and historical justice.

Nevertheless, the most prominent obstacle to the implementation lies in the transitional justice framework itself. Indeed, the framework of transitional justice is originally devised to facilitate reconciliation in countries undergoing transitions from authoritarianism to democracy.⁸⁰ Countries such as Greece in 1974, Argentina in 1983, Eastern Bloc of Europe in 1989, and the democratization of South Africa are common examples. In other words, the transitional justice framework is at least composed of a number of elements, i.e., an identified authoritarian rule and a specific period. In the context of Taiwan, the authoritarian rule refers to the R.O.C. regime under the Nationalist Party and the specific period means the period from August 15, 1945, to November 6, 1992.⁸¹ In much of the indigenous justice claims, the core has two interlocking aspects: indigenous *sui generis* status and indigenous land justice.

Enormous indigenous land loss began in the early twentieth century during the Japanese occupation. Given that R.O.C. was the successor to Japan, the R.O.C. government began exercising jurisdiction over Taiwan in 1945, after Japan surrendered at the end of World War II and took over public and private properties previously possessed by the Japanese colonial government, including indigenous lands. The core issue of indigenous law is whether indigenous peoples could bring the land loss claims against the R.O.C. government in the framework of transitional justice. Furthermore, as indicated above, the process of institutionalizing indigenous peoples while simultaneously ascribing inferior characteristics to different indigenous groups comprised a racializing project aimed at eventually defining indigenous peoples out of existence. This truly is the dilemma of indigenous transitional justice.

It is well-known that two common law countries, Australia and Canada, had their national apologies to indigenous peoples delivered in 2008. However, both countries had avoided using the term “transitional justice.” Instead they

⁸⁰ COURTNEY JUNG, INT’L CTR. FOR TRANSNATIONAL JUSTICE, TRANSITIONAL JUSTICE FOR INDIGENOUS PEOPLE IN A NON-TRANSITIONAL SOCIETY (2009).

⁸¹ Act on Promoting Transitional Justice, *supra* note 9, at art. 3, § 1.

adopted vague reconciliation mechanisms, such as apologies, reparations, truth commissions, and a series of commemorations, to address the historical injustices of Stolen Generations in Australia⁸² and Indian Residential Schools.⁸³ The question is, where did land claims go?

Everything about indigenous peoples is inextricably interwoven with, and connected to, the land. In most of the “New World” modern states, indigenous struggle for land justice has largely been defined by the common law doctrine of “discovery and conquest” and the doctrine of “*terra nullius*.”⁸⁴ As a result, in the context of classic international law, the sovereign status of indigenous peoples was denied by a process of legal rationalization that is underpinned by the assumption that indigenous peoples were inferior and incapable of legal entitlements.⁸⁵ The foregoing illustrates that colonial experiences imposed on the indigenous peoples in the “New World” manifested some similarities to the colonization experienced by indigenous peoples in Taiwan.

Both the Australian and Canadian examples have shown at the outset that there is no regime transition to legitimize the sovereign and legal authority of indigenous peoples and their justice claims. In so doing, both states had structured a framework to divide indigenous justice claims into “land claims and sovereign assertion” and “non-sovereign claims and other justice demands.” Essentially speaking, as Jung observed, “Canadian government has attempted to use apologies and reparations to narrow the scope of government’s obligation and to shut down other indigenous demands.”⁸⁶ In actuality, setting up the Truth and Reconciliation Commission to introspect and review the policy of Indian Residential Schools may be used to draw a line through the past and rationalize historical dispossession of indigenous lands. A similar situation can also be found in the Australian government’s disposition of aboriginal land claims. Although the doctrine of *terra nullius* had been declared null and void by the High Court in *Mabo*

⁸² AUSTL. GOV’T, CLOSING THE GAP ON INDIGENOUS DISADVANTAGE: THE CHALLENGE FOR AUSTRALIA (Mar. 2009), http://www.dss.gov.au/sites/default/files/documents/05_2012/closing_the_gap.pdf.

⁸³ TRUTH & RECONCILIATION COMM’N CAN., SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA (2015), <http://caid.ca/TRCFinExeSum2015.pdf>.

⁸⁴ James Tully, *Aboriginal Property and Western Theory: Recovering a Middle Ground*, 11 SOC. PHIL. & POL’Y 153, 158–69 (1994).

⁸⁵ Robert A. Williams, Jr., *Columbus’s Legacy: Law As An Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination*, 8 ARIZ. J. INT’L & COMP. L. 51, 56–59 (1991).

⁸⁶ See Jung, *supra* note 80.

case,⁸⁷ it had opened the gateway for the judicial intervention to narrow indigenous land rights.⁸⁸ As a result, Australian aboriginal land claims were excluded from the transitional justice framework.

In order to avoid the aforementioned dilemma, this paper argued that it is necessary to think outside the box, i.e., to think imaginatively, using new ideas instead of the traditional or expected legal framework. In its preamble, the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIPs) stated that “indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests”, and affirmed that “all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”⁸⁹ It is clear that the UN DRIPs eradicates the legal fiction of indigenous inferiority denying the legal personality and subjectivity of indigenous peoples. In addition, the UN DRIPs emphasizes that the realization of indigenous justice relies upon reinstating the theoretical framework of historical justice. As I have summarized here, the UN DRIPs framework has sketched the outline of a theoretical framework that better captures the complexity of indigenous justice claims. With this conception of indigenous justice, it may further contribute to reframe and broaden the idea of transitional justice.

In this article, it is evidenced that Taiwan, Canada, and Australia have all positioned their relationship with indigenous peoples without regime transition. On the other hand, this paper also signifies that the roots of injustice experienced by Taiwan indigenous peoples are much deeper and their impact lasts much further compared to the general one under the Act on Promoting Transitional Justice. This paper attempts to call attention to the risk of marginalization on indigenous justice implementations, whether it is transitional or historical. While the cultural pluralism has been embedded within the R.O.C. constitutional regime,⁹⁰ a jurisprudence of hybridity is yet

⁸⁷ *Mabo and Others v. Queensland [No. 2]* (1992) 175 CLR 1 (Austl.).

⁸⁸ *Yorta Yorta v. Victoria* (2002) 214 CLR 422 (Austl.).

⁸⁹ G.A. Res. 61/295, *supra* note 71.

⁹⁰ ZHONGHUA MINGUO XIANFA ZENGXIU TIAOWEN (中華民國憲法增修條文) [THE ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE ROC] art. 10, ¶ 11 (1991) (“The State affirms cultural pluralism and shall actively preserve and foster the development of aboriginal languages and cultures.”).

to be established as a response to the implementation of indigenous transitional and historical justice. Among all other concerns, the key issue, this paper argues, lies in the knowledge gap on the nature of indigenous subjectivity. The majority views still reflect the notion that indigenous peoples are racial-minority disadvantaged groups, leading to the narrow vision of indigenous policy as subsidiary-oriented affirmative measures.⁹¹

Thus far, the history of Taiwan is mostly written by the successive political sovereigns. Within these contexts, as this paper illustrated, indigenous peoples have gone through a series of colonial naming with political and legal implications, contributing to the racial projects for subordination. If we want to understand what transitional and historical justice can do for indigenous cultural survival, we should trace back the history of oppression and exploitation imposed upon indigenous peoples through colonization.

The Executive Yuan has already submitted *Yuanzhuminzu lishizhengyi ji quanlihuifu tiaoli caoan* (原住民族歷史正義及權利回復條例草案, Indigenous Peoples Historical Justice and Rights Restitution Bill) to the Legislative Yuan on May 10, 2018.⁹² The Bill restructured the justice framework, extending the scope far back to the first contact, broadening the issues to human rights violations against indigenous peoples, and setting up an independent land claims commission.⁹³ A major shift is needed in thinking about the operation of transitional justice. This paper has demonstrated that it is of greatest importance that the indigenous justice claims are necessarily tied to the issue of recognition of indigenous jurisprudence.

Using this framework, Taiwan indigenous peoples can help redefine the way transitional and historical justice claims are viewed. Lastly, such changes will make it possible to address the complexity of indigenous justice demands and significantly enhance their chances in achieving mutual understandings and reconciliations in Taiwan.

⁹¹ An exemplary legislation is Indigenous Peoples Employment Rights Protection Act, which adopts proportional recruitment principle to promote the employment of indigenous people. See *Yuanzhuminzu gongzuoquan baozhangfa* (原住民族工作權保障法) [Indigenous Peoples Employment Rights Protection Act] (promulgated and amended by the Council of Indigenous Peoples, Feb. 4, 2015, effective Feb. 4, 2015), <https://law.apc.gov.tw/LawContent.aspx?id=FL002069> (Taiwan).

⁹² Press Release, The Executive Yuan, The Executive Yuan Will Pass the Draft of the Aboriginal Historical Justice and Rights Reply Ordinance (May 10, 2018), available at <https://www.ey.gov.tw/Page/9277F759E41CCD91/8904e4c5-f736-4c3a-8d80-d763b7a79e63>.

⁹³ *Id.*

