

原住民族委員會「促進原住民族國際交流補助實施要點」補助經費出席國際會議成果報告

112 年 6 月 28 日

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會議 時間	112 年 5 月 25~31 日		
會議 名稱	International Symposium: The Right to Catch Salmon in Rivers as Indigenous Rights—A Gathering of Indigenous People who Live from the Sea (i), the Forest (o) and the Rivers (ru)		
發表 題目	Indigenous Sovereignty over Natural Resource Rights in Taiwan: Review of Two Constitutional Court Decisions		

壹、前言

原住民族法律傳統之力量，並非在於其維持為傳統之形式，而是如何使其在變動世界中被繼續發展與保存。儘管全球原住民族間存在著如此多元的文化與相異的議題，考諸原住民族與殖民主義間的歷史發展脈絡，我們仍然可以察覺存在原住民族其中相同的關懷：文化的歧視、經濟的弱勢、土地的流失等。

本項國際學術研討會係以日本北海道愛努原住民族獵捕鮭魚權為引，就原住民族與其土地、領土和資源的關係，從國際原住民族法制發展與權利建構，邀請加拿大、美國、澳洲、臺灣與日本等國的專家學者與原住民族人共同參與研討。

貳、與會過程

本次國際學術會議係由位於日本北海道浦幌町 Raporo Ainu 原住民族，協同北海道大學原住民族暨多元文化國際研究中心（Global Station for Indigenous Studies and Cultural Diversity）與開示文書研究會（Document Disclosure Group）所辦理。會議規劃分為兩個部分，其一係於北海道十勝郡浦幌町就原住民族自然資源使用、管領之權利，由來自五個國家的專家學者與原住民族人進行專題發表與討論。同時，為瞭解 Raporo Ainu 原住民族所提漁獲權的主張與文化實踐，主辦單位安排傳統領域與海域的走訪，以及傳統聚落與舊部落的踏查，配合過往遺骨返還運動的介紹，助益實質對話與深度討論。其二，則係前往東京，參加由公益社團法人日本外國特派員協會辦理之國際記者會，以及由日本律師公會辦理之原住民族權利議題座談會。

參、Raporo Ainu Nation 漁獲權訴訟

本案是為了確認原告作為浦幌町唯一的愛努原住民族社群，有權在浦幌十勝川河捕鮭魚而提起的訴訟。

愛努人是居住在北海道等地的原住民族。Kotan(部落)是愛努原住民族在地方形成的傳統自治團體，部落過著以狩獵和採集為中心的生活，享受大自然的恩惠，使用被稱為愛努語的獨特語言，也孕育了愛努原住民族傳統宗教儀式和祭典的獨特文化。

直到明治時代前，居住在北海道、千島群島和樺太的愛努原住民族的各小社群(稱為 kotan，部落之意)，在各自的領域(稱為 Ioru)中，以鮭魚為始，支配領域內獨占和排他性的方式使用和採集自然資源。鮭魚是愛努原住民族人的主要食物來源，也被用作與和人的貿易品，是經濟活動的重要資源。

明治時代以後，日本政府將松前地、蝦夷地更名為北海道，實施了禁止傳統風俗習慣、強制使用日語等同化政策。愛努人過去進行捕魚、狩獵、採集等生活的土地變成了公有土地。大量「和人」(愛努人以外的日本國民)移居北海道，展開各項開發活動，愛努人的傳統領域遭致剝奪，原本賴以生活的河流、森林等自然環境被改變，再加上漁獵的限制，愛努人的生活和文化受到了很大的打擊。

1873 年(明治 6 年)，明治政府禁止在現在的札幌市主要河流中拖網捕撈鮭魚。1878 年(明治 11 年)，復在札幌全面禁止捕撈鮭魚和鱒魚。其後，禁止捕撈鮭魚的禁令遍及整個北海道，1897 年(明治 30 年)，私人捕撈鮭魚也被禁止。現在，不管是日本人還是愛努人，在河川捕撈鮭魚原則上都是被國家和北海道政府禁止的。原告被禁止在十勝川捕撈鮭魚。唯一的例外是，出於文化傳統的考慮與需求，經北海道知事的許可後，愛努原住民族人可以捕撈一定數量的鮭魚。

關於愛努原住民族人的權利，札幌地方法院 1993(行ウ)第 9 號(所謂的二風谷水壩案)在審查土地徵用法第 20 條第 3 號的要求時指出，因水壩建設而喪失的利益、各種價值，經判決確認愛努原住民族享有文化的權利實係其中一項。根據裁決書稱，愛努人的文化享有權受《公民與政治權利國際公約》(International Covenant on Civil and Political Rights)的第 27 條和日本國憲法第 13 條所保障。

然而，一般認知前開文化享有權在 ICCPR 係定義為「個人權利」，本案 Raporo 愛努原住民族社群的權利訴求，非在尋求作為原告的愛努成員個人權之捕撈鮭魚權，而是提出「先住權」的主張，確認原告作為愛努原住民族各個部落的集體權利，涵括愛努原住民族與部落集體的捕撈鮭魚權。主要訴求則有：

1. 日本中央與北海道政府應尊重愛努原住民族固有的獨特傳統，賦予愛努 kotan 的捕魚、狩獵、採集等權利，並針對孕育這些動植物的自然環境享有維持和管理的權利，以及舉行傳統儀式等文化與精神的權利。
2. 日本中央與北海道政府應通過保障愛努原住民族人接受愛努語教育的權利；因應保存並發展愛努語的學術發展，以及提高愛努原住民族人的社會地位，包括改善他們的教育和就業條件，採取積極平權措施確保權利。
3. 日本中央政府應依其已批准的《國際人權兩公約》之規範意旨，承認愛努人確係國際法所保障之原住民族，並肯認愛努原住民族作為一個群體的法主體地位。同時，應批准國際勞工組織於 1989 年通過之《原住民族與部落人民公約》（第 169 號），並根據前開公約內容，制定國內法以實現前述主張。

肆、個人發表內容簡介與簡報

（一）發表內容簡介

近年來，臺灣司法實務引用國際人權公約論證原住民族權利的案例益增，即如司法院釋字第 803 號解釋，前開解釋雖揭示原住民享有選擇依其傳統文化而生活之權利，進而確認原住民依循其文化傳承而從事狩獵活動，確係原住民文化權利之重要內涵，應受憲法保障。惟就此一狩獵文化權利之權利性質，是否僅係個人權，得否認係集體權或兩者兼具，則仍屬懸而未定。另則，原住民族文化資

產的法律爭議，晚近亦有文物與遺骨返還等權利主張。透過此次移地研究，吾人主動讓日本學界與愛努原住民族社群瞭解臺灣法制實務現況，藉由實質對話與深度討論，取得愛努原住民族權利發展最新狀況。未來應可藉由兩國司法實務經驗之整合，對國內原住民族權利發展提出進一步完整的理論與架構，讓臺灣原住民族權利發展層次不斷提升。

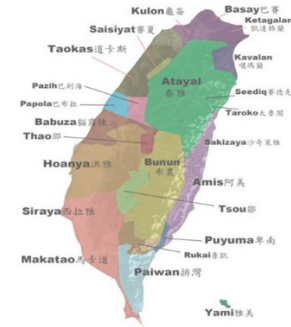
(二) 發表簡報



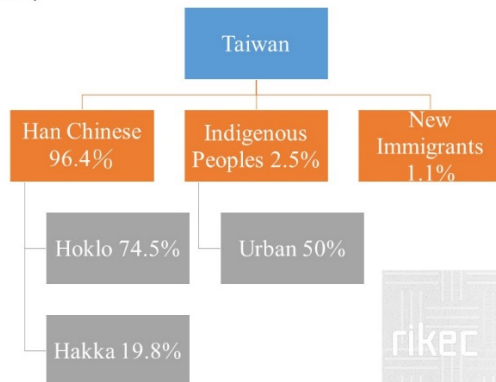
Indigenous Sovereignty over Natural Resource Rights in Taiwan: Review of Two Constitutional Court Decisions

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Associate Professor & Director

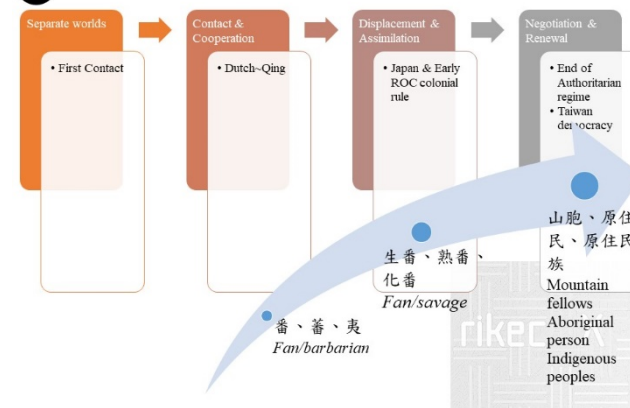
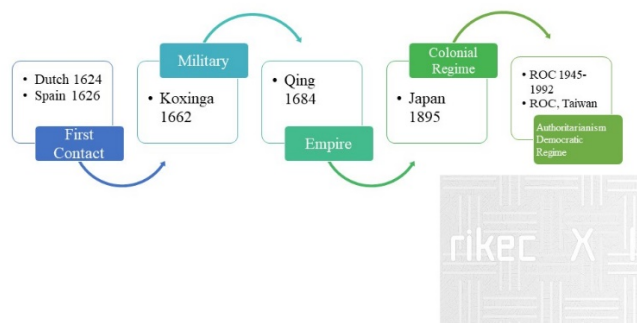
NDHU Law
Hualien, Taiwan



- TW Indigenous peoples belong to Austronesian linguistic family and have a variety of languages and cultures.
- Before the immigration of Han Chinese in the 17th century, Indigenous peoples have lived in Taiwan for a long time.
- 16 officially recognized indigenous nations
- Total indigenous population is about 580,000, accounting for 2.5% of Taiwan population



State's Historical Viewpoints



Formosan Indigenous Peoples



The Idea of the Savage in Colonial Legal Thought and Discourse

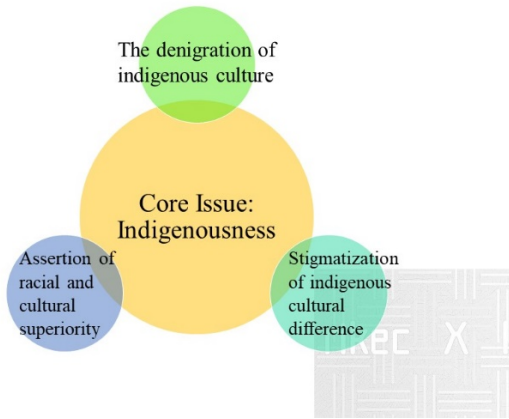
An Untold Story Hidden Behind The Names

Naming as a Legal Tool with the Political Aim

- Savage (Fān rén, 蕃人)
- Takasagozoku (Gāoshā zú, 高砂族)
- Mountain compatriots (Shān bāo, 山胞)
- Indigenous Peoples (yuánzhūmínzú, 原住民族)

Conceptualizing "Others"

- Conceptualized Political language: classifying others
- Wild men, barbarians & savages
- Stages of development: noble and ignoble savages



Post Taiwan Democratic Transition



Indigenous Movements: Emerging and continue to evolve

1980s-1990s

- indigenous movements and constitutional reforms

2000-2005

- “New Partnership Treaty” with Taiwan Indigenous Peoples
- A declaration of “Nation to Nation” relationship

2005-2016

- Indigenous Peoples Basic Law
- Indigenous legal constructions

2016 onwards

- Indigenous Historical Justice & Transitional Justice

Indigenous Historical Justice & Transitional Justice



- From equal protection and anti-discrimination of individual rights towards Indigenous self-determination and self-government.
- To introduce a new legal paradigm
- To actualize Indigenous legal traditions (customary laws)
- Constitutionalizing Indigenous Rights

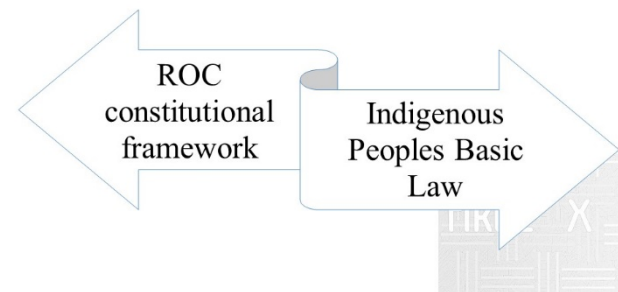


National Apology to Indigenous Peoples by President Tsai Ing-wen



August 1, 2016

Indigenous right to self-government is an institutional assurance (Einrichtungsgarantie) entrenched within the Constitution.





Development of Judicial Practices on indigenous cases



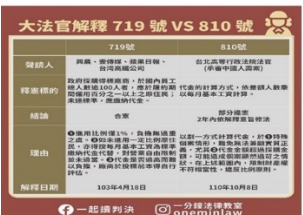
Judicial Yuan Interpretation No. 803 Indigenous Hunting



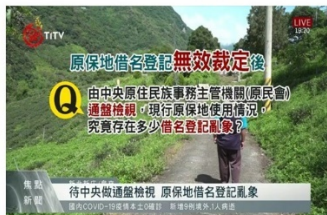
Supreme Administrative Court No. 894 Appeal, 2019



Judicial Yuan Interpretation No. 810, Government Procurement of Indigenous Employment Voucher Case



No. 1636 Taiwan Grand Court Appeal, Civil Grand Court of the Supreme Court, 2019



rikec Indigenous Hunting and the Law: Tama Talum's Hunting Case

Judicial Yuan Interpretation No. 803

- Hunting is a way to use natural resources and an important tradition for Indigenous people.
- Hunting is not only an important activity in traditional ceremonies and community education but also a fundamental basis for an individual member of the Indigenous community to identify with their culture.



- The TCC viewed the issue from the perspective of defending personal dignity, cultural identification, individual cultural autonomy, and the integrity of free development of personalities for the purposes of preserving, practicing, and passing down their unique traditional cultures in order to ensure the sustainable development of Indigenous culture.
- TCC determined that Indigenous people have the right to choose to live in accordance with their traditional cultures. In addition, said right is enjoyed by all Indigenous people and is protected by the Constitution as a fundamental right.



- Through hunting, Indigenous people learn and accumulate their experiences, living skills, and traditional knowledge concerning animals, forests, mountains, and the environment and form their own identity with the community to which they belong.
- Additionally, they are able to participate, practice, and pass down the collective culture of their tribes and communities together with other members, which is a critical part of the forming and passing down of Indigenous culture.
- Therefore, participating in hunting in accordance with their cultural heritage is an important part of the aforementioned Indigenous cultural rights, which should be protected by the Constitution.



rikec The Court Decision as a Denial of Indigenous Sovereignty

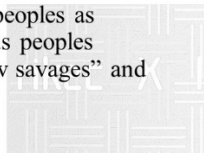
- First is the argument made by the court that the decriminalization of hunting should apply only to self-made rifles used for subsistence.
- Second, the court argued that hunting endangers wildlife, especially protected species and, therefore, protected species must be excluded from hunting activities unless otherwise approved.





Observations

- Although the decision was framed in terms of constitutional proportionality, it was made in a broader context of racial discrimination, accompanied by attitudes of superiority and by a projection of Indigenous lifeways as “primitive” and “inferior.”
- Majority views are the continuation of colonial attitudes that regarded Indigenous peoples as inferior, rooted in calling Indigenous peoples *shengfan* and *shoufan*, literally “raw savages” and “cooked savages”.



Purely colonial gaze

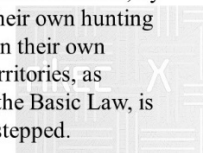
- False cultural imagination of indigenous peoples
- False narrative discourse of indigenous knowledge



Discrimination of a dual nature

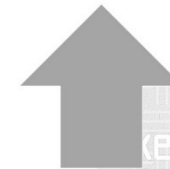
On the one hand, there is direct destruction of the material and spiritual conditions needed for the maintenance of Indigenous ways of life as many Indigenous peoples have been excluded from their forests.

On the other hand, even after President Tsai’s apology, majority attitudes that lead to exclusion or negative discrimination persist. The principle that Indigenous peoples have the right even to modest internal self-determination, by controlling their own hunting institutions on their own traditional territories, as promised in the Basic Law, is entirely sidestepped.



TCC Judgment 111-Hsien-Pan-4 (2022)
The Indigenous People Status of Children of Intermarriage between Indigenous and Non-indigenous People Case

TCC Judgment 111-Hsien-Pan-17 (2022)
Case on the Indigenous Peoples Status for the Siraya People





Case Number	TCC Judgment 111-Hsien-Pan-4	TCC Judgment 111-Hsien-Pan-17
Summary of the Judgment	The TCC ruled that said provisions impose a differential treatment of children born into intermarriages between indigenous people and non-indigenous people in indigenous people status registrations, which does not pass strict scrutiny under racial equal protection, and rendered it arbitrary and unconstitutional.	Indigenous peoples protected by AAoC include all Austronesian Taiwanese Peoples in Taiwan. In its reasoning, the TCC delved into the legal history of the regulation on indigenous status in Taiwan since the Qing dynasty, and extended the definition of indigenous peoples to Austronesian Taiwanese peoples that meet the elements of (1) preserving their cultural characteristics such as their ethnolect, custom, and tradition until present; (2) maintaining their ethnic identity; (3) having a verifiable historical record of them being Austronesian Taiwanese peoples.



Concluding Remarks

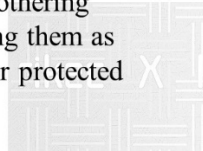


Shared experiences of indigenous peoples

- The racist policy of assimilation by the State oppressed the continuation and preservation of indigenous cultures, history, and identity.
- The nationalistic policy of assimilation by the State disintegrated the inheritance and succession of indigenous languages, education, and knowledge systems.
- The mindset of discovery and development by the State deprives the stewardship and management of indigenous lands, environment, and traditional territories.
- The unjust colonial and welfare policy by the State violates the indigenous physiological, psychological, and spiritual health.



- These legal decisions demonstrate the relevance of CRT to understanding the Indigenous–state relationship in Taiwan
- Interpretation No. 803, despite all appearances of court neutrality and constitutional order, ended up othering Indigenous people by portraying them as savages who hunt and endanger protected species.

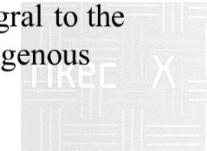


How can, and how should, the state empower the autonomy and effectiveness of indigenous governance in the relationship between indigenous peoples and cultural integrity.



Indigenous Governance and Cultural Integrity

- Concept of ‘good governance’ compatible with their cultural characteristics
- Basic contours of indigenous rights were determined by the historical practices, customs, and traditions integral to the culture of the particular indigenous peoples.



Indigenous
transitional and
historical justice

Cultural
Pluralism

Jurisprudence
of hybridity

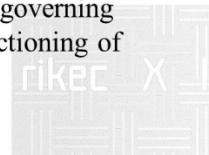




Indigenous Visions of Governance

Towards Nation-building

- Attributes of governance attaching to those practices, customs and rituals integral to the distinctive indigenous cultures
- Formation of a cultural match governing system and in the ongoing functioning of that system



Knbeyax ta naq ka ita!



伍、與會心得及建議

綜合來說，「國家」在政治哲學的探討中，應是成就好的公民生活的建制，卻在資本主義與工業化發展的過程中，成為戕害原住民命運最強悍的殺手。主流社會的族群，掌握國家大部份的資源，或在社經地位上佔有優勢，因此可透過國家的立法、行政的裁量、司法的判決與文化的傳播等，實踐主流社會的價值與利益；原住民因立足地位的不平等，終於逐漸面臨生存的困境。

以個人本次參與的主題來論，國家政策對於原住民族權利認知與保障的態度，常常呈現出發展、人權與民主的糾葛。然則，民主究竟是一種制度亦或是一種價值，民主的價值即在於主權在民，實現實質平等與公平正義。然而，民主制度往往與這樣的價值背道而馳，以原住民族人權的發展為例，其間的衝突可歸類有三：1) 民主與多數決；2) 民主與資本主義；3) 民主與科技發展。在這樣的糾葛下，原住民族的公平正義與實質平等，常常必須委諸於主流社群與政府的同情心與施恩。

承前所述，原住民族權利的在民主制度的架構下，應從多元文化論 (multiculturalism) 與原住民族自決 (self-determination) 的理論來實踐民主的實質平等與公平正義的價值。亦即，強調個人權利保障為基礎的憲政原則與強調文化本體及認同為基礎的原住民族集體權利訴求，即在自由主義多元文化論 (liberal multiculturalism) 的架構下嘗試使之相容。簡言之，如果集體權利訴求並非限制族群內部個別成員自由，而是以促進族群間平等或避免大社會決策傷害少數族群為目標，是有可能於自由主義憲政架構中獲得正當性。換言之，多元文化主義是實踐民主憲政的法律正當化基礎。據此，積極的發展與體現原住民族自決的價值、制度、慣習與程序，是建構現代民主憲政國家與多元文化價值的關鍵。

多元文化主義強調肯認多元族群/社群的存在，並確保每一個個

人在保有他們各自文化實踐權利的同時，亦能夠享有同其他主流族群/社群一般的在憲法上的國家參與，以及憲法所保障的權利原則與共享價值。臺灣作為一個多元族群國家，近幾年來在原住民族權利發展上的努力，的確相當迅速；原住民族與政府間的問題，不能完全依賴法律解決，在先進國家中，雙方以夥伴角色互相傾聽，加強溝通協調解決問題，應是臺灣的應該思考的方向。我們確實需要的是從過去的經驗中學習理解，重新建構一套確實能夠提升與促進多元文化與族群相互間的理解、和諧、接納與尊重的民主憲政與多元文化的人權體制。

當前學術研究取向以進入跨領域甚至是跨國合作型態，對於臺灣進行原住民族研究而言，應積極推動學術社群的組織，並以跨領域整合研究團隊作為核心概念，每一研究團隊可以某一國際會議為表現舞台，這樣可以呈現研究的深度與廣度。對於學界來說，國際場合交流對於國內整體研究領域的成長有相當大的幫助，因此積極參與甚至在國內舉辦類似會議，將是學界中每一份子都應該積極努力的目標。

本次會議的參與成員，計有至少五個國家的專家學者、原住民族部落團體與族人。近年來臺灣司法實務引用國際人權公約論證原住民族權利的案例益增，透過參與此次會議，吾人主動讓與會學界先進與原住民族社群瞭解臺灣司法實務現況，藉由實質對話與深度討論，取得國際原住民族權利發展共識，藉由整合其他國家之經驗，對國內原住民族權利發展提出進一步完整的理論與架構，讓臺灣原住民族權利發展層次不斷提升。

最後，個人此次會議能順利參與，並獲得與國際學者專家交流、互動與學習的經驗，由衷感謝原住民族委員會的支持與協助。

陸、相關媒體報導



アイヌ先住権、浦幌でシンポ きょう開幕
／北海道毎日新聞 2023/05/27



浦幌で国際シンポ 先住民の漁労の課題議論 アイヌ民族遺骨の埋葬地見学も
／北海道新聞 2023/05/27



歴史的不正義な光景「遺骨持ち出された現場など視察 浦幌・アイヌ民族団体主催の国際シンポ
／北海道新聞 2023/05/28



先住権の情報交換を継続 浦幌の国際シンポ閉幕
／北海道新聞 2023/05/28



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／北海道毎日新聞 2023/05/29



浦幌のアイヌ民族団体会長「私たちの文化消えてしまう」 東京で会見、海外記者に先住権訴え
／北海道新聞 2023/05/29

柒、與會影像紀錄



Raporo Ainu 原住民族傳統領域邊界點



Raporo Ainu 原住民族傳統漁場



Raporo Ainu 原住民族舊部落位址



走訪 Raporo Ainu 原住民族傳統領域



走訪 Raporo Ainu 原住民族傳統領域



Raporo Ainu 原住民族祈福儀式



Raporo Ainu 原住民族傳統船舶復造



Raporo Ainu 原住民族會長開幕致詞



研討會發表



研討會閉幕式



與薩米議會議長 Áslat Holmberg 合影



與 Raporo Ainu 青年會會長合影