

THE INCOMPLETE MAKEOVER: SECURING INDIGENOUS PEOPLES' RIGHTS TO LAND AND SELF-
GOVERNMENT IN TAIWAN

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Introduction

This paper summarizes a part of my Ph.D. research to indigenous rights in the postcolonial and post-authoritarian States in Taiwan and Paraguay. In this paper, I introduce the conceptual framework of my research, which consists of the concepts of “double oppression” and “double transition”; concepts that I have developed in my research and that have not yet been applied. I use this approach to analyze the Taiwanese legal framework on indigenous peoples’ rights (“indigenous rights”), specifically the rights to land and self-government. Since my research is a work in progress, the findings presented here are not yet fully developed. It provides however a first view on indigenous rights in Taiwan within the context of the transition from colonial rule and authoritarian rule.

Section I

Conceptual framework: “Double Oppression” and “Double Transition”

1.1 Double Oppression: Internal Colonialism and Authoritarianism

Indigenous peoples¹ in States that have a legacy of colonialism and authoritarianism face the consequences of “double oppression”, the combined impact of “internal colonialism” and authoritarianism.

“Internal colonialism” describes the condition of indigenous peoples in many States.² It means that the State is constructed upon indigenous peoples’ former territories, and possesses exclusive jurisdiction over them and these territories.³ When colonies became politically independent from their colonizers, indigenous peoples were included in the framework of the State as dependent nations⁴, and remained “trapped” within this “postcolonial” State. They have not been included in the process of settling the

¹ There is no generally accepted definition of the term “indigenous peoples” in international and regional law. Jeff J. Corntassel, *Who is indigenous? ‘Peoplehood’ and ethnonationalist approaches to rearticulating indigenous identity*, 9 NATIONALISM AND ETHNIC POLICIES 75, 76 (2003). There are however some authoritative definitions, such as that of former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Martínez Cobo. José R. Martínez Cobo, *Study of the problem of discrimination against indigenous populations: final report*, Comm’n on Hum. Rts., ¶379, E/CN.4/Sub.2/1983/21/Add.8 (Sept. 30, 1983).

² Internal colonialism is a consequence of “external colonialism”, which is the “classic form” of colonialism that took off with Columbus’ arrival in the Americas in 1492. In this form of colonialism, the colonizing State and the colonized territories were geographically separated. It typically involved the establishment of settlements on a territory, which were set up for trade and/or for migration, or for strategic reasons. BILL ASHCROFT, GARETH GRIFFITHS & HELEN TIFFIN, *POSTCOLONIAL STUDIES. THE KEY CONCEPTS* 54, 139 (3rd ed., 2013); James Tully, *The Struggles of Indigenous Peoples for and of Freedom*, in *POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES* 36, 39 (Duncan Ivison, Paul Patton & Will Sanders eds., 2000); ROBERT J.C. YOUNG, *POSTCOLONIALISM: AN HISTORICAL INTRODUCTION* 16 (2001).

³ Sally Engle-Merry, *Review Essay: Law and Colonialism*, 25 L. & SOC. 889, 895 (1991); Tully, *supra* note 2, at 39.

⁴ Tully, *supra* note 2, at 37-38.

State, nor have their pre-colonial sovereign powers been restored. Their lands have not been returned, or are being occupied and invaded without their consent. Their cultures are being suppressed, and they remain subjected to the State's jurisdiction on the basis of the same ancient doctrines that justified the invasion, occupation, and expropriation of their lands during the first centuries of colonization.⁵ Brief, they still live under colonial circumstances.⁶

Authoritarianism, according to an influential description given by renowned political scientist Linz, has four characteristics. Firstly, under authoritarian regimes political institutions and groups, such as legislative bodies and political parties, are limited in their functioning. Similarly, authoritarian regimes restrict political opposition movements and activities. They furthermore legitimize their rule by identifying a specific perceived threat or social problem, such as communism or underdevelopment. Finally, the executive branch of government enjoys relative freedom to exercise its powers and cannot be removed by the free choice of the population.⁷

Combined, the systems of internal colonialism and authoritarianism result in a “double oppression” of indigenous peoples. Indigenous peoples are simultaneously impacted by these closely connected systems, because they are dominated by both the legacy of colonialism and the coercion of the authoritarian regime. As indigenous peoples they remain in a subdued position because of a persisting colonial order; as citizens of an authoritarian regime they are politically oppressed. Because of the lack of democratic institutions and the oppression of political movements, under authoritarian regimes indigenous peoples cannot make claims to undo the adverse impacts of internal colonialism. In this way, colonialism and authoritarianism mutually reinforce each other and repress indigenous peoples.

1.2 Double Transition

Transition can be described as the change from one type of political regime and culture to another, towards decolonization, democracy, or peace.⁸ To address the double oppression of indigenous peoples, ideally a process of “double transition” takes place. This double transition consists of two specific forms of transition: internal decolonization and democratization (or democratic transition).

“Internal decolonization” is a process that aims to transform the relationship of internal colonialism between the State and indigenous peoples. This process includes the acknowledgement that indigenous peoples are free, equal, and self-governing peoples, who can exercise jurisdiction over lands and resources jointly with the State with mutual consent.⁹ Internal decolonization is furthermore linked to a set of specific human rights¹⁰, indigenous rights, which will be discussed further below. The crucial issue in internal decolonization is to shape the conditions for indigenous peoples to re-take control over their collective and individual existence and development, in conformity with their own views and beliefs.

The dismantling of authoritarian regimes takes place through a process that is called “democratization” (or “democratic transition”). This process consists of the change of an authoritarian, nondemocratic

⁵ Jodi A. Byrd and Michael Rothberg, *Between Subalternity and Indigeneity: Critical Categories for Postcolonial Studies*, 13 INTERVENTIONS 1, 4 (2011); Roger C.A. Maaka & Christ Andersen, *Introduction*, in THE INDIGENOUS EXPERIENCES: GLOBAL PERSPECTIVES 10, 10 (Roger C.A. Maaka & Chris Andersen eds., 2006); Ella Shohat, *Notes on the “Post-Colonial”*, 31/32 SOC. TEXT 99, 105-106 (1992).

⁶ ELIZABETH COOK-LYNN, A SEPARATE COUNTRY: POSTCOLONIALITY AND AMERICAN INDIAN NATIONS 29 (2012).

⁷ *Quoted in* GRETCHEN CASPER, FRAGILE DEMOCRACIES: THE LEGACIES OF AUTHORITARIAN RULE 40-50 (1995).

⁸ Paul Gready, *Introduction*, in POLITICAL TRANSITION: POLITICS AND CULTURES 1, 2 (Paul Gready ed., 2003); GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 6 (1986).

⁹ Iris Marion Young, *Hybrid Democracy: Iroquois Federalism and the Postcolonial Project*, in Ivison, Patton & Sanders, *supra* note 2, at 237, 238.

¹⁰ Tully, *supra* note 2, at 56.

political system to a (more) democratic political system.¹¹ It typically marks a shift in the power balance between the elites and the masses in a State, with the latter gaining (more) access and control over the State's institutions.¹²

Similarly to how the concept of double oppression brings together (internal) colonialism and authoritarianism, double transition connects the processes aimed at undoing the consequences of internal colonialism and authoritarianism: ideally the distinctive processes of internal decolonization and democratization are initiated at the same time. Their joint purpose is to empower indigenous peoples, both collectively and individually, to decide independently upon their lives. By removing the legacy of colonial domination of the State over indigenous peoples, and at the same time granting them meaningful possibilities to voice their concerns, the impacts of colonialism and authoritarianism can be addressed.

If only one of the two processes is taken seriously, the impacts of the persisting oppression hamper progress towards the fulfilment of the objectives of the process set into motion. To put it simply: internal decolonization cannot be effective if at the same time democratization is not being considered. Likewise, any process of democratization will not be meaningful to indigenous peoples if it is not accompanied by internal decolonization measures. For instance, democratization increases the opportunities for indigenous peoples to become involved in politics and make decolonization demands.¹³ Yet if such demands are not picked up by the State and are not taken seriously, indigenous peoples' democratic involvement remains an empty shell. It is also difficult to imagine that authoritarian regimes would grant indigenous peoples the considerable freedoms associated with decolonization, since such freedoms would weaken the regime's grip over the territory and a part of the population and thus challenge the dominance of the regime.

1.3 The Role of Law in Double Oppression

Law plays an important role in both processes of double oppression. Firstly, law was an important tool in colonialism. The conquest of populations and territories was legitimized through the doctrine of "discovery", which implied that the colonizers automatically obtained property rights over the native lands that they entered. Not only lands were thus automatically acquired, but the indigenous populations also automatically came under the rule of the colonizers. As a consequence, indigenous peoples lost their sovereignty and independence.¹⁴ Law furthermore helped establishing and maintaining the colonial system and modelling colonial societies to the interests of the colonizer. Aggressive assimilation laws and policies were enacted to "civilize" and control the colonized population.¹⁵ Besides, in many colonies rule of law (briefly, the obedience and subjection of officials to legal norms¹⁶) did not develop.¹⁷

¹¹ GEORG SØRENSEN, *DEMOCRACY AND DEMOCRATIZATION: PROCESSES AND PROSPECTS IN A CHANGING WORLD* 15 (3rd ed., 2008); Patrick Bernhagen, *Measuring Democracy and Democratization*, in *DEMOCRATIZATION* 24, 25 (Christian W. Haerpfer, Patrick Bernhagen, Ronald F. Inglehart & Christian Welzel eds., 2009).

¹² Christian Welzel, *Theories of Democratization*, in Haerpfer et al., *supra* note 11, at 74-75.

¹³ See Roger Maaka & Augie Fleras, *Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa*, in Ivison, Patton & Sanders, *supra* note 2, at 91.

¹⁴ Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 *LEWIS & CLARK L. REV.* 847, 848-849, 851-852 (2011).

¹⁵ Upendra Baxi, *Postcolonial Legality*, in *A COMPANION TO POSTCOLONIAL STUDIES* 540-541 (Henry Schwarz & Sangeeta Ray eds., 2000); John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 *L. & SOC. INQUIRY* 305, 305 (2001); PIYEL HALDAR, *LAW, ORIENTALISM AND POSTCOLONIALISM. THE JURISDICTION OF THE LOTUS EATERS* 2-3 (2007); MAROUF A. HASIAN, JR., *COLONIAL LEGACIES IN POSTCOLONIAL CONTEXTS: A CRITICAL RHETORICAL EXAMINATION OF LEGAL HISTORIES* 4-5 (2002).

¹⁶ There are many definitions of what the concept of "rule of law" entails, but for now, I consider that this brief definition sufficiently covers the concept. REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES* 1, 2 (2004).

¹⁷ *Id.* at 2.

Under authoritarian regimes, law has importance as well. Such regimes use law and courts to support their rule. These are fully subordinated to the authoritarian regime, and are employed to establish, maintain, and expand its grip on the State system and the population.¹⁸ In authoritarian regimes there furthermore is no rule of law, but rather a “rule by law”. This implies that law uniquely serves the government, and does not limit its activities; law is used in an arbitrary and repressive manner, not in conformity with such values as democracy and human rights.¹⁹

In sum, law is important to maintain a system of double oppression since it can be used by the State to justify, facilitate, and legitimize the exclusion of indigenous peoples from decision-making, and power over their development, land, and culture.

1.4 The Role of Law in Facilitating Double Transition

As observed above, law has been essential in setting up and maintaining the oppressive systems of colonialism and authoritarianism. Law nevertheless can also promote the transitory processes of internal decolonization and democratization, most importantly through the branch of human rights law.

Democratization is also related to human rights, in particular civil and political rights such as the freedom of expression and opinion and the freedom of association and peaceful assembly, which can be characterized as “democratic human rights”. These rights support the development of the democratic system, because they are crucial to its functioning.²⁰

It is furthermore often maintained that democracy is intrinsically connected to rule of law and human rights.²¹ It therefore may be argued that there is a strong causal relationship between democratic transition and the protection of indigenous rights. On the other hand, reports of the UN²² and NGOs²³ suggest that indigenous rights are violated on a large scale in democracies in transition. Similarly, established democracies without a history of authoritarianism such as the U.S. and Australia, struggle with guaranteeing indigenous rights. This suggests that the relationship between democratic transition, democracy, and the protection of indigenous rights is far more complex.²⁴

Nonetheless, to both internal decolonization and democratization the implementation of human rights is crucial. The different sets of human rights involved mutually impact each other: democratic human rights give indigenous peoples the opportunity to claim their rights, including self-government and land rights, whereas the protection of land rights enables indigenous peoples to make meaningful use of their democratic human rights, safeguarding the conditions for a full and effective enjoyment and exercise of these rights.

Human rights law furthermore is important to transitional justice mechanisms set up to address human rights violations perpetrated by authoritarian regimes. Such mechanisms have also been

¹⁸ ANTHONY W. PEREIRA, POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA 6 (2006); *also see* Adam Podgorecki, *Conclusions*, in TOTALITARIAN AND POST-TOTALITARIAN LAW, 341, 347 (Adam Podgorecki & Vittorio Olgiati eds., 1996).

¹⁹ *See* MARK FATHI MASSOUD, LAW’S FRAGILE STATE: COLONIAL, AUTHORITARIAN, AND HUMANITARIAN LEGACIES IN SUDAN 21 (2013); Podgorecki, *supra* note 18, at 19-20.

²⁰ Shale Horowitz & Albrecht Schnabel, *Human rights and societies in transition: International context and sources of variation*, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION: CAUSES, CONSEQUENCES, RESPONSES 3, 3 (Shale Horowitz and Albrecht Schnabel eds., 2004).

²¹ *See* SEYMOUR MARTIN LIPSET & JASON M. LAKIN, THE DEMOCRATIC CENTURY 172-173 (2004).

²² *E.g.* Special Rapporteur on the Rights of Indigenous Peoples, *Extractive industries and indigenous peoples*, Hum. Rts. Council, UN. Doc. A/HRC/24/41 (July 1, 2013).

²³ *E.g.* INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS [hereinafter ‘IWGIA’], THE INDIGENOUS WORLD 2015 (2015).

²⁴ Colonial history and unfinished internal decolonization arguably have an important impact, as indicated *supra* 1.2.

applied by States to come to terms with a colonial history.²⁵ An example is Australia, which uses a transitional justice approach to deal with the historical treatment of its Aboriginal population.²⁶

Finally, human rights law can transform and apply a form of rule of law as it is commonly understood in non-colonial, democratic systems. Human rights law guides this transformation by promoting the establishment of fair legal procedures, non-discrimination and equality before the law, transparency, and accountability.²⁷

For above reasons, the implementation of human rights norms greatly facilitates double transition.

Section II

Taiwan's Aborigines under Colonial and Authoritarian Rule

2.1 Taiwan's Indigenous Peoples

Taiwan's indigenous peoples constitute about 2% of the Taiwanese population and are divided in various "tribes".²⁸ They are known in Mandarin Chinese as the *yuanzhuminzu* (原住民族), which in the English-language literature is commonly translated as "aborigines" or "aboriginal peoples" (not to be confused with the Australian Aboriginals). Hence, these terms will be used throughout this paper. Aborigines are ethnically and culturally different from Taiwan's majority population, which is of Han Chinese and Hakka origin and over a period of roughly three centuries migrated to Taiwan from Mainland China (see below).²⁹

2.2 Brief Colonial History of Taiwan (1624-1945)

Until the seventeenth century the various aboriginal communities³⁰ were the only masters of Taiwan and were fully sovereign: they ruled themselves. However, they gradually lost this sovereignty. First to the Dutch, who arrived in Taiwan in 1624.³¹ The Dutch never fully controlled Taiwan; actually only the area around the Dutch settlement at the south-western coast was under their rule. Other areas were never subjected.³² The succeeding colonial regimes of General Koxinga and his sons (1662-1683) and that of the Qing Empire (1683-1895), which ruled from Mainland China, did not achieve subjecting

²⁵ PAIGE ARTHUR, IDENTITIES IN TRANSITION: DEVELOPING BETTER TRANSITIONAL JUSTICE INITIATIVES IN DIVIDED SOCIETIES 17 (Nov. 2009); Jennifer Balint, Julie Evans & Nesam McMillan, *Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach*, 8 INT'L J. OF TRANSITIONAL JUST. 1, 3 (2014).

²⁶ LAVINIA STAN & NADYA NEDELSKY, ENCYCLOPEDIA OF TRANSITIONAL JUSTICE – VOLUME 1 26, 26 (2013).

²⁷ See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2022-2024, 2028-2029 (1997).

²⁸ GRUPO INTERNACIONAL DE TRABAJO SOBRE ASUNTOS INDÍGENAS, EL MUNDO INDÍGENA 2014 269 (2014).

²⁹ Murray A. Rubinstein, *Taiwan's Socioeconomic Modernization, 1971-1996*, in TAIWAN: A NEW HISTORY 389-390 (Murray A. Rubinstein ed., 2007); JOHN ROBERT SHEPHERD, STATECRAFT AND POLITICAL ECONOMY ON THE TAIWAN FRONTIER 1600-1800 7, 29, 32-33 (1995).

³⁰ Before the colonial era, aborigines lived in autonomous villages that were not politically organized in a larger tribal community. The villages only occasionally allied with other villages to fight a common enemy. Japanese anthropologists researching the aborigines during the Japanese colonial period however, erroneously and arbitrarily classified them into various tribes. The division in tribes today nevertheless is important for the self-identification of aborigine groups. Henrietta Harrison, *Changing Nationalities, Changing Ethnicities: Taiwan Indigenous Villages in the Years after 1946*, in IN SEARCH OF THE HUNTERS AND THEIR TRIBES: STUDIES IN THE HISTORY AND CULTURE OF THE TAIWAN INDIGENOUS PEOPLE 54-56 (David Faure ed., 2001); SHEPHERD, *supra* note 29, at 7, 29, 32-33; ROBERT THOMAS TIERNEY, TROPICS OF SAVAGERY: THE CULTURE OF JAPANESE EMPIRE IN COMPARATIVE FRAME 84-85 (2010).

³¹ TONIO ANDRADE, HOW TAIWAN BECAME CHINESE: DUTCH, SPANISH, AND HAN COLONIZATION IN THE SEVENTEENTH CENTURY 11 (2008); CHIU HSIN-HUI, THE COLONIAL 'CIVILIZING PROCESS' IN DUTCH FORMOSA, 1624-1662 3 (2008).

³² Chuan-Ju Cheng, *A New Legal Era for the Indigenous Peoples of Taiwan – Self-Government?* 25 (2010) (unpublished Ph.D. dissertation, University of Washington); CHIU, *supra* note 31, at 111-112.

the entire territory of Taiwan either, facing fierce aboriginal resistance in particularly the mountain areas. Only the Japanese managed to put the whole island under their control through successive bloody and brutal military campaigns.³³

This implies that some Taiwanese aboriginal peoples have a colonial history that goes back to the seventeenth century, whereas other aborigines only lived for some decennia under colonial rule. The impacts of colonialism on Taiwan's aboriginal peoples are nonetheless broadly similar: they (eventually) lost their sovereignty and lands, which was legitimized and facilitated by law³⁴, and were exposed to assimilation laws and policies that aimed modifying their culture.³⁵ It is therefore safe to conclude that colonialism radically transformed the lives of Taiwan's aboriginal peoples.

2.3 Aborigines under the Martial Law Period: the KMT rule (1949-1987)

In 1945, after losing the Second World War, the Japanese were forced to abandon Taiwan. The aboriginal peoples then became internally colonized through a particular external decolonization process in which the leader of the Republic of China (hereinafter 'ROC'³⁶) Chiang Kai-Shek and his political party, the Kuomintang (hereinafter 'KMT') took over Taiwan. Taiwan thus became a province of the ROC.³⁷ Taiwan's aboriginal peoples were included in a State framework, but they were not involved in this process.

Meanwhile, Chiang Kai-shek was fighting a civil war on the Mainland against Mao Zedong and his Communist troops (1927-1936, 1946-1950). When they were losing the battle, Chiang Kai-shek and his troops fled to Taiwan in 1949.³⁸ In the same year, the government imposed martial law in Taiwan, which it justified by the threat of a Communist invasion of the island, led by the freshly established People's Republic of China (hereinafter 'PRC').³⁹

In the subsequent years, especially during the heights of the "White Terror" (Mandarin Chinese: *baise kongbu*, 白色恐怖), thousands were terrorized, arrested, or killed for suspected communist sympathies, or for demanding Taiwanese self-government or democracy. This relationship of terror and oppression between citizens and the government stayed in place for forty years.⁴⁰ The KMT regime, headed by Chiang, established a system of total control over mass media and social life

³³ JOHN H. BODLEY, *VICTIMS OF PROGRESS* 69-70 (5th ed., 2008); TIERNEY, *supra* note 30, at 9, 39-41 (2010).

³⁴ ANDRADE, *supra* note 31, at 197; Cheng, *supra* note 20, at 32; John R. Shepherd, *The Island Frontier of the Ch'ing, 1684-1780*, in *TAIWAN: A NEW HISTORY* 107, 121, 124 (Murray A. Rubinstein ed., 2007); Antonio C. Tavares, *The Japanese Colonial State and the Dissolution of the Late Imperial Frontier Economy in Taiwan, 1886-1909*, 64 *J. OF ASIAN STUD.* 361, 372 (2005).

³⁵ ANDRADE, *supra* note 31, at 1, 123, 188, 198; John E. Wills, Jr., *The Seventeenth Century Transformation: Taiwan Under the Dutch and the Cheng Regime*, in Rubinstein, *supra* note 34, at 84, 91-92; J. Bruce Jacobs, *Taiwan's Colonial Experiences and the Development of Ethnic Identities: Some Hypotheses*, 5 *TAIWAN IN COMP. PERSPECTIVE* 47, 50 (2014); SHEPHERD, *supra* note 29, at 81-82, 85, 93, 97.

³⁶ Although this is still Taiwan's official name, and it therefore would probably be more accurate to refer to "ROC" political institutions and laws, I choose to continue using the more commonly used name "Taiwan" here for reasons of clarity and consistency.

³⁷ Chang Wen-Chen, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* 14-17, 19 (June 2001) (unpublished Ph.D. dissertation, Yale University) (available at National Taiwan University Library).

³⁸ *Id.* at 34-35; Jo Bindman, *Taiwan: Indigenous Peoples in the Taiwanese Sex Industry*, in *ENSLAVED PEOPLES IN THE 1990S: A REPORT BY ANTI-SLAVERY INTERNATIONAL IN COLLABORATION WITH IWGIA* 29, 33 (1997); Chang, *supra* note 6, at 34-35.

³⁹ DAFYDD FELL, *GOVERNMENT AND POLITICS IN TAIWAN* 43-44 (2012); DENNY ROY, *TAIWAN: A POLITICAL HISTORY* 78, 88 (2003); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 *PAC. RIM & POL. J.* 530, 541 (2002).

⁴⁰ Steven Phillips, *Between Assimilation and Independence: Taiwanese Political Aspirations under Nationalist Chinese Rule*, in Rubinstein, *supra* note 34, at 275, 297, 302; Peter Chen-main Wang, *A Bastion Created, A Regime Reformed, An Economy Reengineered, 1949-1970*, in Rubinstein, *supra* note 34, at 320, 330, 335-336.

and the security apparatus silenced any form of dissent.⁴¹ Taiwan under martial law was effectively an authoritarian regime.

Aboriginal leaders and students demanding aboriginal self-government and respect for their interests met a fate similar to that of other dissidents. They were arrested, and some of them were executed, others condemned to long-term prison sentences. It was not until the 1970s and 1980s that any significant form of aboriginal resistance would resurface (see *infra* 3.1).⁴²

The KMT regime did not alter the colonial system it inherited from the Japanese. Its laws declared aboriginal lands to be State property and aboriginal lands were used for national development projects, purchased by non-aboriginal persons and companies, or turned into national parks.⁴³

It coupled these colonial land laws and policies to a radical Chinese nationalist ideology, which maintained that Taiwan's population and culture were inherently Chinese, and therefore formed a unity with the Chinese at the other side of the Taiwan Strait. In this way, the government could justify its ultimate objective: retaking the Mainland.⁴⁴ There was no place for the ethnically and culturally different (Austronesian) aboriginal peoples in the KMT ideology. The KMT regime basically considered the aboriginal peoples to be Chinese, labelling them as "mountain compatriots" (Mandarin Chinese: *shandi tongbao*, 山地同胞).⁴⁵ This term suggested a Chinese fraternity with the aborigines: "*tongbao*" implies "originating from the same uterus"; in other words, aboriginals were considered part of the great Chinese nation.⁴⁶

However, the Chinese culture was clearly deemed superior, while aboriginal cultures were seen as inferior and discriminated. Aborigines were forced to change their aboriginal names to Chinese names, and were subjected to heavy assimilation policies to integrate them in the "Chinese" society, leading to a suppression of their cultures.⁴⁷

The KMT government did also take some measures to protect the aboriginal peoples in the mountain areas by maintaining a reserve-system set up by the Japanese colonial administration.⁴⁸ The "protection" offered by the reserves nevertheless was rather limited, as the size of the reserves established by the Japanese was reduced, the reserve lands were declared State property, and the

⁴¹ Yun-han Chu, *Social Protests and Political Democratization in Taiwan*, in TAIWAN IN THE MODERN WORLD. THE OTHER TAIWAN: 1945 TO THE PRESENT 99, 101-102 (Murray A. Rubinstein ed., 1994).

⁴² Cheng, *supra* note 32, at 37-38; DR. CHEN WEN-CHEN MEMORIAL FOUNDATION, THE ROAD TO FREEDOM: TAIWAN'S POSTWAR HUMAN RIGHT MOVEMENT 37, 90, 97 (2004); Scott Simon, *Indigenous Autonomy: Constructing a Place for Ethnic Minorities in Taiwan's Emerging Civic Society* 3-4, Fifth European Association of Taiwan Studies (EATS) Conference (April 18-20, 2008).

⁴³ Stephen Allen, *Establishing Autonomous Regimes in the Republic of China: The Salience of International Law for Taiwan's Indigenous Peoples*, 4 INDIGENOUS L.J. 159, 186 (2005); Bindman, *supra* note 37, 34; BRUCE GRANVILLE MILLER, INVISIBLE INDIGENES: THE POLITICS OF NON-RECOGNITION 186 (2003).

⁴⁴ Daniel Bowman, *Righting the Wrongs of the Past? The Human Rights Policies of Chen Shui-bian and Ma Ying-jeou*, in TAIWAN SINCE MARTIAL LAW: SOCIETY. CULTURE. POLITICS. ECONOMY 485, 486 (David Blundell ed., 2012); MICHAEL RUDOLPH, RITUAL PERFORMANCES AS AUTHENTICATING PRACTICES: CULTURAL REPRESENTATION OF TAIWAN'S ABORIGINES IN TOMES OF POLITICAL CHANGE 35 (2008); Scott Simon, *Multiculturalism and Indigenism: Contrasting the Experiences of Canada and Taiwan*, in POLITICS OF DIFFERENCE IN TAIWAN 20-21 (Tak-Wing Ngo & Hong-zen Wang eds., 2011); Edward Vickers, *Original Sin on the Island Paradise? Qing Taiwan's Colonial History in Comparative Perspective*, 2 TAIWAN IN COMP. PERSP. 65, 67 (2008).

⁴⁵ Cheng, *supra* note 32, at 22.

⁴⁶ RUDOLPH, *supra* note 44, at 6, 214; Scott Simon, *Paths to Autonomy: Aboriginality and the Nation in Taiwan*, in THE MARGINS OF BECOMING: IDENTITY AND CULTURE IN TAIWAN 221, 225 (Carsten Storm & Mark Harrison eds., 2007).

⁴⁷ Awi Mona, *International Perspective on the Constitutionality of Indigenous Peoples' Rights*, 3 TAIWAN INT'L STUD. Q. 85, 97 (2007); Frank Muyard, *The Formation of Taiwan's New National Identity Since the End of the 1980s*, in Blundell, *supra* note 44, at 297, 327.

⁴⁸ Bindman, *supra* note 38, at 33; The protective measures adopted were motivated by the regime's desire not to antagonize the aborigines and thus making them susceptible to (Communist-)inspired rebellion.

natural resources in these areas were exploited.⁴⁹ The KMT government also started registering the remaining aboriginal lands as “reserve lands”. Aboriginals were allowed to use these lands, but under the condition that they would cultivate crops on these lands for a period of 10 years. If they would not do so, they would lose their rights of use and the government subsequently could transfer these lands to non-aboriginal individuals and companies who could then exploit these lands.⁵⁰

2.4 Taiwanese Aborigines and Double Oppression

Taiwan’s aborigines clearly have a history of double oppression. They were colonized by subsequent colonial regimes, losing their sovereignty and lands, which was furthered by law. This situation did not change when after the Japanese abandoned Taiwan, they were included in a State framework. The KMT regime perpetuated a colonial relationship with the aborigines, in which they and their lands remained under tight, legally sanctioned, government control. This form of internal colonialism was closely linked to a radical Chinese nationalist ideology. Aborigines were not able to present any claims to the government, for the authoritarian KMT government violently suppressed any challenge to its rule. In sum, after the Japanese colonizers left Taiwan, aborigines remained in a relationship of both colonial dominance and political oppression with the government. Hence, they were in a situation of double oppression.

Section III

The Democratic Transition Period and Democratic Consolidation

3.1 Aborigines During the Democratic Transition (1970s – 1990s)

In the 1970s and 1980s, a wide social movement was formed in Taiwan that increasingly challenged the KMT regime and also its Chinese nationalist ideology.⁵¹ The strong pressure from society for political change eventually propelled Chiang Ching-Kuo, who succeeded his father Chiang Kai-shek, to decide lift martial law in 1987. In the following years, Taiwan’s political system was further liberalized.⁵²

Aborigines formed part of the opposition movement and voiced their demands through various forms of protest, such as street demonstrations.⁵³ During the democratic transition, aborigines principally pushed for two claims: change of their official name, and the return of their lands. Both claims were influenced by their participation in international indigenous rights events. In spite of Taiwan’s international isolation since the 1970s, when Taiwan was expelled from the UN⁵⁴, aborigines managed to participate in the international indigenous movement, which coincided with the democratization of Taiwanese society.⁵⁵ Through this international participation, they became acquainted with

⁴⁹ Ku Kun-hui, *Rights to Recognition: Minorities and Indigenous Politics in Emerging Taiwan Nationalism*, in Blundell, *supra* note 44, at 91, 108, 108 fn. 26.

⁵⁰ Allen, *supra* note 43, at 186; Simon, *supra* note 47, at 225.

⁵¹ Roy, *supra* note 39, at 178; Michael Rudolph, *The Quest for Difference vs the Wish to Assimilate: Taiwan's Aborigines and their Struggle for Cultural Survival in Times of Multiculturalism* (2003), <http://www.taiwanfirstnations.org/mult.html> ; Simon, *supra* note 44, at 20.

⁵² ROY, *supra* note 39, 175-177.

⁵³ Rudolph, *supra* note 51; Simon, *supra* note 44, at 20.

⁵⁴ In 1971, through UN General Assembly Resolution 2758 (XXVI), the UN recognized the PRC as the only state legitimately representing China to the UN. UN G.A. Res. 2758 (XXVI), at 2, U.N. Doc. A/8429 (Oct. 25, 1971).

⁵⁵ Simon, *supra* note 50, at 234. There was a growing attention for indigenous issues at the international and regional level in the 1970s and 1980s. For instance, the UN set up the UNWGIP in 1982, which started working on a declaration on the rights of indigenous peoples, and regional NGOs published reports on the situation of Asian indigenous peoples. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 51-52 (2000); Andrew Gray, *The Indigenous Movement in Asia*, in *INDIGENOUS PEOPLES OF ASIA* 35, 43-44 (R.H. Barnes, Andrew Gray & Benedict Kingsbury eds., 1995).

international human rights norms, the ideas of the international indigenous movement, and the views and experiences of indigenous peoples from other States.⁵⁶

Regarding the change of the official name, as explained *supra* 2.3, the KMT regime labelled aborigines as *shandi tongbao*. Their participation in international indigenous rights events, such as the UN Working Group on Indigenous Peoples (hereinafter ‘UNWGIP’) and their contacts with other indigenous peoples, such as the Canadian First Nations, strengthened aborigines in their conviction that this was a derogatory term. In addition, they learned of the impact of being officially recognized as “indigenous peoples” and the international rights associated with this concept. They also found that *yuanzhumin* did not sufficiently express that there are various, distinctive aboriginal groups (or “peoples”) on Taiwan. They therefore started pushing the government to change their official name to *yuanzhuminzu* (“aboriginal peoples”), a demand the government eventually honored in 2000, when this was laid down in the Constitution.⁵⁷

With respect to claims to land, aborigines organized a “Return Our Land movement”, which demanded that the government gave them back the lands taken away from them during the colonial and the authoritarian rule.⁵⁸ Like the claim for the change of the official name, this movement was heavily inspired by aborigines’ participation in the UNWGIP and other international exchanges, and by international statements on indigenous rights, such as the (then) Draft UN Declaration on the Rights of Indigenous Peoples (hereinafter ‘UNDRIP’) and the Statement of Principles of the World Council of Indigenous Peoples.⁵⁹ The movement had some success when the government included land rights in Article 10 of the Additional Articles of the Constitution and decided returning a few reservation lands.⁶⁰

The inclusion of aborigines and their rights in the Constitution was greatly facilitated by aborigine legislators in the Legislative Yuan (Taiwan’s legislative body, comparable to a parliament⁶¹). After constitutional reforms, aborigines were granted a protective quota of seats in the Legislative Yuan (currently 8 out of 225 seats).⁶² This parliamentary representation opened up new possibilities for

⁵⁶ Kun-hui Ku, *Rights to Recognition: Minority/Indigenous Politics in the Emerging Taiwanese Nationalism*, 49 SOCIAL ANALYSIS: INT’L J. SOC. & CULT. PRAC. 99, 101-102 (2005); Scott Simon & Awi Mona (Chih-Wei Tsai), *Human Rights and Indigenous Self-Government: the Taiwanese Experience*, in HUMAN RIGHTS AND THE THIRD WORLD 99, 105 (Subrata Sankar Bagchi & Arnab Das eds., 2013).

⁵⁷ Earlier, in 1994, the government had already agreed to change the official name to *yuanzhumin* (“aborigines” or “aboriginal people”) and this name was then introduced in the revised Constitution. *Yuanzhumin* has an individual understanding, and is therefore linked to individual rights. However, at the time, the government was reluctant to recognize the collective rights connected to the concept of “peoples” under international human rights law, and therefore it did not yet accept the name *yuanzhuminzu* (the collective rights associated with this identity were included in the Constitution in 1997). In addition, the government considered that recognizing the existence of various separate “peoples” on Taiwan would further challenge the Chinese nationalist ideology that it then still adhered to. At the same time, it was not deemed compatible with a developing, separate Taiwanese identity either. Allen, *supra* note 43, at 180-181; Ku, *supra* note 49, at 103; Ku, *supra* note 56, at 101; Mitsuda Yayoi, First Case of the New Recognition System: The Survival Strategies of the Thao, in BLUNDELL, *supra* note 44, at 153, 158; Mona, *supra* note 47, at 104; Simon, *supra* note 51, at 226.

⁵⁸ Da-Wei Kuan, *Transitional Justice and Indigenous Land Rights: The Experience of Indigenous Peoples’ Struggle in Taiwan* 7, Bilateral Conference (Taiwan and Austria) for Justice and Injustice Problems in Transitional Societies (September 2010).

⁵⁹ Shih-Chung Hsieh, *From Shanbao to Yuanzhumin: Taiwan Aborigines in Transition*, in Rubinstein, *supra* note 41, at 404, 410-412; Michael Stainton, *The Politics of Taiwan Aboriginal Origins*, in Rubinstein, *supra* note 35, at 27, 39.

⁶⁰ Kuan, *supra* note 58, at 7; Mitsuda, *supra* note 57, at 159, 171; Simon, *supra* note 50, at 234.

⁶¹ Constitution of the Republic of China, Art. 62 & Art. 63.

⁶² Alliance of Taiwan Aborigines, I Chiang & Lava Kau, *Report on the Human Rights Situation of Taiwan’s Indigenous Peoples*, in Barnes et al., *supra* note 55, at 357, 364; Cheng, *supra* note 32, at 52-53. Simon asserts that the inclusion of indigenous rights in the Additional Articles was not so much related to implementing indigenous rights in Taiwan. Rather, he states, it was concerned with the rights of persons living in remote areas in general (as do many aborigines), because the same Article 10 also explicitly refers to the inhabitants of the Matsu and Kinmen Islands, which are located far off the Taiwanese coast. Simon, *supra* note 51, at 226.

aborigines to present and realize their claims, now they were represented in Taiwan's highest legislative body and could propose legislation to promote their interests.

The introduction of land rights in the Constitution was the result of legislative action taken by aboriginal legislators, and so was the establishment of a highly interesting central government body: the "Council of Indigenous Peoples" (Mandarin Chinese: *yuanzhuminzu weiyuanhui*, 原住民族委員會, hereinafter 'CIP'). The CIP was set up in 1996 and is in charge of aboriginal affairs, formulating and implementing policies on aboriginal culture, identity, autonomy, development, and human rights.⁶³ It is principally administered and staffed by aborigines.⁶⁴

In spite of these important legal reforms, which can partially⁶⁵ be attributed to increased democratic rights for aborigines and their active participation in the democratizing system, aborigines continued losing their lands during the democratic transition period. Their lands were exploited for their natural resources, designated as national parks, or were put under control of the military for reasons of national security. For the same reasons, aborigines were relocated from their lands. They were not consulted or asked for their consent, and rarely were they compensated for their loss.⁶⁶

3.2 Aborigines in the Democratic Era (2000 - present)

After breakthrough elections, Chen Shui-Bian of the long time opposition Democratic Progressive Party (hereinafter 'DPP') took office as first non-KMT President of Taiwan in 2000.⁶⁷ He would be re-elected in 2004 and stay in power until 2008.

Chen was the first president following a comprehensive aboriginal policy, which was based on a treaty-like agreement he concluded with aboriginal representatives, the "New Partnership between the Indigenous Peoples and the Government of Taiwan" (hereinafter 'New Partnership')⁶⁸ and the DPP's "White Paper on Aboriginal Policy" (hereinafter 'White Paper'). These documents recognized the sovereignty of the aborigines and promoted self-government, and advocated concluding land treaties, returning traditional lands, recognizing rights of use of natural resources, and increasing aboriginal political participation.⁶⁹

Chen took some significant steps with respect to aboriginal issues, such as the enactment in 2002 of the "Regulations for Identifying Indigenous People's Ethnicity". Under this Act some aboriginal tribes were able to use their traditional names (the Yami changed the name to Tao, the Taya to Atayal). The government furthermore decided to officially recognize a number of tribes.⁷⁰ Also in 2002, a nationwide "Indigenous Traditional Territorial Survey" was initiated to identify the lands and traditional knowledge of aborigines⁷¹, and in 2005 a national aboriginal TV channel was launched.⁷²

Chen's most important measure was the enactment of the Basic Law on Indigenous Peoples (hereinafter 'Basic Law') in 2005.⁷³ It was prepared by taking into account international law, in particular the (then) draft version of the UNDRIP, International Labor Organization (hereinafter 'ILO')

⁶³ Organization Act of the Council of Indigenous Peoples, Art. 1.

⁶⁴ Ku, *supra* note 49, 118-120; Organization Act of the Council of Indigenous Peoples, Art. 9, Art. 10 & Art. 15.

⁶⁵ Other factors are involved. See *infra* 4.2.

⁶⁶ Alliance of Taiwan Aborigines, I Chiang & Lava Kau, *supra* note 62, at 367-368.

⁶⁷ Chang, *supra* note 37, at 294, 494.

⁶⁸ Cheng, *supra* note 20, at 56; Kuan, *supra* note 58, 9; Mitsuda, *supra* note 57, at 165-167; Simon & Mona, *supra* note 56, at 102.

⁶⁹ Cheng, *supra* note 20, at 56 (2010).

⁷⁰ Allen, *supra* note 43, at 181.

⁷¹ Kuan, *supra* note 58, at 9.

⁷² IWGIA, THE INDIGENOUS WORLD 2006 301 (2006).

⁷³ Simon, *supra* note 50, at 235.

The Enforcement/Implementation Acts stipulate that the domestic legal framework needs to be reviewed for its compliance with the treaty concerned, and that laws, regulations, directives, and administrative measures that are not compatible with the treaty should be modified within a certain time frame.⁸³ Hence, the treaties enjoy a superior status in the Taiwanese domestic legal order: domestic law cannot be contrary to the treaties.⁸⁴ Also important is that through the Acts, the Taiwanese government subjects itself to outside scrutiny (and assistance) regarding the implementation of the treaty norms, for the Acts provide for a reporting mechanism that obliges the government to compile a national report every four or five years, and to invite experts and NGOs to review this report.⁸⁵

Ma stayed in power until 2016, when the DPP's Tsai Ing-wen became Taiwan's first female president after a landslide victory over her KMT rival that also gave the DPP a majority in the Legislative Yuan (Taiwan's Parliament).⁸⁶ Tsai is not only Taiwan's first female president, she is also the first Taiwanese president with aboriginal origins: her grandmother from father's side was a member of the Paiwan tribe.⁸⁷

Tsai has promised a transitional justice approach to aboriginal concerns, declaring that she will officially apologize to the aborigines for their historical treatment by the Taiwanese government on August 1, 2016. She will establish a Truth and Reconciliation Commission that will be in charge of transitional justice policies.⁸⁸ Tsai further stated that she considers aboriginal self-government a part of transitional justice, and that she plans to realize it under her government. This is an important issue, for self-government has been advocated by aborigines for years now, yet nor under the Chen, nor under the Ma presidency it has been realized.⁸⁹

Section IV

Double Transition in Taiwan? Analysis and Prospects

4.1 Did Taiwan Make a Double Transition?

In the last thirty years, Taiwan has adopted many legal reforms and thus undergone a profound transformation from an authoritarian regime to an open and democratic society and political system. During the 1980s and the 1990s the authoritarian rule gradually opened up, which helped aborigines to put forward their claims for a name change, return of lands, and self-government without fear of being arrested and imprisoned or executed. It also facilitated their participation in international events and their familiarization with indigenous rights. They further obtained a fixed number of seats in the Legislative Yuan, which helped them to introduce legislative initiatives. Consequently, my findings so far show that aborigines have benefitted from Taiwan's democratic transition and have managed to use their democratic rights.

⁸³ Either two or three years after the entry into force of the Act concerned. ICCPR & ICESCR Act, Art. 8; CEDAW Act, Art. 8; CRC Act, Art. 8; CRPD Act, Art. 10.

⁸⁴ See COVENANTS WATCH & TAIWAN ASSOCIATION FOR HUMAN RIGHTS, COMPENDIUM OF ALTERNATIVE REPLIES TO THE LISTS OF ISSUES 28 (Feb. 22, 2013).

⁸⁵ ICCPR & ICESCR Act, Art. 6; CEDAW Act, Art. 6; CRC Act, Art. 7; CRPD Act, Art. 7. The ICCPR & ICESCR Act does not set a specific time period.

⁸⁶ *Tsai elected president in landslide*, THE CHINA POST (January 17, 2016, 1:08 am TWN), <http://www.chinapost.com.tw/taiwan/national/national-news/2016/01/17/456323/Tsai-elected.htm>.

⁸⁷ Cindy Sui, *Taiwan's first female leader, shy but steely Tsai Ing-wen*, BBC (Jan. 16, 2016), <http://www.bbc.com/news/world-asia-35320444>.

⁸⁸ Stephanie Chao, *Tsai to make formal apology to aborigines*, THE CHINA POST (May 27, 2016, 12:27 am TWN), <http://www.chinapost.com.tw/taiwan/national/national-news/2016/05/27/467465/Tsai-to.htm>.

⁸⁹ Abraham Gerber, *Aboriginal groups divided over self-government law*, TAIPEI TIMES (Sept. 19, 2015), <http://www.taipeitimes.com/News/taiwan/archives/2015/09/19/2003628077>; interview with official CIP, in Taipei, Taiwan (June 24, 2015); Lii Wen, *Draft autonomy act meets opposition*, TAIPEI TIMES (Apr. 14, 2015), <http://www.taipeitimes.com/News/taiwan/archives/2015/04/14/2003615897>.

There are however, pending issues that suggest that as far as the internal decolonization process of double transition is concerned, Taiwan has not yet fully adopted and implemented the corresponding mechanisms and measures, although it has made some progress (for instance, constitutional recognition⁹⁰ and the installation of the CIP).

A first issue that is depriving a large portion of aborigines of their lands and opportunity to participate in decision-making procedures is the lack of legal recognition of the indigenous status of “lowland aborigines”. Taiwanese law distinguishes the “mountain aborigines” from the “lowland aborigines”.⁹¹ This distinction originates in the Qing colonial era, when aborigines were divided into the categories of “raw savages” and “cooked savages”. The cooked savages were considered to have submitted to the Qing rule. They paid taxes and lived close to the Chinese settlers, and adopted Chinese customs and culture. The raw savages mainly lived in the areas not formally subjected by the Qing.⁹² Originally the division was not linked to territory, but by the nineteenth century the term “raw savage” was interchanged with “mountain savage”, and “cooked savage” with “plains savage”. The Japanese colonial administration and then the KMT regime maintained this distinction.⁹³

In 1954 by the KMT regime terminated the indigenous status of the lowland aborigines, because they were considered to be too assimilated.⁹⁴ The aborigines themselves did not have any say in this decision. So far the Taiwanese government has not corrected this historical error, and continues denying lowland aborigines indigenous status. Lowland aborigines consequently are excluded from the specific entitlements to political participation and self-government and land under Taiwanese law, since these are only applicable to recognized aboriginal tribes.⁹⁵ The power to grant indigenous status nevertheless is completely in hands of the government⁹⁶, and the applicable laws and regulations do not respect aborigines’ right to decide on their individual and collective identity.⁹⁷

Aboriginal lands are another principal issue. These lands are currently regulated by an array of acts, regulations, and decrees on land, environment, and coastal management that confirm the sovereign power of the State over land. For instance, aborigines are to seek permission from the local authorities if they wish to develop or transfer reserved lands to non-aborigines.⁹⁸ The government furthermore can develop and exploit reserved lands, as they are State-owned.⁹⁹ These regulations are not in conformity with the (relatively ambiguous) standards of the Basic Law¹⁰⁰ or international indigenous rights. Lands nonetheless seem to be a particularly thorny issue, since the regulation of lands is not even explicitly mentioned in Tsai’s transitional justice project, even though lands are a crucial part of self-government (see *supra* 1.4). It therefore remains to be seen how her government will address this issue.

⁹⁰ This is an exception in Asia. Many Asian States do not recognize indigenous peoples. For instance China, Thailand, and Vietnam. *Indigenous Peoples in China*, IWGIA.org, <http://www.iwgia.org/regions/asia/china> (last visited May 30, 2016); *Indigenous Peoples in Thailand*, IWGIA.org, <http://www.iwgia.org/regions/asia/thailand> (last visited May 30, 2016); *Indigenous Peoples in Vietnam*, IWGIA.org, <http://www.iwgia.org/regions/asia/vietnam> (last visited: May 30, 2016).

⁹¹ Status of Indigenous Peoples Act, Art. 2.

⁹² SHEPHERD, *supra* note 29, at 306; EMMA JINHUA TENG, TAIWAN’S IMAGINED GEOGRAPHY: CHINESE COLONIAL TRAVEL WRITING AND PICTURES, 1683-1895 126-127, 131 (2004).

⁹³ TENG, *supra* note 92, at 122-123, 131.

⁹⁴ JOLAN HSIEH, COLLECTIVE RIGHTS OF INDIGENOUS PEOPLES: IDENTITY-BASED MOVEMENT OF PLAIN INDIGENOUS IN TAIWAN 4 (2006); IWGIA, THE INDIGENOUS WORLD 2008, 274 (2008).

⁹⁵ Only the Kavalan and Sakizaya lowland aborigines are officially recognized by the government. These groups somehow never lost indigenous status because they were classified under the Amis, a mountain tribe. IWGIA, THE INDIGENOUS WORLD 2008 273 (2008); *Sakizaya ratified as thirteenth indigenous tribe*, CHINA POST (Jan. 17, 2007, 12:00 AM TWN) <http://www.chinapost.com.tw/news/archives/taiwan/2007117/100209.htm>.

⁹⁶ See Art. 2.1 Basic Law and Art. 2 Status Act.

⁹⁷ E.g. UNDRIP, art. 33.1, G.A. Res. 61/295, A/61/L.67 and Add.1 (Sept. 13, 2007).

⁹⁸ Regulations on Development and Management of the Lands Reserved for Indigenous People [hereinafter ‘Reserved Lands Regulations’], Art. 12 - Art. 14.

⁹⁹ Reserved Lands Regulations, Art. 23 - Art. 24 & Art. 32.

¹⁰⁰ E.g. Basic Law, Art. 21 read together with Art. 23, provides for land control by aborigines.

From reports by NGOs and interviews with lawyers working on aboriginal land cases, it seems moreover that there are persisting irregularities concerning the application of land laws with regard to aborigines, for example in land development procedures.¹⁰¹ An infamous case is the construction of a hotel complex at aboriginal land close to the city of Taitung, which was resumed with the authorization of local authorities in spite of court rulings declaring the construction illegal.¹⁰² This might indicate that there is a problem with the rule of law in postcolonial and post-authoritarian Taiwan, which hampers the implementation of indigenous rights.

A final unresolved issue that deserves further discussion here¹⁰³, is self-government. As indicated above, various legislative proposals on granting (more) autonomy to aborigines have been advanced, but so far none of them has resulted in a law.¹⁰⁴ The CIP, with its partly aboriginal personnel and aboriginal president, to a certain extent also enables aborigines to decide and make policy on their affairs, yet remains under control of the Executive Yuan.¹⁰⁵ In addition, a recent (2014) amendment of the Local Government Act introduced some self-government powers of the so-called “mountain aboriginal districts”. These districts can, among others, decide on financial, education, cultural, and social service matters, construction and environment policies and programs.¹⁰⁶ These powers nonetheless do not seem to be very different from those of non-aboriginal districts.¹⁰⁷ In this light, Tsai’s announcements on self-government are highly interesting, and it is to be seen if and how she succeeds where here predecessors failed.

In sum, my findings so far strongly suggest that a double transition in Taiwan has not yet taken place. In spite of Taiwan’s far-reaching democratization, which also improved aboriginal political participation, the relationship between the Taiwanese government and the aborigines remains essentially colonial.

4.2 Prospects

With the ascendance of Tsai Ing-wen to the presidency, there might be new perspective regarding double transition. Her transitional justice approach to aboriginal issues suggests that she will consider indigenous rights from this far-reaching perspective, and that steps will be made that ensure a true transition to internal decolonization. That Tsai frames indigenous rights within an overall transitional justice program, in combination with her various statements on indigenous rights, seems to indicate that she is committed to their realization.

A thorough, transitional justice-based approach to indigenous rights is what previous governments failed to adopt. My research so far suggests that the realization of human rights in Taiwan, including indigenous rights, was mainly the result of a dynamic interaction of government interests, political competition, and the aboriginal movement. During the democratic transition period,

¹⁰¹ IWGIA, *THE INDIGENOUS WORLD 2014*, 250-251 (2014); interview with Shih-Wei Lu, Lawyer, in Taipei, Taiwan (Feb. 27, 2014); interview with Shun-Kui Chan, Lawyer, in Taipei, Taiwan (Sept. 25, 2015); SHADOW REPORT ON THE RIGHTS OF INDIGENOUS PEOPLES AND POLICY IN TAIWAN PREPARED FOR THE UNITED NATIONS HUMAN RIGHTS COMMITTEE ON THE OCCASION OF ITS REVIEW OF TAIWAN’S INITIAL REPORT UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ¶¶27-¶29 (Jan. 2013).

¹⁰² Glenn Smith, *Opposing Meiliwan*, CULTURAL SURVIVAL (March 2015), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/opposing-meiliwan>.

¹⁰³ The aborigines suffer from many more problems in Taiwanese society, such as the disappearance of their languages, but these fall outside the scope of my research.

¹⁰⁴ Abraham Gerber, *Aboriginal groups divided over self-government law*, TAIPEI TIMES (Sept. 19, 2015), <http://www.taipeitimes.com/News/taiwan/archives/2015/09/19/2003628077>; interview with official CIP, in Taipei, Taiwan (June 24, 2015); Lii Wen, *Draft autonomy act meets opposition*, TAIPEI TIMES (Apr. 14, 2015), <http://www.taipeitimes.com/News/taiwan/archives/2015/04/14/2003615897>.

¹⁰⁵ Organization Act of the Council of Indigenous Peoples, Art. 1.

¹⁰⁶ Local Government Act, Art. 83-3.

¹⁰⁷ Local Government Act, Art. 14, Art. 16 & Art. 18 - Art. 19.

human rights were mainly implemented to facilitate the democratizing process.¹⁰⁸ The KMT governments furthermore considered indigenous rights a manner for promoting a multicultural society.¹⁰⁹ Both KMT and DPP governments also used human rights as a foreign policy instrument to obtain legitimacy with the international community. Indigenous rights in particular serve to carve out a specific Taiwanese, non-Chinese identity against the PRC, so as to sharpen its claims to being an independent, sovereign State separate from the PRC.¹¹⁰ So to an extent, human rights (and indigenous rights) are part of Taiwan's foreign policy.¹¹¹

Internal politics also played a role in the realization of indigenous rights in Taiwan. For instance, during the 1990s, aboriginal legislators formed a decisive vote in a divided Legislative Yuan in which the KMT had only three seats more than the DPP. They used this decisive vote to endorse the KMT government in exchange for support for their projects, such as the inclusion of collective rights in the Constitution and the establishment of the CIP.¹¹²

Consequently, it seems that there has not yet been a deep commitment by successive governments to truly realize a double transition. The realization of indigenous rights in Taiwanese law has mainly been based on exterior reasons and not on a comprehensive, dedicated approach to aboriginal issues related to Taiwan's colonial and authoritarian history, except for Chen's not entirely successful aboriginal policy (see *supra* 3.2). Tsai's planned approach seems more promising, especially since it is based on an inclusive transitional justice program, yet it has also already been criticized (mainly by aboriginal legislators) for its lack of inclusion of land rights.¹¹³

In addition, it is crucial that existing laws and regulations are effectively enforced in practice, for it seems that it is not uncommon that laws and regulations, and even court judgments, are ignored by the authorities (see *supra* 4.1). In other words, Tsai's transitional justice approach requires more than merely drafting reports and enacting laws and policies. Although law is crucial in the double transition process (see *supra* 1.4), and effectively shaped the (partial) double transition in Taiwan, there is also a limit to its impact. A profound change in the overall relationship between all levels of government and the aborigines is needed.

Tsai's policies could benefit from incorporating ILO Convention No. 169 into Taiwanese law, similar to how the various UN human rights treaties have been elevated to the status of domestic law (see *supra* 3.2). This would oblige the government to critically examine the existent legal framework on, among others, land and self-government and adopt measures to bring it into conformity with the ILO Convention No. 169. Most importantly, such incorporation should also be accompanied by a scrutiny system as set up under the Enactment/Enforcement Acts¹¹⁴, so that there is (limited) outside control and guidance in the implementation of indigenous rights. In the corresponding review procedure, a wide discussion on the implementation of indigenous rights between the government and aboriginal NGOs, facilitated by outside international experts, could take place. This could help identifying problems and proposing solutions towards completing the double transition.

Conclusion

My findings so far indicate that a double transition has not yet taken place in Taiwan, and the makeover from a colonial, authoritarian State is not complete. During the democratic transition and democratic era, aborigines obtained important democratic rights and they were able to gain access to

¹⁰⁸ TAIWAN ASSOCIATION FOR HUMAN RIGHTS, *THE HIDDEN FACE OF TAIWAN: LESSONS LEARNT FROM THE ICCPR/ICESCR REVIEW PROCESS 7* (2013).

¹⁰⁹ Mau-Kuei Chang, *On the Origins of Transformation of Taiwanese National Identity*, in *RELIGION AND THE FORMATION OF TAIWANESE IDENTITIES* 23, 51-52 (Paul R. Katz & Murray A. Rubinstein eds., 2003); RUDOLPH, *supra* note 44, at 53fn33, 54. Also see Hsieh, *supra* note 59, at 412.

¹¹⁰ See Simon & Mona, *supra* note 56, at 4.

¹¹¹ Also see Joseph Wong, *Deepening Democracy in Taiwan*, 76 *PAC. AFF.* 235, 252 (2003).

¹¹² Ku, *supra* note 49, at 118-120.

¹¹³ Sean Lin, *Tsai's Aboriginal rights policy disputed*, *TAIPEI TIMES* (May 27, 2016), <http://www.taipetimes.com/News/taiwan/archives/2016/05/27/2003647246>.

¹¹⁴ State Parties to ILO No. 169 are to submit reports to the Committee of Experts on the Application of Conventions and Recommendations. Constitution of the ILO, art. 22, Apr. 1, 1919, 15 UNTS 40.

the government, including the highest law-making body. One process of the double transition thus has been largely completed. However, in spite of some import legal reforms, the relationship between aborigines and the Taiwanese government is still colonial, with the government clearly enjoying superior powers over aborigines, which are entrenched in the legal framework. Self-government and land rights, the two pillars of internal decolonization, have not been fully realized. The proposed plans of President Tsai nonetheless may further stimulate the double transition process, so that aborigines can obtain the power to decide on their lives.¹¹⁵

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¹¹⁵ My continuing research to Taiwan, and the comparison with the double transition process in Paraguay, can further clarify the relevant issues. My preliminary findings demonstrate that Paraguay has not yet made a double transition regarding its indigenous peoples.

CHRISTIAN W. HAERPFER, PATRICK BERNHAGEN, RONALD F. INGLEHART & CHRISTIAN WELZEL (EDS.), *DEMOCRATIZATION* (2009).

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