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碩士論文

**Master's Thesis**

台灣的原住民族權利與司馬庫斯案件  
**Indigenous Rights in Taiwan and the Smangus Case**

Student: David Charles Reid

Advisor: Dr. David Blundell

中華民國九十九年四月

April, 2010

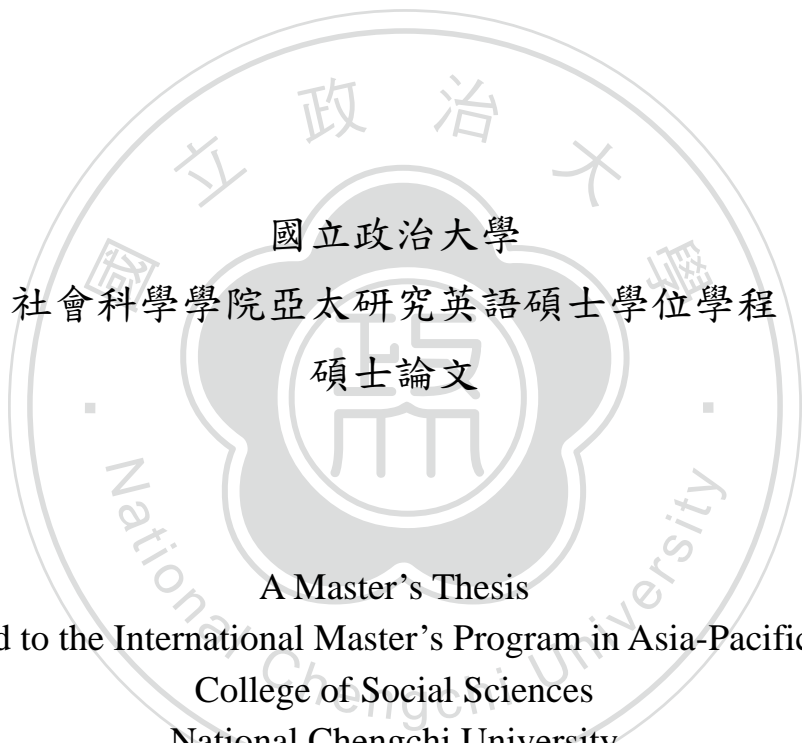
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## **ABSTRACT**

This thesis analyses the current development of indigenous rights in Taiwan based on a study of the Atayal community of Smangus in Hsinchu County. The research focuses on a case study of the Smangus Beech Tree Incident, a legal case related to the use of wood from a wind-fallen tree. The case began in 2005, the same year that Taiwan passed the Indigenous Peoples' Basic Law. The events are also placed in the broader context of the modern indigenous rights movement which had its beginnings in Taiwan in the early 1980s and the more than century long history of conflict between the Atayal and the state. Smangus has developed a unique community with a cooperative system of management that draws from both the Atayal tradition and ideas from the modern world. Ecotourism is the main economic foundation for the community. The development of Smangus and their assertion of their rights in the Smangus case provides an example of how indigenous peoples can regain greater control over the lands which they consider to be their traditional territory. The thesis then looks at co-management of Aboriginal-owned national parks in Australia. The final chapter considers how the co-management model could be adapted in Taiwan and gives recommendations for policy makers.

Keywords: indigenous rights, Taiwan, Atayal, natural resources management

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# CHAPTER ONE – INTRODUCTION

## 1.1 Overview

The indigenous peoples of Taiwan and Orchid Island are currently recognised as members of 14 ethno-linguistic groups. They are the inheritors of a cultural heritage that can be traced back more than 6,000 years to the beginning of the Neolithic period on Taiwan. This population of 430,000 people currently makes up about two percent of the Taiwan population (Council of Indigenous Peoples, 2007).

Taiwan's contemporary indigenous rights movement had its beginnings in the early 1980s (Chiang, 2004: 41-42; Hsieh, 1994a: 408-410). Since the lifting of Martial Law in 1987 there has been significant development of indigenous rights in parallel with Taiwan's democratisation. In the past decade this movement has led to the drafting and passing of a number of laws which promote and protect the rights of Taiwan's indigenous peoples. The cornerstone of this legislation is the 2005 Indigenous Peoples' Basic Law (IPBL).

Taiwan passed the IPBL in January 2005. The law aims to protect and promote the rights of Taiwan's indigenous peoples in accordance with the standards of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The IPBL represented a significant landmark in the development of indigenous rights in Taiwan. However, the high aspirations of the IPBL do not match the reality of practice by government institutions or the expectations of indigenous peoples. To better understand how the IPBL works in practice this thesis makes use of a case study of Smangus in Hsinchu County.

Smangus is a community of Atayal people located at an altitude of 1,500 metres in the mountains of Jianshi Township of Hsinchu County. The Atayal are the second largest indigenous group in Taiwan. They follow a system of traditional law inherited from their ancestors known as the *gaga*. The Smangus Beech Tree Incident relates to events that took place in September and October 2005. A beech tree fell across the road to Smangus during a typhoon. The Forestry Bureau later removed the most valuable timber. The Smangus community held a meeting and asked three men to bring the remaining parts of the tree back to the village. The three Atayal men from Smangus

village were subsequently charged with theft of forestry products under the Forestry Act. The three men were found guilty in the initial court hearings in the Hsinchu District Court and High Court. In December 2009 the Supreme Court sent the case back to the High Court for review. On 9 February 2010 the High Court found the three men were found not guilty bringing an end to the four year long legal battle.

Although the case eventually reached a satisfactory conclusion it highlights the weakness of the law in Taiwan in upholding indigenous rights, particularly in regard to rights to land and natural resources. It provides an example of conflict between national law and the traditional law of indigenous peoples. It is also part of an ongoing conflict between the state and the Atayal people over rights to land and resources that can be traced back to the late nineteenth century. In the present time, the state is represented by the Forestry Bureau which exercises the authority of the central government over the lands which indigenous peoples have lived on for many generations and claim as their traditional territory. Indigenous peoples as the original sovereign owners of the land seek to reclaim their rights to use natural resources from the land according to their traditional law and customs.

The Smangus Beech Tree Incident and subsequent legal case highlight the weaknesses that exist in applying laws that recognise indigenous rights in practice. The reasons for this include lack of clear legal definitions of indigenous peoples' traditional customs and territory and differences in language and world view. Further legislation and changes in the way institutions deal with indigenous peoples are necessary to improve the situation. Recommendations for policy makers form part of the conclusion of the thesis.

This thesis explores in detail the contemporary situation of indigenous rights in Taiwan, in particular the ongoing conflict over rights to land and natural resources. It also seeks to find the key reasons why the IPBL has not matched its aspirations in practice and ways that indigenous people can assert their rights by drawing on their culture and traditions. The key research questions are: How can indigenous people assert their rights to land and resources? Should they do this through the legal system, negotiation involving all stakeholders or adopt other approaches?

To further understand how indigenous peoples can gain control over the management



of their lands the thesis also looks at the case of two Aboriginal-owned national parks in the Northern Territory of Australia. These national parks are operated under a system of co-management. The final chapter then considers how a system of co-management could be adopted in Taiwan.

This thesis provides a substantial examination of the contemporary situation of indigenous rights in Taiwan. Although there already a number of book chapters, articles and theses on this topic in English, indigenous rights are cast in a new light by the 2005 IPBL and the policies of the Democratic Progressive Party (DPP) government from 2000 to 2008. It also includes the first case study of the Smangus community in English. Hence this thesis intends to provide the most up to date analysis of the present situation of Taiwan's indigenous peoples.

## **1.2 Scope of study**

The focus of this study is the period from 2005 to the present. This time period covers two important events. First the IPBL was passed in January 2005 creating a new framework for indigenous people to argue for their rights. It focuses on the community of Smangus in Hsinchu County and the case regarding use of wood from a wind-fallen tree in 2005. The subsequent legal case came to an end in February 2010 with the not guilty verdict passed down by the High Court.

While the study is focused on recent events it also covers the historical background of indigenous peoples in Taiwan and the settlement and colonisation of Taiwan by Chinese, Japanese and Europeans over the past 400 years. The ethnic structure of Taiwan is complex. Where I make reference to ethnic or linguistic groups within Taiwan I use specific terms to describe these groups. Where I use the term Taiwanese it applies to the all the people living in the political entity of Taiwan.

There are two major political parties in Taiwan. The Chinese Nationalist Party or Kuomintang (KMT) first came to Taiwan in 1945 as the de facto occupying power after the Japanese surrendered at the end of World War II. In 1949 the KMT fled en masse from China to Taiwan following the loss of the civil war in China to the Communists, relocating the national capital from Nanjing to Taipei and re-establishing the Republic of China (ROC) on Taiwan. The KMT ruled Taiwan under Martial Law

until 1987. Following the end of Martial Law and the death of Chiang Ching-kuo in 1988, native Taiwanese Lee Teng-hui became President. He implemented numerous reforms that facilitated a shift from one-party dictatorship to democracy and in 1996 was re-elected President in Taiwan's first direct presidential election. The DPP was officially founded in 1986, quickly becoming the main opposition party as the practice of democracy developed in Taiwan. Taiwan experienced its first democratic transition of power in 2000 when DPP candidate Chen Shui-bian was elected President, allowing the DPP to gain control of the executive branch of government. The indigenous policies implemented by the DPP in the period 2000 to 2008 represent a new approach from the previous policies of the KMT. The KMT reclaimed control of the executive again in 2008 with the election of Ma Ying-jeou as President.

The indigenous peoples whose rights are the subject of this study are the Austronesian speaking peoples of Taiwan and Orchid Island. They are the peoples officially called *yuanzhuminzu* (indigenous peoples) by the government of Taiwan. There are 430,000 people officially recognised as indigenous in Taiwan, making up 1.9 % of the population (Council of Indigenous Peoples, 2007).

Historically, Taiwan's indigenous peoples were categorised according to a “nine tribes” model which was based on studies by Japanese ethnographers. However, there are now 14 officially recognised ethno-linguistic groups. There is also a movement for the *Pingpu* (plains) peoples to recover and reclaim their identity. The number of groups and criteria for being identified as indigenous in Taiwan may change further in the future. Issues related to indigenous identity in Taiwan and definitions of indigenous peoples will be further discussed in Chapter Two.

More specifically this thesis focuses on the Atayal people, an ethno-linguistic group that live in the mountainous areas of northern Taiwan. It includes a case study of the Atayal community of Smangus. More details about the Atayal and Smangus are provided in Chapter Three and Chapter Four of this thesis.

### **1.3 Methods**

A case study of the Smangus Beech Tree Incident forms the core part of the thesis. It is centred around the incident involving a wind fallen beech tree occurred in

September and October 2005 and the subsequent legal case which ended with a not guilty verdict from the High Court in February 2010. It also looks at Smangus as a community in the broader context of Atayal culture and contemporary society in Taiwan. Research on the case includes a literature review, key informant interviews, review of related Internet websites and field observations.

The Smangus case is not the only case where indigenous rights have been contested in Taiwan's courts. However, there are a number of reasons why Smangus was chosen for the case study in this thesis. The Smangus case occurred in the same year that the IPBL was passed meaning that is one of the first substantial tests of the IPBL in Taiwan's courts. The case attracted attention and support from academics and NGOs so it was well observed and also reported in the media.

The Smangus community also has some special characteristics. It is a remote village where the people maintain a strong sense of self reliance and independence. The people of the village seek to actively pass on their language and cultural traditions to future generations. At the same time the village has been open to outside influences and has adopted a system of cooperative management and ecotourism as the economic base of the village. There has also been ongoing contact with academics, particularly in a mapping project to define the community's traditional territory. Hence, there is documentation and expert witnesses to support Smangus's claims of traditional territory (Lin Yih-ren, interview).

The experience of Smangus is different from other indigenous communities in Taiwan. A limitation of the case study method is that while it can make descriptive inferences to other cases it can't establish causal relationships (Gerring, 2004). It may not be possible for every indigenous community to replicate the model of Smangus. However, they can certainly learn important lessons from it and adopt these to their own unique circumstances.

To obtain a deeper understanding of the Smangus case I have conducted interviews with a number of people who have been involved in or observed the development of the case. I have also interviewed several people in government who play key roles in the formulation of Taiwan's indigenous policies to learn more about the important issues in the broader field of indigenous rights.

Most interviews were recorded with a digital audio recorder and several of the interviews were video recorded. In addition to the recording some basic notes were made at the time of the interviews with more detailed notes or transcriptions later made from the recordings. A few of the interviews were recorded by hand written notes only. For the people of Smangus Mandarin is a second language. They may not be able to fully explain concepts related to the *gaga* (Atayal traditional law) and traditional territory in that language. Hence my ability to understand some of these concepts through interviews is somewhat limited.

These interviews form the basis of a qualitative study. The case study is focused on events that have happened from September 2005 to the present so it is expected that interviewees can reliably provide detailed and accurate accounts of these events. Some interviewees also supplied additional materials at the time of the interview and these were kept and filed.

I have made three trips to Smangus to conduct interviews and learn about the local conditions. The first two trips were for one day only in December 2007 and April 2008. During these visits there was only time to conduct interviews and have a brief tour of the village area. In August 2009 I spent two days in the village. The longer visit enabled me to see a wider variety of things in the village and gain a better understanding of how everything works. I also had time to hike to the grove of old trees. I have also been able to learn more about the broader situation of indigenous rights in Taiwan by attending several conferences and protests.

There are large bodies of literature related to the international issue of indigenous rights and the ethnology of the peoples of Taiwan. In the area of contemporary indigenous rights in Taiwan the availability of published materials in English is more limited, but cover all the major events of the past few decades. The Smangus community blog also provides an important resource for study. Because of my limited ability to read Chinese only a few documents written in Chinese have been used as references.

## CHAPTER TWO – DEFINING INDIGENOUS PEOPLES AND INDIGENOUS RIGHTS

### 2.1 Defining indigenous peoples

In a study of indigenous rights it is important to establish a definition of indigenous peoples. Indigenous peoples are generally the peoples and cultures that existed before the European expansion and colonisation of the globe that began in the sixteenth century. Indigenous peoples include the peoples variously referred to as indigenous, Aborigines, tribes, First Nations, ethnic minorities, natives or other terms in different parts of the world. A United Nations study *describes* indigenous peoples as follows.

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems (UN, 1995 quoted in Anaya, 1996: 5).

However, in many cases the people identified as indigenous today are not the original inhabitants of the land. The indigenous peoples themselves often displaced or assimilated previously existing cultures during earlier migrations and the transition from Paleolithic to Neolithic periods. It is also important to consider that the societies of indigenous peoples are not static. Even in pre-modern times they were undergoing change and evolution due to a variety of factors.

In the Americas and Oceania it is relatively easy to distinguish the historical moments at which the indigenous peoples began to have contact with outsiders. In other parts of the world the point of demarcation between the original peoples and the subsequent arrival of colonisers or settlers is often less distinct. Furthermore, the arrival of colonisers or settlers on their lands brought about even more fundamental changes in the societies and way of life of the original inhabitants. The indigenous cultures we

observe today can still be considered to represent a continuum from the past though.

Indigenous peoples are usually seen as having connections to land and territories.

However, this view is also somewhat problematic. In many cases they have been forcefully displaced from their lands. In some cases they may have maintained contact or still identify with their traditional lands even though they are no longer living on those lands. In other cases they may have resettled in new areas and recognise these new areas as their own lands. A second issue is voluntary migration, primarily from isolated or rural areas to urban areas. This may be driven by economic factors or for better access to education, healthcare and other services.

Most government policies are formulated based on the view that indigenous peoples are resident on their traditional territories and don't take into account that a large percentage of indigenous peoples may have migrated to urban areas. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) does not mention the words city, urban or migration (Watson, 2009). This thesis is focused on indigenous peoples living on lands which they consider to be their traditional territory. The issue of indigenous peoples in urban areas and migration of indigenous peoples is a subject that needs further research.

Blundell (2008) discusses issues of indigeneity and cultural heritage in the context of Taiwan and Sri Lanka, in particular looking at the usage of the word "tribe". Tribe means a hierarchical group organisation with "chiefs, nobility and commoners." In Taiwan the word used for indigenous groups, *zu* in Mandarin Chinese, is usually translated as tribe. However, it really means "lineage" or "descent of clan". Also indigenous groups of Taiwan are not necessarily tribal in terms of their social organisation. Hence, in Taiwan tribe is a misnomer applied to ethno-linguistic groups who are officially known as *yuanzhuminzu*, meaning indigenous peoples.

Tribe is also used in Taiwan to refer to villages or communities of a few hundred people. This compounds the problem of mislabelling although this doesn't occur in Mandarin where the word *buluo* is used to refer to a village or community. A *buluo* is typically made up of tens or hundreds of people living in the same area and maintaining close relations and sharing of resources. Historically this has been the primary unit of social organisation of indigenous peoples in Taiwan. In this thesis I



use village to refer to the physical collection of houses and living space. Community refers to a group of people who share close social relations and common heritage.

There is an additional term in Mandarin, *qun*, which is used to categorise ethno-linguistic groups into smaller groups that are still larger than a single village. The word *qun* translates as group and in this thesis will be translated as group or sub-group depending on the context. Hence the Mandarin Chinese terms for classifying indigenous peoples in Taiwan are accurate, but they are often translated into English incorrectly.

## **2.2 The international movement for indigenous rights**

Indigenous rights refer to the rights of indigenous peoples, both individually and collectively. Indigenous peoples represent a continuous culture and were once the sovereign powers of their territory. As a result of settlement or colonisation they were marginalised and lost their sovereignty. The indigenous rights movement is based on reclaiming lost sovereignty and recognition of rights under the law.

Anaya (1996) provides the most comprehensive overview of indigenous people and international law. His work looks at indigenous peoples and the framework of international law beginning from Europe's relations with the peoples of the Americas in the sixteenth century to the contemporary situation. The key argument of Anaya is that international law has shifted from a discourse of sovereignty to human rights. Self-determination is a key foundation of human rights that applies to indigenous peoples. He concludes by looking at the contemporary international framework of indigenous rights including the institutions, procedures and key documents.

The legal framework, which Anaya has charted the development of, reached a landmark with the adoption of the UNDRIP by the United Nations General Assembly on 13 September 2007. Oldham and Frank (2008) analyse the process of the drafting of the UNDRIP and the final negotiations that led to its adoption. Indigenous people actively participated in the drafting process which took place over 23 years. This period corresponds with the emergence of the international indigenous peoples' movement focusing on the United Nations (UN). The movement began in the 1970s and expanded in the during the 1980s. The indigenous representatives did not see

themselves as creating new rights, but sought affirmation of rights in existing treaties that had been denied to indigenous peoples.

The UNDRIP doesn't actually define indigenous peoples. An official definition of indigenous peoples has not been adopted by any UN organisation. Definition and recognition of indigenous peoples is left up to individual states. A key point however is focusing on self-identification and identifying rather than defining (UN Permanent Forum, n.d.).

Oldham and Frank (2008) make recommendations on the use of the UNDRIP by anthropologists. They say it merits anthropological analysis through contributions to the emerging anthropology of international institutions, law and human rights. Also anthropologists engaged in field work could report on the status and application of the UNDRIP. Messer (1993) also examines the links between anthropology and human rights. Anthropologists were once critical of human rights because of cultural relativism, however they have now shifted to seeing human rights as setting minimum standards for human dignity. She suggests ways that anthropologists can contribute to human rights through their work. Another significant recent contribution to the discussion about the relationship between anthropology and human rights comes from Goodale (2006).

Orlove and Brush (1996) consider the role that anthropologists can play in the promotion of the conservation of biodiversity through the participation of local peoples, namely farmers and indigenous peoples. They write that anthropologists are particularly well suited to the study of protected areas because of their commitment to long term field studies in remote areas and willingness to study not only the local population, but others such as government officials, biologists and NGO workers. Anthropologists have also engaged in debates over the future of protected areas as advocates for indigenous rights, cultural intermediaries and expert witnesses. Anthropologists have argued strongly for the participation of local peoples in the management of protected areas. These arguments may be based on social justice, human rights or pragmatic reasons. The most common research method used is the interview based longitudinal case study of local peoples and their interactions with outside groups such as the government, NGOs and the media.



### 2.3 The politics of identity in Taiwan

Defining indigenous peoples in Taiwan is often intermeshed with politics. Taiwan's status as a nation is contested and national identity is very much a political battleground. During the 1990s President Lee Teng-hui promoted Taiwanese consciousness and localisation. This was a counter to the Chinese nationalism that had been a part of the authoritarianism during the years of Martial Law. Localisation was further promoted during the eight years that Chen Shui-bian was President. After Ma Ying-jeou became President in 2008 he again sought to return to a form of Chinese nationalism through the idea of Taiwanese being part of the *Zhonghua Minzu* (Greater Chinese Ethnic Nation). However, in spite of this numerous opinion polls show that the people of Taiwan still increasingly identify as Taiwanese rather than Chinese. Democracy and the hostile attitude of the People's Republic of China (PRC) towards Taiwan ensure that this trend is not something that will easily be reversed.

Taiwan's indigenous peoples are in many ways marginalised by this debate. They are the original peoples of the island and were here for thousands of years before the Dutch, Chinese and others started to settle on the island. The debate is largely a contest between the Hoklo-speaking peoples who trace their roots on Taiwan back four hundred years and the Chinese who arrived with the KMT after 1945 and became the ruling elite of the Republic of China on Taiwan, imposing their Chinese nationalism on the Taiwanese people through the education system. The efforts to assimilate indigenous peoples through the education system and teaching of Mandarin taught them a form of Chinese culture that was divorced from the Chinese cultural practices of the Hoklo and Hakka speaking peoples in Taiwan (Harrison, 2001: 69, 73). In the 1950s indigenous peoples realised that the Japanese or indigenous identities that had once been useful had become a political liability. Different communities chose to adopt the “Chinese” identity being promoted by the Nationalist (KMT) government because it was politically advantageous (*ibid.*: 74-75).

Hence the indigenous peoples found themselves better accommodated by the politics of the KMT rather than the DPP which is often linked to a Hoklo-Taiwanese nationalism. In addition there is not the same history of conflict between indigenous peoples and the Chinese who arrived after 1945 as there is with the Hoklo-speaking peoples. With regard to the latter there has been 400 years of fighting over access to

land. This is further complicated by the fact that the Hoklo-speaking people intermarried with the *Pingpu* (plains peoples) (Brown, 2004). The indigenous groups that remain today are the peoples who have resisted assimilation with the Chinese-speaking settlers on Taiwan for 400 years.

There are several competing theories on the origins of Taiwan's indigenous peoples. These theories may also be used to support certain political views or agendas. The southern origin theory, that the peoples migrated from the Philippines or Malaysia is used to distance Taiwan from China. It highlights the non-Chineseness of Taiwan, emphasising the uniqueness of Taiwan's peoples and negating the claims of the ROC and PRC to Taiwan (Stainton, 1999a: 29-32). The northern origin theory, that the peoples migrated to Taiwan from the area that is now southern China, is used to show the connections between Taiwan and China with China as the motherland (*ibid.*: 32-37). Finally, the Austronesian Homeland theory is that Taiwan was the place of origin of the Austronesian languages. This theory is a refinement of the northern origin theory suggesting early neolithic migrations from continental Asia followed by independent development in Taiwan. This theory places Taiwan at the centre and links indigenous identity with Taiwan identity (*ibid.*: 37-41).

Current evidence and academic discourse gives greatest support to the Austronesian Homeland theory. This is based on analysis of linguistic and archaeological evidence from Taiwan and the many islands of the Indian and Pacific oceans where Austronesian-speaking peoples are found (Bellwood, 2009). The idea of Austronesian is primarily a linguistic one. Bellwood's hypothesis is largely based on the linguistic view of Blust and supported by archaeological evidence (Paz, 1999: 151-152).

Blundell (2008) suggests the “idea of an ethnic continuum as a value deserving protection as an endangered heritage.” The Formosan-language speaking peoples of Taiwan represent a continuum from the origins of a language family extending back 6,000 years that now spans the Indian and Pacific Oceans. That the culture and knowledge of indigenous peoples has value as heritage implies that it is valuable not only to the peoples themselves, but as a living resource for the whole world to learn from.

The historical position of Taiwan's indigenous peoples is one of a gradual loss of

sovereignty and rights as a result of European, Chinese and Japanese settlement and colonisation over four centuries. Hsieh (1994a: 404-406) divides the history of Taiwan's indigenous people into several periods according to their status. In the period up to 1624 they were the “only masters” as the only people living in Taiwan during this period were the indigenous Austronesian speaking peoples. From 1624 to 1661 they were “mostly masters”. The plains peoples who came under the rule of the Dutch and Spanish lost their superior position, but peoples in the other regions of Taiwan were unaffected. From 1661 to 1875, under the rule of Koxinga and the Qing (Manchu) dynasty, they were “half masters”. Indigenous peoples in the mountain areas and east coast retained their position of master while the plains peoples were assimilated into the dominant culture. From 1875 to 1930 they were “masters in fewer areas”. In 1875 the Qing government began to extend its power into the mountain areas and then in 1895 the Japanese occupied Taiwan and gradually established control over the entire island. Indigenous people resisted rule by foreign powers, but were still eventually conquered. The Wushe Rebellion in 1930 marked the final major act of resistance, after which the indigenous people were completely conquered. The final period from 1930 to the present is “lost position of master completely”.

The succession of colonial regimes on Taiwan have shaped the identity and position of Taiwan's indigenous peoples today. For the Atayal and other peoples that lived in the high mountains it was not until the Japanese era that their position underwent a massive change. External forces have tried to change the identities of these peoples first to become Japanese and then to become Chinese.

Indigenous memories of the Japanese era are mixed. Many express admiration for the Japanese while simultaneously remembering the oppression that they suffered. Simon (2006) contrasts the memories of the Truku people in Hualien with those of the “Native Taiwanese” (Hoklo and Hakka speakers). For indigenous people the Japanese era was important for identity formation because it positioned them as resisters against colonialism. The Native Taiwanese lived through the Japanese colonial period unlike those Chinese who arrived with the KMT after 1945. Memories of the Japanese era are central to their ethnic identity. They see the Japanese period as a symbol of modernity and Japanese education as a sign of higher levels of development than China at that time.

In the late 1940s and 1950s when Taiwan was under the rule of the Chinese KMT indigenous identity was in a state of flux. Harrison (2001: 51) argues that indigenous peoples didn't necessarily have Chinese identities forcefully imposed on them, but chose their identity to suit the circumstances. In the 1950s villages chose a "Chinese" identity because of the perceived political and social advantages. Harrison looks at the case of Ma Zhili. Ma was the son of a Fujianese man who fled to a Puyuma community in the hills to escape trouble with the government. Ma Zhili grew up speaking Hoklo and Puyuma. He attended a Japanese school where he became fluent in Japanese. He married the daughter of a Puyuma elite and became a "chief". Ma was able to skillfully adopt these different identities for personal and political advantage under both the Japanese and Chinese regimes (*ibid.*: 62-63).

In the current era, democratisation and the indigenous rights movement have allowed indigenous peoples to have more opportunity to define themselves on their own terms. The "nine tribes" model was based on the work of Japanese anthropologists in the late nineteenth and early twentieth centuries. It was an external imposition and previous self-identification was based at the village level. The indigenous identities that subsequently came to exist were a result of the anthropological research that classified them (*ibid.*: 55-56). The "nine tribes" model has been abandoned since 2000 and there are now fourteen officially recognised groups. Indigenous peoples in Taiwan are no longer forced to accept the labels imposed on them by outsiders. Instead they are increasingly able to self-identify and classification is now based on an emic viewpoint.

Blundell (2001) interviews a member of the Toda group. The Toda are a group of about 1,000 people in Hualien County and are classified as Atayal or Seediq. This member of the group asserts their right to recognition as a distinct group based on their self-identification. Achieving such recognition depends on the strength of the case that the people can make to the central government. The group needs evidence of its cultural heritage as well as a claim over territory. The latter is complicated by the fact many peoples were moved around during the Japanese era and may no longer inhabit their ancestral villages. There is also the need for some consensus or agreement within the group and the interviewee in this case acknowledges this is not entirely accepted by the group.

Identity is not something which is static, but changes due to both internal and external influences. Tradition varies from generation to generation. For example, the documentary film *Amis Hip Hop* (Tsai, 2005a) shows the age-set ceremonies in the Amis speaking community of Dulan in Taidong County. The young men use the latest pop music as part of their ceremony. They are not attempting to faithfully copy the dances of the older generations, but instead to prove themselves by being more outrageous than the previous age-set. However, they are still maintaining an important tradition even if the outward forms are different. Tradition essentially means to pass on knowledge and culture. It is rooted in what bonds together the community, while the outward expressions of those bonds adapt to the time and circumstances.

*Amis Hip Hop* shows that identity is fluid rather than fixed; it reflects both continuity and change. It is like the water in a river. Although the water at the source of the river is not the same as that at the river's mouth, it is part of a continuous unbroken flow. Similarly the cultures of Taiwan's indigenous peoples that we observe today should be considered in the same way. Traditional customs and contemporary knowledge overlap in present day Taiwan. The age-set ceremonies in Dulan show this as do the people of Smangus who draw upon both the *gaga* (Atayal traditional law) and modern technology and ideas.

Christianity is also linked to indigenous identity in Taiwan. In indigenous villages throughout Taiwan the church usually occupies a prominent position. This is often a marker that distinguishes indigenous towns and villages from those of the Chinese-speaking mainstream in Taiwan. Christianity first came to Taiwan with the Dutch and Spanish in the seventeenth century. The *Pingpu* converted to Christianity whole villages at a time in the 1860s and 1870s. They sought to ally themselves with foreign powers who they perceived as more powerful than the Qing regime (Brown, 2004: 51-52). Mountain villages converted to Christianity on a large scale in the 1950s (Harrison, 2001: 76). Christianity is now seen as “a universal symbol of pan-Taiwan aboriginalism.” Indigenous peoples have appropriated Christianity as a symbol of power introduced from the West to help cope with the impacts of Chinese colonisation. It has become a symbol distinguishing indigenous people from those of Chinese heritage in Taiwan (Hsieh, 1994b: 194-195).

Stainton (2002) describes the role that the Presbyterian Church has played in the support of indigenous peoples and their rights. Unlike their Catholic counterparts, all indigenous Presbyterian Churches have indigenous people serving as ministers. They preach a Christianity that is indigenised and incorporates many of the structures and functions of traditional culture. For many indigenous people religious and ethnic identity are overlapping constructs. Conversion was a means of deepening rather than changing identity. In the 1970s the Presbyterian Church began to preach about and promote the rights of both Hoklo-speaking Taiwanese and indigenous people against the KMT rule. The church resisted oppressive government policies by denouncing them as violations of God-given human rights.

## **2.4 Indigenous rights movement in Taiwan**

In the early 1980s, before a broad based political movement of indigenous peoples emerged, indigenous peoples lived under the same government system as all Taiwanese. The KMT dominated all political institutions and there was no organisation at the national level or of a single ethnic group that acted as a pressure group or represented indigenous interests. There was a growing sense of relative economic depredation among indigenous peoples. Culturally there was a sense of lost identity amongst the educated. Martial law discouraged the expression of cultural pluralism or the promotion of new ideas (Chiang, 2004: 40-41).

The 1980s and early 1990s were a period of intense political and social change in Taiwan as the nation emerged from Martial Law to become a democracy. This change reverberated among Taiwan's indigenous peoples. Taiwan missed out on the decolonisation process that took place in the 1950s and 1960s because of the Chiang Kai-shek's influential role in the United Nations and US support for his regime in the fight against Communism. When Taiwan began to democratise in the 1980s this was also the moment when international and transnational legal institutions were developing ways of promoting group rights. Both the Taiwan independence movement and the indigenous rights movement were able to tap into this discourse and activity to promote their rights and agendas (Simon, 2007: 234).

Chiang (2004: 33) refers to an “energetic surge of ethnic awareness” among the Austronesian-speaking indigenous peoples. Hsieh (1994a: 408) refers to a “pan-ethnic



identity movement among Taiwan aborigines.” Concerned about the future of their people, young indigenous intellectuals united to search for a new identity and to enhance their power. The publication of the *Gao Shan Qing* magazine in 1983 and formation of the Alliance of Taiwan Aborigines (ATA) in 1984 are recognised as the starting points of the modern indigenous rights movement in Taiwan (Chiang, 2004: 41-42; Hsieh, 1994a: 408-410).

The ATA was founded on 29 December 1984. It was the first pan-ethnic organisation of indigenous peoples made up mostly of intellectuals and graduates of Christian schools. In its early years it focused on opposition to policies of assimilation, criticising the Forestry Department, accusing Han people of invading indigenous peoples' lands and asking for land in the cities for urban indigenous people. In 1987 the group's focus shifted much more to the issues of land and territory. On 26 October 1987 the ATA released a “Manifesto of Taiwan Aborigines”. Six of the seventeen articles were related to land and territory. The demand for recognition of territory was based on consciousness of rights the indigenous peoples should naturally have (Hsieh, 1994a: 410-412).

Although the movement developed in this period, it failed to challenge the power of the KMT and the incumbent elites the KMT supported. Members of the movement contested elections, but were unable to win. They were seen as being a group of elites without people (*ibid.*: 413-414). The strength of the KMT in indigenous communities is further illustrated by looking at the case of the Presbyterian Church. From the 1970s to the present the Church has strongly opposed various policies of the KMT and more recently has been strongly linked to the DPP. In the 1970s many clergy and church elders were KMT members. This was necessary for the benefits it offered through patronage, even though the church met with state repression and actively campaigned against the state for rights. In 1998 the DPP recruited two Presbyterian ministers to run for seats in the Legislative Yuan. Even though every indigenous Presbytery passed resolutions supporting them, both men lost. Furthermore the centrality of the church in the indigenous movement has weakened groups that are independent of the church. They, along with the DPP, often fall back on the church rather than develop independent organisational networks (Stainton, 2002).

Hsieh (1994a: 413-415) says there were at least three elements limiting the ATA's capacity to expand its influence. First, the KMT and the state<sup>1</sup> had firm control over the ethnic administration in indigenous communities. Second, the indigenous peoples are dispersed geographically throughout Taiwan. Third, there are many different ethnic groups that speak mutually unintelligible languages. Although many indigenous peoples can speak Mandarin, the concept of an ethnic political movement was not easily understandable for those peoples with different cultural traditions and languages living in dispersed locations. The resistance movement did however have the effect of making the existing elites who were connected with the KMT become more outspoken. They started to criticise unreasonable government policies and discrimination towards indigenous peoples.

The idea of “self-government” developed during the period from 1987 to 1990. By 1990 the desire for self-government had moved into the indigenous mainstream and become an orthodoxy (Stainton, 1999: 423). The idea of self-government was a utopian ideal, but it provided a way for indigenous peoples in Taiwan to regain power over their lands and livelihood (*ibid.*: 433). There are many practical problems related to actually implementing indigenous autonomy, but it represents an aspiration of the peoples to reclaim their sovereignty and control over land and resources.

I-Chiang's 1991 statement to the United Nations in Geneva highlights some of the key issues facing indigenous peoples as Taiwan emerged from martial law. Indigenous peoples were deprived of proper political participation as the political system was under the control of the KMT and Chinese-speaking peoples. They were denied basic legal rights such as being able to register their own name. Outsiders undertook development projects on indigenous lands without consent and indigenous peoples were economically marginalised (Alliance of Taiwan Aborigines, 1995).

Through the 1990s the indigenous rights movement was unable to achieve its goal of autonomy but it made other important gains. Indigenous peoples were formally recognised in the constitution. These changes included reserved seats in the Legislative Yuan and the now abolished National Assembly. The 1993 constitutional amendments replaced the word *shanbao* (mountain compatriots), which indigenous

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<sup>1</sup> At this time the ROC on Taiwan was governed under a party-state system. As a result there was often little distinction between the KMT and the ROC government.



peoples considered offensive, with *yuanzhumin* (aborigine or indigenous people). The 1993 amendments also guaranteed indigenous peoples right to political participation and government assistance for education, cultural preservation, social welfare and business undertakings. In 1997 this clause was further amended to include transportation, water conservation, health and medical care, economic activity and land (Stainton, 1999b: 430; Simon, 2007: 226). Stainton (1999b: 430) points out that the earlier amendment was general in nature, while the later amendment included matters that would be central to the formation of territorial self-government. Furthermore, Simon (2007: 226) notes that the use of *yuanzhuminzu* (indigenous peoples) in the 1997 amendments recognises collective rights in contrast to the previously used *yuanzhumin* (indigenous people) which is more concerned with individual rights in a liberal framework. In 1996 the Aboriginal Affairs Commission (now known as the Council of Indigenous Peoples) was established in the Executive Yuan. Although the powers of the Commission were severely downgraded from the original plan, its establishment acknowledged that Taiwan's indigenous peoples held a special position in the structure of the state (Stainton, 1999b: 427).

The most recent and substantial contribution to the field of indigenous rights in Taiwan is Scott Simon's "Paths to Autonomy: Aboriginality and the Nation in Taiwan" (2007). It explores the changes in policy that took place after 2000 when Taiwan experienced its first democratic transition of power from the KMT to the DPP. The DPP was the first party to pro-actively define a policy on indigenous rights. The indigenous rights movement made important gains under the DPP government, even though the KMT and its allies continued to garner a majority of the votes from indigenous peoples. The progress made by the DPP ensures that whoever governs Taiwan in the future they will find it difficult to retract any of the rights "granted" under DPP executive rule (*ibid.*: 222-223).

In September 1999 as part of his campaign to be elected President, Chen Shui-bian signed a "New Partnership Agreement" with indigenous representatives. It recognised indigenous peoples' natural rights and as the original owners of Taiwan. This was followed by a DPP "White Paper on Aboriginal Policy" in 2000. This paper shows the way in which aboriginal peoples were incorporated into the DPP's discourse. In many ways it was progressive, recognising that indigenous peoples had been harmed by loss

of territory and involuntary incorporation into the global capitalist system. The paper, written in a decolonisation framework had inherent sovereignty as a central concept. However, even though it discussed indigenous sovereignty and self-determination, the main problem was reduced to Taiwan's independence from China. The Taiwanese nation envisioned in the White Paper was made up of a wished-for alliance of indigenous peoples and “New Taiwanese”. The DPP's definition of “New Taiwanese” differed from that of Lee Teng-hui and Ma Ying-jeou which was inclusive of post-1945 Chinese arrivals on Taiwan. Instead it defined it as meaning Taiwanese who were the descendants of indigenous women and male immigrants from China (*ibid.*: 230-232). In essence this is the Hoklo-speaking mainstream in Taiwan that makes up the majority of the DPP's electoral base. Although these people may have indigenous ancestry they do not explicitly identify themselves as indigenous. Hence, Simon concludes, the DPP tried to incorporate indigenous peoples into a national imagination not of their own making. Indigenous peoples were being used as part of a political discourse to construct a non-Chinese identity for Taiwan (*ibid.*: 232).

A number of pieces of legislation concerning indigenous peoples were passed while the DPP controlled the executive from 2000 to 2008. The most important of these being the Indigenous Peoples' Basic Law (IPBL) passed in 2005. This will be discussed further in Chapter Four of the thesis.

## **2.5 Some examples in Taiwan**

The final part of this chapter looks at some important cases which highlight the ongoing struggle of Taiwan's indigenous peoples for rights to land and resources. Although the focus of this thesis is the Smangus community, similar cases have occurred elsewhere in Taiwan. Together these cases reflect an ongoing struggle by indigenous peoples to assert their rights and autonomy in the face of state intervention and control. The cases detailed here are all quite recent, but they need to be seen in a broader context of colonisation and settlement that dates back to the Dutch arrival on Formosa in 1624. More detail of the historical conflict between the Atayal and the state is given in Chapters Three and Four.

Since the 1990s indigenous peoples have gained some rights and recognition from the government. However, the pattern of conflict between indigenous peoples and the

demands of capital and the state to gain control over lands and resources continues. Chi (2001) looks at the position of Taiwan's indigenous peoples from the perspective of environmental justice. Taiwan's political and economic system makes indigenous communities vulnerable to exploitation by the dominant Chinese-speaking mainstream. This directly attacks the rights of indigenous peoples to land and resources.

A case that provides an example of how Taiwan's indigenous peoples suffer as a result of their economic marginalisation is the nuclear waste dump on Orchid Island<sup>2</sup>. The Yami (Tao) people of Orchid Island are somewhat isolated from the Taiwan mainland. They have experienced the least interference from outsiders of any of Taiwan's indigenous groups. The Japanese kept Orchid Island as a living anthropological museum. It was not until the 1960s that the Taiwan government began to implement significant changes on the island. In 1980 Taipower Company began constructing what they told the locals was a fish cannery on the island. However, in 1982 it was discovered the site was a storage facility for nuclear waste (Arrigo, 2002).

In 1987 after martial law was lifted the Yami began actively protesting against the presence of nuclear waste on their island. In 1994 the Taipower Company agreed to stop shipping nuclear waste to the island, although the storage facility was at full capacity by that time anyway. The payment of compensation to the residents of the island created further problems with inappropriate infrastructure developments (*ibid.*). The nuclear waste still remains on Orchid Island although the government is currently seeking an alternative storage site.

The Truku people in Hualien traditionally occupied the mountain areas that now make up the Taroko National Park. They were pushed out into the foothills during the Japanese era and then to the base of the mountains by the ROC. In 1968 the ROC government began a system of registering Aboriginal Reserve Land. Loopholes in the law were exploited to allow non-indigenous Taiwanese to rent the land. Asia Cement took advantage of these loopholes to rent land from the Truku people in Hsiulin Township with the promise that it would be returned in 20 years. When the people

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2 Orchid Island, or Lan Yu as it is known in Chinese, is currently the most commonly used name for the island. In the language of the Yami people it is Pongso no Tao. The island is also known as Botel Tobago.

tried to reclaim their land after 20 years they found their property rights had disappeared. The Truku people began a long political and legal struggle to win back their land rights. In August 2000 they won a court case recognising their right to cultivate the land (Simon, 2002).

The creation of the Taroko National Park in 1986 further excluded the Truku people from their traditional territory. Previously considered as part of the Atayal group, the Truku won official recognition as a separate group in January 2004. In 2004 the government put out tenders for commercial development of the Park without consulting the traditional owners. The response from the Truku caused the government to halt the bidding process. The Truku put forward a proposal for autonomy in 2006 in accordance with their rights under the IPBL. However, this has not been achieved and needs additional legislation, especially the Indigenous Autonomous Area Law which is still to be passed (Tsai, 2006).

Danayigu<sup>3</sup> Ecology Park in Chiayi County, provides a successful example of ecotourism run by an indigenous community which has enabled the people to reclaim control over their traditional territory. The construction of a road into the area in the late 1970s brought more visitors and the exploitation of fish in the river by outsiders. This led to the collapse of the traditional systems the Tsou had used to manage fishing stocks. This eventually led to a grassroots response by the local community to protect the environment. This effort had two key aspects. The first was implementing local regulations that could be enforced voluntarily by members of the community. The second was economic development in the form of tourism to allow all the community to gain some benefit from the fishing ban (Tang & Tang, 2001).

There are cultural and ecological costs associated with the development of Danayigu. These are associated mainly with the large numbers of tourists arriving in the area. A romanticised version of Tsou culture is presented to Taiwanese tourists in the form of traditional clothing and dance. This raises the question whether a restrictive model of cultural identity has been imposed on the Tsou or is it a positive reinforcement of cultural traditions that helps them resist the influx of global culture. Traffic from tour buses brings pollution and the roads are susceptible to landslides. These things harm

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3 Hipwell (2007) uses the spelling Tanayiku. The Chinese name of the nearest village is Shanmei.

agricultural crops and the harvesting of bamboo also detract from the pristine environment that attracts visitors to the area (Hipwell, 2007).

Although there may be some costs associated with the development of Daniyigu, the overall outcome seems positive. Tang and Tang (2001) say that the Tsou of Danayigu have been able to attain negotiated autonomy based on mutually beneficial relationships with external stakeholders. Hipwell (2007) says that Danayigu represents a process of geopolitical resistance by the Tsou. Danayigu was devastated by the torrential rains associated with Typhoon Morakot in August 2009 bringing the community's experiment in ecotourism to an end.

The Alishan Build-Operate-Transfer (BOT) case provides a recent example of a case where the IPBL has proved to be ineffective. In June 2008 the Forestry Bureau and the Council of Agriculture announced the right to operate the Alishan Forest Railway had been transferred to the Hungtu Construction Company. The BOT project gave the company the right to take over operations of the publicly owned mountain railway and undertake related development projects. These included plans for constructing new hotels and other improvements to the line. Under the terms of the contract the company would return the railway and associated projects to the government after 30 years. A number of local groups, including the Tsou people, are opposed to the project because of concerns about its safety and impact on the local environment and communities (Tsai, 2008).

The Tsou people said the project ignored their 30 year struggle for land rights. In 1976 a fire forced the people to relocate from the area near Jhaoping Station and they were never allowed to return. This land has now been allocated to Hungtu Corporation to construct a hotel in the BOT project. This is in contravention of Article 21 of the IPBL which states, "The government or private party shall consult indigenous peoples and obtain their consent or participation, and share with indigenous peoples benefits generated from land development, resource utilization, ecology conservation and academic researches in indigenous people's regions"(Ministry of Justice, 2005). The Tsou claim neither the government or the Hungtu Corporation consulted with them prior to going ahead with the BOT project. The Tsou demand that the Forestry Bureau and company negotiated with the local people to develop a co-management

mechanism (Tsai, 2008). The damage caused by Typhoon Morakot (2009) has created uncertainty over the future of the BOT project.

The Smangus Beech Tree Incident provides a further example of indigenous peoples struggle for rights to land and resources. These rights are in theory protected by Articles 19 and 20 of the IPBL and Article 15 of the Forestry Act. This is examined in more detail in Chapter Four.



## CHAPTER THREE – ATAYAL CULTURE AND SMANGUS

### 3.1 Atayal people

This thesis is based on a study of the Atayal community of Smangus. There is a need to define who the Atayal people are and to understand the broader context of Atayal culture before looking in more detail at Smangus. While Smangus shares many things in common with other Atayal communities, it also has some unique features. It is important to note that Atayal are defined based on the ethnographic present. The following quote from Kaneko expresses the dynamics of change and is worthwhile keeping in mind whilst reading this chapter.

The written sources present the data as static entities, *frozen in time and space*. The dynamics of change which must have been at work in even this conservative society through internal development and inter-ethnic and intra-ethnic contacts, fusions and dispersals in the course of the expansion process, and caused tangible divergences from the “norms,” are not visible in these sources (Kaneko, 2009: 250).

The Atayal group was originally defined by Japanese ethnographers based on their field studies in the late nineteenth and early twentieth century. The people are also known as Tayal or Daiyan, from the word in their own language for people. The Atayal were one of the “nine tribes”, although this model of categorisation was abandoned in Taiwan following the government's official recognition of five more indigenous groups between 2001 and 2008. The Truku and Seediq were formerly classified as part of the Atayal group. In 2004 the Truku were recognised as a separate group (Ko, 2004). Then in 2008 the Seediq also gained official recognition (Shih & Loa, 2008). Hence many references to Atayal in the literature from the twentieth century may also include the Truku and Seediq groups. All these groups can be considered to share some characteristics (Hsieh, 1994b: 186) and they all speak Atayalic languages.

The Atayal population was 92,000 in the 2000 Census making up 23.1% of Taiwan's indigenous population (Directorate General of Budget, Accounting and Statistics,



2002), however this was before the Truku and Seediq were separately classified. The Atayal traditionally live in the mountainous areas of Nantou, Taichung, Miaoli, Hsinchu, Taoyuan, Taipei, Yilan and Hualien counties. Many Atayal may have moved temporarily or permanently to major urban areas for work or education. How this has affected Atayal identity is a topic that needs further research. This thesis focuses on Atayal speakers who still live on their traditional territories. (Traditional territory is defined later in this chapter.)

### **3.2 History and culture of the Atayal**

The Atayal have been through many changes in the past century. At the beginning of the Japanese era they lived in small communities that were self reliant and they were the only masters of their land. They were conquered by the Japanese in the 1920s and lost their position. However, in present day Taiwan the Atayal are experiencing something of renaissance, rediscovering their culture and reasserting their rights to manage land and natural resources.

Atayal people have historically lived in the mountains at altitudes above 1,000 metres (Kaneko, 2009: 250). They migrated into the mountainous areas of northern Taiwan about 250 years ago (Li, 2004). (More details of the migration are given later in this chapter.) However, they have no ethnic memory of life other than in the high mountain valleys to which they are fully adapted. They practiced swidden agriculture growing millet, dry rice, beans and root crops. They also added to their diet by hunting and fishing. Millet was not only a staple part of their diet but had religious and cultural significance (Kaneko, 2009: 249-250).

Takekoshi (1996: 219-222) provides a description of the Atayal in the early Japanese era. This was a time when the Japanese had yet to establish control over the mountain areas and the indigenous peoples living there maintained their autonomy. He notes the Atayal were “extremely ferocious” and “attach great importance to head-hunting”. They lived in small tribes which were like one family under the patriarchal rule of a chieftain.

The core belief of the Atayal is the *gaga*. This is a set of rituals and prohibitions inherited from the ancestors and held by the elders within patrilineal clan groups. The



clan group that shares the same rituals and prohibitions is known as the *qotux gaga* (Kaneko, 2009: 252). The *gaga* is an all-embracing concept for the Atayal and it regulates almost all aspects of Atayal affairs (Piling Yapu, 2009a: 70).

Atayal culture has been described as “acephalous, closed and dominated by rigid standards of conduct.” However, the migration from the homeland, aided by the adoption of firearms, which allowed the expansion of the Atayal into new territory shows that there must have been considerable adaptive flexibility. Gradual adaptation to new locations led to the development of new *gaga*. The knowledge contained in the *qotux gaga* was important as it was specialised to the environment in which the community lived. At high altitudes small differences in elevation or location could mean significant changes in the dates of specific agricultural activities. Hence the knowledge contained in the *gaga* was highly specialised and essential for the Atayal to maintain their agricultural systems in the high mountain environment (Kaneko, 2009: 253).

The Atayal believe that humans have an immortal spirit known as the *utux*. After death the *utux* leaves the body and sets out on a journey. The journey ends at the rainbow bridge (*hogo utux*) where the ancestral *utux* are waiting at the other end. The *utux* is requested to provide proof that they have lived according to the *gaga*, making them a true Atayal. For a man this means being a brave headhunter, for a woman a skilled weaver (*ibid.*: 254). Kaneko details the mortuary practices of the Atayal based on field studies in the 1950s and 1960s and Japanese historical records. The in-house burial and associated rituals were abolished by the Japanese in the 1920s (*ibid.*: 252-278).

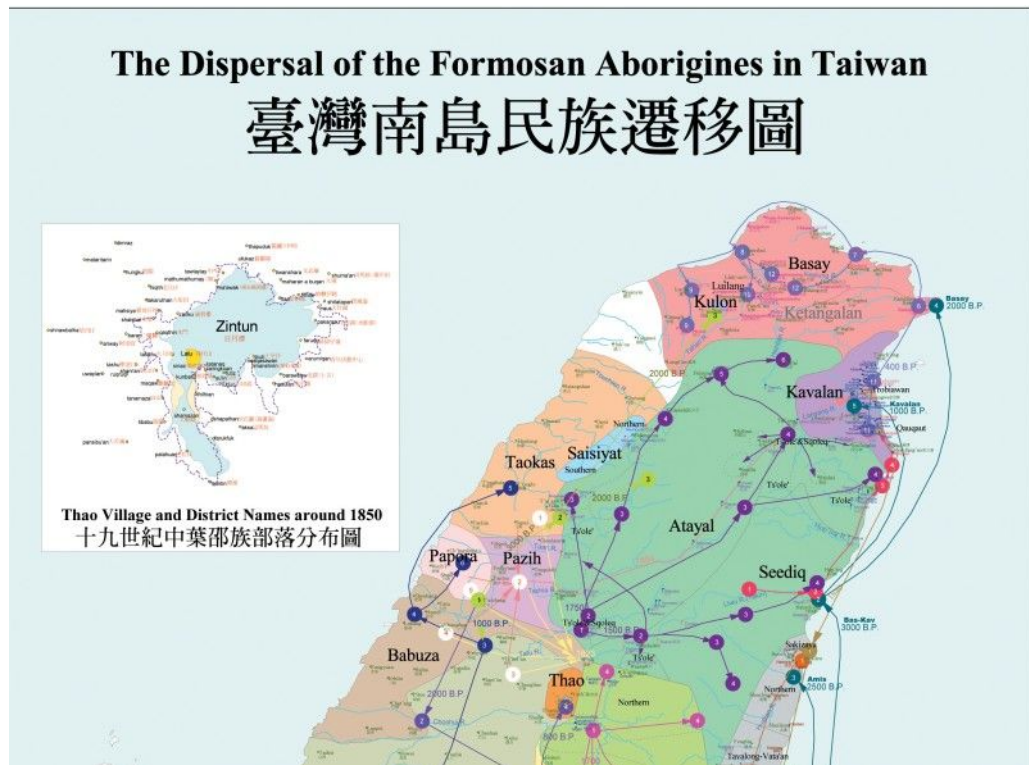
Facial tattooing is a distinctive feature of Atayal culture. Although this practice was eradicated by the Japanese in the 1930s, there are still a few elders surviving with facial tattoos. These elders offer a window to the past. Being tattooed marked coming of age and once men or women received tattoos they were able to marry. The tattoos also symbolised recognition by the community that a person was a true Atayal. It was necessary to obtain the approval of all community members in order to receive the tattoo. For men this meant proving themselves as a hunter, for women it meant skill in weaving. The facial tattoos represent “*gaga* on the face” and the diamond pattern represents the ancestral spirits. They are a bridge for communication between humans

and the ancestral spirits (Piling Yapu, 2009a: 154-162).

Another key part of Atayal identity is the migration story. This details the migration of the ancestors from the mountains of central Taiwan to the north in search of arable land and new hunting grounds. There are some differences in the details of the stories between places and these create multiple forms of story telling and traditional songs (Tnunan, 2009: 1).

In the middle of the eighteenth century the Atayal began migrating to the north and east from the place presently known as Ren'ai Township in Nantou County. The groups that expanded to the north were the Atayal, while those that moved to the east were the Seediq (Li, 1999: 35). The migration routes are shown in Figure 1 (Li, 2001). The date of the establishment of the Smangus village as “more than two hundred years ago” (Tnunan, 2009: 2) is in accordance with the date on Li's map.

Information from Smangus provides more detail about the path of the migration. There are two different origin places in the oral record. One is Pinsbkan (presently Ruiyan Village, Ren'ai Township, Nantou County) and the other is Papak-Waqa (Dabajian Shan in the Shei-Pa National Park). The people of Smangus believe their ancestors came from Pinsbkan. From the southeastern saddle of Dabajian Shan it is possible to see every valley of northern Taiwan. The Atayal call this the dispersal area with people moving to the north and east from this point. One group came to the area on the left bank of the Takechin Creek around the present day village of Cinsbu (Zhenxibao) and expanded out from there. This group is the Mknazi. Another group came to the right bank of the Takechin Creek around the area where Smangus is currently located and expanded to the north as far as Wulai. This group is the Mrqwang (*ibid.*). Smangus is part of the Mrqwang group and more details of their origins are given in the section “Migration story and origins of Mrqwang group and Smangus” later in this chapter.



**Figure 1:** The Dispersal of Formosan Aborigines in Taiwan (Li, 2001).

### 3.3 Atayal claims and conflict over territory

The Atayal migrated to the lands they currently refer to as their traditional territory about 250 years ago. However, people have been living in Taiwan's high mountain areas for at least several thousand years. Archaeological sites provide evidence of the dates of human habitation in the mountains of Taiwan. During the period 3,500 to 2,000 B.P. the habitable areas up to 1,000 metres were filled with some groups settling at altitudes up to 1,700 metres. After 2,000 B.P. the mountains filled with more groups with archaeological records showing sites up to 2,950 metres. Associated with this move to higher altitudes is a proliferation of distinct cultures as a result of adaptation to different environments. There were 17 distinct cultures or phases at this time (Liu, 2009: 383).

When the Atayal migrated from central to northern Taiwan 250 years ago they may have made claims over new territory, but they were continuing a way of life that had been based on living in the high mountains for thousands of years. The migration was not about creating a new way of life but preserving their heritage of a lifestyle based on hunting and farming in the high mountain areas. This heritage and value systems

are embodied in the *gaga*.

Since the Dutch arrived on Formosa in 1624 the interactions between different indigenous groups and Chinese settlers have varied. For many groups significant contacts and exchanges began soon after the Dutch arrived. For the mountain peoples of northern and central Taiwan, including the Atayal, there was little contact with the Chinese until the latter half of the nineteenth century, more than two centuries after the colonisation of Taiwan began.

These mountain peoples were also feared as warriors and head hunters. In the mid-nineteenth century demand for camphor led to conflict with the Atayal and Bunun more fierce than anything previously seen in Taiwan's history. This was a result of Qing troops moving into the mountain areas, availability of firearms to both sides and a shift from land settlement to logging. Changes took place too rapidly for the mountain peoples to develop a political structure they could use for bargaining. Hence this led to brutal conflict (Faure, 2001).

Early in the Japanese era there was a “Savage Border”, a guarded line that demarcated the mountain territories of the indigenous peoples from the peoples under state control on the plains. This line was a continuation of the policy that divided Taiwan into two distinct domains during the Qing era (Takekoshi, 1996: 210-218). Soon after the Japanese took over Taiwan they sought to establish state control over camphor production. The Japanese' miscalculation of the interests of existing stakeholders in the camphor trade and the indigenous peoples on whose lands the camphor trees stood led to the 1902 Nanzhuang conflict. It was an effort by the local indigenous people to reestablish control over their territories in the face of capitalist and state exploitation. The introduction of private and public property rights over the forests undermined indigenous peoples' control over forest resources. The camphor capitalists were able to gain exclusive control over the forest resources without needing to engage in negotiation with the indigenous owners as had been past custom (Tavares, 2005).

The Japanese policy of *Riban seisaku* (“Control of the Savages”) was based on the twin pillars of economic development by switching from swidden to paddy cultivation and assimilation through the forced adoption of Japanese values and norms.

Relocation of households or villages was done with these goals in mind after the

indigenous peoples were pacified by force or forced to surrender. Forcing heterogeneous groups to live together in unfamiliar environments eroded traditions and over time made them dysfunctional (Kaneko, 2009: 250-252). Hence the Atayal lost their position as masters of the land during the period of Japanese rule. Some distinctive features of Atayal culture, such as facial tattooing and in-house burial, also came to an end at this time.

In the martial law era (1949-1987) access to the mountain areas was restricted. Contact with outsiders was limited to missionaries, anthropologists and government officials. It was during this time that most Atayal converted to Christianity (see “Christianity and the Atayal” later in this chapter). During this time there was still conflict with the Forestry Bureau (Stainton, 2006: 414-415). However, indigenous peoples in the mountain areas did not face the constant pressure of outsiders seeking control over land and resources. When martial law came to an end this de facto protection also ended beginning a new and ongoing negotiation with the state over rights to lands and resources.

### **3.4 Defining traditional territory**

There is a need to provide a clear definition of traditional territory as it is the basis on which rights to land and resources are claimed. The Atayal history of migration and the upheavals beginning in the late nineteenth century mean the boundaries of the Atayal people's territories have shifted over time and never been truly fixed. Hence it is important to understand what traditional territory means in the present and how legitimate claims to land and resources can be made on the basis of this.

Chiang Bien, a researcher at Academia Sinica, says that traditional territory has two meanings. One is from the time when there was no state defined boundary. There was a mutually understood boundary between neighbouring communities with some overlapping and dispute. Although it was unwritten, there was a commonly understood territory defined by rivers and hunting grounds belonging to a certain village. The second meaning stems from a mapping project launched around 2000 based in university geography departments. This was based on interviews with locals as well as the use of Geographical Information Systems (GIS). This has had substantial results but these have not yet been legalised (Chiang Bien, interview).

The mapping project represents an attempt to define traditional territory using the tools of information technology. GIS is a valuable analytical tool for understanding traditional territory because it can contain multiple layers of information in both the spatial and temporal dimensions. It creates a map based on the ethnographic present. While this creates a valuable record it has not yet been accepted by government institutions or the courts as a basis for claims of indigenous rights in Taiwan.

So the attempt to define traditional territory using GIS can be considered a way of translating the ideas of indigenous people into something that can be accepted and understood within a modern legal framework. Lin Yih-ren, an academic with close connections to Smangus, says the traditional territory is well understood by indigenous people but is not known by outsiders. It's difficult to translate the ideas of indigenous people into Chinese because it is another culture's language. The knowledge is held in their own language and customs and indigenous peoples have a different conception of land. It is not just a line drawn on a map, "it's a collective memory, a major part of culture, also it's a complex network of social relations." The government has put the terms "traditional territory" and "traditional customs" in the law but doesn't know what they mean (Lin Yih-ren, interview).

This difficulty of translation is again highlighted by Lin Shu-ya in recounting details of the court hearing in the Smangus case. She also points out that traditional territory is based on responsibility. This could be considered a form of custodianship over the land rather than ownership in the modern legal sense:

Territory is based on responsibility rather than ownership. It is the land that they care for. In the laws of the Atayal people this territory gives the people priority to use the resources on the land. It doesn't exclude other people from using it, it just determines who is responsible. So the men explained in the court what their traditional territory was defined by traditional laws. The boundary is defined according to the recognition of the adjacent group or village. They tried to explain this to the judge but he didn't understand (Lin Shu-ya, interview).

In anthropology there is a traditional idea of land tenure but modern legal systems are very different. This is always a central issue in anthropological study. Land rights can



be flexible and overlapping and many layers of rights can exist at the same time. In the modern legal system there is only the state and individual owners. The legal system wants it to be fixed. At the moment land titles are based on the government land survey at the end of the 1960s. In the 1960s the villages and fields were not necessarily the same as 200 years earlier. That is also one of the major discrepancies between the traditional territory project and the contemporary land title system (Chiang Bien, interview).

It is easy to recognise claims on the village area and agricultural fields as constant use of the land is easily demonstrated, but uses of and claims on land in other areas may not be so obvious to outsiders. A problem arises when the government seeks to draw a line on a map to delineate boundaries. As mentioned before the boundaries are not fixed and from the perspective of indigenous peoples traditional territory represents a complex network of relationships. Going directly to negotiating over the line leads to conflict between indigenous peoples and the government. The government needs to invest resources to understand the culture, collective memory and social relations that define traditional territory, but this takes time (Lin Yih-ren, interview).

In addition typhoons and earthquakes can significantly alter the landscape and force people to move or change their patterns of land use. This has occurred following Typhoon Morakot which struck in August 2009. Climate change also means that extreme weather events like Typhoon Morakot may occur more frequently in the future. The new government policy of relocation following Typhoon Morakot raises the question of how indigenous peoples can maintain claims over the lands they previously occupied once they are relocated in new areas. Chiang Bien suggests that some people may choose to live the high mountain lifestyle by residing on their traditional territory while other members of the community live in the new area with better access to schools, jobs and other services. For the Paiwan and Rukai in the south of Taiwan it is already common to maintain two houses, one in the mountains and one in the city or on the plains (Chiang Bien, interview).

Traditional territory is something that is defined in the ethnographic present. The determination to preserve the integrity of the territory is borne out of the indigenous peoples' cultural heritage. Heritage is embodied in the laws and customs inherited



from the ancestors. Land provides the environmental space the community requires to maintain their traditions and way of life. Traditional territory represents indigenous peoples serving as custodians of the land, preserving their cultural integrity and maintaining a sustainable way of life based on their heritage. Recognition of traditional territory should not focus on drawing lines on maps, but understanding indigenous communities' relationships with land.

### **3.5 Contemporary Atayal culture**

A review of the literature shows that the experience and culture of the Atayal is closely linked to their historical experience and geographical location. Indigenous communities in the high mountain valleys seek to maintain claims over their traditional territories as a means of maintaining cultural heritage. These communities are more homogeneous and have been able to maintain their culture and language with less interference from outside forces.

Although Taiwan is a relatively small island where it is possible to travel from one end to the other in just a few hours, many indigenous communities maintain a sense of remoteness. Travelling between villages which may only be tens of kilometres apart as the crow flies may take several hours of driving along narrow and twisty mountain roads. In these places the urbanisation and industrialisation that dominates much of Taiwan is absent. A few roads and scattered settlements are the only obvious signs of human presence. Views take in mountain peaks and valleys that stretch as far as the eye can see. It is easy to see how the people living in these areas maintain a close connection to the traditions of their ancestors.

Communities which are in the foothills and lower parts of the valleys have been subject to much greater outside influence. They are much closer to and more easily accessible from urban areas. Hence they have been subject to much greater influence from mainstream society. It has been more difficult for indigenous people in these areas to maintain their language and culture in the face of outside forces. In these areas business may be dominated by Chinese-speakers who have settled in the area only recently. In some cases the Atayal people may now be in a minority in these areas.

Wulai provides a case study of the Atayal communities in the latter category. Wulai is located in the mountains in the south of Taipei County, just thirty or forty minutes by bus or car from the edge of the Taipei metropolitan area. It is the closest indigenous village to Taipei and because of this proximity, as well its beautiful mountain scenery and hot springs, was developed as a tourist destination.

Wulai is a traditional homeland of the Atayal people, although in the present day the Atayal make up less than half the population in the town. Tourist businesses in the town are dominated by Chinese-speaking outsiders relegating the Atayal to an inferior position. The Atayal of Wulai have lost most of their traditional artifacts, clothing and other attributes. Despite this they have used their ethnic identity as part of ethnic tourism in the town. Tradition is reinvented through dance performances even though the dances combine traditions from other Taiwanese indigenous groups. In the face of losing their culture the dances become a new symbol of Atayal identity (Hsieh, 1994b: 198-200).

Yoshimura's (2007) study of Wulai takes place more than ten years after Hsieh's study. She notes that weaving as a tradition was largely lost among the Atayal of Wulai. Dancing became the focus of their cultural identity. There is also an issue related to gender roles and cultural identity. Women participated in weaving and dancing activities while there were no similar activities for men. Her study didn't examine the issue of men's identity in detail though.

Weaving began to be revived in Wulai through community projects grants under then President Lee Teng-hui's policies of localisation in the 1990s. Hence the revival of traditional culture was linked to Taiwan's democratisation. Although the knowledge of weaving had been lost an Atayal woman from Nan'ao initially came to teach the local women. However, most of the instruction was provided by a professor from Taipei who had learnt Western weaving techniques in Japan (*ibid.*: 154-156).

The Wulai Atayal Museum opened in October 2005. It also provided a focus for weaving and cultural activities. It is the only place in the town where tourists can directly experience and engage with Atayal culture. Weaving has once again become a key part of Atayal cultural identity in Wulai. Although there have been some changes in its practice. Now both men and women can learn weaving whereas in the past it was

considered an activity strictly for women, although there are mixed feelings about this (*ibid.*: 153-202).

Hence we can see that the people of Wulai lost many of their gender-specific traditions but in recent times have sought to revive them in various ways. However, they are still marginalised as a result of the control of most businesses in the town by Chinese-speaking outsiders. This is in contrast to the experience of the Atayal in the high mountain areas such as the community studied by Stainton (2006). Stainton's study takes place in a community that is in many ways similar to Smangus. It is a homogeneous community of Atayal speaking people and it is located in a relatively remote mountain area. A distinction is made between the anterior, the foothills or boundary between the plains and the mountains, and the interior, the high mountain areas. The Atayal of the interior claim to be stronger and tougher than the people of the anterior. They also see themselves as the holders of traditions and the mother tongue that has been lost elsewhere (*ibid.*: 394-398).

The Atayal refer to their Taiwanese neighbours as Mugan, a term which is inclusive of Hoklo, Hakka and Chinese that arrived in Taiwan after 1945. Although most Mugan in the area Stainton studied are Hakka. Atayal identity is shaped in contrast to Mugan. Atayal see themselves as *lokah*, an Atayal word meaning strong, tough, diligent or healthy. Mugan are seen as having less or none of these qualities (*ibid.*: 398-401).

Mugan who do business with the Atayal are labelled as “Taiwanese bosses”. The Atayal are unsure of themselves in the Mugan situation of doing business and also morally reluctant to become bosses. A true Atayal is not an exploiter, but a morally innocent victim of a Taiwanese boss (*ibid.*: 401-402). This shows the importance of a spirit of egalitarianism and cooperation in Atayal communities.

Ethnographic film also provide important insights into Atayal culture. Atayal director Piling Yapu's documentaries present the unique perspective of an insider closely related to his subjects. The documentary film *Through Thousands Years* provides an insider's perspective of how the Atayal negotiate with outsiders in present day Taiwan. The film details the process of a Taiwanese director producing a short film about Atayal culture. The film was made with assistance and actors from Cinsbu and Smangus. However, the Taiwanese film crew find that the process of negotiation takes

much longer than expected. There is some suspicion from the Atayal about the motives of the outsiders. Also the negotiation process requires the agreement of the entire village (Pilin Yapu, 2009b). This related to the Atayal concept of *sbalay* meaning harmony or reconciliation. The community won't start working on something until there is *sbalay* (Lahuy Icyeh & Icyeh Sulung, pers. comm.).

### **3.6 Christianity and the Atayal**

Another important part of Atayal identity is Christianity. Atayal began converting to Christianity in 1946 and their conversion was almost complete by the 1960s. Atayal society is predominantly Christian with 84% Christian in 1997. 26% were Catholic and 58% Protestant (Stainton, 2006: 396). Hsieh (1994b: 194-195) notes that Christianity is the key cultural element that distinguishes Atayal from Chinese-speaking outsiders. Yoshimura (2007: 150-152) writes the church is an important place for the Atayal to define who they are as Atayal.

Stainton (2006: 405-408) further defines the place of the Christian tradition in Atayal culture by looking at differences between the Catholic and Presbyterian churches in defining Atayal identity. For Catholics Christianity is a marker of non-Mugan identity but not specifically Atayal identity. Catholic theology in Taiwan emphasises the universal and non-ethnic character of apostolic tradition. Catholics are “Catholic and Tayal” but not “Tayal Catholics.”

In contrast Presbyterians are Atayal Presbyterians. They don't make any separation between their Presbyterian and Atayal personae. This distinction also exists in the administrative structure of the churches. There is a large Atayal Presbytery that covers the Atayal congregations and is separate from the five Taiwanese Presbyteries that cover the same area. Catholics have territorial dioceses and there is no supra-diocesan structure which unites Atayal across three different dioceses. Another difference is that all Atayal Presbyterian churches have Atayal clergy while Catholic parishes in Atayal areas have foreign missionaries under Chinese bishops (*ibid.*).

### **3.7 Migration story and origins of Mrqwang group and Smangus**

The migration story is an essential part of Atayal cultural identity. According to the migration story Smangus has its origins in Pinsbkan. In order to search for new

hunting grounds and arable land a group of ancestors set out from this place to the high ridge of Dabajian Shan. From there they surveyed the area to the north and split into separate groups. One group settled on the left bank of the Takechin Creek and is known as the Mknazi group. One group came to the area on the right bank of the Takechin Creek around where Smangus is today and from there expanded to the north. This group is known as the Mrqwang. The ancestor who led them was Yawiy-Pot. The descendants after settling are recounted in the “Six Brothers Story” which is an extremely important part of the oral history. The people presently living in Smangus are the grandchildren of the third brother (Tnunan, 2009: 1-2).

In discussing the lineage of the families in Smangus there is a traditional song which is carried down to the present, the “Five Brothers Story”<sup>4</sup> of Talah Necyeh, Ahok Necyeh, Temu Necyeh, Yukan Necyeh and Miquy Necyeh. More than 200 years ago the five brothers' families in the migration of Mrqwang sought out arable land and living space to establish Smangus and other communities. The present inhabitants of Smangus are the descendants of the youngest of the five brothers, Miquy Necyeh. A second family came from Tanan Sayun (place name) of the Mknazi group and married to Yukeh Miquy, the daughter of Miquy Necyeh. Another three families came in the 1960s, 70s and 80s by marrying and moving to Smangus. This has created the present situation of “five families” forming an Atayal village (*ibid.*).

### **3.8 Smangus community and village environment**

The village of Smangus sits on a ridge at an altitude of about 1,500 metres in Jianshi District of Hsinchu County. Below it lies the valley of the Takechin Creek, which runs northward into the Shimen Reservoir, the main water supply for Northern Taiwan. It is about 12 kilometres north of the boundary of the Shei-pa National Park. The location is shown on the map in Figure 2. It takes around three hours to travel to the village from Zhudong, which is the nearest major city. The roads are narrow and twisty. They are prone to landslides after typhoons or heavy rains and at any time at least some section of the road is likely to be under repair.

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4 In a 1935 interview recorded by Japanese anthropologists in Uraw and Raliyun villages the oral accounts of Kayua Tahos and Sha Mohen recorded a sixth brother. The sixth brother's name was Mohen Necyeh. Smangus currently has no record of this sixth brother and the three families that have continuously lived in Smangus are the descendants of one of the six brothers, Miquy Necyeh (Tnunan, 2009: 2).

At the village of Xiuluan, located on the floor of the valley before reaching Smangus there is a police checkpoint. Here it is necessary to apply for a mountain permit to travel along the road to Smangus. The police checkpoint is a remnant of the Japanese era when police outposts were created to control access to mountain areas and bring indigenous villages under the control of the Japanese government. Today the checkpoints are maintained for the safety of visitors to mountain areas and also to monitor any possible illegal activities such as logging.

The last 16 kilometre section of road after the turn-off to Smangus is particularly narrow. It descends to the bottom of the valley and then slowly ascends toward Smangus. Arrival at the village is sudden after rounding a sharp bend and then reaching a gate emblazoned with the words, “Welcome to God's Village, Smangus” in Chinese characters. A little further on there is a management gate followed by a large carpark.

The temperature in the village is notably cooler than the on the plains of Taiwan. There is a snowfall in the village about once every five years. Every winter there is snowfall down to an altitude of 1,900 metres (Lahuy Icyeh, pers. comm.). In the afternoon clouds and mist often fill the valley.

The village is home to about 160 residents, with 120 to 140 living there permanently. Most houses in the village are constructed from wood. There are also numerous wood carvings dotted around the village. Many of the signs in the village are also carved from wood. In addition to housing for the residents there are accommodation facilities for tourists visiting Smangus. There is accommodation for up to 400 guests and this is usually about 80 percent full on weekends when the weather is fine (Lahuy Icyeh, interview). A large wooden building has a shop downstairs and a large restaurant and kitchen that can cater for several hundred people upstairs.





**Figure 2:** Map of Northern Taiwan showing the location of Smangus (Taiwan Travel Map, n.d.).

The Presbyterian Church has a large open space out the front where community activities are held. There are several classrooms beside the church which are part of the experimental branch of the Xinguang Primary School. In April 2009 the construction of a new classroom building was completed on the level below the church. The building has a concrete foundation, rough sawn timber walls and a slate roof. The design draws from tradition, but also incorporates modern materials and building techniques. A building constructed with similar materials in the past would not have been so big (Lahuy icyeh, interview). A second classroom building was under construction in August 2009. Figure 3 shows the village as viewed from the watchtower.



Smangus was once known as the *heise buluo* or black (without lights) community. This name referred to the people living there having no electricity until 1979. In 1995 the village was finally connected to the outside world by a motorable road (Cheng, 2007: 13; Tnunan, 2009: 5). Before this time village residents recount that everything had to be carried in to the village by hand from Xinguang, a village on the other side of the valley. This took about four to six hours return. One resident told me that his father was known for being very strong and was able to carry a fridge across the valley on his back.

The village has some large tracts of bamboo forest around it. The bamboo is harvested for use as a building material and also bamboo shoots are collected for food. The other main crop in the village is peach trees. The peach orchards were developed beginning around 1990 and now make up the main part of Smangus's income from agriculture (Lahuy Icyeh, interview).



**Figure 3:** The village of Smangus in Jianshi District of Hsinchu County (photo by David Reid, 1 December 2007).

### 3.9 Smangus cooperative and ecotourism

After the discovery of the grove of ancient trees (Yaya Qparung) in 1991 tourists began arriving in the village of Smangus by walking across the valley from Xinguang. The first accommodation for visitors was built in 1992. At that time Smangus residents would do agricultural work from Monday to Friday and then assist visitors during the weekend (Tnunan, 2009: 4).

After the road was completed in 1995 more tourists began to arrive in the village. By 1999 the changes in the village had led to unequal distribution of resources and conflict. In the latter half of 1999 there was a series of meetings to discuss how to work together. This led to the establishment of a communally operated kitchen in the summer of 2000 involving women from nine families (*ibid.*: 5).

The first stage of the cooperative was established in 2001 with 16 members from eight families collectively managing the restaurant, shop and accommodation. By 2003 most families had entered the cooperative. Only two families didn't join despite ongoing discussions. This was because these families had moved out in 1985-86 to Hukou and Xinfeng for work and only started moving back in 1998 when tourism had already developed (*ibid.*: 5-6).

The cooperative known as Tnunan Smangus was officially established on 1 January 2004. At this time it had 48 members who collected a salary. In the same year a community covenant and the regulations of Tnunan were established (*ibid.*: 6).

*Tnunan* is an Atayal word which means the interweaving of threads to make a pattern which emphasises the spirit of sharing and coordination (*ibid.*: 10; Cheng, 2007: 17).

The organisational structure of Tnunan Smangus has three committees with combined responsibilities for all matters in the community. They are the Smangus Community Development Association, Tnunan Smangus, and the Smangus Church. There are nine departments that operate under Tnunan Smangus with each taking responsibility for management of specific matters. These are Education and Culture, Ecological Protection, Agriculture and Land, Human Resources, Accounting and Finance, Health and Welfare, Research and Development, Accommodation and Restaurant and the last one is Engineering (Tnunan, 2009: 9).

All members who work in the cooperative receive an equal monthly salary. In addition

to the salary they and their families are entitled to other benefits. These cover five areas: education, medical care, care for elderly, wedding celebrations and housing construction. The education benefits pay for school fees and for those studying outside the village an allowance to cover living expenses (*ibid.*).

The cooperative has developed based on a mix of external and internal influences (Tsai, 2005b: 30-32). It is based on the Atayal spirit of egalitarianism or sharing. It represents a reinterpretation of tradition to adapt to new circumstances in the modern world. Members of Smangus have also learnt from other communities. In August and September 2003 the Presbyterian Church supported a study tour by members of Smangus to a *kibbutz*<sup>5</sup> in Israel. There has also been exchange with the Tsou community of Danayigu in Chiayi County with visits in 2000 and 2002 to learn from their experience in developing ecotourism (Lahuy Icyeh, interview). Friends of the Presbyterian Church and university student clubs contributed ideas to the development of the cooperative (Tsai, 2005b: 30). The close family relations between members of Smangus, that they were all members of the Presbyterian Church and belief in the *gaga* were also important factors in the establishment of the cooperative (*ibid.*: 27).

In addition to the factors mentioned by Tsai there are several other important factors which have influenced Smangus's development. These factors are being located at the end of the road, being a homogeneous community with shared values and retaining most of the people of working age in the village rather than having them leave to earn money outside. Ecotourism is now the most important part of Smangus's economy generating about 70 to 80 percent of Tnunan's income (Lahuy Icyeh, interview). Smangus is a vibrant community. It has become economically independent with the community having a strong sense of self reliance and self-confidence.

On the two afternoons I was present in the village in August 2009 I participated in and observed the activities for visitors. There was a similar program for visitors on both days. It began with the chief of the village conducting a simple welcoming ceremony for the visitors. The ceremony involved tying grass, giving everybody a small bit of

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5 *Kibbutz* is a Hebrew word meaning “gathering” used to describe collective communities in Israel that were traditionally based on agriculture. They originally began as utopian communities based on socialism and Zionism. In recent decades many *kibbutzim* have undergone changes and adopted some forms of private ownership and expanded their economic activities into areas other than agriculture.

salt to eat and sprinkling water on everyone. The purpose of the ceremony was clearly explained. It represented that people should be safe as they travel to and from the village and are welcomed into the village.

Following the ceremony there was an introduction to Smangus and the recently completed community classroom. Then there was a DIY activity for visitors to make and engrave bamboo cups. The significance of bamboo was explained as part of the activity. Its cultural importance and multiple uses were emphasised as well as explaining the life cycle and harvesting. The multiple uses of bamboo are food, clothing (indirectly in weaving apparatus and fibre processing), shelter and tools.

After a demonstration visitors cut sections of bamboo to make a cup. They then used electric engraving tools to carve the outside of the cup. They were encouraged to use traditional totem designs in the engraving which represent the mountains or the eyes of the ancestors. This takes elements of traditional culture and adapts them into a modern “DIY” activity for tourists.

There were presentations in the evening for visitors. On both nights the short film *Once Upon a Time* was shown. The film is about Atayal migration and includes some people from Smangus as actors. Following this presentations gave some information about Smangus as well as Atayal culture and language. There was an introduction to Atayal language with some simple phrases taught and then a simple Atayal song was taught. This was followed by PowerPoint presentations which detailed the history, development and daily life in Smangus. This is an attempt by Smangus to educate visitors and allow them to better understand the goals of the Smangus community and the context in which tourists visit.

The other major activity for visitors in the village was to hike to the grove of ancient trees. The distance to the grove is about six kilometres. As it is at a similar altitude to the village there is not much climbing necessary to reach the trees. The track is muddy in a few parts but generally easy to walk along. It took about two hours to reach the trees. With time spent looking at the trees the out and back hike took a total of about five hours.

Atayal culture is presented to tourists in a way that is educational and informative. There are no staged singing or dancing performances as is the case in many other

indigenous villages in the Taiwan. Instead the people of Smangus show visitors how they live in the present, rather than creating an idealised construction of indigenous culture especially for tourists to observe. Activities such as the village tour, evening presentation and bamboo cup making seek to impart to visitors an appreciation of how Smangus operates as a community as well as an introduction to Atayal culture and language.

What attracts tourists to Smangus and the experiences they seek needs to be examined in the broader context of indigenous cultural tourism in Taiwan. Domestic tourism in Taiwan has undergone significant growth development since the introduction of the five day working week in 1998. This has led to tourism becoming an important part of the economy of many indigenous communities.

Chang, Wall and Chu (2006) discuss the motivations of tourists visiting indigenous cultural villages in central and southern Taiwan. Novelty seeking was part of tourists motivation for visiting these sites. Although authenticity of culture was important, natural scenery and a well managed environment were more important to tourists. Chang (2006) discusses tourism and indigenous cultural festivals via a study of a Rukai festival in southern Taiwan. Tourists visiting this festival were heterogeneous. Some were seeking authentic indigenous culture, while others were escape seeking with experiencing the festival only part of a broader enjoyment of the natural scenery and other things.

Smangus has developed ecotourism as the foundation of their community's economic independence. Tourists are attracted to Smangus by its beautiful scenery and remoteness. In addition they seek the experience of hiking to the grove of ancient trees and also learning about a unique indigenous community and its culture. Smangus seeks to maintain those attractions by drawing on its Atayal heritage as well as adopting new ideas that are in harmony with Atayal culture. Smangus has found a way to both sustainability maintain its community and act as custodians of their traditional territory.





## **CHAPTER FOUR – CASE STUDY**

### **4.1 Conflict between Atayal and government agencies**

The earliest conflict between the Atayal and the outside forces of capital and the state related to the timber trade began in the latter half of the nineteenth century. Outsiders sought to exploit the valuable natural resources contained within the domain of the Atayal. The violence and disruption this brought upon Atayal society has led to a suspicion of outsiders and a strong spirit of independence as the Atayal seek to reassert their autonomy over their lands.

This tension between the government, through its agencies the police and Forestry Bureau, and indigenous peoples continues up to the present. The story of Gomin Tana highlights how the Atayal view the state. In 1968 Gomin Tana, who had served as a Marine frogman, was harrassed and threatened with arrest by a forestry patrol officer for cutting down trees for mushroom cultivation. This was very common at the time. Gomin killed the forestry officer and then made a fire to bake yams over the hole he had buried the officer in. This detail in the story highlights Atayal forestry skills and resourcefulness. Gomin hid in the mountains and the military searched for him with no success. Eventually Gomin came down to repair his musket. Someone betrayed his hideout and he was ambushed and shot by the military (Stainton, 2006: 414).

The story of Gomin Tana was raised during an emotional confrontation between an Atayal community and the Forestry Bureau in 1999. These past events still shape memories and attitudes in the present. Stainton observes that years of conflict with the Forestry Bureau has strengthened Atayal identity with the land and their right to use forest resources (*ibid.*: 414-415).

### **4.2 Indigenous rights to land and resources**

Much of the conflict between indigenous peoples and the state over rights to land and forest resources took place up to the 1990s before there was any official recognition of indigenous peoples rights. This meant that at this time indigenous peoples had no legal means to address their grievances or claim their rights to land and natural resources. However, since the 1990s a number of laws have been put in place which explicitly



recognise indigenous rights. An overview of the key laws pertaining to rights to land and the use of natural resources follows.

Article 15 of the Forestry Act was amended on 20 January 2004. It states that in forests located in the traditional territory of indigenous peoples, indigenous people may take forest products for their own living needs and customs. In addition it specifies that the rules for this should be decided by the central government (Ministry of Justice, 2004). Hence while it affirms indigenous peoples rights to use forest products, it places a caveat that this must occur in accordance with rules set down by the central government.

The amendments to the Wildlife Conservation Act on 4 February 2004 follow a similar pattern. The amended Article 21 states that indigenous peoples may hunt, cull or use wildlife for traditional culture and ritual, but this must be subject to approval by the competent authority and fines may be imposed for violation (Global Legal Information Network, 2004).

There are several other articles of the Forestry Act which specifically mention indigenous peoples. Article 6 states that land designated as forest that is owned by indigenous peoples can be redesignated with the approval of the Council of Indigenous Peoples (CIP). Article 38-1 states that the Forestry Bureau should advise indigenous peoples about reforestation and forest protection. Article 48 says the government may provide assistance or incentives to indigenous peoples to encourage reforestation. Article 56-4 states that indigenous peoples may enter forest areas without a permit and do certain activities for their traditional living needs even when these are against regulations (Ministry of Justice, 2004). The full text of the Forestry Act is contained in Appendix I.

A key point in these laws is that while they recognise the rights of indigenous peoples, they still allow the central government to exercise control over how these rights are enforced in practice. They do not give indigenous peoples genuine autonomy over decision making about use of natural resources. Furthermore, there is a lack of regulations and management practices by government agencies to provide guidelines for how these cases should be treated.

Taiwan faces special challenges in forest and watershed management due to the steep

mountainous terrain weakened by earthquakes and typhoons as well as experiencing hydrometeorological extremes. A policy of promoting forest cover in headwater areas to control streamflows and erosion was established during the Japanese era and continues to the present. This policy was based on Japan's 1897 Forest Act which was similar to the policies of several European countries at that time. Extensive harvesting of forest resources took place under the Japanese and then up until the 1970s. This came to an end with the national forest policy in 1976. Around this time a soil and water conservation program that focused on agricultural activities on slopes was launched. Conversion of forested slopes to areca palm plantations (for “betel nut”), tea growing or fruit orchards continues to be a concern today (Lu, Cheng & Brooks, 2001). In 1989 the Forestry Bureau changed its operations from being a public business with business funding to being a public organisation with public funding. In 1999 it came under the Council of Agriculture of the Executive Yuan (Forestry Bureau, 2009).

The Forestry Bureau has a policy of sustainable management, however within that framework it views itself as the sole agency for making decisions about what is sustainable use. Hence it is overzealous in its policing of indigenous communities leading to incidents such as the Smangus Beech Tree Incident. This may be a result of fear that allowing indigenous communities to autonomously engage in sustainable use of forest resources will either undermine the Forestry Bureau's position or lead to uncontrolled exploitation of forest resources.

The Indigenous Peoples' Basic Law (IPBL) passed in January 2005 and it has two articles specifically related to rights to land and resources. Article 19 states that indigenous peoples may undertake hunting for wild animals, collecting plants and fungus, extracting rocks, minerals and soil and utilising water resources on indigenous lands. These activities must be non-profit and in accordance with traditional customs or for self-consumption (Ministry of Justice, 2005). Article 20 states that the “government recognizes indigenous peoples’ right to lands and natural resources.” It goes on to state that the government should establish a management committee for indigenous lands as specified in other laws. It also states that “Restitution, acquisition, distribution, management and utilization of lands and seas owned or used by indigenous peoples or indigenous individuals shall be stipulated in other laws.” (*ibid.*).

Other relevant articles of the IPBL include Article 21 which states indigenous peoples should be consulted about and give consent to or participate in development, natural resource utilisation, research or conservation activities on their lands. Article 22 also concerns the issue of consent saying that the government shall obtain consent from indigenous peoples and formulate communal management mechanisms before establishing national parks, national scenic areas, forest areas and other resource management areas (*ibid.*). The full text of the IPBL can be found in Appendix II.

The IPBL sets out the aspirations for indigenous rights, but lacks details and requires further legislation before it can be effective. Another key point is that while recognising indigenous rights, the IPBL simultaneously authorises the central government to establish rules which regulate or control these rights. This does not give indigenous peoples autonomy in the spirit of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

#### **4.3 Opinions of policy makers**

I interviewed several indigenous politicians and government officials who have played an active role in the formulation of indigenous policy over the past few years.

Lin Chiang-I (Mayaw Dongyi), deputy minister of the CIP, explained the long process of drafting and finally passing the IPBL. The process began in 1997 following the amendment of Section 4.2 of the Constitution. A committee was formed to draft the Indigenous Peoples Development Law. In 2000 this law was sent to the Legislative Yuan but not passed. Then the DPP took over the government and made many amendments. In 2003 the Executive Yuan reduced the draft of what was now called the IPBL to 25 articles. The biggest area of contention was land rights and many articles related to this were deleted. When the law finally went to the Legislative Yuan it was further debated and amended. It finally passed in January 2005 with 35 articles (Lin Chiang-I, interview).

Indigenous legislator Kung Wen-chi said the IPBL is like an indigenous constitution. It covers a wide out a range of rights including lands, media, political rights and economy. When the Sixth Legislative Yuan began sitting in 2005 the indigenous legislators met and each legislator agreed to take responsibility for certain legislation.

The Indigenous Media Law and and Indigenous Knowledge Intellectual Property Law where the only two laws to pass during the Sixth Legislative Yuan. There are still eleven laws that need to be passed (Kung Wen-chi, interview).

The important laws that need to be passed are the Indigenous Autonomy Law and the Land and Sea Law. These laws are very controversial and need a lot of debate.

Amending the existing laws to make them in accordance with the IPBL is more urgent than passing additional legislation. The laws that need to be revised are the Forestry Act, Wildlife Conservation Act, National Parks Act and Water Resources Act (*ibid.*).

Traditional territory is used as an academic term it is not a legal term. This concept has not been acknowledged by the government or the court. It is something the indigenous people are claiming and it has only been used by academics or as part of a political discourse. There is a need to pass the Land and Sea Law to be able to define it and so the government can acknowledge indigenous peoples' land rights (*ibid.*).

Taiwan is a small and densely populated island so there is a lot of conflict over land use. It is not like Canada or the USA where the government can allocate large tracts of land to indigenous peoples as nobody else really wants it (Lin Chiang-I, interview).

Yohani Isqaqavut, minister of the CIP from 2000 to 2002, says there is a need for a clear definition of autonomy and it is clearly explained in the UNDRIP (autonomy is explicit in Article 4 and implicit in many other articles of the UNDRIP, see Appendix III). The Land and Sea Law can help define traditional territory. Yohani says the main achievements during the DPP administration from 2000 to 2008 were the passing of five or six laws related to indigenous peoples and the revision of the “nine tribes” model to include 14 indigenous groups. Indigenous people were given the right to identify themselves (Yohani Isqaqavut, interview).

Another issue raised by Kung Wen-chi was the importance of infrastructure. He outlined a plan for rebuilding bridges, roads and rivers damaged by landslides and typhoons. Every year indigenous towns are worst hit by the typhoons (Kung Wen-chi, interview). The interview was conducted before Typhoon Morakot (2009) devastated parts of southern Taiwan. The government has since introduced a policy of relocation based on concerns about the safety and cost of infrastructure in the face of extreme weather events. Smangus was not affected by Typhoon Morakot, but the impact of this

event will shape future policies on indigenous people living in mountain areas.

Overall it can be seen that there has been slow progress on implementing the necessary legislation. Furthermore there is a conflict between the central government wishing to maintain control and the desire of indigenous peoples for autonomy. This represents a fundamental battle between national law and traditional law, a battle of the village versus the nation.

#### **4.4 Smangus Beech Tree Incident**

The Smangus Beech Tree Incident or Smangus Case is about a legal case over the right to use wood from a wind fallen tree on the traditional territory of Smangus. The legal case was drawn out for over four years and finally came to an end with the not guilty verdict passed down by the High Court in February 2010. A summary of the key events follows and these are also detailed in the time line in Appendix IV.

Typhoon Talim (aka Isang) hit Taiwan on 31 August and 1 September 2005 damaging the road to Smangus. Some people from Smangus repaired the road on 2 September 2005 and moved a fallen beech tree to the side of the road. On 12 October 2005 they discovered the Forestry Bureau had taken the trunk of the beech tree. A community meeting was held and three men were asked to bring the stump back to the village (Smangus, 2007a; Loa, 2007a).

While returning to the village the three men from Smangus met some officials from the Forestry Bureau. The Forestry Bureau subsequently charged the three men from Smangus, Amin Yosyo, Kokwang Kumay and Sangas Icyeh, with theft of forest products under Article 52 of the Forestry Act (Smangus, 2007a; Loa, 2007a; Tsai, 2007). Article 52 sets out what constitutes theft of forest products and the penalties for this (Ministry of Justice, 2004).

On 26 April 2007 the three men were found guilty by the Hsinchu District Court. They were fined NT\$160,000 each and given suspended sentences of six months imprisonment (Loa, 2007a). The case was appealed in the High Court which passed down its decision in September 2007. The fine and sentences were reduced to NT\$59,000 and three months respectively (Chuang, 2007).

In December 2009 the case was finally heard in the Supreme Court. The guilty verdict

of the previous hearing was repealed and the case sent back to the High Court for reexamination. The judge's verdict included the wording “indigenous peoples' traditional territory” for the first time in the Smangus case. The verdict recognised that there needed to be greater respect given to the activities of indigenous peoples that are in accordance with their traditional customs on their traditional territory to guarantee their basic rights. The judge also identified problems with the previous interpretations of Article 15 of the Forestry Act (Abas, 2009).

The legal battle finally reached a conclusion on 9 February 2009 when the High Court passed down a not guilty verdict to the three men. This decision was in accordance with the Supreme Court verdict and upheld the spirit of the IPBL. It was described as “belated justice” by defense lawyer Thomas Chan (Taiwan Today, 2010; Loa, 2010). The judge's decision was in accordance with the spirit of the IPBL and had historical significance (Lin, 2010).

#### **4.5 Interviews and Smangus blogs**

In order to better understand the case I have conducted interviews with a number of people involved in the case and court hearings. The interviews provide a number of different perspectives of the case generally and the court hearings.

Smangus used blogs<sup>6</sup> in both English and Chinese to put out information about the case and tell their story. This was the first time in Taiwan that indigenous people had used an English-language blog for activism (Lin Yih-ren, interview). The English-language blog was created with assistance from staff at Providence University who had close connections with Smangus. The blogs provide important information about the case and how the Smangus community responded to the events with various forms of protest.

The blog includes letters of support from international academics who have some connection to or knowledge of Smangus. It also details some of the activities of protest of the Smangus community and the broader network of people that supported them. It represents the voice of Smangus in a way that media reports cannot. Some quotes in this chapter have been taken from the Smangus blog.

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6 A blog is a World Wide Web site contained on the Internet which can be quickly and easily updated and usually displays the articles in chronological order with the most recent article at the top.



## 4.6 Perspective of the chief

An interview was conducted with the chief of the village of Smangus in which he expressed his feelings about the case. Even though he spoke in Mandarin he used the Atayal word *gaga*. He used this word mainly to refer to the traditional law followed by the people of Smangus.

We want to use our traditional law (*gaga*) to talk about the case. It is not because we broke the law. That tree fell over in typhoon. We put it by the side of the road for more than a month. The Forestry Bureau took away the good wood. We work as a cooperative. We had a village meeting. We arranged for three people to go and collect the rest of the tree. After that we met some officials. Then we went to meet with the Forestry Bureau. They said we stole the wood, we are thieves. When they said this we were very unhappy. Because we didn't want to sell the wood. We just wanted to use it in the village. According the Forestry Bureau's rules it was stolen. They took the good wood. The other wood we took to the village for firewood and to make things in the village. So we always said to the Forestry Bureau that the way they are doing this is wrong. I wasn't happy.

The chief also talks about the poor relations between the people and the Forestry Bureau being the result of ongoing conflict over several decades.

From that time I went to Sanlin community<sup>7</sup> and said we want to protect our mountain forest area. The Forestry Bureau sent their foreman. He said we haven't taken care of the forest. He said more than thirty years ago we had cut down many trees. He said we had cut down the trees around the Xinguang village on the other side of the valley, but that is a different community. He said the Atayal's traditional rules for forestry management weren't good. He said we always cut down the trees. The Forestry Bureau still cut down trees every year. We took the tree stump just to use in the village. But they said we stole it.

At the end of the interview the chief made an appeal to another government agency to recognise their traditional law and rights.

<sup>7</sup> In the recording he seems to say Sailin community. The only community with a similar name in the area is Sanlin so I assume this is the community he is referring to.



We also hope the Council of Indigenous Peoples can say whether our traditional laws are accepted. The government's regulations and laws... None of them are in accordance with our laws. They used a bad way to deal with us.

It is also important to understand the collective nature of thinking. From the point of view of Smangus it was not just the three men that were responsible for taking the tree, but the whole village. The three men went to collect the tree stump after a decision had been made at a community meeting so the court should not just accuse these three men, but the whole village (Lin Yih-ren, interview).

#### **4.7 Perspective of the Forestry Bureau**

An interview with Lai Tsung-ming, a director of a division of the Forestry Bureau, asked about the Smangus case as well as more general issues related to the Forestry Bureau's relations with indigenous peoples.

The most important point was that the Forestry Bureau operates under the principles of democracy and national sovereignty. It uses a system of “administration under law” in accordance with the constitution. If any staff act against the law then they must accept civil, criminal and administrative responsibility. As such they must carry out their duties according to the Forestry Act (Lai Tsung-ming, interview).

Article 15 of the Forestry Act says indigenous peoples can use forest resources on their traditional territory according to their customs and living needs. However, the CIP needs to confirm the traditional territory and this hasn't been done yet (*ibid.*). In October 2007 the CIP announced the recognition of Yufeng and Xiuluan in Jianshi District of Hsinchu County, which includes the area around Smangus village, as the traditional territory of the Atayal. Indigenous peoples living in these areas would be able to apply to collect forest products for ritual and cultural purposes. However, the decision was criticised as it did not fully realise indigenous rights because people still needed to apply for permission to use forest resources, they were still not given the autonomy to use resources according to their traditional beliefs and customs (Loa, 2007c; Wu, 2007).

The Forestry Bureau respects indigenous peoples and gives them special consideration in some matters such as being able to enter forest areas without a mountain permit

(Lai Tsung-ming, interview). Following the passing of the IPBL the Forestry Bureau put out a policy document on 5 February 2005 about dealing with matters related to indigenous peoples (Forestry Bureau, 2005). However, the Forestry Bureau still must operate under the law and indigenous peoples need to apply for a permit if they want to use forest resources. Exactly what indigenous peoples can take without a permit hasn't been defined because there is no sub-legislation of the IPBL which defines traditional territory, customs and living needs (Lai Tsung-ming, interview).

The perspectives of the Forestry Bureau and the chief of Smangus show that both parties believe they acted according to the law. The problem rests in one party's law being the national law of Taiwan while the other party follows the *gaga*, the law of the Atayal ancestors. This conflict of world views is further evident the court hearings, which are explored in the next section.

#### **4.8 The court hearings**

Two interviews provide a look at how the proceedings in the first two court hearings were perceived by people who supported or were sympathetic to Smangus but are not members of the community. One interview was with Pisuy Masou an Atayal woman who was a reporter for Taiwan Indigenous Television. The other interview was with non-indigenous Taiwanese, Lin Shu-ya, who works for a human rights organisation.

Pisuy said that initially indigenous people in Taiwan thought the IPBL would protect indigenous rights. However, when reporting on the Smangus court hearing in the Hsinchu District Court she found the IPBL hadn't protected the rights of the people from Smangus. She said, "The Smangus case has made me think the Basic Law is very beautiful. But it's just a piece of paper."

Another thing Pisuy recounts is the attitude of the judge in listening to the three defendants:

I went to see the case in the High Court in Taipei. The judge said to one of the three men from Smangus, "Do you want to say something?" The man from Smangus said, "I can't speak Mandarin. Can I speak in Atayal?" The judge said, "You only need to say the key points [in Mandarin]." Then he said, "Can I ask someone from the village to help me speak Chinese, I will speak Atayal."

The judge said, “You only need to say the key points.” Then the man from Smangus decided not to say anything (Pisuy Masou, interview).

Another recollection of the exchange between the judge and defendants is reproduced on the Smangus blog and quoted verbatim as follows:

The judge: “ Are you saying that the beech was within your community’s traditional territory? Where and how large is the territory?” (The judge pondered for long as speculating that there was such a territory.)

One of the defendants tried to recall the location: “It starts from our village and extends to the Dabajian mountain.”

The judge: “I am asking about that of your village, not that of your tribal nation. I would like to ask another person ..... Can you indicate the location of the traditional territory?”

Another defendant answered “If I need to count the area precisely, although not having exactly measured it, I can give you my estimation – the area starts from our village, up and down to 800 meters, left to 5 kilometers, and right to 12 kilometers.”

The judge frowned: “Can you raise any legal evidence to prove your statement? Did you ever register the territory to the government?”

A defendant replied: “Our governmental body is the Council of Indigenous Peoples. We are also making our own tribal map.”

Judge: “Your own tribal map?” (Pisuy Silan, 2007).

Further information about the problems communicating with the judge are provided in the Smangus blog:

At the third appearance in court, a lot of the tone and the words the judge questioned I could not agree to. For example, the judge asked the three defendants : "Do you have any opposition to the two witnesses' testimony? Please state your stance." The three defendants did not respond, because "they did not understand what the judge meant at all." What Elder Amin stated was his own opinion regardless of the testimony. The judge asked Amin again: "Do

you have any opposition to the witnesses' testimony? You need to state your opinion." Elder Amin still presented his own opinion about the fact. After that he did not know how to say further. So he stopped. The judge asked the witnesses to leave. The silence of the three defendants did not mean that they fully agreed to the witnesses' words. In fact, we did not know whatever the exact meaning of the judge's inquiry (Batu Icyeh, 2007).

The problem of language used in the court is further highlighted in the interview with Lin Shu-ya. She said that many Taiwanese people would have difficulty understanding the language used by the judge. The judge in the first trial also lacked an understanding of concepts related to indigenous rights and territory. In the second trial expert witnesses were called and this represented an improvement. While the judge was more sympathetic he still lacked an understanding of how indigenous peoples defined their territory and wasn't prepared to recognise the rights in Article 15 of the Forestry Act or the IPBL. Hence the three men were still found guilty in the second trial although their sentence was reduced.

#### **4.9 Smangus community uniting with other groups**

Pisuy Masou notes how many indigenous peoples came together to support Smangus. She specifically mentioned cooperation between Smangus and the Tsou from Alishan. The Tsou previously were involved in a case about indigenous rights concerning the use of wild honey. Pisuy said:

On 30 May [2007] Smangus had the second protest. The first time was at the Forestry Bureau [in Taipei], at the end of April, they had about 40 or 50 people. Next time, on 30 May there were 400 or 500 people. There were many more people joining.

On 20-21 May 2007 a conference was held at Smangus bringing together elders from the Mrqwang group of the Atayal as well as representatives of other groups including the Bunun, Paiwan, Amis, and Puyuma. On 20 May elders of the Mrqwang group chanted the Lmuhu which describes the migration history and traditional territory. That evening the ceremony of Msbalay was also held. Msbalay is a ritual for the formation of alliances between villages and vow to protect their lands (Smangus,

2007c).

The next day the Pinhaban ceremony was held to form an alliance. This involved again chanting Lmuhu and reviewing the topics discussed. Participants signed their name on a wooden map of Taiwan to show their loyalty to the alliance. The alliance issued a statement of five points. These included the right of indigenous peoples to autonomously govern their traditional territories and calling on the government to honor the spirit of the “new partnership” and implement the IPBL. Elders of the Mrqwang group formed an alliance to protect their traditional territories (*ibid.*).

#### **4.10 Conflict between Smangus and the state**

Some posts on the blog give insight into relations between the Smangus community and the police and Forestry Bureau. These mainly represent the viewpoint of the Smangus Community and its supporters. Again this section highlights the clash between two world views with different languages and cultural values.

“The Dialogue between Smangus and the Bureau of Forestry April 24th, 2007” details the discussion that took place between the Forestry Bureau and representatives of Smangus in Taipei on 24 April 2007 (Smangus Action Alliance, 2007). This was just after the judgment had been handed down by the Hsinchu District Court. The Smangus representatives entered the meeting with a number of points. The first two points were asking for an apology from the Forestry Bureau and for the Forestry Bureau to clarify the truth and make corrections to the court. No agreement could be reached on this so the discussion moved on to the next points (*ibid.*).

The next three points asked that the Forestry Bureau recognise the rights of Smangus under the IPBL and to consult with indigenous communities about management regulations. After the meeting the Forestry Bureau issued a statement saying, “We realize that Smangus could consider this wind-fall beech case with the spirit of Article 15 of the Forestry Act. Therefore, when you appeal to a higher court, our staff could help clarify your thinking.” The blog post notes that the dialogue failed. A consensus could not be reached and the gap between the parties had further increased. Smangus chief Icyeh was quoted as saying, “Thank you for the long and vehement discussions today. Since we can not get a bona fide response from the Bureau of Forestry, we will

call an end to our meeting here.” (*ibid.*).

“The Second Conversation between Smangus and the Bureau of Forestry” details a conversation that took place between a group of eight staff from the Forestry Bureau and some residents of Smangus in front of the Smangus Visitor Center on 30 April 2007 (Wali & Lahuy, 2007).

The Forestry Bureau staff said they wanted to check the patrol box. The context of the conversation suggests the patrol box is by the grove of ancient trees, the Yaya Qparung. The people of Smangus assert that it is not necessary for the Forestry Bureau as the land belongs to Smangus and also because the people of Smangus actively manage the land. They also accuse the Forestry Bureau of doing a very poor job. The following two quotes from the article illustrate the strong feelings of Smangus and how their viewpoint differs from the Forestry Bureau:

“We share the same goal.” someone from the Bureau claimed.

“This decision is totally disrespectful to indigenous peoples. We’ve had the idea of conservation for generations. We won’t cut the woods or hunt animals without limits. This is the environment where we live. We should manage our traditional territory following our ancestor’s way. Our ancestor has never chopped off all the trees, unlike what the Japanese or the KMT Government did when they first came,” said Masa (*ibid.*).

And the second exchange:

Luo: “But the Bureau-administered land is in there!”

Ikit: “What do you mean by “Bureau- administered land”? That’s Smangus’s “traditional territory”. Are you still pretending that you don’t know about it? You come with so many people this time, and the issue is not even settled yet. Are you trying to incite some conflicts?” (*ibid.*).

The exchange ended with the Forestry Bureau leaving without checking the patrol box (*ibid.*).

“The First Conversation between Smangus and the Police (before P’surux Btunux)” details events on 6 May 2007, the day before the P’surux Btunux, a traditional ceremony to proclaim territorial sovereignty was held. Smangus put out a press

release about their intention to hold the ceremony and this led to phone calls and visits from the local police (Smangus, 2007b).

Two police officers visited Smangus. They are reported as saying that the police should be notified about the ceremony and that it may be in breach of the Parade and Assembly Law<sup>8</sup>. The police also said they may send many officers to the event. A phone call from the the Chief Officer of the Public Order Unit in Heng-Shan branch at 9:00pm that night is then detailed:

*Chief Officer:* “I’ve looked up related statutes. Religious ceremonies and activities are not subject matters of the Assembly and Parade Law. So for the activities tomorrow, let’s say that I ‘have given you permissions’.

“But do you have banners for tomorrow’s ceremony?”

*Batu:* “Yeah. How could this kind of ceremony violate the Assembly and Parade Law? If Chief Officer has time tomorrow, we welcome your participation. It is a very ancient and sacred Tayal ceremony.” (*ibid.*).

These exchanges can be understood as an expression of the deep conflict and vastly different world views that exist between the state, represented by the police and the Forestry Bureau, and indigenous peoples, represented by Smangus. Both parties are attempting to assert their power and authority over the right to control activities on the territories of indigenous peoples. Smangus is actively asserting its sovereignty over the land based on its long term occupation of the land which it sees as its traditional territory and its continuing management of the land with goals of conservation and sustainable use.

The conflict also exists at a practical level of forest management, particularly in relation to mushroom farming and the harvesting of bamboo. Before 1990 mushroom farming was a major source of income for Smangus. The mushrooms could only be grown on the cut surfaces of trees and this led to a lot of conflict with the Forestry Bureau. The Forestry Bureau caught people or destroyed the mushrooms. Mushroom farming ended around 1990 when peaches became a new source of income (Lahuy Icyeh, pers. comm.).

<sup>8</sup> The Parade and Assembly Law is a law which was created following the end of martial law to regulate protest activities. It gives police the power to break up any political protest activity held without a permit.



Elder Batu talks about how the cutting of bamboo has damaged the environment and is directly linked to the incident of the wind-fallen beech tree. He says that around 1981 the Forestry Bureau sold the bamboo grown by the ancestors of Mrqwang. They also built roads into the area. The trees growing amongst the bamboo were cut down and this disturbed the ecological balance. The valuable wood was transported out, but the other wood was left to rot in the bamboo forest. As a result the beech tree which fell during the typhoon in 2005 could not stand the torrential rain. The foundation of the road in that area is sliding down the slope every year (Batu Icyeh, 2007).

During my August 2009 visit to Smangus I was told that in 1994 the Forestry Bureau gave outsiders permission to harvest bamboo around Smangus. The people of Smangus were strongly opposed to this. They believe the bamboo is a gift from their ancestors (Lahuy Icyeh, pers. comm.). I also observed the how the cultural importance of bamboo was emphasized and included in activities for visitors.

#### **4.11 Smangus assertion of sovereignty**

This section looks at how Smangus view themselves as the sovereign powers of the land they call their traditional territory. It also looks at actions they have taken to assert their sovereignty and how this was often drawn specifically from Atayal culture.

The Smangus Tribal Covenant is a document setting out the rules agreed to by the community. It includes two clauses specifically related to ownership and use of land. Article Three prohibits the sale, rental or lease of land to anyone who is not a resident of Smangus. Article Four prohibits any major changes being made to a piece of land unless the changes are first discussed and approved by the community. This reflects usufruct property rights where families or individuals have the right to use certain pieces of land for an agreed purpose, but the land is the common property of the Smangus community (Wu & Huang, 2006; Smangus, n.d.).

Articles five to eleven of the covenant concern ecological conservation and sustainable use of land and natural resources. Emphasis is put on using resources in ways that conserve them for future generations. Wu and Huang conclude that as a result of more than a decade of hard work Smangus has achieved economic independence. Although the covenant is basic, it is the right start (*ibid.*).

On 7 May 2007 Smangus held the traditional ceremony of P'surux Btunux to declare the autonomy of their traditional territory. The ceremony involves setting up a stone marker to make a covenant. In the days leading up to this event, as noted previously, there was pressure from the police not to hold the event, although it eventually went ahead without interference. Later in the same month they held the Pinhaban ceremony, as detailed earlier, to unite with other groups and assert sovereignty over traditional lands (Smangus, 2007c).

Similar sentiments are expressed elsewhere. "Declaration of Indigenous Land Rights" first asserts the Atayal's right to traditional territory and then rejects the intervention of the state. It says the Tayal people declare, "full sovereignty, control and management over our ancestral lands." They have never given up ownership and use of ancestral lands so they have never lost their rights to their traditional territory (Neqo Soqluman & Lahuy Icyeh, 2007).

A statement on 24 April of the Tayal Tribal Committee rejects the control and management of the Forestry Bureau. It calls the enforcement of the law by the Forestry Bureau "illegal and ineffective". The statement says:

Since the establishment of Republic of China, the Bureau of Forestry invades and destroys the ecological resources of indigenous forest, resulting in the contraction of the indigenous living space and the destruction of the communal culture rooted in the land. Originally we believed that the mistakes of former policies could be revised and improved in accordance with the political development towards democracy. However, the Bureau of Forestry nowadays still controls the natural resources belonging to the tribal land, makes the profit, and leaves the land wounded. What's even worse, without viewing the issue from the indigenous standpoint, the Bureau of Forestry takes a step further and violates the living rights of the land-based indigene who are disadvantaged. The government ignores the existence of the law and the ethics of the administration (Tayal Tribal Committee, 2007).

Masay Sulong, former director-general of The Association for the Development of Atayal Smangus, also talks about how the Forestry Bureau's management has not been effective and compares it to Smangus's protection of their traditional territory. Masay

says aerial photos show thick forests in Alishan and Cilan mountain have changed from green to bare. While Smangus still has dense forests and giant trees. Smangus is devoted to protecting the forests based on its practical concern of living with the environment (Tzuyaya, 2007).

#### **4.12 Final summary of the Smangus case**

The conflict between Smangus and the Forestry Bureau represents a clash of two world views. The Forestry Bureau represents the state with a constitutional government and a system of national law. Smangus represents an indigenous community which follows the *gaga*, a traditional system of beliefs passed down from the ancestors and held in an oral tradition. Smangus has developed a degree of autonomy with an economic base supported by ecotourism and a communal system of management. Smangus has successfully adapted Atayal traditions to the circumstances of the modern world. This is an important example and model for the development of indigenous autonomy in Taiwan.

The decisions of the Supreme Court and High Court show that Smangus was vindicated in its pleas of not guilty in the beech tree case. There has now been at least a partial recognition of indigenous knowledge and traditions by the courts in Taiwan. This sets an important precedent for future cases. However, there are still problems with the practice of government agencies. This is an area where new approaches need to be adopted.

## **CHAPTER FIVE – CO-MANAGEMENT IN AUSTRALIAN NATIONAL PARKS**

### **5.1 Australian Aborigines and land rights**

The Aborigines have occupied Australia for some 60,000 years. Their culture is intimately connected to the land through the Dreaming stories and their environmental management created an eco-cultural landscape. Since the British established a penal colony at Port Jackson in 1788, Australia's Aborigines have suffered dispossession of their lands and great injustice. The British failed to recognise the values or rights of the Aborigines, considering the land to be *terra nullius*. The Aborigines suffered persecution including murder, rape, abuse and forced separation of families (De Lacy & Lawson, 1997: 157-158).

In recent decades the Aborigines have begun to win back some of their rights, with the land rights movement central to their claims for justice. In 1967 Australians voted overwhelming in favour in a referendum to give the commonwealth government the power to implement policies to benefit Aborigines. The referendum gave the commonwealth the power to override discriminatory legislation and practices by the states. It also gave impetus to Aboriginal activism and boosted Aborigines' claims for rights in a range of areas.

In 1992 the High Court made a landmark decision in the Mabo Case. The judgment rejected the concept of *terra nullius* and recognised common law native title for the first time. This led to much debate in Australia and the passing of the Native Title Act in December 1993. The Mabo decision recognises that native title exists not just over areas of unallocated Crown land but also Crown land “where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over that land.” The Mabo decision includes the “national park rule” which means any national park which Aborigines still have strong attachment to can be subject to a land claim regardless of previous legislation or government actions (*ibid.*: 171-172).

### **5.2 Kakadu and Uluru-Kata Tjuta national parks**

Uluru-Kata Tjuta and Kakadu are two of Australia's most well known and iconic

national parks. They are listed as World Heritage for both cultural and natural values. Kakadu National Park covers an area of 19,804 square kilometres and is located 120 kilometres southeast of Darwin. It is in the wet-dry tropics and is geologically and biologically diverse. There is evidence of Aboriginal presence in the park for at least 50,000 years. There are many Aboriginal rock art sites in the park (*ibid.*: 162-164). Uluru Kuta-Tjuta National Park is located 335 kilometres southwest of Alice Springs. It covers 1,325 square kilometres of arid-zone ecosystems. The park has a number of large monoliths including Uluru which is one of Australia's most distinctive and well-known landmarks. It is listed as a biosphere reserve in UNESCO's Man and Biosphere program (*ibid.*: 167).

Unlike the United States and Canada, national parks and other protected areas in Australia are managed by the relevant state government. However, the territories have less legislative independence and rights than the states. Hence the commonwealth (federal) government has control over some protected areas in the Northern Territory which come under the management of the Australian Nature Conservation Agency (ANCA) (*ibid.*: 155). Kakadu and Uluru-Kata Tjuta national parks in the Northern Territory are the longest established and best known Aboriginal-owned national parks in Australia. The starting point for the establishment of these parks was the 1976 Aboriginal Land Rights (Northern Territory) Act (ALRA) of the commonwealth. This allowed for the grant of statutory freehold title of certain Crown land to the Aboriginal traditional owners (*ibid.*: 161).

According to the ALRA the traditional Aboriginal owners are the people who, have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and are entitled by Aboriginal tradition to forage as of right over that land (Commonwealth Consolidated Acts, n.d.). In English the term “traditional owner” is commonly used to refer to someone who is a member of the clan associated with a particular clan estate (Director of National Parks, 2007: 3). Another point to note is that the history of colonisation in the north of Australia is somewhat different to the more densely populated regions in the south. Colonisation in the north occurred much later and was comparatively benign. Aboriginal peoples in the north have generally been able to maintain their languages and cultures a lot more successfully.

### 5.3 Co-management in Kakadu and Uluru

Kakadu and Uluru national parks are operated under a system of co-management. They are legally owned by the Aboriginal traditional owners and then leased back to the commonwealth for operation as national parks. The policy framework for joint management is provided by a management plan that is negotiated at five-year<sup>9</sup> intervals. This management plan is implemented by a board of management (De Lacy & Lawson, 1997:155-167). In Kakadu the board of management currently has 15 members, ten of whom are nominated by the traditional owners. The Aboriginal members of the board are selected to cover the geographic spread of Kakadu as well as the major language groupings. The other five are representatives of specific organisations or have specific skills. The chair of the board is appointed from the Aboriginal members of the board (Director of National Parks, 2007: 7).

Kakadu National Park was established under the commonwealth National Parks and Wildlife Conservation Act 1975. This act was amended in 1978 to allow for leasing of Aboriginal-owned land and to ensure greater input from Aboriginal people. In 1978 a 99 year lease was negotiated between the Northern Land Council and the commonwealth government for Stage I of Kakadu National Park taking effect in 1979. Stage II and III of Kakadu were later dedicated although not all of the area is Aboriginal-owned land. A new lease was entered into in 1991 following the successful operation of the 1991 lease at Uluru-Kata Tjuta which gave much greater recognition to Aboriginal interests. Amendments to the ALRA make it a condition that for any land granted to traditional owners in Kakadu, an agreement be entered into for the lease of the land to the ANCA for the purpose of a park. (De Lacy & Lawson, 1997: 161-164). At the time of preparing the 2007-2014 management plan for Kakadu approximately 50 percent of the land within the park was aboriginal land under the ALRA leased to the director of the ANCA by Aboriginal Land Trusts. Most of the remaining area is under claim by Aboriginal people (Director of National Parks, 2007: 22). Although not all of the park is Aboriginal land under the ALRA, the park is managed on the principle that all land is Aboriginal land (*ibid.*: 35).

The lease for Kakadu National Park is divided into three parts. The first part reserves

<sup>9</sup> The most recent management plan for Kakadu National Park is for seven years from 2007 to 2014. The most recent management plan for Uluru-Kata Tjuta National Park is for ten years from 2009 to 2019.



the right of Aboriginal groups to enter and inspect the part. Furthermore it reserves the right of Aboriginal groups to use and occupy the park for traditional purposes. The second part stipulates the terms of the lease. The third part defines the obligations of the lessee in covenants and conditions. Many of the covenants are specific to Aboriginal rights ( De Lacy & Lawson, 1997: 164-167; Director of National Parks, 2007: 152-169).

A quote attributed to Russell Cubillo, a Jawoyn Bolmo affiliate, in the Kakadu National Park Management Plan reveals a lot about the spirit of co-management. He says, “Bininj/Mungguy [traditional owners] try hard to learn Balanda [non-Aboriginal Australians] law to make informed decisions. Balanda need to make an effort to learn Bininj/Mungguy law” (Director of National Parks, 2007: 5). This shows a spirit of cooperation and compromise. The traditional owners realise that they have to co-exist with the state, but in return they expect respect and recognition of their culture and laws. The Kakadu National Park Management Plan also gives a clear and detailed explanation of the meaning of co-management:

Joint management is about Bininj [traditional owners] and Balanda [non-Aboriginal Australians] working together, solving problems together, sharing decision-making responsibilities and exchanging knowledge, skills and information. Important objectives of joint management are to make sure that traditional skills and knowledge associated with looking after culture and country, and Bininj cultural rules regarding how decisions should be made, continue to be respected and maintained. It is also important that contemporary park management skills are available to enable the joint management partners to look after Kakadu in line with current best management practices (Director of National Parks, 2007: 7).

This system of joint management in Kakadu and Uluru-Kata Tjuta has been in place since the late 1970s. This provides several decades over which to understand how it works, the problems and how some of these problems have been solved. Furthermore the model has now extended beyond the Northern Territory to several states. For example, in New South Wales there are now 13 protected areas with co-management agreements. This includes five parks which are Aboriginal-owned with lease back

agreements (Department of Environment, Climate Change & Water, 2010). This indicates that co-management policies have attracted broad support from both Aborigines and government policy makers.

This is not to say that there is no conflict between the traditional owners and non-Aboriginal park managers. There are still differences in worldview. An example of this is attitudes to control of feral animals in Kakadu. The subsistence economy still forms an important part of the economy of many communities. This includes hunting or foraging for personal consumption and cultural reasons as well as commercial harvesting. Programs to control feral animals have led to occasional conflict because non-Aboriginal park managers have failed to recognise that certain feral species have historical and economic significance to the traditional owners (De Lacy & Lawson, 1997: 173-174).

Ecotourism can bring major economic benefits to the traditional owners of national parks, but it also imposes burdens on Aboriginal communities. Traditional owners get income from park entrance fees and ownership of tourist infrastructure such as accommodation and shops. However, tourism can also compete with subsistence activities. Aboriginal park rangers may be reluctant to carry out hunting and gathering in front of tourists. Furthermore despite the financial benefits tourism brings the intrusion of many tourists on their lands is something the traditional owners did not seek and may not wish to interact with. As tourist numbers increase the chances for genuine encounters between the traditional owners and tourists are reduced. There is also a greater risk that culture is misinterpreted or trivialised as it becomes increasingly commodified (*ibid.*: 174-176).

The most important thing about the co-management model in Uluru and Kakadu National Parks is that it clearly recognises Aboriginal ownership and land rights. Although this ownership is qualified by the condition of leaseback and joint management (*ibid.*: 183). Aboriginal culture and traditional knowledge informs all aspects of park management.

The Aboriginalisation of Australian national parks strongly challenges concepts of wilderness and pristineness that have dominated national park culture in Australia. It moves away from seeing humans as a threat to recognising that the so-called natural

landscapes in Australia are actually cultural landscapes created by thousands of years of Aboriginal land management (*ibid.*: 186). Joint management is a way to accommodate the interests of the traditional owners with those of the state. Although there are compromises involved it gives Aboriginal people a high degree of autonomy. It also recognises the value of Aboriginal traditional knowledge and allows for the continuing existence of a subsistence economy which contributes to the health of communities and maintenance of culture.



## **CHAPTER SIX – CONCLUSIONS AND RECOMMENDATIONS**

### **6.1 Realising indigenous rights**

The Smangus case demonstrates that there is still significant room for improvement in both realising the aspirations of the Indigenous Peoples' Basic Law (IPBL) and the practice of government institutions regarding indigenous issues. The desire of Taiwan's indigenous peoples for autonomy and control of their traditional territory is strong and has become stronger in recent decades as a result of the indigenous rights movement and Taiwan's democratisation. The pace of legislation and institutional change has been slow in comparison to the expectations of indigenous peoples. However, it is clear that since the early 1990s indigenous rights in Taiwan have advanced significantly. The inclusion of indigenous peoples in the constitution in the 1990s and the passing of the IPBL and other legislation in the 2000s have established important standards for indigenous rights which can continue to be built upon.

The IPBL is based on the standards of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). These two documents clearly set out standards for indigenous rights. Furthermore in 2009 the KMT government ratified the International Covenant on Civil and Political Rights (ICCPR). This is another sign that Taiwan is working to be in line with international standards even though it is largely excluded from participation the United Nations and its associated bodies. Hence in the future, regardless of which party is in power, Taiwan will continue to work towards meeting international standards for human rights. Even if the government of the day fails to work towards the standards of these United Nations documents, indigenous peoples can still use them as a basis to demand their rights according to international standards.

The verdicts of the Supreme Court in December 2009 and the High Court in February 2010 also indicate that the courts are open to accepting Taiwan's cultural diversity and making decisions giving consideration to this. There is now a precedent for recognition of traditional territory by the judicial system. This means that minority groups will have greater confidence in the legal system to uphold their rights and will

be able to seek recourse through the courts in important cases.

In the midst of positive signs there are also negative ones. The impacts of Typhoon Morakot and the subsequent actions of the government to relocate indigenous communities post-disaster highlights the need for new approaches in the spirit of the IPBL. The government needs to show greater respect for the existing capacity of indigenous communities to make decisions about the management of resources based on their traditional knowledge. The top-down approach of government organisations has failed to properly respect the integrity of indigenous communities in this case.

The twentieth century was a time of great upheaval and change in Taiwan as the island went from being under Japanese rule to the ROC and four decades of Martial Law, then finally emerging as a democracy in the last two decades of the century. The twenty-first century is also likely to pose great challenges to Taiwan. The rise of China as a military and economic power will create many difficulties as China exerts increasing influence over Taiwan's economy and politics. The increasingly serious impacts of climate change are also likely to negatively impact on Taiwan in the next few decades. Water supply, especially in the south, will become less reliable due to predicted changes in rainfall patterns. The already frequent typhoons that hit the island may increase in frequency and intensity. Furthermore Taiwan is dependent on the importation of energy and resources as the basis of its economy. The likelihood of peak oil affecting the stability and growth of the world's economies in the near future will pose a severe threat to the sustainability of Taiwan's existing economic structure.

This means that any predictions or recommendations about the future are made with some uncertainty about exactly what Taiwan's future will look like in the decades ahead. In any case the position of Taiwan's indigenous peoples is one that deserves attention. What is clear is that they have a unique contribution to make to Taiwan with their traditional knowledge and understanding of the land. Indeed they are the ones who may hold the key to finding sustainable ways of living in the future.

Taiwan already looks to Canada as a model for indigenous rights policies (Lin Chiang-I, interview). Karalekas (2006: 10), in his thesis comparing indigenous autonomy in Taiwan and Canada, points out that there are clear precedents for the adoption of policies from foreign governments by Taiwan. However, these policies cannot be

imported wholesale.

## **6.2 Taking the co-management model to Taiwan**

It is important to recognise that models from Australia cannot be directly transplanted into Taiwan. There are not only historical differences and different systems of government, but one country covers a vast area and there is not intense competition for land. Indeed the areas in which Aborigines have been given legal rights and control over in Australia are predominantly places that are sparsely populated and not valued for development (with the exception of pastoralism, tourism and mining). In contrast Taiwan is a relatively small and densely populated island. There is greater competition for the control of land and access to natural resources. Furthermore, the management of watersheds is a critical issue that directly affects every person on the island.

The co-management models of Uluru and Kakadu go beyond the national park paradigm that began with the declaration of iconic national parks such as Yellowstone and Yosemite in the United States in latter half of the nineteenth century. The Yellowstone model deliberately excluded indigenous peoples and failed to recognise the influence of man in shaping the landscape. Co-management is more in accordance with the biosphere model which emerged in the 1970s and better accommodates the coexistence of indigenous peoples with protected areas and nature conservation. The biosphere model clearly recognises the existence of cultural landscapes and the importance of indigenous peoples' ongoing management in maintaining these landscapes.

The biosphere reserve model is based on the concept of core conservation areas surrounded by buffer zones and transition zones. The outer zones allow for a wider range of land use than in the core conservation areas (Stevens, 1997: 18). Such a model could be adapted to Taiwan as it recognises the place of indigenous peoples living in national forest areas but outside national parks. It would allow for traditional or sustainable use of resources in concert with promoting conservation goals.

Formally recognising conservation areas that include indigenous peoples needs to be complemented by a system of co-management. Indeed the establishment of a system



of co-management is clearly mandated by Article 22 of the IPBL which states:

The government shall obtain consent from the locally affected indigenous peoples and formulate a common management mechanism before establishing national parks, national scenery, forest district, ecological protection zone, recreation zone and other resource management institutions. The regulations shall be made by the central relevant authority jointly with the central indigenous affairs authority (Ministry of Justice, 2005).

Co-management will ensure that indigenous peoples play an active part in the decision making process and their interests are not marginalised. Allowing indigenous people to hold a majority of seats on boards of management would be a formal recognition of custodianship. If such a system were implemented it is possible that the government would try to maintain control by installing pro-government elites, fostered through a network of patronage, who would act as the government's proxies and not radically change the status quo. However, the past two decades of democratisation in Taiwan though have changed people's expectations of government. The people now have much stronger expectations of actively participating in government decision making, not merely voting in elections once every few years.

If co-management is adopted in Taiwan it is essential that boards of management have broad representation and mechanisms to prevent control of them being captured by groups promoting partisan or economically exploitative agendas. The differences in skills and world view that different parties bring to the table also need to be accommodated. Indigenous people have traditional knowledge about the land and strong social and cultural ties to it. However, there may be a lack of individuals with technical expertise or professional knowledge in certain areas. Appointments to boards should also take this in consideration to ensure that the boards are made up of people with the necessary skills that can complement each other.

A further challenge lies in how willing government agencies are to give up their power or change their ways of management to better accommodate indigenous peoples. The spirit of co-management is one of partnership and working together. Yet it is the government agencies who currently control the resources and these agencies may fear co-management as it threatens their existing power and control. The Forestry Bureau

and other government agencies may also fear that if indigenous peoples are given greater control over resource use and decision making then this will lead to unsustainable exploitation of resources.

Yet these fears are not necessarily justified. Their needs to be recognition of the social and cultural connections that indigenous peoples have to the land. The management of land and forests affects indigenous peoples very directly. They are the ones who live in areas that are most affected by landslides and floods that are caused by poor management of forests. Where exploitation does occur it may be as a result of the influence of outside economic forces. Indigenous peoples certainly have something to gain by gaining greater participation and power in decision making. However, this is recognition of their historical circumstances and special status. Co-management enables indigenous people to have a formal custodianship of the land and is a means by which they can continue their culture and protect their heritage.

Co-management is not necessarily a panacea. It can actually lead to increased conflict and may in fact lead to an increase in state control and marginalisation of local people (Castro and Nielsen, 2001: 230). There may be a need for caution in how and where it is adopted. If a co-management framework is put in place without adequate support from either the government or local people or the necessary skills and capacity then it will be a failure. Hence, it is best to adapt co-management in a region where the key ingredients for success are already present. These ingredients include strong communities with a demonstrated capacity to work together and an economic base that reduces the dependency on the central government. Altman (2003: 4) suggests that winning land and resource rights are an essential first step. But subsequently there is a need for either institutional redesign or strengthening or the establishment of new institutions so gains can be realised. Hence existing institutions like the Forestry Bureau may have to undergo reform or new institutions must be founded to enable co-management.

It is important for government agencies to gain a greater understanding of the indigenous peoples' traditional management practices. If agencies only focus on maintaining control over use of resources then they ignore the potential value of land management work that is done by indigenous peoples as part of their customs and

daily life. Altman (2002: 42), in discussing indigenous land management in Australia, suggests that the value of indigenous land management needs to be properly quantified. Expenditure on land management in national parks could be benchmarked against the unrecognised value of land management undertaken on adjacent Aboriginal land. This is an area that needs further research in Taiwan.

There is also a need to better understand the contribution of subsistence to the indigenous economy. Indigenous peoples use forest resources for multiple purposes. These include building materials, food and fibre. A better understanding of the patterns of resource use and their place in the local economy can be incorporated into management plans. This is an area that requires more qualitative research.

### **6.3 Indigenous peoples as custodians of the land**

Co-management can provide a model and framework for the formal recognition of indigenous peoples' special status as custodians of land and culture. The starting point for this is the recognition of the inherent capacity of indigenous peoples to manage their lands. This capacity draws from their traditions and knowledge and reflects their ongoing close relations with the land. They are committed to managing the land as they are embedded in it.

A shift to the biosphere model for managing forests and protected areas would recognise the place of indigenous peoples and incorporate them into the system of management. Such a system allows for the co-existence of conservation goals and traditional or sustainable use of resources by indigenous peoples. Putting such a system in place may require the creation of a new government agency in Taiwan that oversees or coordinates the roles of the Forestry Bureau, the National Parks Division and other agencies.

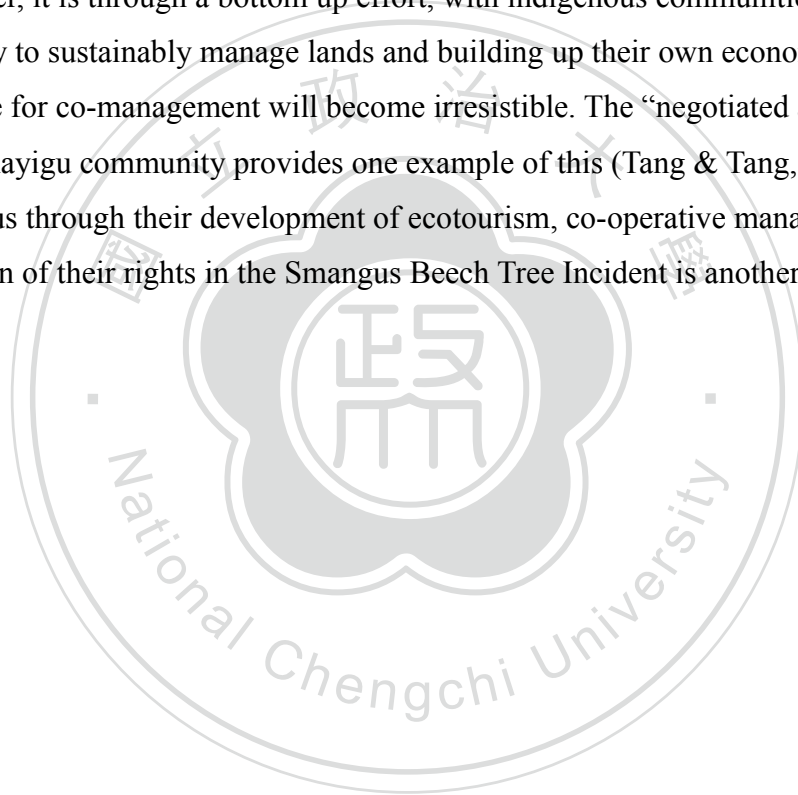
Official recognition or definition of traditional territory is important. However, it is not sufficient to merely recognise traditional territory by drawing a line on a map. Indeed this may lead to further conflict if it doesn't properly account for indigenous peoples' present circumstances. Traditional territory has its meaning in the ethnographic present and should be based on this. It is part of a living tradition and a preservation of indigenous peoples' heritage. Furthermore recognition of traditional

territory is only meaningful if indigenous peoples can actively participate in the management of the land and access its resources in a sustainable manner in accordance with their traditions.

While legislation and institutional reform are important for providing a framework for indigenous rights, the most important lesson from Smangus is that rights are realised through a grassroots effort. It is through an ongoing process of negotiation between the state and indigenous communities that indigenous peoples can ensure they can follow their traditional customs and act as custodians of the land without fear of legal sanction. Further legislation and institutional change is important to support this.

However, it is through a bottom up effort, with indigenous communities proving their capacity to sustainably manage lands and building up their own economic base, that the case for co-management will become irresistible. The “negotiated autonomy” of the Danayigu community provides one example of this (Tang & Tang, 2001).

Smangus through their development of ecotourism, co-operative management and assertion of their rights in the Smangus Beech Tree Incident is another important model.





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## **APPENDIX I**

### **The Forestry Act**

Promulgated on September 15, 1932.

Amendment to Articles 9, 18 promulgated on February 13, 1937.

Amendment to all Articles promulgated on February 6, 1945.

Amendment to Article 49 promulgated on May 27, 1972.

Amendment to all Articles promulgated on December 13, 1985.

Amendment to Articles 15, 17, 44, 45, 47, 51, 53~56 and addition of Articles 48-1, 56-1~56-4 promulgated on May 27, 1998.

Amendment to Articles 2, 12, 26, 29, 48 promulgated on November 15, 2000.

Amendment to Articles 6, 7, 15, 25, 34, 48, 56-2, 56-3 and addition of Articles 17-1, 38-1 promulgated on January 20, 2004.

### **Chapter I General Provisions**

#### **Article 1**

This Act is established to preserve forest resources, the natural functions of forests and their economic viability.

#### **Article 2**

The term ‘government agency’ as used in this Act means the Council of Agriculture, Executive Yuan of the central government; the relevant direct municipal government at the municipal level; the county (city) government at the county (city) level.

#### **Article 3**

The term ‘forest(s)’ means the land(s) and its collateral trees and bamboo, collectively. According to the delineation of ownership, forest(s) shall be distinguished as national forest(s), public forest(s), and private forest(s); forests principally belong to the nation.

#### **Article 4**

Whereas whoever owns bamboo or trees on the land of others, constituting a claim of land-surface rights, lease rights or for other applications, or revenues, shall be deemed forest owner where this Act applies.

## **Chapter II Forestry Administration**

### **Article 5**

The administrative management of the forestry industry shall be predicated on the primary goal of preserving the long-term integrity of national lands.

### **Article 6**

Whereof undeveloped mountains and lands suitable for forestry, the central government agency shall request that the central land administrative authority classify them as forestland, and promulgate accordingly.

Whereas land designated as forestland cannot be changed to other designations.

However, forestland can be redesignated if approval is obtained from the direct municipal and county (city) governments, and this is then reported to the central government and central land management agency. If the land belongs to aboriginal people, it is also necessary to obtain approval from the aboriginal peoples' central government.

Forestland designated as such by other acts cannot be redesignated, except as provided in the preceding paragraph.

### **Article 7**

Should a public or private forest have any of the following, the central government agency may appropriate it to national ownership, and shall compensate the owner accordingly:

1. It is needed for reasons of national security or operation of national forest;
2. It includes a river, lake or other water source that provides important resources to the public.

Any and all acts relevant to land appropriation may be applied when appropriating land to national ownership. The procedure for appropriating public forest may follow the relevant rules of public property management.

### **Article 8**

Should a national or public forest have any of the following, it may be leased, transferred or appropriated:

1. It is required for establishing a school, hospital, park or other public facilities;
2. It is required for national defense, transportation or water conservation

3. It is required for establishing public works;
4. It is required for establishing a duly approved national park, designated scenic area or forest recreation park.

Should the applications stipulated above be violated, or not used for the said purposes during the assigned period, the leased, sublet or appropriated forestland shall be seized.

#### **Article 9**

To carry out any of the following actions in a forest, an application shall be filed with the government agency who shall, together with the relevant local agency, examine the specified area for its suitability for the proposed action. After the application is approved, the action may be undertaken within the designated boundaries.

1. To build or repair a reservoir, roadway, power transmission system or to develop a source of electricity;
2. To mine or quarry;
3. To build or repair other engineering works.

These undertakings are limited to those not impairing geological stability, national security and forestry.

For number 1, above, if there are concerns the forest will be damaged, the government agency shall oversee that the party in question shall perform due water conservation measures or other necessary measures, and the party may not refuse.

#### **Article 10**

Should a forest have any of the following, the government agency shall bar logging:

1. The land is so steep or the soil so shallow that re-forestation is difficult;
2. After logging, the soil is likely to be eroded or affect public benefits;
3. The land is located in a water reservoir collection area, headwaters of a river, on an eroded riverbank, windward coastal area or sand dune area;
4. The forest is in other areas where logging prohibition is essential.

#### **Article 11**

The government agency may, according to where a forest is located, limit or prohibit the harvest or excavation of grass cover, tree roots and grass roots to a specific location and time period.



### **Chapter III Forestry Management and Utilization**

#### **Article 12**

Whereas national forests shall be classified and managed by the central government agency; public forests shall be managed by the owner authority or consigned to some other legal entity; private forests shall be managed by private individuals.

The central government agency may, according to the state of the forestry industry, regulate and implement the forest management plan.

#### **Article 13**

To reinforce the water retaining ability of the forest, forest management shall comply with the protection and management regulations for water collection areas; these regulations shall be mandated by the Executive Yuan.

#### **Article 14**

National forest management plans shall be regulated by the relevant administrative agency, and shall be submitted to the central government agency for approval.

#### **Article 15**

The annual plan for the yields of national forest products shall be based on the management plan for the relevant business area.

Harvesting of national forest yields shall be carried out according to the annual logging plan and national forest yields management code.

The category and handling of, and criteria pertaining to, national forest yields, and the harvest, transport, transfer, fee payment and other issues relevant to forest yields shall be regulated by the central government agency.

If the forest is located in the traditional territory of aboriginal people, the aboriginal people may take forest products for their traditional living needs. The harvesting area, variety, time, paid/unpaid, and other rules should be decided by the central government agency along with the central government of the aboriginal people.

After a natural disaster, the local government has one month to finish the cleanup and tally up all bamboo or trees carried outside the boundary of the National Forest by natural forces. After one month, local people may collect freely the remaining displaced wood and bamboo.

#### **Article 16**

Should a national park or scenic area be designated in a forest area, the responsible party shall meet with the government agency to conduct a field survey. The forest area within the demarcated boundaries shall be managed by the government agency according to this Act in conjunction with the relevant national park or scenic area development plan.

The regulations for the above shall be mandated by the Executive Yuan.

#### **Article 17**

Wherein a forest region, subject to approval of a relevant environment impact assessment, may be designated a forest recreation area; the establishment and regulation of this area shall be mandated by the central government agency.

A forest recreation area may collect fees for environmental improvement, and maintenance and cleaning; amusement facilities may collect a usage fee; such fees shall be regulated by the central government agency.

#### **Article 17-1**

To maintain forest ecology and preserve biodiversity, a Forest Reserve may be designated within a forest area. The number of people and the amount of traffic allowed into a Forest Reserve shall be regulated in accordance with the unique characteristics of the resources within the Reserve. The central government agency shall set the criteria for establishing and abolishing a Forest Reserve, its management plan, and relevant regulatory rules.

#### **Article 18**

Whereas public and private forests with a commercial forest area of more than five hundred (500) hectares shall have a licensed forestry technician.

Forest planters and loggers shall be assisted by forestry technicians or forestry technical staff.

#### **Article 19**

Should business collaboration among forestry practitioners become necessary, the said practitioners may organize a forestry cooperative association in accordance with the Cooperative Association Act; the association shall be counseled by the local government agency.

#### **Article 20**

Should a forest owner need to use another's land to transport forest equipment and products, or use, alter or remove implements in a water course, which must be done without endangering the water supply or peoples' lives, the owner shall negotiate with the landowner or other interest-holders. Where negotiation is discordant or impossible, the parties shall file with the government agency and the relevant local government agency for mediation; where mediation fails, the government agency shall resolve the issue.

#### **Article 21**

On the following forestlands the government agency may order the forest owner or stakeholder to undertake and complete reforestation and necessary water and soil conservation measures within an assigned period:

1. Eroded gorge, steep exposed land, collapsed land, landslide area, fragmented belt, severely eroded land and scattered sand dune;
2. Water source area, reservoir collection area, coastal area and riverbanks;
3. Old fire site, flood eroded land;
4. Logged site;
5. Other areas where conservation is essential.

### **Chapter IV Conservation Forestry**

#### **Article 22**

Whereas forests held by the state, or a public or private entity, which meet any of the following requirements shall be classified as conservation forests by the central government agency:

1. Essential for preventing damage from floods, wind, tides, salt, and smoke;
2. Essential for the conservation of a water source or protection of a reservoir;
3. Essential for preventing damage from sand, soil erosion and blowing sand, falling rock, ice, or avalanches;
4. Essential to national defense;
5. Essential to public health;
6. Essential for navigation;
7. Essential for the fishing industry;

8. Essential to the preservation of landmarks, historic relics, and scenery;
9. Essential to nature conservation.

**Article 23**

Whereas hills or other lands conforming to any of the criteria in Article 22, Sections 1-5, shall be classified as conservation forest by the central government agency, and the conservation thereof shall be augmented.

**Article 24**

The management of conservation forests shall be predicated, regardless of ownership, on serving the public interest. All conservation forests shall be reasonably managed, cultivated, renewed and logged according to their individual characteristics.

Conservation forest management standards shall be decreed by the central government agency in conjunction with the local government agency.

**Article 25**

Should the subsistence of a conservation forest become unnecessary, subject to approval from the central government agency, it may be partially or wholly declassified.

The review standard for declassifying conservation forest will be decided by the central government agency.

**Article 26**

The classification or declassification of a conservation forest may be effected by submitting an application to the direct municipality or county (city) government agency by a legal entity or organization located in the vicinity of the forest or other parties having direct interests. The application then must be presented to the central government agency for approval. If the forest falls under the jurisdiction of the central government agency, the application shall be sent directly to the central government agency.

**Article 27**

In accepting the aforesaid application for classifying or declassifying a conservation forest, the government agency shall notify the relevant forest owner, landowner and parties holding other land rights, and promulgate accordingly.

Starting from the day of the said promulgation until the day of promulgation stipulated

in Article 29, Section 2, forests classified as conservation forests may not be developed or logged, except with the approval of the government agency.

#### **Article 28**

Should any party with direct interests object to the specific classification or declassification of a forest, the party may present a statement of opinion to the local government agency within thirty (30) days of the day of promulgation stipulated in the first paragraph of the preceding article.

#### **Article 29**

The relevant direct municipality or county (city) government agency shall present all documents related to the classification or declassification of a conservation forest to the central government agency for approval. Where there are objections filed according to the preceding article, the statement of opinion shall be enclosed. The classification or declassification of a conservation forest, after approval by the central government agency, shall be promulgated by the relevant direct municipal or county (city) government agency, and the forest owner shall be duly notified.

The classification or declassification of a conservation forest, upon approval by the central government agency, shall be promulgated by the central, direct municipal or county (city) government agency, and the forest owner shall be duly notified.

#### **Article 30**

No logging, damage to wood or bamboo, development or livestock grazing, harvesting or excavating of earth, rocks, grass cover or tree roots may be carried out in a conservation forest, except with the approval or consent of the government agency.

In addition to the limitation clause herein, the government agency may limit or prohibit the use of revenues therefrom by the conservation forest owner, or dictate the method of operation and protection.

The government agency may order reforestation or other essential restoration procedures if these limitations are violated.

#### **Article 31**

Whereof conservation forests are protected against logging, the landowner or crop owner may file for compensation limited to the extent of direct damage.

For the owner of a conservation forest who undertakes reforestation, as stipulated in

paragraph three of the preceding article, and thus incurs reforestation expenditures, the said expenditure shall be deemed damages, as defined above.

For the damages specified herein, the landowner shall be compensated by the central government, which may order the legal entity, organization or private individual that benefits from the conservation forest classification to bear part or all of the compensation.

## **Chapter V Forest Protection**

### **Article 32**

To protect the forest, forest police may be instituted; where forest police are not instituted, the local police shall assume the duties of forest police.

The administrations and district heads of villages (towns, cities) are responsible for assisting in forest protection.

### **Article 33**

The forest periphery may be designated a forest protection area. The area shall be delineated by the government agency, presented to the central government agency for approval, and promulgated by the local government agency.

### **Article 34**

Prescribed burns shall not be started in forest areas and forest protection areas. Parties that have a burning permit from a relevant fire prevention institution, and which report to the relevant government agency, are not bound by this limitation. The permitted party must notify the owner or manager of adjacent forests prior to conducting a sanctioned burn.

In carrying out a sanctioned burn, the permitted party must have fire-extinguishing equipment on hand.

### **Article 35**

The government agency shall institute a forest fire squad based on forest conditions and organize a volunteer forest fire squad as needed.

### **Article 36**

Where a railway passes through a forest area or forest protection area, fire and smoke



prevention equipment shall be implemented; the same is required of a factory situated near a forest protection area.

Where electrical wires pass through a forest area or forest protection area, equipment that prevents electrical shorts shall be implemented.

#### **Article 37**

Where there are biological hazards or disturbances in the forest, the forest owner shall be responsible for their elimination or prevention. Where hazards or disturbances are present, the forest owner, when necessary and subject to permission by the government agency, may enter another's land to eliminate or prevent hazards to forest biology. In the event of damages, the forest owner shall be liable for compensation.

#### **Article 38**

Should a forest be threatened or afflicted by biological organisms and their spread or protraction, the government agency may order the forest owner and other parties with interests in the forest to perform actions required for the elimination or prevention of said organisms.

The cost of said elimination or prevention will be based on the area and value of the land, and shall be borne by the forest owner. However, if a prior agreement has been made among those sharing such costs, the terms of the agreement shall preside.

#### **Article 38-1**

The central government agency shall determine the methods used to protect and manage forests, prevent disasters and carry out rescues; the equipment used in forest protection; all aspects of forest propagation; and the rewards for forest fire prevention. For National Forest located within the traditional territory of aboriginal peoples, the central government agency shall make it a priority to advise aboriginal peoples community development associations, legal entities or individuals with reforestation and forest protection.

### **Chapter VI Supervision and Incentives**

#### **Article 39**

To register with the government agency, a forest owner shall provide the geographic

name, area, tree and bamboo species and volume, a map of where the forest is located and the forest plan.

The rules governing forest registration shall be decreed by the central government agency.

#### **Article 40**

Should there be an incident of forest neglect, over-development for agriculture or over-logging, the local government agency may assign specific management practices to the owner.

Should there be a breach of the said practices or wanton logging, the government agency may order the termination of logging and order reforestation.

#### **Article 41**

Should reforestation be ordered, as stipulated above, but not undertaken accordingly, the government agency may execute the order, but the cost of reforestation shall be borne by the obligated party.

#### **Article 42**

Whereas publicly and privately held undeveloped mountains and lands shall be classified as forestry lands, the government agency may order the owner to reforest within an assigned time period.

If reforestation is not completed within the specified time period, the government agency may execute the order, but the cost of reforestation shall be borne by the obligated party.

#### **Article 43**

In forest areas, unauthorized disposal of wastes or pollutants is prohibited.

#### **Article 44**

A harvester of state or public forests shall keep an account book documenting the yield of each species, the volume, origins and distribution channels.

The said harvester shall choose a mark or seal to identify his forest products. The mark or seal shall be filed with the local government agency, and it shall be used before the forest products are moved out of the forest.

The harvester, as defined in paragraph one herein, may not use a mark or seal that is similar or identical the previously filed mark or seal of other harvesters.

#### **Article 45**

All forest products are subject to permitting and inspection by the government agency prior to transport for distribution. The terms of logging and harvesting permits, application procedures, and due compliance requirements and inspection regulations shall be decreed by the central government agency.

The government agency shall set up checkpoints to inspect the harvest at crucial locations along the roadways used to transport forest products.

The said government agency or public official invested with the authority of criminal investigation may, at their discretion, inspect the harvester's permit, account book, equipment and materials.

#### **Article 46**

By act, taxation of forestry land and forest products is discounted or they are exempted.

#### **Article 47**

A forestry business that meets one of the following criteria may receive an award.

1. Special achievement in reforestation or forestry management;
2. A special forestry business whose forest products have significance to national defense or the nation's economic development;
3. Large scale cultivation of forests as a commodity to supply industry, national defense, ship building, road engineering or other important applications;
4. Nurseries that propagate seedlings in large numbers for local reforestation;
5. Those who invent or improve tree species, or bamboo and wood applications and crafts;
6. Significant contributions to extinguishing forest fires, or mitigating the damage by pests or pathogen and disasters caused by man;
7. Significant contributions to the research improvement of forestry science;
8. Significant contributions to the security of the nation's territory, conservation of water sources.

The award may be a cash prize, plaque, trophy or commendation certificate. The qualifications, procedures and complete incentive measures for such issuance shall be decreed by the central government agency.

#### **Article 48**

To encourage reforestation by private individuals, aboriginal people and/or organizations, the government agency may, depending upon actual needs, provide free seedlings, rewards, long-term low interest loans, or other assistance and rewards. The methods will be decided by the central government agency and the aboriginal peoples' central government agency.

#### **Article 48-1**

To encourage long-term reforestation by private individuals and/or organizations, the Government shall establish a reforestation fund. The sources of funding shall be as follows:

1. Allocations from water-rights fees;
2. A reciprocation fund provided by those who undertake development of hillsides;
3. Penalty fines for violation of this Act;
4. Allocations from the engineering budget for water resource development projects;
5. Allocations from government budgeting procedures;
6. Donations;
7. Other sources of income.

The water-right fee in Section 1 and the proportion of the allocation from the engineering budget for water resource development projects in Section 4 herein shall be regulated by the central water conservation government agency in conjunction with the central government agency. At the time a permit is issued for hill development, the reciprocation fund fee in Section 2 shall be served. The obligated party, calculation format, payment schedule, time period, procedures, and regulations, shall be decreed by the central government agency, and submitted to the Executive Yuan for approval.

#### **Article 49**

Undeveloped mountains and lands owned by the state shall be classified for forestry. Lands not reserved for state forestry operation may be designated and classified by the central government agency for reforestation leased to nationals of the Republic of China.

## **Chapter VII Penalty Provisions**

### **Article 50**

Those who steal primary forest products or forest by-products, or accept, transport, hoard or buy these stolen properties, and those who abet these actions, shall be held liable.

### **Article 51**

For unauthorized development or occupation of forest or forestland, the offender shall be liable to from six months to five years of imprisonment. This may be commuted to a penalty fine of up to six hundred thousand New Taiwan Dollars (NT\$600,000).

When the offenses listed above lead to disaster, the punitive term shall be increased by one half. Those who commit offenses that result in death shall be liable to imprisonment for at least five years but not more than twelve years, commutable to a penalty fine of up to one million New Taiwan Dollars (NT\$1,000,000). Perpetrators of offenses that result in serious injuries shall be liable to at least three years but not more than ten years of imprisonment, commutable to a penalty fine of up to eight hundred thousand New Taiwan Dollars (NT\$800,000).

For offenses of paragraph one involving a conservation forest, the penalty may be increased by one half.

Should the offenses in paragraph one result from negligence, and lead to disaster, the responsible party shall be liable to no more than one year of imprisonment, commutable to a penalty fine of no more than six hundred thousand New Taiwan Dollars (NT\$600,000).

Those who attempt to commit offenses stipulated in paragraph one shall be liable to penalty by act.

For offenses stipulated herein, the cultivated plants, tools and supplies, construction materials and the machinery used shall be seized.

### **Article 52**

The penalty for burglary of primary forest products or forest by-products shall be at least six months but no more than five years of imprisonment, and from two- to five-fold the value of the stolen property. Burglary offenses include:

1. Offenses committed in a conservation forest.

2. Offenses committed by an individual obligated to protect the forest according to a consignment to an organization or other contract agreement.
3. Offenses committed while exercising the right to harvest forest products.
4. Offenses by more than two conspirators or the employment of other individuals therefor.
5. Using stolen goods as raw materials for producing charcoal, turpentine or other products, or for cultivating mushrooms.
6. Those who use equipment, livestock, vessels, vehicles or other equipment for transporting stolen forest products.
7. Those who excavate, destroy, incinerate or hide roots to cover up traces of crime.
8. Those who use stolen forest yields as fuel for mining, refining lime, or for manufacturing bricks, tiles and/or other articles.

Those who attempt any of the above shall be subject to penalty.

Goods produced under Sections 1 through 5 shall be deemed stolen properties, and seized accordingly.

### **Article 53**

Anyone who sets fire to another's forest shall be liable to from three years to ten years of imprisonment.

Anyone who sets fire to his or her own forest shall be liable to no more than two years of imprisonment or labor in confinement. This sentence may be commuted to a penalty fine of no more than three hundred thousand New Taiwan Dollars (NT\$300,000). Should the fire destroy another's forest, the perpetrator shall be liable to from one year to five years of imprisonment.

Anyone whose accidental fire destroys another's forest shall be liable to no more than two years of imprisonment or labor in confinement. This sentence may be commuted to a penalty fine of no more than three hundred thousand New Taiwan Dollars (NT\$300,000).

Anyone whose accidental fire destroys his or her own forest and, as a consequence, destroys another's forest, shall be liable to no more than one year of imprisonment or labor in confinement. This sentence may be commuted to a penalty fine of no more than one hundred and eighty thousand New Taiwan Dollars (NT\$180,000).

Anyone who attempts any of the above shall be subject to penalty.



#### **Article 54**

In case of destruction, or damage to a conservation forest sufficient to entail injury to the public or others, the offender shall be liable to no more than three years of imprisonment or labor in confinement. This sentence may be commuted to a penalty fine of no more than three hundred thousand New Taiwan Dollars (NT\$300,000).

#### **Article 55**

Anyone who undertakes unauthorized land development or occupation of another's forest or forestland shall be held liable to compensate damages sustained by the injured party.

#### **Article 56**

Anyone who violates Articles 9, 34, 36 or paragraph one of Article 45 shall be liable to a penalty fine of at least one hundred and twenty thousand New Taiwan Dollars (NT\$120,000) but no more than six hundred thousand New Taiwan Dollars (NT\$600,000).

#### **Article 56-1**

Anyone committing any of the following shall be liable to a penalty fine of from sixty thousand New Taiwan Dollars (NT\$60,000) to three hundred thousand New Taiwan Dollars (NT\$300,000).

1. Violation of Article 6, paragraph two; Article 18; Article 30, paragraph one; Articles 40 and 43;
2. Failure of the forest owner or party of interest to comply with the government agency's order to complete reforestation and necessary conservation measures within the assigned period according to Article 21;
3. Failure of the forest owner to take actions necessary for elimination or prevention as stipulated by Article 38;
4. Refusal of a forest product harvester to accept supervision during the harvest period by an adviser assigned by the administrative authority;
5. Moving, destroying or damaging signs placed in the forest by another party.

#### **Article 56-2**

The following conduct in a forest recreation area or Forest Reserve, without permission from the government agency, is subject to a penalty fine of at least fifty

thousand New Taiwan Dollars (NT\$50,000) and no more than two hundred thousand New Taiwan Dollars (NT\$200,000):

1. Putting up advertising, signs or other objects with this purpose;
2. Collecting specimens;
3. Incinerating grass or trees;
4. Filling up, diverting or expanding a waterway or water surface;
5. Operating transportation for passengers goods.
6. Driving vehicles that adversely affect the forest environment.

**Article 56-3**

For any of the following, the offender shall be liable to a penalty fine from one thousand New Taiwan Dollars (NT\$1,000) to sixty thousand New Taiwan Dollars (NT\$60,000):

1. Failure to register as stipulated in paragraph one, Article 39, and continued failure to do so after notification;
2. Having committed any of the following in a forest recreation area or Forest Reserve:
  - (1) Pick flowers or snap tree branches, or engrave text or graphics on trees, rocks, signs, display plaques or other objects fixed on the land;
  - (2) Unauthorized peddling;
  - (3) Spit, or dispose of fruit, paper or other wastes indiscreetly;
  - (4) Pollute the ground surface, walls, pillars and beams, water body or air, or produce loud or disturbing sounds.
3. Harass or destroy wildlife, nests or dens in a Forest Reserve.
4. Entering a Forest Reserve without permission.

Owing to their traditional living needs and activities, aboriginal people are not bound by the above regulations.

**Article 56-4**

The penalty fines regulated by this Act shall be exercised by the government agency. Any and all fines imposed according to this Act that are not paid within the assigned period shall be moved to court for forcible execution.

## **Chapter VIII Supplementary Provisions**

### **Article 57**

The enforcement rules of this Act shall be decreed by the central government agency.

### **Article 58**

This Act shall take effect on the day it is promulgated.

Retrieved 5 March 2010 from <[http://law.moj.gov.tw/Eng/news/news\\_detail.aspx?id=1069](http://law.moj.gov.tw/Eng/news/news_detail.aspx?id=1069)>.



## **APPENDIX II**

### **Indigenous Peoples' Basic Law**

#### **Article 1**

This Law is enacted for the purposes of protecting the fundamental rights of indigenous peoples, promoting their subsistence and development and building inter-ethnic relations based on co-existence and prosperity.

#### **Article 2**

Definitions:

1. Indigenous peoples: refer to the traditional peoples who have inhabited in Taiwan and are subject to the state's jurisdiction, including Amis tribe, Atayal tribe, Paiwan tribe, Bunun tribe, Puyuma tribe, Rukai tribe, Tsou tribe, Saisiyat tribe, Yami tribe, Tsao tribe, Kavalan tribe, Taroko tribe and any other tribes who regard themselves as indigenous peoples and obtain the approval of the central indigenous authority upon application.
2. Indigenous person: refers to any individual who is a member of any of indigenous peoples.
3. Indigenous peoples' regions: refer to areas approved by the Executive Yuan upon application made by the central indigenous authority where indigenous peoples have traditionally inhabited, featuring indigenous history and cultural characteristics.
4. Tribe: refers to a group of indigenous persons who form a community by living together in specific areas of the indigenous peoples' regions and following the traditional norms with the approval of the central indigenous authority.
5. Indigenous land: refers to the traditional territories and reservation land of indigenous peoples.

#### **Article 3**

For the purpose of reviewing and coordinating matters related to this Law, the Executive Yuan shall establish a promotion committee which shall be called by the Premier.

Two thirds of the afore-mentioned promotion committee members shall comprise members of indigenous tribes in accordance with their respective proportions. The

organization bylaws of the committee shall be made by the Executive Yuan.

#### **Article 4**

The government shall guarantee the equal status and development of self-governance of indigenous peoples and implement indigenous peoples' autonomy in accordance with the will of indigenous peoples. The relevant issues shall be stipulated by laws.

#### **Article 5**

The state shall provide sufficient resources and allocate abundant annual budget to assist indigenous peoples in developing autonomy.

Unless otherwise provided under this Law or other laws related to autonomy, the power of autonomy and finance in regions of autonomy shall be subject to the Local Institution Law, the Act Governing the Allocation of Government Revenues and Expenditures and other statutes governing county (city).

#### **Article 6**

In the event that any dispute concerning the power of autonomy arises between the government and indigenous peoples, the Office of the President shall call a consultation meeting to resolve such dispute.

#### **Article 7**

The government shall protect indigenous peoples' rights to education by upholding the principles of versatility, equality, and reverence in accordance with the will of indigenous peoples. The relevant issues shall be stipulated by laws.

#### **Article 8**

Governments of municipal cities and counties where indigenous peoples' regions are located shall establish specialized units in charge of indigenous affairs. Other county (city) governments may establish specialized units or have specialized personnel in charge of indigenous affairs.

#### **Article 9**

The government shall establish special unit responsible for indigenous language researches and indigenous language proficiency evaluation system in order to actively engage in the promotion of indigenous language development.

The government shall provide preferential measures for indigenous peoples or hold

special civil service examinations designed for indigenous peoples whereunder the relevant laws and regulations may require beneficiaries or candidates to pass the afore-mentioned evaluation or have proficiency in indigenous language.

The development of indigenous language shall be stipulated by law.

**Article 10**

The government shall keep and maintain indigenous cultures, give guidance to the cultural industry and incubate professional talent.

**Article 11**

The government shall restore the traditional names of indigenous tribes, rivers and mountains in indigenous peoples' regions in accordance with the will of indigenous peoples.

**Article 12**

The government shall protect indigenous peoples' rights and access to broadcast and media, establish indigenous peoples' cultural affairs foundation and formulate plans to establish indigenous-language broadcast media and institutions exclusively for indigenous peoples.

Issues related to the establishment of the afore-mentioned foundation shall be stipulated by laws.

**Article 13**

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.

**Article 14**

The government shall formulate economic policies for indigenous peoples and give guidance on conservation and utilization of natural resources for the purpose of developing indigenous economy in accordance with the will of indigenous peoples and characteristics of environmental resources.

**Article 15**

The government shall generously allocate budget for indigenous peoples and supervise utilities providers to actively improve transportation, post,

telecommunication, irrigation works, tourism and other public construction in indigenous peoples' region.

For the purpose of implementing the affairs as set out in the preceding paragraph, the government may establish construction funds of indigenous peoples' regions. The fund's utilization procedure shall be stipulated by laws.

#### **Article 16**

The government shall formulate indigenous housing policies, give guidance to indigenous persons to construct, purchase or lease dwellings, and actively promote the tribal renewal project.

#### **Article 17**

The government shall protect indigenous peoples' employment rights, provide vocational trainings which are suitable for the conditions and characteristics of indigenous society, give guidance to indigenous persons to obtain professional qualifications and technician certificates, build complete indigenous employment service network to protect their employment opportunities and fair remuneration and promotion.

The protection of indigenous peoples' employment rights shall be provided for bylaws.

#### **Article 18**

The government shall establish indigenous peoples' development fund for developing indigenous peoples' economy and assisting indigenous businesses. The sources of the fund shall include budget allocated by the central government in accordance with the budget procedure, compensations made to indigenous peoples' land, reparation, revenues, funds distributed in accordance with other relevant laws and regulations as well as other revenues.

#### **Article 19**

Indigenous persons may undertake the following non-profit seeking activities in indigenous peoples' regions:

1. Hunting wild animals.
2. Collecting wild plants and fungus.
3. Collecting minerals, rocks and soils.



#### 4. Utilizing water resources.

The above activities can only be conducted for traditional culture, ritual or self-consumption.

#### **Article 20**

The government recognizes indigenous peoples' rights to land and natural resources. The government shall establish an indigenous peoples' land investigation and management committee to investigate and manage indigenous peoples' land. The organization and other related matters of the committee shall be stipulated by law. The restoration, acquisition, disposal, plan, management and utilization of the land and sea area owned or occupied by indigenous peoples or indigenous persons shall be regulated by laws.

#### **Article 21**

The government or private party shall consult indigenous peoples and obtain their consent or participation, and share with indigenous peoples benefits generated from land development, resource utilization, ecology conservation and academic researches in indigenous people's regions.

In the event that the government, laws or regulations impose restrictions on indigenous peoples' utilization of their land and natural resources, the government shall first consult with indigenous peoples or indigenous persons and obtain their consent.

A fixed proportion of revenues generated in accordance with the preceding two paragraphs shall be allocated to the indigenous peoples' development fund to serve as returns or compensations.

#### **Article 22**

The government shall obtain consent from the locally affected indigenous peoples and formulate a common management mechanism before establishing national parks, national scenery, forest district, ecological protection zone, recreation zone and other resource management institutions. The regulations shall be made by the central relevant authority jointly with the central indigenous affairs authority.

#### **Article 23**

The government shall respect indigenous peoples' rights to choose their life style,

customs, clothing, modes of social and economic institutions, methods of resource utilization and types of land ownership and management.

#### **Article 24**

The government shall formulate public health and medical policies for indigenous peoples in accordance with the characteristics of indigenous peoples, incorporate indigenous peoples' regions into the national medical network, implement indigenous peoples' health care, establish comprehensive and long-term health care, emergency care and evacuation system, and protect indigenous peoples' health and physical safety.

The government shall respect the traditional medicine and health methods of indigenous peoples and undertake researches and promotions.

#### **Article 25**

The government shall establish a natural disaster prevention and relief system in indigenous peoples' regions and natural disaster prevention priority zones to protect physical and property safety of indigenous peoples.

#### **Article 26**

The government shall actively implement social welfare for indigenous peoples, undertake planning to establish indigenous peoples' social security system and give special protection to the rights of indigenous children as well as women and mentally or physically disabled indigenous persons.

The government may provide subsidies for those indigenous persons who lack resources to participate in the social insurance scheme or use medical and welfare resources.

#### **Article 27**

The government shall actively promote savings and cooperative businesses by indigenous peoples, give guidance to the management thereof, and grant them with preferential tax measures.

#### **Article 28**

The government shall provide protection and assistance for indigenous persons living outside indigenous peoples' regions in respect of their health, accommodation, finance, education, caring, employment, medical care and adaptation to the society.

**Article 29**

In order to protect the dignity and fundamental human rights of indigenous peoples, the government shall provide for a separate chapter devoted to indigenous peoples' human rights in the national human rights legislations.

**Article 30**

The government shall respect tribal languages, traditional customs, cultures and values of indigenous peoples in dealing with indigenous affairs, making laws or implementing judicial and administration remedial procedures, notarization, mediation, arbitration or any other similar procedure for the purpose of protecting the lawful rights of indigenous peoples. In the event that an indigenous person does not understand the Chinese language, an interpreter who speaks the tribal language shall be provided.

For the purpose of protecting indigenous peoples' rights and access to the judiciary, indigenous peoples' court or tribunal may be established.

**Article 31**

The government may not store toxic materials in indigenous peoples' regions in contrary to the will of indigenous peoples.

**Article 32**

The government may not forcefully evict indigenous persons from their land, except in the case of imminent and obvious danger.

Indigenous persons shall be properly accommodated and compensated for losses suffered as a result of forced eviction as set out in the preceding paragraph.

**Article 33**

The government shall actively promote exchanges and cooperation between indigenous peoples and international indigenous peoples and ethnic minorities in economical, social, political, cultural, religious, academic and ecological issues.

**Article 34**

The relevant authority shall amend, make or repeal relevant regulations in accordance with the principles of this law within three years from its effectiveness.

**Article 35**

This law takes effect upon promulgation.

Retrieved 23 February 2010 from <<http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=D0130003>>.



## APPENDIX III

### **United Nations Declaration on the Rights of Indigenous Peoples Adopted by General Assembly Resolution 61/295 on 13 September 2007**

*The General Assembly,*

*Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

*Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

*Affirming also* that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

*Affirming further* 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,

*Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

*Concerned* 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,

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to

their lands, territories and resources,

*Recognizing* also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

*Recognizing* in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering also* that treaties, agreements and other constructive arrangements, and

the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights (2) and the International Covenant on Civil and Political Rights,<sup>2</sup> as well as the Vienna Declaration and Programme of Action,<sup>(3)</sup> affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

*Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

*Believing* that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

*Recognizing* and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,



*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

**Article 1**

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights(4) and international human rights law.

**Article 2**

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

**Article 3**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

**Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

**Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

## **Article 6**

Every indigenous individual has the right to a nationality.

## **Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

## **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
  - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
  - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
  - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
  - (d) Any form of forced assimilation or integration;
  - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

## **Article 9**

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

## **Article 10**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

### **Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

### **Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

### **Article 13**

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

### **Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate

to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

#### **Article 15**

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

#### **Article 16**

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

#### **Article 17**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance

of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

#### **Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

#### **Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

#### **Article 20**

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

#### **Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

#### **Article 22**

1. Particular attention shall be paid to the rights and special needs of indigenous

elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

### **Article 23**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

### **Article 24**

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

### **Article 25**

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

### **Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and

resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

#### **Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

#### **Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

#### **Article 29**

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

#### **Article 30**

1. Military activities shall not take place in the lands or territories of indigenous



peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

### **Article 31**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

### **Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

### **Article 33**

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of

indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

#### **Article 34**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

#### **Article 35**

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

#### **Article 36**

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

#### **Article 37**

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

#### **Article 38**

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

**Article 39**

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

**Article 40**

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

**Article 41**

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

**Article 42**

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

**Article 43**

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

**Article 44**

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

**Article 45**

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

## Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

(2) See resolution 2200 A (XXI), annex.

(3) A/CONF.157/24 (Part I), chap. III.

(4) Resolution 217 A (III).

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<<http://www.un.org/esa/socdev/unpfii/en/drip.html>>.

## APPENDIX IV

### Time line of events

Date	Summary of events
31 August/1 September 2005	Typhoon Talim hits Taiwan. Beech tree falls across road to Smangus.
2 September 2005	People of Smangus repair the road and move the fallen beech tree to roadside.
12 October 2005	People of Smangus discover the wood has been removed from the tree.
14 October 2005	Smangus holds a meeting and asks three men to take the remains of the tree for use in the village. The three men were caught by police and charged with theft of forestry products.
August 2006	Summary court hearing – Defendants refused offer of guilty plea and \$10,000 fine.
April 2007	Hsinchu District Court – Defendants found guilty. 6 months of imprisonment suspended for two years and fine of \$160,000.
24 April 2007	Smangus present petition to and hold discussion with Forestry Bureau in Taipei.
7 May 2007	Smangus held the ceremony of P'surux Btunux (set up a stone marker to make covenant) to declare the autonomy of the traditional territory.
20-21 May 2007	Conference of Pinhaban held at Smangus. Elders of the Mrqwang group and other indigenous groups formed an alliance to protect their traditional territories.
30 May 2007	Protest at Forestry Bureau in Taipei. Dialogue with Forestry Bureau failed to achieve any outcome.
September 2007	High Court – fine and sentences were reduced to NT\$59,000 and three months respectively.
December 2009	Supreme Court – verdict sends case back to High Court for another hearing
9 February 2010	High Court – new verdict finds the three men from Smangus not guilty