CULTURE ON TRIAL:

LAW, CUSTOM, AND JUSTICE IN A TAIWAN INDIGENOUS COURT

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For Juliet and Miriam

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John Christopher Upton

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Taiwan (Republic of China) has made incremental progress in recent decades towards securing the lifeways and lands of the island's sixteen officially recognized indigenous Austronesian groups. Recently, the Taiwan government has turned to its judiciary and created a system of indigenous courts designed to be more respectful of indigenous peoples' cultural differences and to help secure their judicial rights in Taiwan courtrooms. This study examines the face-to-face encounters occurring within Taiwan's special indigenous court units, or *yuanzhuminzu zhuanye fating*, to answer the question: How do notions of indigenous culture and state law emerge in and shape the interactions of courtroom actors and outcomes in cases involving indigenous custom and tradition?

Drawing on seventeen months of ethnographic research, this study follows the development and operation of the special indigenous court units in Hualien, Taiwan, a venue overseeing a high volume of cases addressing local indigenous peoples' customs and traditions. In the special units, matters of ambiguity, encounter, and refusal were pivotal. Examining these themes, this research shows that rather than supporting a pluralistic framework, Taiwan's special indigenous court units formed sites of significant state power that reinscribed Han Chinese preferences and understandings of indigeneity. That power, however, was never complete. Ambiguities in law, encounters with alterity, and strategic litigation created unanticipated fractures that permitted new expressions of indigenous identity and critiques of state power. In

these fractures, the special units intermittently emerged as extra-ordinary institutional spaces for debate and experimentation with the capacity to reshape state and local understandings of belonging, custom, and law.

More broadly, legal actors' efforts to manage ambiguities in law, encounters between indigenous and non-indigenous views, and local practices of refusal exposed the fragility and instability of law in the modern state. Here, instability of law has consequences far beyond immediate disputes as indigenous and human rights constitute a critical resource for Taiwan's enactment of sovereignty and serve as a mechanism for distinguishing the country from the People's Republic of China. As such, this study sheds new light on articulations of indigenous identity, constructions of indigenous and human rights, performances of sovereignty, and practices in inchoate legal institutions drawn from the East Asia context.

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NOTES ON ROMANIZATION, IDENTITIES, AND INTERVIEWS

The system of romanization in Taiwan is complicated and controversial. There are several rival forms of romanization and depending upon the author's choice, they may suggest certain political alignments (Fell 2018: xii).[1] Throughout this text, I generally romanize Mandarin Chinese words, names, and expressions using the *Hanyu Pinyin* system. Where relevant, however, I use the *Tongyong Pinyin* for place names and personal names, for example when referring to Kaohsiung and Taichung. For indigenous words, names, and expressions, I use the system recognized by Taiwan's Council of Indigenous Peoples (2019). Since romanization practices in Taiwan are not always consistent, I do my best to follow typical conventions when using indigenous, Taiwanese, and Mandarin Chinese terms. For Mandarin Chinese names, I follow local naming conventions and put the surname first, followed by the personal name.

I employ pseudonyms throughout this text to protect individual identities. The only exceptions are cases where I refer to elected politicians (presidents, presidential candidates, and legislators). In circumstances where I feel using a pseudonym is not sufficient, I identify individuals by their professional or social position, such as "judge" or "member." To further protect participants' identities, some events discussed in the text have been combined.

I conducted all interviews and conversations for this research in Mandarin Chinese, with the exception of a few conducted in English. For verbatim quotations from court decisions, laws, and interviews, I retain the original Mandarin Chinese in the endnotes while providing the

[1] For many years, the accepted practice was the Wade Giles system for place names and names of Taiwanese people and *Hanyu Pinyin* for names and places in the People's Republic of China. This changed when the Democratic Progressive Party (DPP) came into power, when issues about Romanization became politicized, with the DPP promoting the use of a system called *Tongyong Pinyin* and the Kuomintang Party (KMT) advocating the continued use of *Hanyu Pinyin*. When the KMT came back into power, many areas of Taiwan, particularly those in the north of the island, reverted back to the *Hanyu Pinyin* system.

English translation in the main text, except where there is an official English translation available. For situations where I summarize what the speaker said rather than recording or writing it down verbatim, I provide English summaries in the text. I cite interviews by number, indexed to a complete list of interviews included as Appendix A.

CHAPTER ONE

Introduction:

Courtroom Protagonists

Of Courts and Ancestral Spirits

I had been living in the city of Hualien, Taiwan, for about two months when a local lawyer invited me to attend a legal proceeding in Taitung about indigenous traditional lands. I was excited to attend the hearing because I had heard that Taiwan had recently created a special set of court units to handle legal matters involving indigenous cultural practices and territory. I traveled by train to Taitung, a city located on Taiwan's rugged, mountainous, and sparsely settled east coast. Two hours later, I arrived at the courthouse, which was located just down the street from the house where I lived as a youth. Members of the indigenous Bunun community had gathered, dressed in traditional attire of brilliant blues and rich blacks, with beaded woven headdresses, some adorned with the small horns of the Formosan Reeve's muntjac (*shanqiang*, 山羌), or barking deer. They were conducting a ceremony on the steps of the courthouse, just outside the front door. Smoke billowed up from burning green leaves as members of the community sang songs to their ancestors. A small group of indigenous activists stood to the side, leading chants about the rights of indigenous peoples and their original claims to traditional lands. After the ceremony, the community members filed into the courthouse, filling up the gallery of the courtroom just behind the long wooden bar separating the judge, lawyers, and litigants from the general public.

The hearing began. The Han Chinese judge, dressed in a formal black robe with royal blue lapels, entered and sat behind a tall desk, high above everyone else. Flanking him, the

Republic of China (ROC) flag stood to his left. The gold scales of justice, the symbol of the Taiwan Judicial Yuan, hung above his head. The community's lawyer, a Han Chinese man, also dressed in a black robe but with white lapels, stood making his opening statement. He held in his right hand two *binlang* (檳榔, betel quid). He shook them in his hand as he spoke.

"Lawyer, why are you shaking your hand?" the judge asked.

"The village elders asked me to," the lawyer responded. "They gave me two betel quid and asked me to shake them."

"Why?" the judge inquired.

The lawyer responded, "Well, they believe that if I shake them, the spirits of their ancestors will come."

"You mean, they believe there are spirits in here right now?" the judge asked incredulously.

"Yes, they believe the courtroom is filled with their ancestral spirits who are helping me make my argument," the lawyer answered.

The judge sat silent, slowly looking around the courtroom, in the dark corners and back of the room.

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In Taiwan's special indigenous court units, or *yuanzhuminzu zhuanye fating* (原住民族專業法庭), disputes about indigenous custom and tradition emerged as encounters of language, law, and logic. This study examines the everyday practices used to resolve disputes in these special units, with a view to understanding how face-to-face encounters of indigenous and non-indigenous actors in the special units created a field of recognizable indigenous custom and tradition, and how these interactions shaped outcomes about indigenous lands and practices.

These special units have taken a leading role in mediating between Taiwan's Han Chinese and indigenous societies, and yet they had a paradoxical existence. Instead of supporting a pluralistic framework, in their day-to-day activities they formed sites of significant state power that reinscribed Han Chinese preferences and understandings of indigeneity. That power, however, was never complete. Ambiguities in law, encounters with alterity, and strategic action created unanticipated fractures that permitted new expressions of indigenous identity and critiques of state power. In these fractures, the special units emerged as exceptional spaces for debate and experimentation with the capacity to reshape state and local understandings of belonging, custom, and law. The special units therefore exist as paradoxical judicial bodies, at once securing and undermining indigenous rights claims.

In contrast to studies that have examined established indigenous courts, this research follows the development of a new and ambiguous indigenous court institution and the practices that gave it life. Cases involving indigenous custom in Taiwan inspired fierce contestations about indigenous identity and the nature of culture, rights, and reality. Judicial and indigenous actors' efforts to navigate an ambiguous terrain of rights, and encounters between dominant Han Chinese and indigenous understandings of law, reality, and sociality, exposed the fragility and instability of modern state law. Oftentimes, resolving disputes over indigenous custom and tradition required the exercise of creativity and reaching out to extra-legal resources. Here, instability of law had consequences far beyond immediate disputes as indigenous and human rights constitute a critical resource for Taiwan's enactment of sovereignty and serve as a mechanism for distinguishing the country from the People's Republic of China (PRC), which rejects Taiwan's standing as an independent nation-state and claims it is an inalienable part of "One China."

Walking into the special indigenous court units, one immediately sees the Taiwan state apparatus at work. Architecture, discourse, ethnicity, language, and symbolism in courtrooms reinforce perceptions about state power. There is little to no indication of any presence of Taiwan's 16 officially recognized indigenous nations or their customs or justice practices in the special units. One sees the struggles of a judicial body adjudicating indigenous traditional practices that Taiwan mainstream society has tentatively agreed to protect yet feels ambivalent about, if not at times regards as dangerous or distasteful, as suggested by the judge's reaction in the anecdote above. One sees a court institution wrestling with claims over indigenous land, territories, and natural resources as they challenge the sovereignty of the state, whose laws and authority the court is duty-bound to uphold. To assume a simplistic top-down application of antiseptic laws "out there" to uncontaminated fact sets "in here" would miss the crucial work of on-the-ground individual actors in the special units engaged in an operation of crafting—making the law, facts, and court space authoritative, intelligible, and relevant through encounters of people, epistemologies, and ontologies in a largely ambiguous institutional space.

Mainstream understandings of black letter law (well-established legal principles and rules) and jurisprudence often present it as something stable and firm, where legal principles apply deductively to fact sets within a largely closed universe of norms and professional practices. This is a familiar understanding of law, one projected by liberal and neoliberal governance institutions highlighting the central importance of individual rights and liberties, and maintaining that deeply held principles such as equality, privacy, and market efficiency can best, or perhaps only, be secured through formal legal apparatuses. In the United States, for instance, veneration of law at times even takes on divine associations.[2] This picture of unity and

[2] For example, on June 16, 2018, then-Attorney General Jeff Sessions defended the Trump administration's policy of separating immigrant children from their families at the U.S. southern border

efficiency, however, masks a deeper complexity, wherein law is a human activity, consisting in a nexus of social activities and narratives involving many different actors with different, and sometimes conflicting, understandings of justice, rights, fairness, and welfare (see Clifford 1988; Collier 1975; Comaroff and Roberts 1981; Coombe 1998; Geertz 1983; Kahn 1999; Leonard 1995; Moore 1978; Tsosie 2012).

Sitting at the intersection of Han Chinese and indigenous societies, Taiwan's special indigenous court units were imaginative, physical, and symbolic sites of encounter, revealing significant state power but also dimensions of deep contradiction, sociality, and uncertainty within the law. As such, they operated as and within a contested and uneven legal terrain. Some judges attended training sessions and worked with experts to understand indigenous traditions; others dismissed indigenous legal protections as conflicting with core liberal values and being "dangerous" sets of rights. Some lawyers carefully researched indigenous customary lifeways and human rights jurisprudence; others saw no reason to raise these issues and questioned the existence of the special courts. Some indigenous litigants strategically performed elements of indigenous identity in the court through behavior, dress, and language to emphasize their cultural uniqueness; others were unsure of how to be "indigenous" in ways recognizable or acceptable to mainstream society and wondered if there was any point to these displays anyway. Some lower court judges showed signs of increasing openness to arguments protecting indigenous custom and tradition, while many prosecutors and higher court judges tended to remain closed to this line of reasoning. International human rights instruments suggested broad protection for indigenous lands and customary practices, but their application at the local level diluted and

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by referencing a biblical passage from the Apostle Paul's epistle to the Romans: "I would cite you to the Apostle Paul and his clear and wise command in Romans 13, to obey the laws of the government because God has ordained them for the purpose of order. Orderly and lawful processes are good in themselves and protect the weak and lawful" (Miller and Shimron 2018).

narrowed these protections. Many domestic laws also appeared to protect indigenous lands and traditions, but in practice these protections turned into rights without remedies. Institutional structures, such as summary proceedings, also incentivized litigants away from invoking these rights. Indigenous actors seeking to engage in customary practices were thus left with an uncertain set of protections and institutions and remained at significant risk of arrest and prosecution for engaging in traditional activities.

During my time in Taiwan, first as a youth when my parents served as Protestant Christian missionaries in southern Taiwan (1986-1990) and later as a lawyer and graduate student in cultural anthropology (2017-2018), I became intrigued by both the diversity of indigenous societies and the ways these communities and individuals engaged with the Taiwan state. In the course of my research, this interest turned to the newly created special indigenous court units. The Judicial Yuan (*sifayuan*, 司法院) established the special units in 2013 to adjudicate criminal cases and civil disputes involving persons having an officially recognized indigenous status. The idea of developing a set of specialized court units was inspired by examples from Canada, New Zealand, and the United States, and was motivated by the understanding that indigenous peoples have different views on law from Taiwan's Han Chinese majority; therefore, protection of indigenous rights could be better served by specialized courts familiar with indigenous peoples' cultures, practices, and legal concepts (Bekhoven 2018: 217n899). The Judicial Yuan created the special units with the idea that they would be more understanding and respectful of indigenous cultural differences, and they could better secure indigenous peoples' judicial rights (Judicial Yuan 2012; Xiang 2012). The judiciary anticipated that these special units would also build a repository of case law about disputes involving indigenous custom and tradition that could later be used by judges as references (Interviews 002

and 047). The action of creating special units modeled on tribunals in other sovereign states was also a sign, like migration polices and border inspections (Friedman 2015: 52), of the Taiwan government's efforts to model recognized sovereignty to assert its position on the world platform.

Unlike other indigenous courts, such as the Indigenous People's Court in Ontario, Canada (Gall 2006), or the Hopi Tribal Court in northeastern Arizona (Richland 2008), which were independent or quasi-independent judicial institutions utilizing, at least in part, indigenous law, Taiwan's special indigenous court units were intimately bound to the national judiciary. Embedded within the island's district courts and high courts, the special units consisted of a select set of judges who received special training about the customs and traditions of the island's indigenous Austronesian peoples. The vast majority of judges and lawyers practicing in the special units were members of the ethnic Han majority; only a handful of lawyers and judges had indigenous status (Hsu 2015: 92). Further, state law alone applied within the special units, and national courts had sole authority to make binding pronouncements of law, meaning that indigenous customs and justice practices were recognized not "as law, but as fact" to be proved (Kerruish and Purdy 1998: 153). The official language of the special units was Mandarin Chinese (Organic Act of Courts, Art. 97), not an indigenous language.[3] The jurisdiction (the authority of the court to hear certain claims) of the special units also extended far beyond matters of indigenous custom and tradition, which often left these issues sidelined when they arose. Moreover, as the name of these institutions—special indigenous court units—implied, they covered all of Taiwan's officially recognized indigenous nations, rather than specializing in a

[3] Procedures were in place that allowed Taiwan courts to use interpreters in cases with indigenous parties, but, as discussed later, these procedures did not guarantee interpreters who spoke the same dialect, and these procedures were remarkably infrequently used. Under Taiwan law, indigenous persons also received free legal services, but these services could be as much a burden as a benefit for indigenous litigants.

particular group. In the midst of these contradictions and tensions, the special units undertook the work of resolving quotidian and sensitive disputes involving indigenous persons as the units operated everyday as institutional spaces of encounter between Taiwan's Han Chinese majority and indigenous groups.

Many days, I went to the special indigenous court unit in Hualien, Taiwan (fig. 1). Soon my growing fascination with the special units led me to my overarching research questions: How do judicial actors and indigenous litigants in the special units construct notions of custom and tradition? What kind of negotiation of power and identity do these legal institutions make possible for indigenous actors? How has the Taiwan legal system been shaped by its engagement with indigeneity over time? What kind of space is this court—what is possible or impossible, sayable or unsayable at the intersection of legal norms and indigenous actors who seek to claim or subvert those norms? What do moments of encounter at this intersection reveal more broadly about our understandings of law and sovereignty?

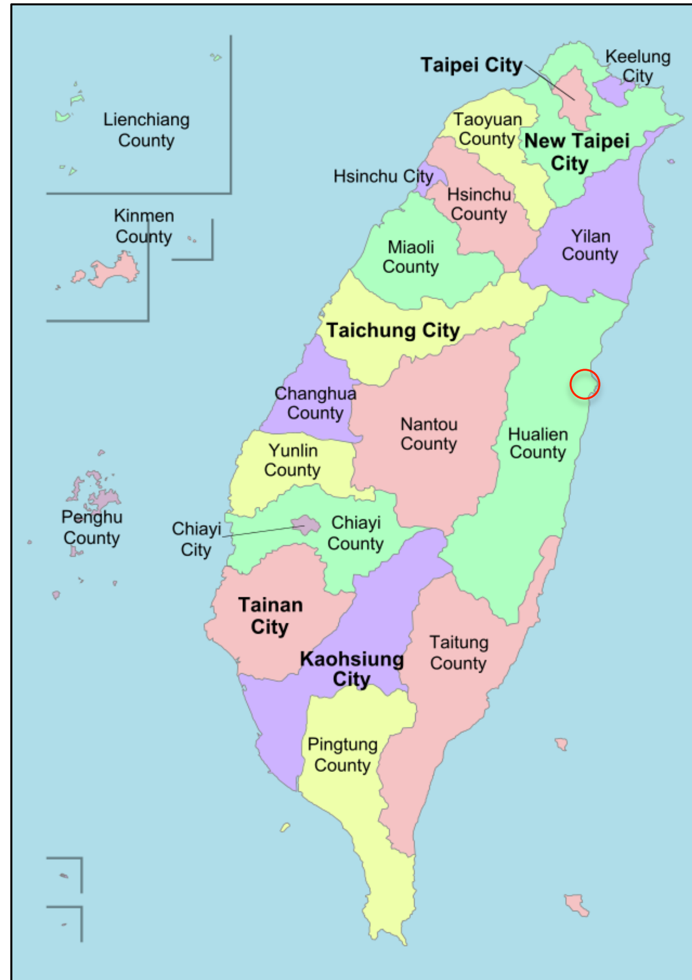

Figure 1. Map of Taiwan (indicating the author's field site, Hualien City) (Luuva 2009)

These questions led me through a vast physical and intellectual landscape: from state courthouses to indigenous villages; from late nineteenth century Japanese colonial policies to twenty-first century human rights jurisprudence; from judicial training seminars in state-of-the-art government buildings to hunting expeditions with indigenous hunters high in the central mountains. Along the way, I was consistently struck by how the special units served as sites not just of legal pronouncement but also of constructions of history, identity, meaning, normativity, and ontology.

Research Overview

In my time working with legal actors and indigenous actors in Taiwan's special indigenous court units, I found that legal processes in the special units offered the intellectual opportunity to destabilize entrenched epistemological dichotomies: divisions between law and society, between the state and indigeneity, between indigenous custom and positive law, between tradition and modernity, between the global and the local, and between politics and technology. In the text that follows, I show how, in interactions within the special units, individuals engaged in a co-constitutive process of articulation and rule-making, revealing law as a dynamic process of encounter. Through their quotidian and high-stakes encounters in the special units, legal actors and indigenous individuals drew upon different knowledges, worldviews, and relations of power to articulate laws and norms, perform identities, and negotiate understandings of the world. To accomplish this, this analysis combines a large-scale focus on domestic and international law with fine-grained ethnographic detail about people, practices, and events in courtrooms.

Regarding the persons appearing in the special units, and recalling the anecdote that introduces this text, in my fieldwork and in my legal practice I was always haunted by people in the law. More precisely, it was not simply people understood in terms of anthropological typologies but specific persons—judges, lawyers, litigants, witnesses. Highlighting the individuals at work in the law rubs against popular understandings of "rule of law" and imaginings of the orderly operation of legal systems as it invites attention to the variability, mutability, and indeterminacy of lived law as it appears in real-time, in specific moments, in actual disputes, and in the interstices of interpretations, constructions, and rationalities that are continually shifting from certainty to uncertainty, fixity to fluidity, closure to openness, passivity to activity, and belief to doubt (cf. Jackson and Piette 2015: 3-4). That is, a central underlying

dimension emerging in this research was that understanding law requires considering not just abstract norms or technical processes but the discrete encounters of individuals in particular moments revealing how social action and the normative order affect one another, and how normative systems are used and change over time.

Taiwan's special indigenous court units emerge in this analysis as ambiguous and diverse judicial institutions. Ordinarily, the special units operated in conventional ways, engaging in many of the processes and tensions that exist in all law-like institutions. At times, however, their operation involved adjudication of radically different understandings of culture, custom, and identity that altered the underlying character of the court, enabling new expressions of indigenous identity and critiques of state power unavailable in other state institutions. In these exceptional moments of encounter, the special units served as important organizing spaces as people pondered: What is culture? What is law? What is custom? What does it mean to be indigenous? What is a court institution? How does one understand rights, both domestic and universal? How does Taiwan's political status relate to these issues?

At the heart of my analysis are cases, disputes, and local struggles centering on indigenous custom and tradition in the special indigenous court units in Hualien City. These included matters involving wildlife hunting, fishing practices, gun use, forest product collection, mineral collection, and traditional lands. Artificially, I group these cases together as "culture-related cases" or "cases involving cultural issues." I say this grouping is artificial because the construction of "culture" was important work within the special units.

When compared to quotidian matters, cases involving cultural issues in the special indigenous court units located within the Hualien District Courts and High Courts were few (fig. 2). Over the period from 2012-2015, ordinary criminal matters involving indigenous persons in

the Hualien District Court, such as drunk driving (2,000+), vastly outnumbered cases involving indigenous custom and tradition—guns (17), hunting (16), and forest product and mineral gathering (15). As discussed later, the broad jurisdictional scope of the special units shaped how judges addressed (and failed to address) indigenous cultural differences in specific disputes.

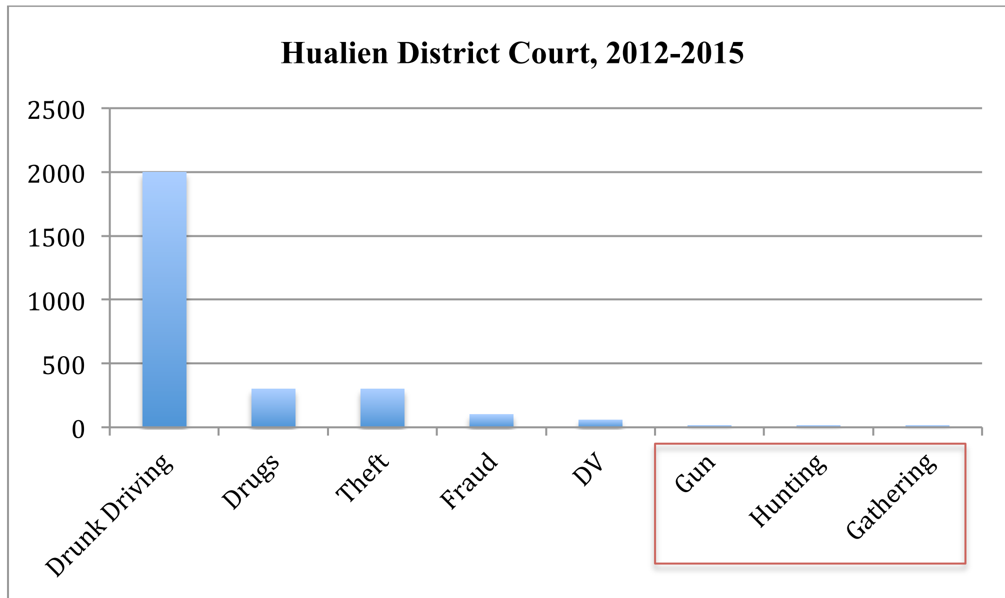

Figure 2. Number of criminal cases involving indigenous persons, Hualien District Court, Criminal Division, Hualien, Taiwan, 2012-2015 (Interview 046)

The special indigenous court units in Hualien City offered fertile ground for this study as they were situated in a geographic region with a high population of indigenous peoples representing six different indigenous nations: the Amis (*ameizu*, 阿美族); Atayal (*taiyazu*, 泰雅族); Bunun (*bunongzu*, 布農族); Kavalan (*gamalanzu*, 噶瑪蘭族); Sakizaya (*saqilaiyazu*, 撒奇萊雅族); and Truku (*tailugezu*, 太魯閣族) (fig. 3). The Hualien special units were among the most active on the island, adjudicating disputes involving access to natural resources, land boundaries, fishing, mineral and plant gathering practices, gun use, land development, and wildlife hunting, among others.

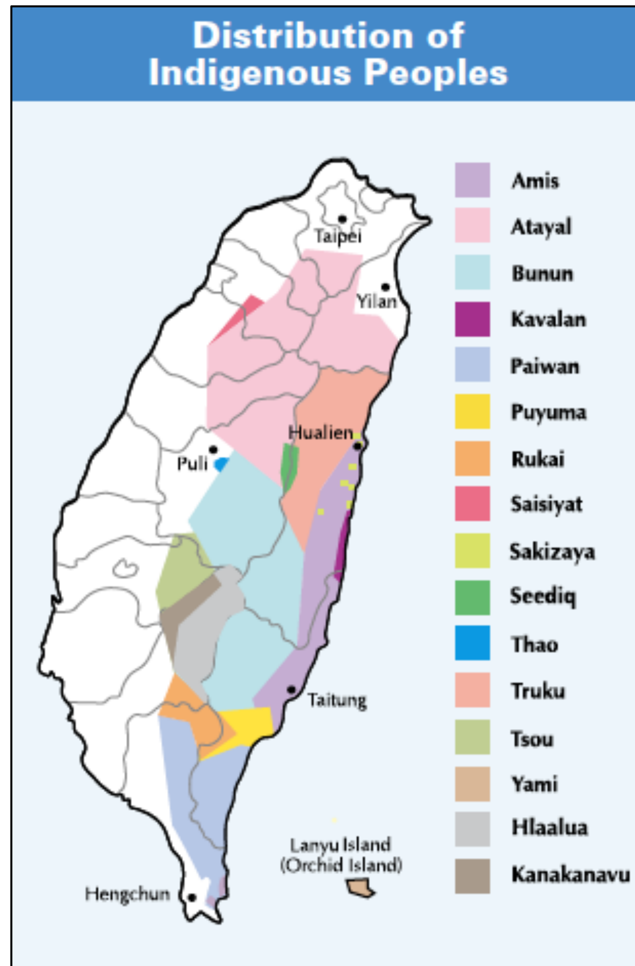

Figure 3. An illustration of Taiwan's officially recognized indigenous nations and their distribution across the island (Executive Yuan 2016b)

Over the course of 17 months in 2017 and 2018, and building on earlier ethnographic research in 2015 and 2016, I traced what happened in face-to-face encounters among indigenous and non-indigenous actors in and around the special units as they debated notions of indigenous culture, custom, and identity. To study the special units, I used ethnographic methods of observation, participant-observation, interviews, and archival research. I observed 70 court hearings corresponding to more than 50 civil and criminal cases involving indigenous persons in the Hualien District Courts and High Court special units and other special units around the island. In the analysis that follows, of the 50 cases I observed I focus on five cases in particular

because of the conflicts over indigenous custom and tradition that arose in the courtroom. All court hearings used in this study were open to the public.

I supplemented courtroom observation with participant-observation (Bernard 2011: 257). I moved to Meilun District in Hualien City, living in a residence within walking distance of the Hualien District and High Courts, and joining in activities at one or both courthouses nearly daily. I also regularly visited a Truku community in remote Hualien County and a Bunun community in rural Taitung County, where I participated in customary activities, such as wildlife hunting, gun-making, and forest product and mineral collection, and joined in village meetings. In addition, I participated in training programs for judges organized by the Judicial Yuan and educational programs for lawyers organized by the Legal Aid Foundation to better understand how courtroom actors learned about indigenous customs and legal protections.

I also worked with a law center, advising lawyers on international protections for indigenous peoples. In this advisory role, I had an opportunity to observe and consult lawyers as they strategized about cases, researched issues, developed legal arguments, and engaged with indigenous clients and communities. This may be regarded as a form "activist" anthropological research. Charles Hale (2001) observes that activist anthropology "asks us to identify our deepest ethical-political convictions, and to let them drive the formulation of our research objectives" (Hale 2001). As a practicing legal professional before and during my fieldwork, I worked as an advocate for people in less powerful positions, whether they were detainees at Camp Delta in Guantanamo Bay, victims of domestic violence, or indigenous persons. Rather than avoiding an ethical orientation toward advocacy, I embraced it: I worked with Taiwan lawyers to craft new arguments, I addressed deficiencies in indigenous protections and legal process with Taiwan judges and members of the Judicial Yuan, and I spoke with Taiwan's indigenous communities

about contemporary indigenous legal protections. Indeed, many of my collaborators expected me to take on such an advocacy role—judges asked how I would analyze issues, lawyers wanted to know what arguments I would make, indigenous persons sought information about how to protect their lands and traditions. Hence, this form of engagement not only satisfied what I felt were ethical dimensions of this project, both in terms of the AAA Code of Ethics (2012) and my personal moral framework (Wiles 2013: 12), it offered something observations, interviews, and archival research could not: a deep insider's view of state actors' practices and struggles, and indigenous actors' understandings of state and international order and legal process.

In addition to courtroom observation and participant-observation, I conducted semi-structured and structured interviews (Bernard 2011: 157). I conducted 133 interviews with 74 individual actors at each level of Taiwan's special indigenous court units and connected institutions. These included interviews with Judicial Yuan representatives (2 individuals), Supreme Court justices (1), high court judges (5), district court judges (10), legal aid attorneys (6), attorneys in private practice (7), indigenous defendants and litigants (4), expert witnesses (3), law professors (7), anthropologists (10), and indigenous community members (30). I also conducted hundreds of conversations with these and other actors. Like many anthropologists, I found that the most meaningful parts of my research did not come from interview sessions, set apart as they were from ordinary life with scheduled times and recording devices (Bernstein 2008: 928). Rather, the material gathered here benefited most from people's offhand observations, moments of unreflective thought, and commentaries about the ongoing events that characterized their daily life.

Finally, I studied a corpus of 40 rulings on indigenous customary practices and lands from Taiwan's Supreme Court, high courts, and district courts over the preceding twenty years.

In addition, I studied black letter law, formal and informal government reports, legal filings, court transcripts, and secondary sources. These materials covered a range of historical periods (from the Japanese colonial period to pending legislation), legal issues (from hunting wildlife to territorial boundaries), and normative arenas (from indigenous justice practices to international human rights protections).

These methods and my positionality as a Caucasian North American middle-class male ethnographer were, of course, not unproblematic positions from which to conduct this study. They impacted different aspects of the research, both opening and closing opportunities for study. Some collaborators found the experience of engaging with me to be an unsettling experience, whether due to my connections to state institutions, physical appearance, or prior experience in Taiwan. At other times, a kind of Heisenberg indeterminacy intervened: my physical presence distorted the site I had come to study. Judges, prosecutors, and lawyers would sometimes verbally mark my attendance, inventing stories about me (a frequent story was that I was a United Nations observer), and then use those stories to support their position either for or against the indigenous parties in the courtroom. Protocols in the courtroom often meant that I had no opportunity to clarify my presence or my project.

My decision to concentrate on cases open to the public also shaped the research project in unexpected ways. Cases about indigenous custom and tradition most often arose in the criminal courts. Public hearings about those matters also tended to involve activities associated with men—hunting, guns, mineral collection. Cultural practices affecting or associated with indigenous women were largely absent from public view in the criminal courts. Cases involving family matters and sexual violence, for example, were closed to the public in Taiwan (Li 2015: 60n455; Lin 2010: 175n85). Consequently, I did not observe legal proceedings involving these

issues. This is not to say, however, that indigenous women themselves were absent. To the contrary, they were very active and regularly appeared in court as plaintiffs in civil suits, witnesses in criminal cases, unofficial translators, and supporters in the audience but infrequently as defendants in criminal matters open to the public. This potentially gives the analysis a gendered slant. I attempted to address this imbalance through interviews and discussions with indigenous women as well as judges and lawyers involved in matters of family law and domestic violence.

My access to Taiwan's prosecutors' offices was also limited as prosecutors were reluctant to engage with the project. Coincidentally, I began my research shortly after the local prosecutors' office in Hualien City filed a brief outlining their opposition to the use of indigenous customary law in court cases (Interview 056). This posture, together with local perceptions that prosecutors were becoming increasingly hostile to indigenous rights claims, suggested that my project about indigenous custom and Taiwan courts was likely not a priority for their office. I attempted to address the role of prosecutors indirectly through courtroom observation, archival analysis, and discussions with other courtroom actors.

Another issue concerns terminology. While language shifts, and meaning is never stable, terminology used to describe indigenous experience has the power to harm, offend, and to affect identity and policy. Language can reinforce certain discourses as one speaks about or represents alterity (McGloin and Carlson 2013: 1). Bearing this in mind, before continuing I offer a few notes on the terminology I will be using in this text and my reasons for these choices.

Early Portuguese explorers called the island of Taiwan "Formosa" (*Ilha Formosa*). Some studies of indigenous peoples in Taiwan adopt conventions of linguistic anthropology in Austronesia and refer to the geographic island and its indigenous peoples as Formosa and

Formosan (e.g., Cauquelin 2004; Simon 2006, 2012a). Other studies of indigenous peoples refer to the island as Taiwan (e.g., Hu 2007; Ku 2008; Simon and Mona 2015). While the ROC officially governs the island of Taiwan through its constitution, institutions, and laws, the term "Taiwan" (*taiwan*, 臺灣) is the commonly used name for the island and refers both to the ROC governing structure and the island as a socio-geographic entity. As this text focuses on a national court unit sitting at the intersection of Han Chinese and indigenous societies, I use the term *Taiwan* because it flexibly enables discussion of both structures associated with the national government and societies on the island, including indigenous peoples. I thus intend a wider meaning than the Taiwan Tourism Bureau's (2018) recent marketing of the island as "Taiwan - 'The Heart of Asia'" by situating the island simultaneously in Asia (connected to Chinese migrations to the island) and in Oceania (connected to indigenous peoples' relation to Austronesian languages and cultures).

While it is common to see the term *yuanzhumin* (原住民) translated into English as "aborigines" (Bekhoven 2016: 204), that usage has fallen out of favor among indigenous activists as it carries connotations of primordialism (Friedman 2018: 80n1). Scott Simon (2012c: 227) observes that the term "indigenous" (*autochtone*) is a "legal classification" (*classification juridique*) rather than an ethnic category. Following Simon, I choose to use the lowercase form of *indigenous* in this text to avoid objectifying the concept of "indigenous" as an ethnic group and distracting from the effects of colonialism and inclusion in a state system.

The Judicial Yuan typically refers to the special court units addressed in this text as *yuanzhuminzu zhuanye fating (gu)* (原住民族專業法庭(股)) (Judicial Yuan 2012, 2018b). Relevant literature translates this term variously as "aboriginal courts" (Tang 2013); "indigenous courts" (Hsu 2015); "Special Court of Indigenous Peoples," "Special Unit of Indigenous

Peoples," and "Special Court (Unit) of Indigenous Peoples" (Executive Yuan 2016a: paras. 26-27); and "Indigenous *ad hoc* Chambers" (Tsai 2015). In personal communications, local judges and lawyers suggested the term "indigenous special tribunals" (Interview 101). Articles 14 and 34 of the *Organic Act of Courts* (*fayuan zuzhifa*, 法院組織法) set out the legality of the special units. Under these articles, "specialized courts" are specialized divisions in a court established for the better arrangement of work in response to societal changes and include such institutions as the electoral and labor courts (Hsu 2015: 94). These kinds of courts stand in contrast to the "specialized district courts," which are established on a permanent basis. Accordingly, I choose to use the term *special indigenous court units* to emphasize the specialized nature of these judicial bodies and to signal they are not stand-alone institutions but rather subsumed within the Taiwan national court infrastructure.

In this text, I use such terms as *nation*, *native*, *community*, and *village*. These terms index social divisions among Taiwanese peoples. The term *nation* (*minzu*, 民族) refers to one of Taiwan's officially recognized indigenous groups, e.g., the Atayal nation. My decision to translate *minzu* as "nation" moves away from much of the English-language documents and literature on Taiwan's indigenous peoples tending to translate this term as "peoples" or "tribe." The official English language version of the *Indigenous Peoples Basic Law* (IPBL) (*yuanzhuminzu jibenfa*, 原住民族基本法), for example, translates *minzu* as "peoples" or "tribes" (Art. 2.1). Other documents suggest a different gloss on the term. In places where the Chinese language version of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) refers to *minzu*, the English language version uses "nation" (Art. 9). As I discuss later, Taiwan is in a transitional phase to pluralism. As such, it appears the time is right to address these groups not as "tribes," which carries misleading historical and cultural assumptions, but to follow

UNDRIP and the present movement in Taiwan and address them as "nations"—with identities that are complex, diverse, dynamic, modern, and political—engaging with other nations, notably the Taiwan government (see also Hipwell 2019).

Native (*benshengren*, 本省人) in this context marks not an "indigenous" category but a division between Chinese peoples on the island. It differentiates those who migrated to the island prior to establishment of the Kuomintang (KMT) government in the 1940s—notably, the Hakka and Hoklo (or Hokklo) or Native Taiwanese—from the "mainlanders" (*waishengren*, 外省人) who migrated from China following the Chinese Civil War (Corcuff 2002; Gates 1981). Although these categories have lost some of their salience in recent decades, they continue to be part of the discourse of an overarching and contested ideology of Chinese-ness on the island (Simon 2009).

The IPBL defines *buluo* (部落) as "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" (Art. 2). Accordingly, it indexes a social category between the larger indigenous nation and the local village. I translate this term as *community*. Finally, "village" (*cunluo*, 村落) refers to the subdivisions of a local *buluo*. As Kerim Friedman (2018: 82) notes, distinctions between these social categories—nation, native, community, and village—may often be blurred by local people as they attempt to articulate the social level most "local," and therefore, most authentically "Taiwanese."

With these methods and terminologies in hand, the trajectory of this text follows what I refer to as "guideposts": theoretical directional indicators guiding one towards a destination. Here, the destination is uncovering how notions of indigenous culture and state law emerged in and shaped the constitution of courtroom interactions and rules about indigenous custom and

tradition in Taiwan's special indigenous court units. The metaphor of guideposts is important in another respect. In Taiwan, as in many other geopolitical contexts, place names and street signs are sites for debating indigenous identity, decolonization, and nation building (Leitner and Kang 1999; Rudolph 2004). My usage of "guideposts" thus serves a double function: it signals directions towards an answer, and at the same time, it signals an attempt to level the playing field by incorporating indigenous interests and views. Here, I use three guideposts: refusal, encounter, and ambiguity, which serve as the theoretical protagonists in this study.

Guidepost 1: Refusal

Many disputes involving indigenous custom and tradition arising in Taiwan's special indigenous court units involved indigenous communities and persons who simply refused to be anyone other than themselves. Given the controversial classifications of indigenous persons in imperial and colonial periods, which I discuss later, one must be cautious in applying the concept of "refusal" to Taiwan's indigenous peoples unreflexively. The intention here is to capture a disposition that being and staying indigenous was articulated to understandings of a particular past but also at times to a desire to remain distinct from wider society. This is to not say that all indigenous peoples engaged in refusal practices or that individuals did so consistently but rather that the theme of refusal, frequently arising intermittently as moments of refusal, provides inroads to behaviors and understandings giving rise to and shaping disputes about indigenous custom and tradition in the special units.

A major concern in studies of colonialism is the extent of resistance by colonized populations and the complicity of colonized elites. Theorists have analyzed how the order established by colonialism—master and servant—was internalized by both the colonizer and the

colonized. Franz Fanon (1963), for example, considered how settled communities adopted the values and way of life of their colonizers, imitating Europeans but never achieving identity with them, ultimately laying the groundwork for considering the complicity of colonized peoples in their own subjugation (Merry 2000: 12). Like Fanon, Partha Chatterjee (1992) saw difference between colonizer and colonized as being at the core of the colonial project. He found the stress on difference undermined attempts to "reform" colonialism into a modern regime of power because modern governmentality would convert colonized groups into "rational" people, thereby undermining the foundations of colonial power.

Scholars later turned their attention to dimensions of representation, exposing the discourses framing colonial experience. Edward Said (1979) considered how representations of the "Orient" are inextricably bound to the imperialist societies that produce them. Gayatri Spivak (1988) built on Said's insights by considering how subaltern voices are cast to the margins of intellectual discourse on the basis of differences in "knowing." Homi Bhabha (2004) likewise observed that colonial power was characterized by ambivalence: the split between its appearance as authoritative and yet requiring consistent repetition of difference.

More recently, scholars have focused on strategies used by settler governments and dominant societies to compel indigenous peoples to consent to a particular form of culture somewhat distant from their original culture. These often involve strategies of shifting indigenous peoples away from focusing on their "original right" to self-determination toward consenting to changes to their customary practices. For example, Elizabeth Povinelli (2002) shows how liberal multicultural society only recognizes those features of indigenous peoples' culture that fit within its preferred model of indigeneity. Circe Sturm (2002) examines how Native Americans express Gramscian notions of contradictory consciousness as they react to

their world with a mixture of tacit accommodation to the hegemonic order and express resistance. Jessica Cattelino (2008) studies the complexities of performing "authentic" indigenous identities, where economic independence of the tribal communities was simultaneously a source of sovereignty and a denigration of native tradition. Mark Rifkin (2011) examines how colonial regulation of Native American peoples targeted kinship relations that appeared non-heteronormative as a way of maintaining settler domination. Audra Simpson (2007, 2014, 2016) shows how the social sciences, including the discipline of anthropology, have participated in creating a fixed conception of indigenous culture that erases indigenous subjectivities (Gilley 2014).

In this context, literatures on colonialism and indigenous peoples draw out dimensions of difference, sovereignty, and refusal in relations between indigenous peoples and governance authorities. Scholars recognize that states use law as a tool of governance, a material means of manufacturing pacification (Comaroff 2001: 305). One of the ways states preserve control over indigenous populations is through systems of legal recognition. In many geopolitical contexts, regulations and policies governing legal recognition have been crafted under regimes of law having their origins in, and often remaining relatively intact from, colonial systems of governance (Gandhi 1998: 7). In many contexts, colonialism has fundamentally shaped the category and corresponding status of "indigenous peoples." Taiwan law, for instance, preserves colonial-era categories distinguishing between mountain-dwelling and plains-dwelling indigenous peoples, according legal recognition to mountain-dwelling groups only (Bekhoven 2016: 215). In examining mechanisms of legal recognition for indigenous peoples in Taiwan, I show how indigenous peoples embody and express notions of identity and difference articulated to history but also to racial, ethnic, and legal expectations of authenticity (Graham and Penny

2014b). I thus consider how articulations and performances of indigenous difference under law and within courts shaped discussions about indigenous custom and tradition.

Sovereignty forms another key area of debate. A common understanding of sovereignty concerns the capacity for self-rule, but scholars have recently shifted their attention to alternative expressions of sovereignty, moving away from unitary and totalizing presumptions about such power. Cattelino (2008: 163), for example, argues that casinos become central sites for enacting Seminole "economic nationalism," a form of nationalism based upon principles of economic diversification, and that this form of nationalism reveals that indigenous sovereignty in the United States is shaped by relations of interdependence among tribal, state, and federal government institutions. Here, I expand on these insights to consider how articulations of history and uncertainties in law opened a space for indigenous actors and communities to act intermittently as if they have sovereign control. I refer to such enactments as "as-if " sovereignty, or "just do it" sovereignty (Kalt and Singer 2003: 5), as local indigenous persons and communities engaged in practices, managed natural resources, and claimed territory as if they had sovereign control. Drawing on the Kantian idea of the "consciously false" (Vaihinger 1935), sovereignty was not something subject to proof or disconfirmation but rather only to neglect. In certain respects, indigenous enactments of "as-if" sovereignty mimicked the Taiwan government, which, as a de facto state, must likewise act "as-if" it is a state (deLisle 2011; Friedman 2015).

Resistance is another issue in contemporary analyses of colonialism. Lila Abu-Lughod (1990: 41) insightfully argues that the concept of resistance enables a more complex recognition and theorization of domination. Over time, however, resistance has taken the form of a stock story in postcolonial analysis—what Roger Keesing (1992: 219) describes as a "prototype-image"—covering permutations from overt acts of confrontation to the covert strategies

identified by James Scott (1985). The concept of "refusal" starts from a somewhat different position. Rather than positing an *a priori* landscape of domination and resistance tending to overestimate the place of the state and treating suppression as an all-encompassing frame, refusal offers its own structure as groups refuse "to let go, to roll over, to play this game" (Simpson 2016: 330; McGranahan 2016: 320).

Refusal may seem an odd fit for a study on courts where participation is often compulsory and there is little room for disengagement or refusal to "play the game." Yet, cases involving indigenous customs and tradition arising in Taiwan's special indigenous court units often had their genesis in activities that rejected the hierarchical relationship between the state and society. Both in and out of the courtroom, indigenous actors also took opportunities to remind non-indigenous actors this was not their land and that there were other political orders and other normative possibilities (Simpson 2016: 328). Attention to refusal, as a particular claim to a form of sociality (McGranahan 2016: 320), foregrounds the expectations imposed upon the island's indigenous peoples and helps explain the disputes over custom and tradition arising in Taiwan's special units.

Guidepost 2: Encounter

Disputes over custom and tradition in Taiwan's special indigenous court units involved encounters of Han Chinese and "other" indigenous cosmologies, epistemologies, and ontologies. Invoking the concept of encounter would appear to introduce a binary between the Taiwan state and indigenous persons, thus making an "encounter" necessary. The special units that are the subject of this dissertation and the laws they consider explicitly frame indigenous actors as different, articulating these differences across registers of culture, language, and socio-

economics. The theme of encounter provides a useful starting place for considering engagements across constructed lines of commonality and difference in a legal setting, and it provides an opportunity to consider the tensions in drawing upon "difference" as a basis for securing rights.

In this regard, the special units destabilized entrenched epistemological divides between law and society. In theorizations of law, there has been a long-standing tendency to separate law and society into separate spheres (Frankfurter 1930: 7-8), where law and not-law are seen as sealed, inward looking fields. This understanding fails to recognize that theory and practice interact: that law and society are entwined in critical respects, two faces of one coin. Out of this tendency emerged an insistence that only so-called "civilized" societies had law, while "uncivilized" societies had customs and traditions—an understanding anthropologists have long sought to dispel by challenging notions of legal categories, emphasizing the relation between law and culture, and exposing the plurality of normative orders (Bohannan 1957; Geertz 1983; Gluckman 1966; Llewellyn and Hoebel 1941; Malinowski 1926). Yet, adopting the opposite extreme by rejecting the idea of any meaningful distinction between law and society makes a similar error by neglecting the organizing force of the state and the deep-rooted practices cultivated within certain disciplinary fields (Bourdieu 1987; Merry 1988). Law and society appear instead as distinct but deeply interrelated phenomena.

As I examine in this text, aspects of the interrelationship of law and society were integral to understanding how Taiwan's special indigenous court units articulated indigeneity and crafted rules about indigenous custom and tradition. This dissertation complicates assumptions about where to look for the "law," unsettling the distinction between traditional institutions of law (such as courts) and "law in action" out in society, as these presume one already knows where such lines are drawn. It also enables us to shift away from naturalizing notions that processes in

courts transform social events and relationships into things that can, and should be, be handled by the law (Burns et al. 2008: 314)—legitimizing law's power and, at the same time, missing the eccentricities of legal praxis and courtroom trials.

The field of anthropology has a long history of examining mechanisms of dispute resolution and their relationship to broader cultural systems (see Bohannan 1957; Geertz 1983; Gluckman 1955; Llewellyn and Hoebel 1941; Malinowski 1926; Nader 1997; Rosen 2006). In these formulations, Western law and legal categories tended to dominate, analysis focused on the significance of legal concepts, and discussions largely failed to address the unique power of the state. More recently, anthropologists have abandoned the effort to equate law and culture, or law and society, as being generalized reflections of each other, finding that specific activities and entanglements in law tend to escape the bounds of these generalities. Contemporary studies are more inclined to be concrete in their attention to the dynamic specificity of institutional and interpretive practices and the interests and social consequences these entail (Greenhouse 2006: 188). It is in that vein of analysis that this analysis proceeds.

Recent work has highlighted the emergence of new actors working across various margins of law, such as human rights activists (Merry 2006), indigenous and ethnic communities (Comaroff and Comaroff 2005; Johnson 2014), and international organizations (Sarfaty 2009). Debates originally focusing on the cultural and socio-historical assumptions embedded within human rights (e.g., An-Na'im 1992; Cunha 1992; Martinez 1996; Preis 1996) have shifted to broader considerations, like anthropological activism, human rights practice and industry, and connections between global and local scales (see Allen 2013; Boyd 2013; Goodale and Merry 2007; Falk 2002; Farmer 2004; Messer 1997; Riles 2006; Scheper-Hughes 1995; Speed 2006). Scholars have also looked closely at the operation of rights discourse in various contexts: in

constructions of ethnicity (Wilson 2011), judicial adjudication and court decisions (Kobelinsky 2015; French 2009), language of law (Conley and O'Barr 1990; Matoesian 1993; Philips 1998), legal consciousness (Engel 2005; Merry 1990; Silbey and Ewick 1998), legal education (Mertz 1992), legal techne (Riles 2006), and social innovation in courts (Richland 2008). Legal pluralism (Davies 2010; Merry 1988; Griffiths 1986; Moore 1978) remains a potent source of ideas for challenging the traditional state-centered legal philosophy, but this too has been undergoing revision as scholars address the imbrications of powers and interests across multiple social fields, not all of which are related to law (see Sharani 2008; Simon and Mona 2015). Across these various streams of analysis, scholars have become increasingly attuned to dimensions of law beyond formal and informal law that reveal its connections to violence, oppression, and marginalization (see Brunneger and Faulk 2016; Clarke 2009; Lauri 2014; Mattei and Nader 2008).

The contemporary study of law by anthropologists thus exhibits two overlapping, but not coequal, rubrics about law (Goodale 2017: 5-6). The first concerns an "anthropology of *law*"—one placing law at its center and applying anthropological analysis to legal forms and processes. This is a perspective that privileges law and considers the different ways in which anthropology has developed methodologies and theories about law. The second consists in an "*anthropology* of law"—a perspective offering a wider critique of processes of justice, human rights, global capital, etc. It focuses in particular on responses to and critiques of the wider consolidation of the "neoliberal world order."[4]

[4] This transition appears to track a contemporary trend within anthropology oriented to exposing the hard dimension of life—power, domination, inequality, and oppression—what Joel Robbins (2013) describes as an anthropology of the "suffering subject" and Sherry Ortner (2016) calls "dark anthropology" (see also Geertz 2004: 585).

Speaking from the vantage point of a legal practitioner subject to the gaze of anthropologists, I feel compelled to issue a short concurrence.[5] Anthropological research on law and legal actors has insightfully revealed dimensions of culture, language, power, and practice in law. There lingers the view, however, that legal actors' principal concern in resolving disputes is law: that law dominates legal practice. This is a view rehearsed in law departments and representations in popular media and figures centrally in legal education. From the perspective of a legal practitioner, law shares space with—and, at times, is overtaken by—other activities directed toward resolving a dispute. While legal actors regularly reference and make use of laws, if it is assumed that laws are the only (or even principal) tool used by legal practitioners, a deeply distorted image of law practice can emerge.[6] The point is not that "law" does not matter, but

[5] To give a sense of what I mean by being a legal practitioner subject to the gaze of anthropologists, in my legal practice at an international law firm of more than 1,000 attorneys, which ranged from antitrust class action suits in American federal courts to project finance contract negotiations in East African boardrooms, I never self-identified as a lawyer. A "lawyer" was someone like the fictional character Atticus Finch in *To Kill a Mockingbird* (Lee 1988): a whole-system-viewing, justice-oriented practitioner advocating for the powerless and the marginal (but see Pryal 2010). I was not that. I was a businessman. The goods I produced were high quality billable hours. In my law world, concepts like social justice were remote and often subject to ridicule (see Riles 2006: 61). During my first week of law practice, for example, I received multiple copies of an online animated video entitled, "So You Want to Go to Law School" (Kazzie 2010), from fellow lawyers/businessmen. The video offered a humorous critique of idealism in law practice. Without explicitly stating it, the message was clear: "We are not about any of those ideals you learned in law school. We are about the pragmatics of law business." It was not until I began my Ph.D. studies in anthropology that I adopted the moniker of "lawyer" and I did so mostly because that was the category my colleagues in anthropology felt I occupied. My turn to anthropology was a profound experience as I reflected on my profession, the nature of anthropology as a discipline, and how these should inform my study of legal actors and indigenous actors in Taiwan courts.

[6] Some personal anecdotes here may be illustrative. In law practice, my work was oriented as much toward black letter law and legal reasoning as towards other things: the specific decision-maker, prior trial verdicts and settlements, the parties, the witnesses, the cost of litigation, etc. In my practice, these elements were deeply important to, sometimes even determinative of, legal disputes. For example, one state court judge handling domestic violence cases reported she did not pay much attention to legal filings. She felt instead she could "see" the truth in the victim's eyes. Truth, for her, was a matter of performance. Accordingly, as an advocate for victims, I changed my practice to address her expectations, working less on legal argumentation and more on testimony preparation. As another example, my objective in tort matters was often to move the matter to (or keep it in) a jurisdiction where it had the strongest connection and where I would potentially obtain the most favorable ruling. From the point of view of the parties, the forum was often dispositive, facilitating settlement discussions to avoid costly litigation. To this point, in certain cases my strategy was not to win the case but rather to not let it end.

rather that it should not be taken for granted in law practice. From the street view, so to speak, for many legal practitioners, law, as daily life practice, is something much more complicated than simply "law."

I thus step back from viewing law as a determinative set of rules or a set of social processes towards seeing it as a social field in which normative rules are simultaneously governing, negotiable, and peripheral. The rules encapsulated in codes, constitutions, customs, statutes, regulations, and restatements of law are situated within a larger fabric of anxieties, attitudes, habits, incentives, obligations, rules, strategies, and traditions that inform their application in legal disputes, guiding in a contextualized way what can and should happen given a set of characters, events, and plots. This approach presents new questions, ones that are particularly relevant to engagements between the state and indigenous peoples: Whose norms are they? Who can influence them? Where do alternative justice practices fit in? To what degree are law and custom different?

To explore these dimensions of law, I draw inspiration from ethnographic studies of tribal and indigenous courts (Cooter and Fikentscher 1998a, b; Miller 2001; Nesper 2007; Richland 2008). Bruce Miller (2001) compares what he calls "justice practices" across three Coast Salish communities in the United States and Canada, revealing significant problems concerning the degree to which traditional practices can be brought into the present. This stems from a conservative view of tribal life as a "harmony society" that ignores past problems of social conflict, oppression, and violence. Robert Cooter and Wolfgang Fikentscher (1998a, b) collect

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Financial strains placed on firms, particularly small firms, from legal representation, when combined with the uncertainty of trial outcome, could pressure opposing counsel to convince their clients to quit or settle for less than they might otherwise obtain with a verdict. Other examples abound, but the point is that in each set of circumstances, while the substantive "law" was in play, a resolution was reached—justice served, so to speak—through techniques beyond the bounds of strict considerations about law or legal reasoning. Individual people, particular places, and financial pressures factored in as well.

commentary from tribal jurists across Indian Country regarding the value of custom and tradition in their contemporary jurisprudence, finding that judges make adjustments to Anglo-American legal structure and ideologies to shape tribal court proceedings in ways that allow them to address local understandings of justice. Notably, both works take indigenous custom and tradition as they are presented rather than interrogating the ways in which they are constructed in the flows of legal praxis and procedure. Justin Richland (2008) engages in such an interrogation by examining how understandings of tribal custom, tradition, and culture are invoked and constructed through interactions in a tribal courtroom. He finds that Hopi judges' use of certain linguistic constructions embeds an Anglo-American legal ideology oriented toward abstraction in discussions of custom and tradition. Richland's insight is that one must not take invocations of indigenous culture and tradition as givens; rather, they are concepts constructed through interactions among people, texts, and epistemologies within the courts.

In addition to studies of tribal and indigenous courts, I draw on the lessons of practice-centered approaches (Bourdieu 1977, 1987; Comaroff and Roberts 1981; Moore 1978). These approaches direct attention to the features and characteristic activities of the legal profession, considering it as a space of structured, socially patterned practices in which participants struggle over the appropriation of knowledge and power implicit in legal practices and texts but also as a space of improvisation as actors respond to issues in real-time. Under this view, legal practice is something deeply patterned by daily experience, experience, and tradition but also something extemporaneous, sometimes compelling legal actors to look for extra-legal solutions. Cases involving indigenous custom and tradition arising in the special units often pushed judicial actors into improvisational dimensions of practice as they encountered and struggled to address "other" different understandings of law, reality, and sociality.

I also look to the concept of vernacularization. This concept helps explain how global norms find their expression and saliency in local contexts, not as a top-down imposition of global norms but through a reciprocal process of infusing abstract norms with local meanings, practices, and signs (Levitt and Merry 2009; Merry 2006). As part of its performance as a sovereign state, Taiwan incorporated human rights instruments into its domestic legal framework (Zeldin 2009, 2011). The Taiwan government adopted these instruments in whole, but executive and legislative processes for incorporating global norms into the local legal framework prioritized certain norms over others (Gao, Charlton, and Takahashi 2016: 74-75) and tended to narrow their scope of protection dramatically (Simon and Mona 2015: 11). These processes filtered into the special indigenous court units as legal actors and indigenous actors endeavored to use international human rights norms and jurisprudence to protect indigenous rights and practices.

In addition, I look to the concept of legal pluralism to study how people draw upon multiple sources of law in their daily lives (Davies 2010; Griffiths 1986; Merry 1988). Scholarship on Taiwan's indigenous peoples has addressed pluralism in such contexts as hunting wildlife, finding that discourses surrounding hunting practices invoke a multiplicity of legal norms and practices, specifically custom, international law, domestic law, and religious precepts (Simon and Mona 2015). While Taiwan's special indigenous court units display a relatively weak form of legal pluralism, ambiguities in the law and institutional structure created gaps and inconsistencies allowing judicial and indigenous actors to incorporate indigenous perspectives into legal analysis, building an ad hoc and uneven pluralistic framework.

The guidepost of "encounter" underscores the activities and sociocultural worlds of legal actors and indigenous actors in resolving disputes about indigenous custom and tradition. Encounters within Taiwan's special indigenous court units are anthropologically interesting

because they reveal ongoing negotiations over knowledge, normativity, and reality among differently situated actors—judges, lawyers, litigants, witnesses. Examining these interactions not only helps explain the activities of the special units but also contributes to our understandings of alterity, translations of law across global and local scales, and pluralistic spaces.

Guidepost 3: Ambiguity

Ambiguity plays a significant role in Taiwan's special indigenous court units. In the special units, ambiguities arose in legal contests over facts and norms, denials of contingency, and other knowledge practices in legal situations. I explore how ambiguities in Taiwan's indigenous rights protections and judicial institutions created conditions where the special units formed sites of state power that reinscribed dominant Han Chinese preferences and understandings of indigeneity but also opened a space that permitted new expressions of indigenous identity and debating state authority.

Anthropologists have approached ambiguity from various directions. Marc Augé (1998) distinguishes between ambivalence and ambiguity. Ambivalence is an expression of the plurality of existing possibilities: "ambivalence implies perceiving the coexistence of two qualities, even if, in the domain of truth judgments, ambivalence is due only to a change in point of view or scale" (Augé 1998: 30). Ambiguity, on the other hand, is the quality of being open to more than one interpretation, of being inexact. It is often viewed as a threat to the modernist categories of ordering the world and "seeing culture like a state" (Scott 1998) because, as Augé argues, ambiguity carries with it a potential to imagine a world otherwise. It affirms that something is neither one nor the other: "to put in negative form—the form considered a given moment to be the only one possible—something positive that cannot yet be qualified. It is to postulate the

necessity of a third term" (Augé 1998: 31). Ambiguity thus indicates that the world must be altered to make something new intelligible (Brković 2017: 16).

Anthropologists have also considered how ambiguity challenges and reproduces categories appearing to be fixed and stable. Michael Herzfeld (1999) examines national identity in Greece, approaching ambiguity as part of a productive tension between national discourse and everyday practice. He finds that this tension gets resolved in different ways in different situations, sometimes reinstating Greek national identity, sometimes threatening the power of the state. Echoing Augé, Herzfeld (1999: 133) notes "it is ambiguity that most threatens the ideal order of the state."

Other anthropologists view ambiguity as a form of hegemony, becoming itself the preferred, rehearsed category. Sara Green (2005: 12) observes that

> [a]mbiguity can be as hegemonic and subject to disciplinary regimes as clarity; confusion, lack of a means to pin things down, can be as actively generated as positive assertions and constructions of truth . . . Far from an apparent stability and fixity . . . the hegemonic discourse on the Balkans insists that the region is fluidity and indeterminacy personified.

Čarna Brković (2015, 2017) similarly shows how ambiguity can be manipulated and sustained to reproduce position powers. In her study of Bosnia and Herzegovina, the more powerful people—decision-makers and providers of social protection—were able to use structural ambiguities to influence when and how much a particular service was a matter of professional duty or of personal goodwill (Brković 2015: 273). These actors were "flexians" (Wedel 2009: 45): individuals who generated power by managing ambiguity. Their activities depended upon and reproduced ambiguities between public and private power, thriving on uncertain appearances, borders, identities, and loyalties.[7]

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[7] Recent studies of the sciences similarly show that persons who skillfully manage ambiguity can generate power. Scientific expertise, for instance, does not ordinarily stem from producing stable facts or ultimate

Other anthropologists note that ambiguity can create protective spaces for vulnerable persons. Jess Marie Newman (2019) shows how managing ambiguities surrounding single mothers in a Moroccan maternity ward required triage and inscriptive practices that created tensions between patients and staff members and among different levels of hospital hierarchy. These ambiguities created gaps and inconsistencies that allowed vulnerable patients to disappear from view and avoid unwanted scrutiny (Newman 2019: 2).

In Taiwan, the practice of indigenous rights involved managing significant ambiguities: blurry institutional purposes; conflicts between laws; gaps in knowledge; and vague guidelines, all of which occurred in the uncertain geopolitical context of a de facto state. In certain respects, these ambiguities were opportunities for state actors to consolidate their power and influence. In other respects, they introduced questions going to the core of understandings of law and justice, which in turn opened the door to new types of conversations about indigenous peoples and their rights. Attention to the ambiguities in Taiwan law and legal institutions ultimately reveals how the special units formed an uneven framework of governance over the island's indigenous peoples.

The Approach of This Research

I attempt to read "along the grain" (cf. Stoler 2009: 50) of Taiwan's special indigenous court units, following the actors, issues, and norms appearing in the special units to their end without assuming their activities, experiences, or impact, or even the existence of the special units themselves. It is important to bear in mind that court hearings, as units of analysis,

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truths but from the skilled management of changing and contradictory forms of evidence (Deener 2017: 360). Scientific knowledge is connected to processes of marshaling support—from ideas from past research, from colleagues who are willing interpret findings in similar ways, and from those who control resources for research (Latour 2003). Scientific organizations engage in "interpretive flexibility" to handle persistent ambiguities (Pinch and Bijker 1984; Vaughan 1996).

represent only part of the picture of the flows and conflicts of normativity in indigenous communities and in wider society (Burns et al. 2008: 314). Keeping that in mind, I do not take for granted that the invocations of indigenous custom and tradition presented in court cases represent a definitive world of indigenous normativity outside the particulars of the specific actors, events, and disputes. Neither do I take for granted that laws or legal institutions are clearly defined or consistently understood among individual actors. I also do not for granted that logics of law within courts are homogenous or so thorough-going that they fully eradicate the complexity of social facts or the impact of human emotion (Sapignoli 2017: 223).

Instead, I follow proceedings in the special units as they present themselves, on their own terms. Examining face-to-face interactions of indigenous and non-indigenous actors in cases involving indigenous custom and tradition, I show how individuals with different attitudes, knowledges, roles, and values gave life to a contested judicial space equipped with ambiguous tools. I show that the special units operated as spaces of significant state power but also ones of profound uncertainty. I explain that the special units, in many respects, operated as ordinary courts do, largely invisible as institutions within the national court framework, but ambiguities in law and legal structure, coupled with encounters with alterity, created conditions compelling some judicial actors to reflect on their assumptions about difference, law, and reality. In those moments, the special units emerged as exceptional spaces for debate and experimentation with the capacity to reshape state and local understandings of belonging, custom, and law. As such, Taiwan's special units existed as paradoxical judicial bodies, at once securing and undermining indigenous rights claims.

I organize this text into eight chapters. Permitting alliteration to run wild for a moment, the argument proceeds by examining the protagonists (indigenous peoples and legal actors),

purlieu (the historical context and legal framework), power (flowing and fracturing), protections (codified and uncodified rules), paradoxes (of institutions and praxis), performances (of indigenous and non-indigenous actors), precarity (of life and access to justice), and provisionality (law and sovereignty as conditionals) in this legal framework.

The first substantive chapter, Chapter Two, “Making a Special Indigenous Court in Taiwan,” introduces Taiwan’s indigenous peoples; the development of the concept of indigeneity and ethnic typologies; and the history, legal foundations, personnel, and style of the special indigenous court units. It highlights the persistence of colonial systems and categories for administering Taiwan’s indigenous peoples, the importance of the special units as institutions mediating between Taiwan’s Han Chinese and indigenous societies, and the compromises that led to the weak pluralism embedded in these judicial bodies.

Chapter Three, “In the Hallowed Halls of Justice: Towards an Ethnography of Court Infrastructure,” situates Taiwan’s special indigenous court units within the broader infrastructure of the national court system. It examines how the special units were a mix of materials, meanings, and practices shaping human relations and experiences through the resolution of disputes about indigenous custom and tradition. Focusing on dimensions of power, design, movements, perspectives, and mobility in court infrastructure, this chapter emphasizes the degree to which the special units were spaces through which Han Chinese political rationalities flowed. Anticipated and unanticipated fractures in that power, however, enabled other forms of expression, interaction, and practice.

The fourth chapter, “Legal Stereoscopy: Indigenous Rights, Historiography, and Interdisciplinarity,” examines the ambiguous and sometimes contradictory terrain of legal protections for indigenous peoples used in the special indigenous court units. It offers an

alternative account of indigenous rights in Taiwan from the perspective of its legal subjects as it interweaves the texts of indigenous protections with their lived experience in local communities. More broadly, the chapter uses the heuristic device of stereoscopy (three-dimensionality) to explore the collaboration of law and anthropology, arguing that their most productive partnership is neither in separation nor merger but in tension.

In the next chapter, "Courts of Being and Nonbeing: Searching for Ontological Salience in a Special Indigenous Court Unit," I consider the paradoxical existence of Taiwan's special units as participants disagreed about who they were, where they were, and what they were doing. I argue that the special indigenous court units exhibited a "punctuated ontology," in that they typically operated as ordinary courts, but ambiguities in law and encounters with indigenous "others" at times generated conditions where the special units emerged as extra-ordinary judicial bodies.

Chapter Six, "Performing Indigeneities: At the Intersection of Law and Indigeneity," considers indigenous peoples' engagement with Taiwan's special indigenous court units. "Staging" the analysis as a drama, it examines the range of performances of indigeneity—charismatic, low-key, and in-between displays—occurring in and around legal proceedings in the special units as indigenous actors strategically used these spaces to perform and debate difference and state power, and to advance their own understandings of culture and justice practices.

In the seventh chapter, "From Thin to Thick Justice and Beyond: Precarity across the Lawscape of Indigenous Rights in Taiwan," I tack in and out of the courtroom doors to consider the challenges of providing adequate legal services to Taiwan's indigenous peoples. I sketch the contours of a broader, more complex set of considerations about the challenges of law and access

to justice for indigenous peoples, arguing for a "thicker" concept of law and justice that recognizes the entanglements of law with other social fields. I caution that the ideal solution may not lie in seeking more security for indigenous rights and access to justice but rather to stay strategically with precarity to advance an alternative approach to indigenous rights and access to justice grounded in a language of land and self-determination.

The concluding chapter, "Opening Statement as Closing Argument: Customs, Parables, and Sovereignty," provides a summary of the argument and turns to what the discussion reveals more broadly about law and sovereignty. I suggest it invites attention to the central role of narrative in law and sovereignty. Codified laws and indigenous custom share in a fundamental feature as storytelling: they consist in "if-then" moral stories, what I loosely identify as "parables," about what can and should happen given a set of events, characters, and plots. State and indigenous expressions of sovereignty in Taiwan also share in a pattern of constructing a narrative of self-rule and then behaving as if the world fit that model: they consist in intermittent and strategic expressions of "as-if" sovereignty creating a tentative field of claims to self-rule that, while not unified or totalistic, are nonetheless powerful in their own right.

CHAPTER TWO

Making an Indigenous Court in Taiwan

My Truku friends told a story about their origins. During ancestral times, there was an enormous tree located in a place called *Bunohon* in the central mountain range of the island. The tree was made of wood on one side and stone on the other side. The spirits of this special tree became gods. One day, a god and a goddess came out of the trunk of the tree, and they had many children. Their children also had offspring. Food was plentiful. If they wanted meat, all they had to do was call for a boar and it would come. They could then pluck out a single hair, cut it into pieces, and then when they cooked the hair they would have all the meat they needed. After many generations, *Bunohon* became too small for the group, so they migrated elsewhere. Once they left *Bunohon*, however, they had to start farming and life became much harder.

This "born of wood, born of stone" origin story, like many other origin stories, was as much about contemporary circumstances as it was about the past. Taiwan's indigenous peoples have been subjected to the consecutive control of six different powers over a period exceeding 400 years. These powers increasingly attempted to control indigenous lands; assimilate indigenous groups through intermarriage, language and naming requirements, and suppression of local practices; and subjugate the indigenous population to racially discriminatory processes. These practices have had a deep and lasting impact on Taiwan's indigenous peoples. Lands have not been returned; indigenous cultures are under ongoing cultural, economic, and social pressure; and indigenous communities are marginalized. Developments in recent decades suggest progress towards protecting indigenous lifeways and territories, but much work remains to be done to decolonize state control over and narratives about indigenous peoples.

This chapter introduces Taiwan's indigenous peoples and traces the development of Taiwan's special indigenous court units. It does so by examining the linkages of Taiwan's indigenous peoples to other Austronesian-speaking peoples across Oceania, the island's history of colonial control and transition to democracy, constructions of the concept of "indigeneity" and ethnic groups, articulations of indigenous status under law, and the creation of the special indigenous court units. The chapter highlights the persistence of colonial systems and categories for administering indigenous peoples, the importance of the special units as institutions mediating between Taiwan's Han and indigenous societies, and the compromises that led to the weak pluralism embedded in these judicial bodies.

The Austronesian Peoples of Taiwan

The indigenous peoples of Taiwan generally refer to the groups and communities that have been living in Taiwan and its neighboring islands before the influx of Chinese immigrants from the coastal provinces of China starting in the seventeenth century (CIP 2016: 8). At present, there are approximately 546,700 indigenous people, making up nearly 2.3 percent of the island's 23.5 million people (Executive Yuan 2016b: 10, 46). Ninety-five percent of Taiwan's population is Chinese (including Hoklo, Hakka, and other groups originating in mainland China). As such, Taiwan's indigenous peoples comprise a percentage of the population comparable to Native Americans in the United States (1.7%), Aboriginal and Torres Strait Islander peoples in Australia (3%), and First Nations in Canada (4.3%), although somewhat less than the number of Maori people in New Zealand (15%).

Taiwan's indigenous peoples belong to the Austronesian linguistic family group, which includes the majority language groups in Malaysia, East Timor, the Philippines, Indonesia,

Brunei, Madagascar, Micronesia, and Polynesia. Concentrated in Southeast Asia and Oceania, Austronesian peoples number approximately 300 million and are the most widely spread people in the world (CIP 2016: 9). The languages spoken in Taiwan are also the most varied of all Austronesian localities, leading some scholars to suggest it was the origin of Austronesian diaspora (CIP 2016: 9; Vost 1995) (fig. 4). Taiwan is unique in that it is simultaneously situated culturally and linguistically in East Asia through its connection to Chinese migrations to the island and in Oceania via indigenous peoples' relation to Austronesian languages and cultures.

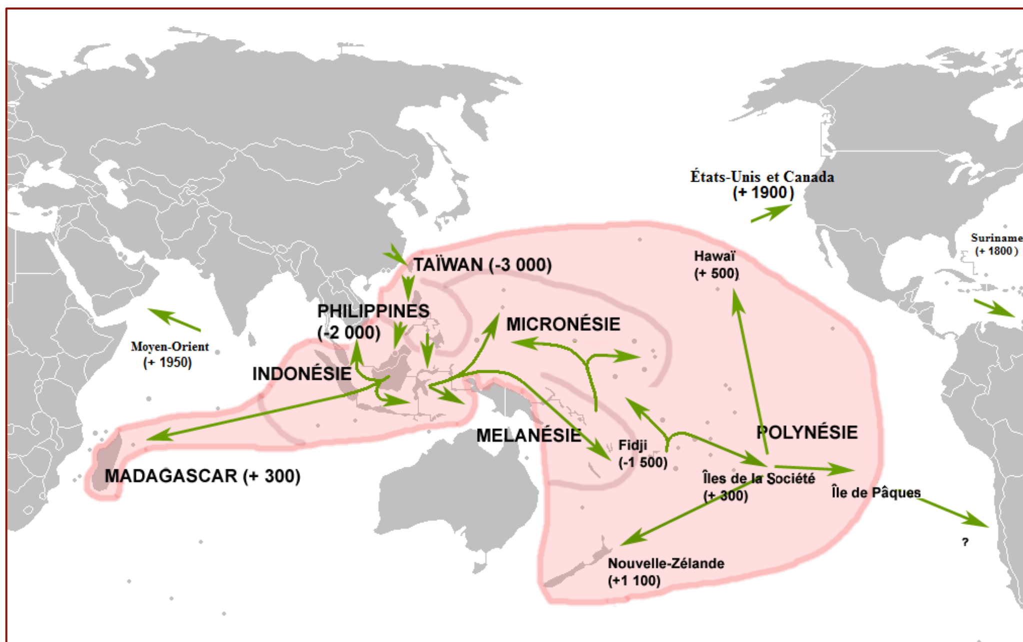

Figure 4. Migration and expansion of Austronesian peoples (ECAI Austronesia Project 2013)

History of Taiwan's Austronesian Peoples

Other than for a brief presence of the Spanish and Dutch, Austronesian peoples in Taiwan were relatively isolated until the mid-seventeenth century, after which Chinese settlement began in earnest. In the early modern period, Taiwan's indigenous peoples encountered the Dutch (1624-1662), the Spanish (1626-1642), Koxinga (1662-1683), and the Manchu Qing Dynasty (1683-1895). Later, Taiwan's indigenous peoples encountered the Japanese (1895-1945) and the

Mainland Chinese (1945-present). Given the longevity and varied nature of colonial control of Taiwan, some have called the island a "colonial laboratory" (Kerr 1942).

In 1624, the Dutch Empire, through the East India Company (EIC), established a colony in the southern part of the island. The Dutch were the first and only European power to establish a relatively long-term colonial government in Taiwan. The Spanish Empire established a small colony on the northern tip of the island in 1626, but the Dutch drove them from the island 16 years later in 1642. During Dutch rule, the EIC concluded treaties with numerous indigenous villages. These treaties recognized certain features of indigenous sovereignty. For instance, they allowed indigenous villages to keep their rights to their traditional territories and they ensured that indigenous lands would not be alienated without their consent. When Chinese or company officials engaged in logging or farming on indigenous lands, they had to pay a fee to the EIC meant to be remitted to the indigenous communities. In practice, however, these revenues infrequently made their way to their intended indigenous recipients (Andrade 2010: 185-186). These treaty rights ultimately expired when the Dutch were defeated and driven from the island by the Ming-dynasty General Koxinga in 1662.

Koxinga (國姓爺, or Cheng Cheng-kung, 鄭成功) took his forces to Taiwan as the Manchu Qing Dynasty advanced towards southern China. After a short period when Koxinga and his son and grandson controlled the island, the Qing took control of Taiwan in 1683, making the island a prefecture of Fujian Province and later a province in its own right in 1887 (Andrade 2010: 260-261). Under Qing control, Chinese immigration and intermarriage with mainly plains indigenous groups resulted in plains groups being increasingly assimilated into Han Chinese culture (Refworld 2008).

Indigenous groups living high in the mountains were largely left alone as the Qing slowly expanded their reach across the island's plains. Qing authorities divided the island's indigenous population into two groups: *shufan* (熟番, "cooked savages," those who submitted to Qing rule) and *shengfan* (生番, "raw savages," those who maintained their own political institutions) (Simon and Mona 2013: 103). This classification system was not based upon cultural, ethnic, or racial features but rather upon a political relationship between Qing authorities and local indigenous peoples, serving mainly tax purposes. So-called "cooked" savages had officially submitted to Qing rule and paid taxes to Qing authorities. They lived close to Chinese settlers and adopted Chinese customs and culture. So-called "raw" savages did not pay taxes and lived beyond boundary trenches set up by Qing authorities to prevent attacks and to prevent Chinese settlers from encroaching on indigenous lands (Shepherd 1993: 16-17).

By the nineteenth century, the term "cooked savage" became interchangeable with "plains savage" and "raw savage" became exchangeable with "mountain savage." Again, these territorial classifications did not accurately reflect facts on the ground as some mountain-based groups submitted to Qing rule and some plains-based groups remained beyond the reach of Qing rule. As explained below, these arbitrary distinctions have persisted to this day, contributing to the exclusion of Taiwan's lowland-dwelling groups from formal recognition as indigenous groups (Bekhoven 2016: 215). For this reason, one must be attentive to history when theorizing contemporary indigenous peoples in Taiwan in terms of "refusal," as a form of sociality rejecting the hierarchical relationship between the state and society (Simpson 2014). One must do so because it potentially reifies old and offensive distinctions of "raw/mountain" versus "cooked/plains" peoples. I intend no such connection as I explore moments of refusal by indigenous actors and communities occurring in and around the special indigenous court units.

In 1895, the Empire of Japan annexed Taiwan under the Treaty of Shimonoseki, which concluded the First Sino-Japanese War and resulted in Qing defeat. Japan regarded the island as critically important to its regional strategy, calling Taiwan the "key to the southward policy" (Kerr 1942: 51). It became the first power to attempt to pacify the indigenous population and subjugate all of Taiwan's indigenous peoples to colonial control. Japanese military governors, adopting a practice similar to the Qing Dynasty, classified indigenous peoples into two groups: mountain peoples (Japanese: *takasago zoku*, 高砂族) and plains peoples (Japanese: *peipo zoku*, 平埔族). Drawing on American models of Native American policy, Japanese administrators forced indigenous communities to settle in fixed reserves and take up agriculture. Entire communities were forcibly removed to low-lying areas near Japanese military and police outposts, land was confiscated, and indigenous groups were required to use Japanese language and to adopt Japanese names (Refworld 2008). Japanese colonial administrators forced indigenous groups to live as state wards while Chinese inhabitants enjoyed private property rights. Those indigenous groups who resisted Japanese control were met with violence from the Japanese military. For example, in 1914 Japanese security forces killed approximately 10,000 Sedeq people. In 1930, in retaliation for a rebellion in Wushe, Taiwan, Japanese forces destroyed six Sedeq villages, killing over 600 Sedeq people. During World War II, Japanese administrators also conscripted indigenous men into the army and forced indigenous women to serve as "comfort women" (Chou 2009: 120-124; Hays 2008).[8]

Following the Japanese defeat in 1945, Allied forces transferred control of Taiwan to the

[8] For some elderly indigenous people in Taiwan, life under Japanese colonial rule remains a part of living memory. I can recall hearing stories in my youth from our elderly Paiwan neighbor about being forced by Japanese forces to lie on the beach wrapped in barbed wire together with other local Paiwan men in an effort to discourage US naval forces from shelling the beach. During my fieldwork, elderly indigenous hunters shared their memories of traveling with their fathers and other village men to collect the heads of dead Japanese soldiers.

ROC government on the Chinese mainland. During the early period of the KMT rule, while it was still in Nanjing, the ROC government viewed Taiwan as a "border area." With the Communist victory in 1949, the ruling KMT party retreated to Taiwan, and the government had to redefine Taiwan as the center of "free China" and true home of Confucian culture (Chun 1994). National discourse during this time was deeply China-centered. Kerim Friedman (2018: 90) notes that this China-centered focus meant that Taiwan's indigenous peoples during the KMT period were "doubly marginalized" as they were seen as not following Chinese cultural norms, and their perceived ties to the land of Taiwan rendered them peripheral to the geographic center of an imagined Chinese nation.

KMT policies regulating Taiwan's indigenous peoples were in many ways similar to and just as devastating as Japanese colonial policies (Refworld 2008; Tai 2015: 2052). From 1949 to 1987, the KMT held the island under martial law and implemented a program of "White Terror" designed to squelch political dissidents, subjugating both native Taiwanese and indigenous peoples.[9] Under the White Terror program, indigenous peoples often found themselves the targets of violence and interference. KMT authorities, like their Japanese antecedents, adopted policies designed to assimilate the indigenous population by prohibiting teaching of their native languages and prescribing the use of Chinese language and adoption of Chinese names. The sudden influx of more than one million Chinese migrating to Taiwan in the span of a few years, the new measures imposing exclusive use and domination of the Chinese language on all aspects

[9] As a youth, my family and I lived in Taiwan during the White Terror period. I can recall the presence of machine gun-carrying soldiers, hearing stories about government surveillance of our family, watching as my parents were taken away by government officials for questioning, and trying to read my brother's *Ranger Rick* magazines after customs officials had blacked out all the text with permanent marker. If this was a challenging time for a foreign family, it was far more so for indigenous peoples. During this time, indigenous groups had few legal protections and many lived in abject poverty. As one example, I recall my young Amis friend who disappeared one day, sold to a Japanese fishing trawler for the sex trade because her parents had no other means to support their family.

of public life, and further erosion of indigenous land rights continued and accelerated the process of assimilation into the controlling Han Chinese population.

Following KMT authoritarian rule, Taiwan transitioned to democracy. During the period of martial law, the hard authoritarianism of Chiang Kai-shek (蔣介石), Taiwan's first president, shifted to a softer form of authoritarianism under the leadership of his son, Chiang Ching-kuo (蔣經國), as calls for liberalization grew. During this transition period, government policies and models of economic development gave rise to relatively equitable income distribution, education levels rose dramatically, and a prosperous and sophisticated civil society developed. New political parties were allowed to form and major political and constitutional reforms followed, including direct elections of legislators and the President, the emergence of an independent judiciary, and the establishment of a free press. In 1987, the KMT government finally lifted martial law after almost four decades of authoritarian control. In 1992, the island held its first full elections to parliament and in 1996 held its first direct election for president (Lim 2011).

Colonialism, Democracy, and Indigenous Rights

A few features of Taiwan history are worth highlighting at this point. First, Taiwan was arguably a colonial state until 1987. Bruce Jacobs (2018: 166) defines a colonial regime as one "ruled by outsiders for the benefit of outsiders." Most scholars would likely agree that the form of rule imposed by the Dutch, early Chinese, and Japanese was a form of colonialism in the manner in which outsiders subjugated indigenous populations. More interesting is the proposition that the KMT authoritarian government was also a form of colonialism, not a settler society as is commonly recognized (see Weitzer 1990: 24-27).

Identifying the ways in which KMT rule resembled Japanese colonial rule, Jacobs (2018: 166-168) argues that when the KMT arrived in Taiwan they systematically suppressed not just indigenous peoples but also Chinese migrants who arrived on the island prior to 1895 (the year Japanese rule began in Taiwan). In other words, the KMT government did not form a Chinese settler state because they also liberally discriminated against the Chinese settlers who arrived earlier, engaging in what one may call a form of internal colonialism (Allen 2005: 186; see also Churchill 2002: 24). If a settler society refers to the arrival of substantial numbers of outsiders who subjugate the indigenous population only, Taiwan was not a settler society (Jacobs 2018: 171). Along this vein, scholars observe that the subsequent rise of multiculturalism in Taiwan was not actually intended to benefit indigenous peoples but rather to combat the rise of Taiwanese nationalism and to secure KMT (colonial) control in the transition to democracy through obscuring questions of nationhood, ethnicity, and colonial legacies (see Friedman 2018).

Second, two events occurred in the late twentieth century that opened a political and social space for discussions about indigeneity and indigenous rights. In 1971, Taiwan lost its status as representative for the "State of China" to the United Nations (UN 1971). Following this change, most nation-states severed diplomatic relations with Taiwan (Su 2006: 51). This left Taiwan in a unique and uncertain position: it was a state-like entity, but it was not recognized as such within the modern international system. Compliance with international law and norms became an opportunity for Taiwan to affirm its place on the world platform, and promoting human rights and the rights of indigenous peoples was one mechanism for accomplishing that goal (Gao, Charlton, and Takahashi 2016: 69; Simon and Mona 2015: 4).

The late 1980s also saw the KMT's authoritarian rule give way to a new liberal democratic order (Cooney 1996: 11-12). Along with Taiwan's transition to a liberal democracy,

an indigenous rights movement began to emerge. Inspired by the global indigenous movement and propelled by the efforts of activists, like the Mountain Greenery (*gaoshanqing*, 高山青) newspaper, a small newspaper established by a group of indigenous students in Taipei, the indigenous rights movement advocated for a pan-indigenous identity and human rights (Allio 1998). Notably, early efforts to secure indigenous rights took the form of working within the nation-state structure, rather than appealing to international enforcement, and were particularly driven by urban interest groups. As Taiwan gradually transitioned away from an idealized China, indigenous rights became a symbol representing an independent Taiwan, shaping the imaginary of the state and signifying a rejection of China's repeated claims that Taiwan is "part of China" (Schubert 2016).

These moments—the U.N. de-recognition of Taiwan and the transition to a democratic state—opened a space and, in some ways, created an incentive for the Taiwan government and indigenous peoples to turn to international norms and indigenous issues. These served as mechanisms for both positioning Taiwan on the world stage and for asserting a claim of independence from China.[10] Yet, in this turn, the Taiwan government has maintained firm control over the category of indigeneity and acceptable expressions of indigenous lifeways, a point to which I turn next.

[10] It is, of course, an oversimplification to attribute a causal relation solely to these conditions. Other factors likely contributed to the expansion of indigenous recognition in Taiwan during this period. As noted, hegemonic national discourse for many years centered on a return to and retaking of China. In conversations, many of my local colleagues and friends suggested that Taiwanese people, particularly those of Mainlander descent (*waishengren*, 外省人) who immigrated in or around 1949, remain cognizant of their non-native status in ways more immediate and forceful than those in other contexts, such as Anglo-Europeans in the United States. In addition, Taiwan has consistently had a high number of academics in public office and not just cradle-to-grave politicians (Fell 2018: 3). The fact that many Taiwanese politicians and officials have PhDs and spent portions of their careers as academics has potentially opened additional channels for progressively minded ideas to enter policymaking. These and other factors suggest that the introduction of indigenous rights in Taiwan involved a complex set of circumstances and conditions.

Indigenous Status in Taiwan

Presently, the Taiwan government unilaterally establishes the concept of indigenous peoples and indigenous status. It sets the criteria by which both groups and individuals qualify as "indigenous." This power imbalance in indigenous recognition in many ways perpetuates earlier colonial forms of control over Taiwan's indigenous peoples (Bekhoven 2016: 209).

The 2001 *Indigenous Peoples Status Act* (Status Act) (*yuanzhuminzu shenfenfa*, 原住民身分法) is the official law regulating the status of indigenous peoples in Taiwan. Rehearsing earlier arbitrary distinctions of "raw savages" and "cooked savages," Article 2 divides indigenous peoples into "mountain region indigenous peoples" and "lowland region indigenous peoples." Mountain region indigenous peoples are those nations that are "permanent residents of the mountain administrative zone before the recovery of Taiwan" and lowland-dwelling indigenous groups are the "permanent residents of the plain-land administrative zone before the recovery of Taiwan."[11] Article 2.2 of the Indigenous Peoples Basic Law (IPBL) also used these classifications, initially defining "Indigenous Persons" as "nationals who are registered either as Mountain Region Indigenous Peoples or as Plain Region Indigenous Peoples and thereby obtain legal Indigenous status, being evidenced by the household registration records of aforesaid Indigenous Persons" (Tagliarino 2017: 41n24). Subsequent amendments to Article 2.2 removed references to these categories.

Besides rehearsing a classification scheme that no longer served any purpose, there was little clarity about which criteria determined whether a group was indigenous. Initial versions of Article 2.1 of the IPBL connected the concept of "indigenous peoples" conjunctionally to

[11] "Recovery of Taiwan" refers to Taiwan being recovered by the ROC from the Japanese at the end of World War II, specifically October 25, 1945 (Gao 2014: 8n6). The Status Act thus situates Taiwan's indigenous peoples historically in the period of Japanese colonial rule and the early modern period.

territory, performance, difference, and self-identity. Subsequent amendments emphasized tradition and approval by the central government body representing indigenous peoples, the Council of Indigenous Peoples of the Executive Yuan (CIP) (*yuanzhuminzu weiyuanhui*, 原住民族委員會). Scholars note that no laws, regulations, or internal documents exist that set out principles or guidelines for recognizing "indigenous peoples"; rather, the CIP reviews petitions with reference to earlier precedents that were decided during earlier colonial periods without any guiding regulations (Bekhoven 2018: 216).

The Taiwan government presently only recognizes so-called mountain region indigenous peoples. There are currently 16 officially recognized indigenous nations: Amis (*ameizu*, 阿美族); Atayal (*taiyazu*, 泰雅族); Bunun (*bunongzu*, 布農族); Hla'alua (*laaluwazu*, 拉阿魯哇族); Kanakanavu (*kanakanafuzuzu*, 卡那卡那富族族); Kavalan (*gamelan*, 噶瑪蘭); Paiwan (*paiwanzu*, 排灣族); Puyuma (or Pinuyumayan) (*peinanzu*, 卑南族); Rukai (*lukaizu*, 魯凱族); Saisiyat (*saixiazu*, 賽夏族); Sakizaya (*saqilaiyazu*, 撒奇萊雅族); Seediq (*saidekezu*, 賽德克族); Thao (*shaozu*, 邵族); Truku (*tailugezu*, 太魯閣族); Tsou (*zouzu*, 鄒族); and Yami (or Dawu) (*yameizu*, 雅美族) (Executive Yuan 2016b). These nations are primarily concentrated in Orchid Island and the mountainous central and eastern portions of Taiwan. Again, reflecting the inconsistencies of this classification system, several groups designated as "mountain region peoples" are plains-dwelling groups (Amis, Kavalan, Sakizaya, and Pinuyumayan). The Taiwan government regards these plains-dwelling groups as distinct from the lowland-dwelling indigenous groups, or *pingpuzu* (平埔族), who primarily reside on the western side of the island. These *pingpuzu* groups include the Babuza, Basay, Hoanya, Ketagalan, Luilang, Makatao, Pazeh/Kaxabu, Papora, Qauqaut, Siraya, Taivoan, Toakas, and Trobiawan (Adawai 2017: 320;

n.a. 2014). To date, no lowland-dwelling group has received official indigenous status, although the Tainan County government and Taiwan's courts recently recognized the Siraya lowland group as an indigenous nation (Morris 2018; Pan 2016). The county has no authority, however, to give Siraya individuals the rights and privileges accompanying official indigenous status under national law.

Only individuals belonging to one of the 16 officially recognized indigenous nations qualify for indigenous status in Taiwan. Article 2 of the Status Act stipulates that determinations about an individual's "indigenous" status are based on the individual's household registration record. This record must show that the individual is of indigenous descent or that her or his parents or other immediate kin are registered as indigenous persons. Indigenous communities in Taiwan thus do not have control over who is given indigenous status. It is determined by historical records dating back to the Japanese period when, as part of a larger program to control the population, colonial authorities marked individuals as indigenous on a census certificate (Bekhoven 2018: 220).

There are numerous concerns with this registration system. It assumes adequate maintenance of records from over 70 years ago across a regime change. It also begs the question of whether indigenous persons during that time acquiesced to or avoided being classified as "indigenous" by Japanese colonial authorities. Further, colonial authorities based indigenous identity upon whether the father was indigenous, excluding individuals whose mother was indigenous. Finally, the system assumes that lowland groups had fully assimilated into Chinese society and were, therefore, no longer "indigenous." In drawing on this registration system, the present framework for determining indigenous status in Taiwan both perpetuates a colonial system and contains deep flaws.

The registration system also has significant tensions in Taiwan law. The Status Act presents one standard based upon a registration system while the IPBL, which provides a more comprehensive set of protections for indigenous peoples, offers another standard grounded in self-determination. While the IPBL states that all Taiwan laws would be amended to give effect to its principles, the Legislative Yuan has not amended the Status Act to make it consistent with the IPBL. As a result, it remains unclear whether the two documents present different standards or if the Status Act presents a specific test under the IPBL.

The 2000s saw a proliferation of domestic laws aimed at protecting the island's officially recognized indigenous peoples (Gao, Charlton, and Takahashi 2016: 68). In addition to the Status Act, the Taiwan government enacted laws regulating indigenous employment, guns, education, hunting, political representation, lands, and intellectual property as part of a movement propelled by the newly elected DPP government. As discussed in detail in subsequent chapters, ambiguities and contradictions in these laws have resulted in an uneven, often conflicting, terrain of law. In recent years, signs of a shift toward self-determination have emerged. For example, current Taiwan President Tsai Ing-wen (蔡英文) (2016) has committed her administration to "promote indigenous self-government" in her landmark apology to indigenous peoples on August 1, 2016. Much work, however, remains to secure indigenous peoples' rights (Mona 2019).

Constructing Indigeneity

But what does it mean to be "indigenous"? And how are the ethnic categories within this concept formed? *The Oxford English Dictionary* defines "indigenous" as "born or produced naturally in a land or region; of, pertaining to, or intended for the natives; 'native,' 'vernacular'"

(OED 2012). This definition raises more questions than it answers. What is “native”? What does “naturally” mean? Is it the same as “tradition”? What about expectations of authenticity? And how does one demonstrate they are legitimately “indigenous”? (Marsden 1994: 42).

The concept of “indigeneity” is a socially constructed and politically contingent one (Chen 2014b). At the international level, the concept of indigeneity has met with acceptance, resistance, and strategic use in many international and domestic contexts. Some contexts, like China, India, Myanmar, and Indonesia, have rejected the concept altogether (Davis 2014: 206; Das et al. 2012; Kline 2013; Morton 2017). Other states, like Brazil and Taiwan, have inscribed the concept in their constitutional documents (Constitution of Brazil, Arts. 231-232; Republic of China Constitution, Addl. Arts. 4 and 10).

Over the years, several international frameworks have been proposed as to what constitutes the necessary and sufficient criteria by which indigenous peoples may be identified. None of these frameworks can claim universal acceptance insofar as they are either over-inclusive or under-inclusive. For example, in 1972 UN Rapporteur Jose R. Martinez Cobo provided a frequently cited definition of “indigenous peoples” based upon relational, historical, and political elements (Cobo 1986). This definition, however, was criticized as freezing indigenous peoples into a particular historical period, over-simplifying indigenous culture and customs, and tying it to the survival of indigenous identity in the face of outside suppression. As such, it only applied to a limited group of indigenous peoples in the Americas, Australia, and the Pacific. In 1986, the UN Working Group on Indigenous Peoples expanded this definition to add a principle of self-identification: “any individual who identified himself or herself as indigenous and was accepted by the group or the community as one of its members was to be regarded as an indigenous person” (McGuinne 2014). Presently, no UN-system body has adopted a formal

definition of "indigenous peoples" (United Nations 2009: 4). Article 33 of UNDRIP, rather than offering a definition, underscores the importance of self-identification, that indigenous peoples themselves determine their own identity as indigenous. Self-identity is, therefore, the prevailing conceptual understanding of indigeneity at the international level.[12]

Scholars of indigeneity note that "indigenous" peoples share common social experiences of oppression and marginalization. For instance, David Marsden (1994: 43) writes, "Indigenous peoples are marginal peoples, dispossessed or threatened minorities." Similarly, Ronald Niezen (2003b: 13) observes, "A common experience of those who identify themselves as indigenous . . . is a sense of illegitimate, meaningless, and dishonorable suffering," a shared experience of 'collective suffering.'" Under Niezen's view, while indigeneity is a self-defined category, it is not necessarily self-defined by individuals but by the collective consent of the international indigenous community. Advancing a fixed category of indigenism based on criteria of shared suffering, however, tends to reintroduce old problems in that it elides differences across colonial and settler contexts. It would appear that there exists not a single category but rather a range of "indigenous" persons across the world (Merlan 2009). Moreover, the connections between global indigenous identity and domestic policymaking concerning indigenous peoples are unclear. Domestic legal systems often present significant legal hurdles for advancing indigenous interests (Echo-Hawk 2010). In Taiwan, for example, the government has maintained firm and exclusive control over indigenous rights and excluded certain groups through an arbitrary classificatory scheme. In this regard, Scott Simon (2012c: 227) reminds us that the term "indigenous" is a legal classification, not an ethnic category.

[12] Other international instruments, like Article 1 of ILO Convention No. 169, provide a broad definition of indigeneity but distinguish between tribal and indigenous peoples due to pressures from different Asiatic Countries. The World Bank (1991, para. 5) also does not define the term but offers a more operational definition based upon the presence in varying degrees of certain characteristics.

The term "indigenous," or *yuanzhuminzu* (原住民族), is relatively new in Taiwan. As noted, indigenous peoples on the island have historically occupied numerous categories: they were Formosans during Dutch colonial rule, cooked savages (*shufan*) and raw savages (*shengfan*) under Qing rule, mountain tribes (*takasago zoku*) and plains tribes (*peipo zoku*) under Japanese colonial rule, and mountain compatriots (*shandi tongbao*, 山地同胞, and *shanbao*, 山胞) under KMT martial law (Bekhoven 2016: 211). It was not until 1994 that the term "indigenous people" (*yuanzhumin*, 原住民) gained traction when the Taiwan National Assembly passed the Third Amendment of the Constitution (Shih 1999), which changed to "indigenous peoples" (*yuanzhuminzu*, 原住民族) in 1997 when the Constitution was again amended (Gao, Charlton, and Takahashi 2016: 68). The category of "indigenous" in Taiwan has thus taken many forms.

To elaborate on the terminology in this dissertation, as noted presently the category of "indigenous" serves to index a group of peoples recognized as having indigenous status under Taiwan law. As this study is concerned with courts and legal documents, it often addresses "indigeneity" in terms of the legal category of personhood, but as an anthropological study it also recognizes that indigeneity addresses social groups beyond mere state law determinations. As such, usage of the term "indigenous" here maintains one eye on its legal form and another on groups who may claim an indigenous status but who are not officially recognized as such, including the island's lowland-dwelling *pingpuzu*.

Recognizing that "indigeneity" is a socially constructed and politically contingent concept, it also important to consider the construction of the ethnic typologies within this concept. In July 2015, I attended a closing ceremony in Taitung celebrating the acquittal of four Puyuma (or Pinuyumayan) hunters. Several months earlier, four hunters had submitted an

application to the local police station to go hunting. On the application form they listed their names and addresses, and described the hunting activities in which they planned to engage. During the ritual preparing the hunters for the expedition, police raided the community's cultural center, read the names off the application form, and arrested the four men on the grounds that they intended to hunt illegally. This outraged the community as they felt they had followed the letter of the law and yet they were still persecuted for their cultural practices. Ultimately, the district court agreed and acquitted the four hunters.

At one point during the ceremony event, a Pinuyumayan leader pulled me aside. We sat in plastic chairs, and I listened as he expressed his frustration with the situation, noting its common occurrence: "There is a technical term for this in English, 'Fucking bullshit'" (Interview 022). In the course of our conversation, I asked about different features of Pinuyumayan culture, including hunting and spirituality. Not hiding his annoyance, he stopped me. "You talk too much about indigenous, Puyuma, Paiwan. You should be talking about humans. We are humans. Why draw lines?" For him, the concept of indigeneity and the ethnic categories populating it were arbitrary classifications imposed on indigenous peoples by outsiders. These classifications also distracted from the more important point that we, as human beings, are connected through a common humanity. In his view, constructed notions of ethnic and racial difference lie behind the police's arbitrary arrests of the Pinuyumayan hunters and were, in the larger picture, central to the subjugation of Taiwan's indigenous peoples.

Indigenous peoples in Taiwan also participated in the process of constructing ethnic typologies, finding them to be an important source of identity and meaning. One of the indigenous nations with whom I conducted research was the Truku in eastern Taiwan. Truku people number approximately 30,000 and live in four different townships in Hualien (fig. 5).

Accounts of Truku culture typically note their weaving, facial tattoos (*Pataszukelaszu*), faith in ancestral spirits (*Utux*), and ancestral law practices (*Gaya*) (CIP 2016: 36). In my fieldwork, I worked closely with a village situated deep within the Mugua River Gorge in Hualien County. I joined Truku research partners and friends on hunting expeditions and in forest product and mineral collection activities. I participated in village meetings. I attended worship services at the local Presbyterian Church. I traveled with locals as they attended court proceedings. And, I was generally a part of daily life. My relationship with this community was such that they felt I needed a Truku name to navigate this social terrain, and so they gave me the name *Peydang Omu*, the equivalent of "Lost One," reflecting the many questions I asked.

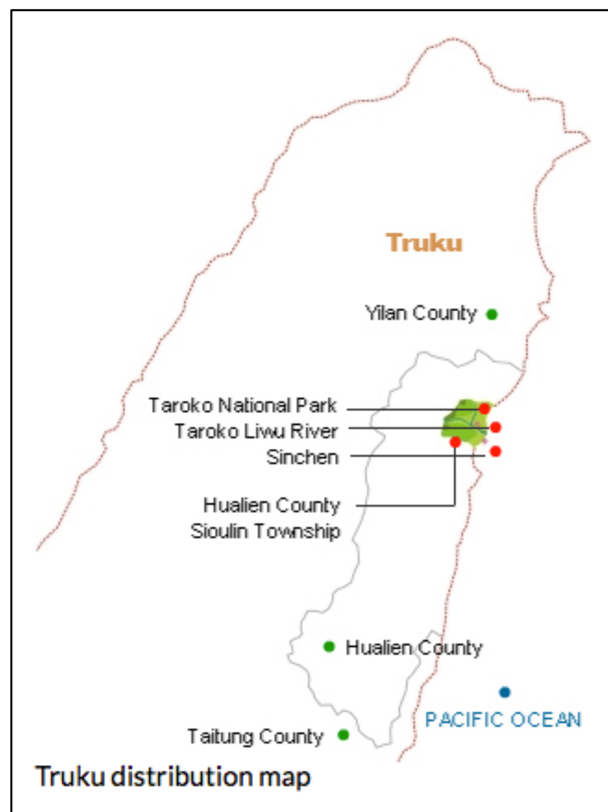

Figure 5. Map of Truku distribution in Hualien County, Taiwan (National Museum of Prehistory 2017)

Like the concept of "indigenous," the category of "Truku" was a contested and tortuous

one having its roots in Japanese colonial administration. In an effort to control the island's indigenous population, Japanese authorities constructed a system of classification about indigenous social characteristics. In 1900, Japanese scholars Ino Kanori and Awano Dennojou (1900) identified "Atayal" as an ethnic group in their study of the island's indigenous peoples. The Japanese government subsequently adopted the name Atayal in 1911, but because the group was so widespread and exhibited so much variation, scholars proposed different classifications of Atayal. Utsurikawa Nenozo (1935) divided the Atayal into three systems—Səqoleq, Tsəʔoleʔ, and Sədeq—whose names were based on the terms for "human being" they used.[13] The Səqoleq, and Tsəʔoleʔ called themselves the "Atayal," "Tayal," or "Tayen," which meant "human," "true human," or "people in the same tribe" (Wang 2008: 7-8). The Sədeq, which also meant "human," were subdivided into west and east groups. This system of classification became the dominant approach to understanding Atayal people. Subsequently, drawing on Utsurikawa Nenozo's work, Masau Mona (1984: 8-9) developed a detailed scheme of the sub-divisions within the Atayal group, which combined two principles of classification: merging place of origin and political administration. Mei-hsia Wang (2008: 9) observes that because these principles did not correspond to one another, this framework ultimately resulted in a confused system where lower order subdivisions at times encompassed higher order systems.

The Atayal ethnic classification system was thus a product of the Japanese colonial period constructed on the basis of criteria that did not match dynamic understandings of local social divisions (Wang 2008: 10). In 1999, the east Sedeq sub-ethnic group launched the "Truku Name Rectification Campaign" in an effort to detach itself from the classification of Atayal

[13] My Atayal colleagues and friends frequently told the story that when their ancestors first met Japanese colonial administrators, the administrators asked them, "What do you call yourselves?" Unaware of ethnic classifications, their ancestors replied, "Humans. We are humans" (Interview 059). My colleagues and friends used this story not only to rehearse a historical moment of first contact, but also to highlight the artificiality of typologies often advanced by anthropologists and used by colonial authorities.

(Wang 2008: 12). This campaign involved numerous groups, including the Presbyterian Church, Truku Cultural Development Association, Truku Economic Affairs Association, Wanrung Work Station, and Association for the Promotion of the Truku Name Rectification. Notably, these efforts situated the campaign predominantly in the sphere of Taiwan politics, for example making it part of the 2003 election for Hualien County Head. This tended to shape the campaign according to what was acceptable to Taiwan mainstream society, rather than what was important to the local communities (Wang 2008: 12-13).

In 2004, through the effort of churches, associations, and government organizations, the Executive Yuan finally ratified the term "Truku." Ratification did not, however, end the debate (Ko 2004). The Truku Economic Affairs Association, made up of teachers and school officials, argued that the name should be "Sedeq," not "Truku," and that the group should include the west Sedeq in Nantou County. As one representative asked, "How can a tribe with the same culture, language and way of life be split in two? It makes no sense." Others alleged the decision was based on political, not ethnic, factors: "It's a bid to woo the 13,000 Truku that live in Hualien County. They don't really care what the 7,000 Sedeq in Nantou County think. . . . It is the saddest day in the history of the tribe" (Ko 2004).

In contrast, the Truku Presbyterian Church maintained that "Truku" was the proper name for the group. One representative stated,

> It's a sacred moment, and it is for us the highest honor . . . today we are proud to call ourselves Truku. . . . We'll continue to negotiate with our brothers, the Sedeq in Nantou, and work toward holding a peace ceremony with them in the near future.

The dispute about "Truku" caused a significant rupture in these communities as they debated origin stories, original group names, customary traditions, and historical memories to articulate an ethnic category of "Truku" (Wang 2008: 13-21). Today, the concept of Truku

remains an uncertain category. One of my Truku colleagues noted, “Maybe we are Truku. We are in this location because the Japanese were angry about having their soldiers return headless, so they moved us here. Our ancestors are from over there, in the mountains. Maybe we have close relations to them” (Interview 059).

Following the successful Truku Name Rectification Campaign and settling on the name Truku, an effort began to reinvent “Truku culture” as members of the group sought to rediscover and reclaim their customs and traditions. Rituals involving customary ideas of *Gaya* (law) and *Utux* (ancestral spirits) soon became a field in which to congregate and rediscover Truku culture. The Truku Presbyterian Church, however, regarded ancestral worship practices as conflicting with Christian values and worked to squelch these practices. What was a fertile ground for cultural rediscovery quickly eroded under pressure from the church (Wang 2008: 29-31).

While the church applied pressure to curb ancestral worship, my impressions in the field were that some Truku people remained open to these practices. For example, a Truku colleague and deacon in the local Presbyterian Church I attended (and a criminal defendant in one of the cases I discuss) led both ancestral spirit worship ceremonies in the village and Christian prayers in the courthouse. When I inquired about this practice, his explanation suggested a spiritual division of labor: “Here, ancestors are responsible for the land and the people. Out there [gesturing beyond the village], God is responsible for everything. So, it makes sense” (Interview 059). There was also substantial mixing of Christian belief and traditional practices. For instance, the Truku minister regularly referred to Jesus Christ as a “hunter” (*lieren*, 獵人), drawing a connection between Truku wildlife hunting and divine “hunting” for souls. These references suggest that what has emerged as “Truku culture” is a complicated matter, one requiring an understanding of environment, history, and local circumstance.

The concept of “indigenous” and the ethnic categories populating this concept were thus constructed and contingent (Bekhoven 2016: 213; Tierney 2010: 85). Yet, while these were imagined things, people nonetheless experienced and lived them as though they were real. These categories provided the bases for self-identity, both locally and globally, and they served as the groundwork for legal protections, material benefits, and social connectedness. Indeed, constructions of indigeneity, ethnicity, and culture sat at the heart of Taiwan’s special indigenous court units. It is to these special units that I turn next.

The Special Indigenous Court Units

As legislative efforts to protect indigenous peoples stalled, Taiwan’s special indigenous court units took an increasingly central role in mediating between the Taiwan state and indigenous peoples. In recent years, President Tsai Ing-wen’s administration has signaled a willingness to expand indigenous protections, such as laying out a comprehensive plan to restore historical and transitional justice for indigenous rights, but the special units appear to remain the principal bodies on the island securing indigenous peoples’ rights for the immediate future.

Passed in 2005, the IPBL contemplates the creation of special courts to protect indigenous peoples. Article 30 states: “For the purpose of protecting indigenous peoples’ rights and access to the judiciary, indigenous peoples’ court or tribunal may be established.” In September 2012, Taiwan’s first report on the implementation of the International Covenant on Civil and Political Rights (ICCPR) represented that it would establish indigenous courts as soon as possible, stating: “The government shall adequately evaluate and establish the indigenous peoples’ court or tribunal with respect for traditional customs, culture, and values of indigenous peoples” (Executive Yuan 2012: 359). According to this report, the special courts would take

into account the uniqueness of indigenous peoples' situation and show respect for their cultural distinctiveness.

On May 15, 2012, the Judicial Yuan held a symposium on "Assessing the Feasibility of Setting up an Special Indigenous Court," where they invited academics, judges, lawyers, and legislators to hold a discussion about creating indigenous courts. At the meeting, the majority of participants agreed they would not undertake efforts to modify Taiwan law but rather focus their attention on setting up a special indigenous court or a special court unit to handle cases involving indigenous peoples (Judicial Yuan 2018b: 2; 2017a: 2). The special units thus constituted a compromise solution that substituted the creation of a judicial institution for substantive legislative reform.

Following this assessment, on May 30, 2012 the Judicial Yuan formulated a set of rules in the *Measures for the Annual Assignment of Judges in Civil and Administrative Litigation Cases and Special Courts* (*gejifayuan faguan banli min xingshi yu xingzheng susong ji teshu zhuanye leixing anjian niandu sifa shiwu fenpei banfa*, 各級法院法官辦理民刑事與行政訴訟及特殊專業類型案件年度司法事務分配辦法) for the assignment of judges to form a special indigenous court unit (Judicial Yuan 2018b: 2; 2017a: 2). Amendments to Articles 13 and 14 outlined the basic framework of the special units. Article 13 provides: "To protect the judicial rights of indigenous peoples, the Judicial Yuan may order courts to establish indigenous courts or specialized divisions."[14] Article 14 states:

> The number of courtrooms or divisions, the selection of chief judges and judges, and the distribution of cases shall comply with the following rules: 1. The number of courtrooms or divisions shall be set by the chief justice based on the needs of the court. 2. The chief judges and judges of the courts or divisions shall be appointed by the chief justice after consulting with relevant chief judges and judges; if any adjustments are deemed necessary, the decision shall be made by

[14] 「為保障原住民族之司法權益，司法院得指定法院設置原住民族專業法庭或專股。」

> the chief justice after consulting with relevant chief judges and judges. 3. The chief judges and judges shall hear exclusively the cases specified in the previous Article. However, the chief justice may decide based on the situation in practice what cases chief judges and judges of specialized courts and divisions may consult on, as long as the court continues to provide speedy and fair trials. 4. The chief judges and judges of specialized courts and divisions shall preside for three consecutive years, at the end of three years, they may continue presiding as they desire, except when otherwise prohibited by these Rules.[15]

On October 8, 2012, the Judicial Yuan (2018b: 2; 2017a: 2) ordered the district courts in Taoyuan, Hsinchu, Miaoli, Nantou, Chiayi, Kaohsiung, Pingtung, Taitung, and Hualien to establish special indigenous court units starting January 1, 2013. A year and a half later after the special units began operation, the Judicial Yuan expanded the program on September 3, 2014, to include all district courts and high courts across the island (Hsu 2015: 93). In a matter of just seven and a half months—from May 15, 2012 to January 1, 2013—the Judicial Yuan had made and implemented a decision to create the special indigenous court units and then quickly expanded them to the entire island.

Some individuals involved in the process noted the rushed manner in which the Judicial Yuan conceived of and created the special units. One participant recalled that early discussions contemplated a three-stage process, whereby the government would first survey and document indigenous customs and legal traditions across the island; then determine the traditional boundaries of indigenous communities, with the special courts' jurisdiction following these boundaries; and finally amend all relevant laws as they created the indigenous courts (Interviews 002, 025, 055). Rather than following these steps, the Judicial Yuan skipped the initial phases

[15] 「前條專業法庭或專股之庭數、股數與庭長、法官之遴選及其事務分配，應依下列原則辦理：一、專業法庭或專股之庭數、股數，由院長視法院業務需要定之。二、專業法庭或專股庭長、法官應由院長徵詢相關庭長、法官意見後遴選之；認有調整必要者，由院長徵詢相關庭長、法官意見後定之。三、專業法庭或專股庭長、法官專辦前條案件。但院長得於不違反妥速審結前條案件之原則下，視情形決定兼辦之案件範圍。四、專業法庭或專股庭長、法官，其辦理期間應連續三年，期滿，除本辦法另有規定外，得依其志願繼續辦理。但本辦法施行之日前辦理之庭長、法官，其辦理期間滿二年，得變更所辦理之案件類別，所留案件由遞補之庭長、法官繼續辦理。」

and rolled out the special units in a matter of months. Some insiders interpreted this rush as a political move by then-President Chen Shui-bian (陳水扁) to fulfill a promise he made to indigenous peoples but not as a real measure to help these communities (Interview 055).

When the Judicial Yuan announced the special units, it emphasized two features of these new institutions: their role in "respecting" (*zunzhong*, 尊重) indigenous cultural differences and their role in securing indigenous "judicial rights and interests" (*sifa quanyi*, 司法權益). Judicial Yuan press releases noted the special units would "respect indigenous cultures and protect civil rights"[16] (Xiang 2012). Government reports also stated the special units would "establish an effective mechanism to protect the judicial rights of indigenous peoples"[17] (Judicial Yuan 2017b). Combining these, the CIP (2015) observed that

> [i]n terms of the traditional customs of indigenous peoples and domestic laws, when these come into contact, the special units can demonstrate respect for pluralistic cultures, traditional customs, and values, and provide indigenous peoples a proper legal evaluation to implement the provisions of Article 30 of the Indigenous Peoples Basic Law.[18]

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[16] 「司法院昨天表示，為尊重原住民文化、保障民住民權益。」

[17] 「政府相關院部應建立有效保障原住民族司法權益機制。」

[18] 「針對原住民族傳統慣習跟國家法律，相互牴觸時，能以彰顯司法對多元文化、傳統習慣與價值觀之尊重，使族人獲得適切之法律評價，以落實原住民族基本法第 30 條規定之意旨。」Other documents state the special units would "consider the particularities of indigenous matters and are based on respect for traditional customs, cultures, and values of indigenous people" [「司法院審酌原住民族事務之特殊性，並基於對原住民族傳統習俗、文化及價值觀的尊重」]; that "[t]he establishment of special indigenous courts demonstrates judicial respect for multiculturalism and values and implements the concept of reform for the benefit of the judiciary, which will give indigenous peoples the right to judicial protection more fully" [「原住民族專業法庭（股）的設置，彰顯司法對於多元文化與價值觀的尊重，並落實司法為民之改革理念，將使原住民族的司法受益權獲得更充分的保障」] (Judicial Yuan 2012); that they would "protect the judicial rights of indigenous peoples" [「以落實保障原住民族之司法權益」] (Judicial Yuan 2018b: 2; 2017a: 2); and that they were "based on respect for the traditional cultures and values of indigenous peoples" [「並基於對於原住民族傳統習俗、文化及價值觀的尊重」]" (CIP 2015).

Insiders noted that the special units would also be used to build a repository of case law. Addressing indigenous issues on a case-by-case basis, future judges could refer to these decisions when handling cases involving indigenous customs and traditions (Interviews 002 and 047).

The special indigenous court units were, by design, impermanent judicial bodies. Articles 14 and 34 of the *Organic Act of Courts* (*fayuan zuzhifa*, 法院組織法) state that "specialized courts" (*zhuanye fating*, 專業法庭) consist in specialized divisions within a court established for the better arrangement of work in response to societal changes and include such institutions as the electoral courts and labor courts. These courts stood in contrast to the "specialized district courts" (*zhuanye difang fayuan*, 專業地方法院), such as the Intellectual Property Court, which are independent courts established on a permanent basis, having their own staff and organization, and requiring certification demonstrating competency in the subject matter of the specialized unit (Hsu 2015: 94).

The subject matter jurisdiction of the special units was wide. It included all criminal cases in which the defendant was an indigenous person regardless of the nature of the crime (Judicial Yuan 2012; 2018b: 3). The special units also heard all civil cases in which both parties were indigenous persons, nations, or peoples. In addition, they heard civil cases in which one party was an indigenous person and the case involved any of the following issues: return of land, damage compensation (including debt defaults and infringement), fulfillment or termination of a contract or lease, third party objection, the return of unjust enrichments, injunction, determination of ownership of lands or housing, determination of a lease contract, erasure of agricultural rights and superficies, division of common properties, determination of land boundaries, moving and transfer of housing, or debtor objection. In the event that the civil matter

did not involve one of those and one of the parties was indigenous, the party could request that the case be heard by the special indigenous court unit (Judicial Yuan 2012; 2018b: 3-4). At present, the special units do not include administrative cases. The scope of the special units' jurisdiction turned out to be both too broad in that it tended to distract from the goal of respecting indigenous cultures and too narrow in that it did not include all civil matters potentially affecting indigenous interests. In this regard, the special units were not unlike the category of indigeneity itself, insofar as both failed to hit the mark they created for themselves.

There were two procedural changes in Taiwan courts that impacted the operation of the special units. The first concerned language. The official language of Taiwan courts is Mandarin Chinese (Organic Act of Courts, Art. 97). The Taiwan High Court created a special interpreter program whereby litigants could request the assistance of an interpreter who spoke their language. By the end of 2016, it had generated a list of 35 interpreters fluent in nine different indigenous languages (Judicial Yuan 2018b: 29). This system had several deficiencies: the lack of representation of certain dialects, the fact that many interpreters did not understand Taiwan law or legal procedure, and the infrequent use of the program (see Chapter Five).

The second change related to legal representation. Article 31.6 of the *Code of Criminal Procedure* (*xingshi susongfa*, 刑事訴訟法) and Article 5 of the *Legal Aid Act* (*falu fuzhufa*, 法律扶助法) guaranteed free legal services to all indigenous litigants. This system also had deficiencies: compulsory features of the system forced indigenous litigants to work with lawyers when they preferred to represent themselves, statutory language indirectly associated indigeneity with peoples with mental impairments, and the connection between this system and the goal of greater respect for indigenous cultural differences was tenuous at best (see Chapter Five).

In summation, the special indigenous court units were a compromise solution created to substitute for legislative efforts to secure indigenous rights. Rather than working to pass laws protecting indigenous peoples, the ROC government turned to the judiciary to secure indigenous peoples rights under the existing domestic legal framework. Given this role, the special units became important institutions for mediating between the Taiwan state and the island's indigenous communities as they worked to resolve conflicts through a posture of "respect" for cultural differences and to secure indigenous "judicial rights and interests." Notably, the contours of these terms—respect and judicial rights—were nowhere defined. Further, there existed substantial disagreement about what they meant or how they should be implemented (see Chapter Five).[19] Moreover, the Judicial Yuan intended the special units to serve *all* indigenous peoples within the geographic jurisdiction of the court. Unlike indigenous courts in other contexts, the special units did not specialize in a particular nation or community and thus formed a single judicial solution for all 16 officially recognized indigenous nations (Interview 063). Finally, the special units were oriented towards the future. They operated not just as fora for adjudicating discrete disputes but also as a testing ground for building jurisprudence about indigenous cultural issues on a case-by-case basis.

The Special Indigenous Court Units in Hualien Today

Today, special indigenous court units appear in the criminal and civil divisions of the Hualien District Court, as well as in the Hualien High Court. It is important to bear in mind that the special units were not specific sites. Rather, they were constituted anew each time in the

[19] Judicial rights generally refer to rights exercised during a trial or judicial proceedings, such as the right to a fair trial, right to legal remedies, and rights of the accused (Michael and Hajrendini 2010). Even this seemingly straightforward definition was a space for disagreement as some legal actors interpreted it as relating to interpreters and legal representation, while others viewed it as encompassing more substantive aspects of legal rights and other dimensions of indigenous normativity and social life (Interview 087).

courtroom by the presence of a specific judge and an ethnic marker for the case. In the Hualien District Court courthouse, the special units typically appeared in Courtrooms 3 and 4, emerging only when judges assigned to the courtroom had received special training in indigenous cultures and the legal matter involved an indigenous person. At all other times, these courtrooms operated as ordinary courtrooms in the courthouse. In the Hualien High Court courthouse, the special units appeared when the legal matter involved an indigenous person; the small number of judges in the High Court required all of them to handle indigenous cases. The special units were thus deeply embedded in the Taiwan national court infrastructure.

Upon entering the courtroom, there was little indication of the presence of a special court unit dedicated to indigenous peoples. The absence of any indication of indigenous representation stood in marked contrast to the many representations of indigenous peoples adorning other public buildings in the region. Indeed, the only marker indexing the presence of a different form of judicial body was the docket, which was mounted on the wall next to the courtroom door. This docket number contained a Chinese character (always in criminal docket numbers, sometimes in civil docket numbers), *yuan* (原), which referred to the first character in the Mandarin Chinese term for "indigenous peoples" (*yuanzhuminzu*, 原住民族) (see Chapter Five). In all other respects, the special unit courtroom looked exactly like an ordinary courtroom.

During proceedings, judges made no announcements that the special indigenous court unit was in session. Lawyers likewise did not typically invoke the special unit in their oral arguments or paper filings.[20] The broad jurisdictional scope of the special units meant that the

[20] I observed only a single instance where a lawyer referenced the presence of the special indigenous court unit. A legal aid lawyer argued in her opening statement: "Article 30 of the Indigenous Peoples Basic Law created the special indigenous court units, which are supposed to be respectful of indigenous cultures and help secure indigenous peoples' rights. This case is about these things. It is about indigenous land,

special units primarily considered quotidian matters, rather than sensitive matters of indigenous culture. Consequently, for an ordinary observer visiting the court, there was little to indicate the presence of a special court body at work.

Special Indigenous Court Unit Composition and Personnel

The judiciary in Taiwan was a career judiciary (Chiu and Fa 1994: 14). Law graduates took a Special Examination for Judicial Officials and could enter the judiciary as early as their twenties. Success rates in the examinations were low, approximating only 4 percent. As such, Taiwan judges represented a highly intellectual community of legal actors; however, the judiciary's focus on study over life experience created a reputation that judges lacked knowledge of real-world circumstances (Interview 108).

Judges appointed to the special indigenous court units were selected by a committee of judges at the local court (Method for the Annual Assignment for Judges, Art. 11). No prior specialization in the legal issues pertaining to indigenous peoples or indigenous cultures was necessary to participate in the special unit system. Taiwan law schools had no courses dedicated to indigenous cultures or rights, and the Special Examination did not include any questions about these things.[21] For many judges, involvement in the special units was their first introduction to indigenous peoples and substantive law on Taiwan's indigenous protections (Interview 058).

Upon appointment, judges assigned to a special indigenous court unit participated in two days of training at the Judge Academy (Method for the Annual Assignment for Judges, Art. 23). Judicial training for judges in the special units consisted of 12 hours of coursework. In 2016 and

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which is important to their culture." Taiwan Hualien District Court 106 [2017] Case No. 250 (June 19, 2018, hearing).

[21] The Judicial Yuan (2017a: 35) has recognized that this must be addressed and has made it a priority to introduce questions about the IPBL on the Special Examination.

2017, this coursework included lectures on the customs and traditional lands of specific indigenous nations; visiting indigenous villages and the sites of important cases, such as the Smangus Beechwood Case (see Chapter Four); moot court-style training about indigenous issues; and presentations about recent research on indigenous practices, like indigenous hunters' homemade firearms (Judicial Yuan 2018b: 19-22). Indigenous leaders, academics, and other judges typically led these training sessions.

Only the first-year training was compulsory; all subsequent training was voluntary (Interviews 003 and 068). Given the infrequency of indigenous cases concerning cultural issues, many judges chose to spend their time training in other areas of law. One judge estimated that only half of judges obtained training beyond the first year (Interview 076). Some participants reported that the amount of training was actually less than 12 hours, approximating six hours (Interview 056). Additionally, the same experts tended to lead judicial training sessions, limiting the number of voices and perspectives about indigenous peoples and issues (Interview 076). Finally, this training did not include any examinations to test competency in the subject matter; attendance alone satisfied this requirement (Interviews 056 and 062).[22] While judicial training about indigenous custom and legal protections was considered to be a defining feature of the special units, such training appeared to be grossly inadequate for accomplishing the ostensible goals of respecting indigenous cultures and securing indigenous judicial rights (see Chapter Five). Ultimately, the lack of substantial training for judges opened a question for many legal actors about whether the special units were really "there" at all.

[22] Recognizing that a competency review would strengthen the special units, in 2018 the Judicial Yuan created a voluntary certification program (Judicial Yuan 2018b: 24; 2017a: 3; 2017b: 35). Under this program, judges may apply for a certificate indicating their specialization in indigenous law and cultures. As of this writing, only one judge has applied for such a certificate (Interview 096).

In terms of judicial composition, younger judges were typically assigned to the special units. Assigning a block of cases, such as indigenous matters, to these new judges was one way of ensuring they shared an equal load of cases with other judges (Interview 062). Judges noted that being part of the special units was not a particularly popular assignment. Judges generally did not view indigenous cases as important cases when compared to other areas of law, such as finance. Moreover, it took a great deal of time and effort to become an expert in indigenous issues, which was difficult to justify when so few culturally related matters came to trial (Interview 094). Some judges, however, expressed an intellectual interest in these cases and sought out an assignment to the special units (Interview 068).

During my fieldwork, the criminal division in the Hualien District Court had nine judges assigned to the special indigenous court unit. They were a mix of male and female judges, many of whom were young and expressed an interest in indigenous issues. By contrast, all judges in the Hualien High Court were members of the special unit. While district court judges reported participating in the judicial training program (Interviews 046 and 068), high court judges stated they were not required to obtain special training (Interview 069). Instead, high court judges decided on their own whether to study indigenous issues and legal protections. One district court judge, reflecting on those high court judges who actually participated in the training program, observed, "High court judges are not good students. They do not study hard, they do not care so much about [indigenous] cases" (Interview 076). It bears noting that Hualien High Court judges heard appeals from all cases arising in Hualien County and Taitung County—the two counties with the highest population densities of indigenous peoples on the island.

District court and high court judges also described different orientations toward litigation. District court judges tended to discuss legal cases in terms of focusing on and understanding the

local situation and seeking an acceptable solution to all parties. These statements suggested open-mindedness to solutions that would help resolve disputes, including innovative ways of addressing indigenous matters (Interviews 090). By contrast, high court judges generally discussed cases in terms of focusing on broader regional issues and the need to follow Supreme Court jurisprudence. While high court judges were not closed off to the idea of new solutions, these statements suggested a more conservative reading of law and jurisprudence (Interviews 069, 087, and 119). There were exceptions, of course, such as a high court judge who invested his time in indigenous cases and developed new ways of approaching these cases, such as drawing on the concept of "human dignity" (Interview 093, see also Chapter Five). These different judicial orientations were no secret. Practicing lawyers were aware of them and adapted their arguments accordingly (Interview 092).

Another dimension of the special units concerned rotation. Every three years, Taiwan judges nationwide had an option to apply for transfer to another court (Interview 019). Common reasons for seeking transfer included family issues, living environment, and case type (Interview 126). This presented a unique challenge in indigenous cases because, even with recent migrations to urban centers, indigenous nations were generally situated in peripheral geographic areas (Interview 063). The territorial jurisdiction of courts placed judges in certain assemblages of indigenous cultures, and when a judge moved from one court to another, she or he moved from one indigenous context to another. For instance, if a judge sought to transfer from the Hualien District Court to the Chiayi District Court, the cultural context shifted from a collection of Amis, Atayal, Bunun, Kavalan, Sakizaya, and Truku communities to one dominated by the Tsou Nation. Moreover, the rate of rotation from courts in rural regions to urban courts was high. There was thus a special unit "brain drain," so to speak, as judges moved from rural places where

indigenous peoples were most densely concentrated to urban places where their numbers were fewer, taking with them the special knowledge they acquired about peoples in that region (Interview 029 and 126).

Judicial rotation was also internal to the special indigenous court units. Many jurisdictions employed a system where special unit judges served only three-year terms (Interview 094). After completing their terms, judges rotated off to other special units in the court. This internal rotation system meant that judges spent very little time in the special units, and depending on the number of judges at the court, they might not rotate back onto the special units for many years, assuming they had not already sought a transfer to another court (Interview 068).

Regarding prosecutors (also called procurators) in the special indigenous court units, aspiring prosecutors must also pass the rigorous Special Examination for Judicial Officials. Again, passage rates for this test were low, averaging 4 percent annually (Chiu and Fa 1994: 14). Prosecutors' offices were split into two teams of attorneys. Investigative prosecutors were in charge of pre-prosecution matters, such as case investigation and making the decision to prosecute, and trial prosecutors were in charge of everything after prosecution began, like arguing motions hearings and trials (Wang 2011: 10). Relative to the American system of law, Taiwan prosecutors performed the duties of both prosecutors and the grand jury.

To serve in the special indigenous court units, prosecutors also attended a special educational program about indigenous cultures. In most respects, this program was similar to the special education program for judges, although there was little public information available about it (Interview 090).

In the criminal division of the Hualien District Court, trial prosecutors were assigned to

particular courtrooms, just as judges were. Through the regularity of courtroom practice, they often developed a rapport with the judge or judges assigned to that courtroom. Lawyers noted this gave prosecutors an advantage in criminal cases by providing them an opportunity to learn the judge's preferences and establish a relationship with the judge. From the vantage point of defense lawyers, criminal cases could be difficult cases to win because of a perceived "teaming up" of trial prosecutors and judges. As one lawyer explained: "So, often the judges and the prosecutors are aligned against criminal defendants. In the Taiwan legal system, it is two against one. It is not fair to criminal defendants" (Interview 085).

While court structure may have facilitated rapport among judges and trial prosecutors, there were notable differences, particularly in their attitudes toward indigenous cases. Lawyers observed that lower court judges were becoming increasingly open to arguments protecting indigenous customs and traditions, but prosecutors (as well as higher court judges) were becoming more conservative and close-minded, if not outright hostile (Interviews 056). For example, as noted, the Hualien prosecutors' office filed a brief opposing the use of indigenous custom in the court's proceedings, arguing that Taiwan state law alone should govern.

In regards to the defense lawyers, there were generally two ways to become a lawyer in Taiwan. An aspiring lawyer may take the High Examination, which also had a low passage rate (around 10 percent in 2017 and 2018), or judges and prosecutors could apply to the Ministry of Examination and Selection to become certified as lawyers (Chiu and Fa 1994: 15). Like judges and prosecutors, lawyers represented a highly intelligent and academically successful group of legal actors.

In my fieldwork, different types of lawyers represented indigenous persons in the special units. These included attorneys in private practice, legal aid lawyers, and law center lawyers.

There was no mandatory training necessary for lawyers to represent indigenous litigants in the special units. Legal aid centers offered continuing legal education courses on indigenous cultures and law several times a year. In 2018, these programs included lectures about legal protections for indigenous lands and moot court-like activities. Lawyers could voluntarily participate in these programs, but there was no formal requirement for them to do so, and, given the few number of cases relating to indigenous culture, there was likewise little incentive. The lawyers with whom I worked participated in and led these programs, but they recognized the programs' lack of comprehensiveness and rigor (Interview 110). Connecting this with Taiwan's guarantee of free legal representation for indigenous peoples, lack of mandatory lawyer training in indigenous legal protections or cultures, coupled with a lack of incentive to obtain this training, did little to advance the special units' professed aim of respecting indigenous peoples' cultural differences and securing indigenous peoples' judicial rights.

Rounding out the courtroom actors, a judicial assistant, clerk of court, and bailiff were also present in the courtroom. Lawyers and aspiring lawyers who had not yet passed the High Examination often filled positions as judicial assistants and clerks of court. The court clerk was typically assigned to the courtroom, while the judicial assistant was assigned to the judge, meaning that court clerks and judicial assistants frequently worked together. The division of labor was such that the judicial assistant helped judges by maintaining files, obtaining identification documents, and projecting photographs and text onto the courtroom screen. The court clerk was primarily responsible for transcribing statements. The bailiff was a law enforcement officer who helped maintain order and provided security in the courtroom, and she or he changed positions with other bailiffs on a quarter- or half-hour basis.

It is important to emphasize the near total absence of indigenous representation among

judicial actors and legal actors in the special units. Only a handful of judges and lawyers island-wide had indigenous status (Hsu 2015: 92). During my fieldwork, I met only one judge who acknowledged his indigenous ancestry (his mother was Amis), but did not claim, to my knowledge, an indigenous status. I also met only one trial lawyer who self-identified as having indigenous status. Collaborators estimated there were two to three judges and five to six lawyers with indigenous status in Taiwan (Interview 133). Ethnic representation among judicial actors and legal actors in the special units was conspicuously and overwhelmingly Han Chinese.

Style of Proceedings

Taiwan's legal system has been heavily influenced by Imperial Chinese law as well as law in contemporary China. It also borrows elements from civil law traditions, such as those in Germany and Japan, and common law traditions, like that in the United States (Chiu and Fa 1994: 1-3). In Taiwan's legal system, Chinese concepts of law grounded in Confucianism, which emphasize the need for human actions to harmonize with the natural order, have been incorporated into and transformed within a modern framework of civil law influenced by Japan and Germany. Since the 1950s, with increased close relations with the United States, influences from American law have grown, as in the turn from an inquisitorial to an adversarial form of adjudication.

As a civil law country, Taiwan's legal system emphasizes statutes over case law. This means that when adjudicating matters, Taiwan courts look to what the Constitution states first and then to codes, statutes, and ordinances (Columbus School of Law 2003). While judicial decisions are consulted, the concept of *stare decisis* is not formally followed, and court decisions generally only bind the case at trial (Chiu and Fa 1994: 7). Nevertheless, as in other civil law

traditions, precedent has de facto binding force due to requirements of certainty and predictability as well as judicial habits of mental economy and fear of reversal.

As a civil law tradition, Taiwan's legal framework embraces conflict of laws rules that emphasize choosing one rule over another rather than a synthesis-oriented approach used in common law traditions (Colangelo 2016: 18n65). Principles of statutory construction, such as *lex specialis*,[23] which direct judicial focus to specific laws, are widely used among the Taiwan judiciary, much more so than principles, like *in pari materia*,[24] focused on reading laws together. Additionally, under Article 344 of the Code of Criminal Procedure all parties, including the prosecution, have an absolute right to appeal in criminal matters. The protection of double jeopardy does not prohibit prosecutors from appealing a not-guilty decision (Su 2017: 218). Further, hearings on appeal can be *de novo*, meaning that the appeals court will consider issues of both fact and law. For all intents and purposes, it is a new criminal prosecution on the same facts and issues.

This legal procedure has shaped indigenous cases because, as noted, while lower court judges tended to be more liberal when addressing indigenous issues, higher court judges were more conservative. Further, reversal rates for appeals were not low. From 2010 to 2015, the reversal rate for district court decisions was on average 27 percent nationally (Su 2017: 219). During my research, I observed only a handful of indigenous cases that went through trial and appeal, but I was struck by the fact that, with the exception of one case, appeals courts consistently reversed district court decisions in favor of indigenous persons. In fact, in one civil

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[23] *Lex specialis* is a principle of statutory construction stating where two laws govern the same subject, judges should look to the specific law over the general law (Black and Nolan 1993).
[24] *In pari materia* is a principle of statutory construction stating where statutes sharing a common purpose or relating to the same subject are construed together as one law, regardless of whether they contain any reference to one another (Black and Nolan 1993).

case, the appeals court not only reversed parts of the district court decision on appeal but also reversed parts not on appeal.[25]

In 2002, Taiwan changed its trial procedure from an inquisitorial model to an adversarial approach (Wang 2011: 10).[26] Upon shifting to an adversarial model, Taiwan adopted American-style rules of evidence in the Criminal Code of Procedure. This change meant that parties' representatives would be more involved in cases, and judges would play a more neutral role at trial. From a comparative perspective, as an American trial lawyer, I was regularly struck by the non-neutral manner in which judges managed trials and the relatively minimal involvement of prosecutors and lawyers. From this vantage point, contemporary trial procedure in Taiwan retained significant elements of an inquisitorial model of adjudication (see Chapter Three).

The shift to an adversarial system brought with it a significant increase in prosecutors' and lawyers' workload (Wang 2011: 11). To deal with these pressures, Taiwan introduced plea-bargaining in 2004. Under the "summary proceeding" (*jianyi chengxu*, 簡易程序) system, accused persons may acknowledge guilt in exchange for a reduced or suspended sentence (Kennedy 2003: 115-116). Taiwan limits summary proceedings to non-serious offenses, excluding such offenses as those punishable by the death penalty, life imprisonment, or with a minimum punishment of imprisonment for not less than three years, or where the high court has jurisdiction in the first instance (Code of Criminal Procedure, Art. 455-2).

The introduction of an adversarial system of adjudication and summary proceedings had a significant impact on indigenous cases. With the transition to an adversarial procedure, lawyers

[25] Kaohsiung High Court 105 [2016] Case No. 1.
[26] The Legislative Yuan amended Article 163 of the Criminal Code of Procedure to read: "For the necessity to discover the truth, the court may, on its own initiative, investigate evidence. However, in the interest of justice or in matters significant to the defendant's interests, the court must, on its own initiative, investigate evidence." This amendment had the effect of shifting the Taiwan legal system from an inquisitorial to an adversarial model of adjudication.

played a more robust role in managing litigation. Perhaps a relic of the inquisitorial system, only judges and prosecutors, however, received any formal education about indigenous legal protections or customs. Consequently, the quality of lawyers' representation of indigenous persons in matters related to indigenous culture was uneven and largely depended upon the individual lawyer's willingness to obtain training on their own. Further, while helping economize legal proceedings, "summary proceedings" incentivized indigenous litigants away from raising cultural defenses provided to them by law (see Chapter Seven). Uncertainty of trial outcome, coupled with legal actors' lack of knowledge about indigenous customs, made the prospect of going to trial and facing a potential jail sentence far riskier than taking a guilty plea with the possibility of a suspended sentence. As one lawyer summarized the issue:

> Would you risk going to jail for years trying to prove a customary tradition when the judge does not understand the idea of culture, when you can take a guilty plea and get a suspended jail sentence, maybe pay a little fine, and go on? . . . Even when the law is clear, it is not so clear. This is our job. It is risky to fight for cultural rights. So, many lawyers advise their clients to accept a summary proceeding and get a reduced sentence. The stakes are much lower in that procedure than if they go to trial. At trial, who knows what will happen? You see this a lot. (Interview 131)

Culture, Tradition, and Ritual in the Courts

In Taiwan's indigenous rights discourse and legal framework, the concept of "culture" (*wenhua*, 文化) was everywhere invoked and virtually nowhere explained. It appeared in courtrooms, government reports, laws, museum exhibits, promotional materials for tourism, and so on. As a sampling, Additional Article 10.11 of the Constitution maintains that "[t]he State affirms cultural pluralism and shall actively preserve and foster the development of aboriginal languages and cultures." Article 19 of the IPBL protects indigenous peoples' rights to hunt wild animals, collect wild plants and fungus, collect minerals, and utilize water resources for

"traditional culture, ritual or self-consumption purposes." Article 21-1 of the *Wildlife Conservation Act* (*yesheng dongwu baoyufa*, 野生動物保育法) permits hunting for "traditional cultural or ritual hunting, killing or utilization." Article 15 of *The Forestry Act* (*senlinfa*, 森林法) allows the collection of forest products for "traditional living needs and activities."

The term, *wenhua* (culture), regularly arose in courtroom discussion. Reviewing one hearing transcript from a case in Pingtung County involving a Paiwan cemetery, the term "culture" appeared 56 times during the 45 minute-long hearing. References to culture during the hearing switched between generic discussions of "indigenous culture" (*yuanzhuminzu wenhua*, 原住民族文化), indicating a pan-indigenous vision of indigeneity, and specific references to the culture of Paiwan people, whose lands and burial practices formed the center of the dispute.[27]

Taiwan's legal protections for indigenous peoples created a set of "cultural defenses" (*wenhua kangbian*, 文化抗辯) for customary practices (Chang 2018a: 10). The concept of a cultural defense is based on the understanding that everyone's behavioral choices and motivations are rooted in a cultural context and that the judiciary must understand and respect cultural context when evaluating conduct. In criminal prosecutions and civil disputes, indigenous persons have an opportunity to raise statutory cultural defenses to protect their customary activities, such as hunting wildlife, gathering plants, and water use.

A recent review of court cases involving prosecutions for hunting under the Wildlife Conservation Act shows that, in the period from 2004 to 2010, indigenous hunters raised cultural defenses only five times. This number began to increase in 2011, reaching a high point in 2015 of 10 times before tapering downward in later years. Remarkably, only 14 percent of indigenous hunters have invoked a cultural defense since the Taiwan legislature amended the Wildlife

[27] Taiwan Pingtung District Court 106 [2017] Case No. 7 (October 18, 2018, hearing transcript).

Conservation Act to protect indigenous hunting practices (Chang 2018: 19). If one may extrapolate to other domains of indigenous practices protected by Taiwan law, invocations of cultural defenses are few indeed. As noted, many of these cases are resolved under "summary proceedings" procedures, effectively taking away any opportunity to raise a cultural defense.

While Taiwan laws and courts discussed concepts of "culture," "tradition" (*chuantong*, 傳統), and "ritual" (*jiyi*, 祭儀), they did not offer definitions of these terms. Other state documents provided clues as to how these terms were interpreted. Article 2.1 of the *Use of Wildlife Management Measures for Aboriginal Peoples Traditional Cultural and Ritual Hunting and Killing Needs* (*yuanzhuminzu jiyu chuantongwenhua ji jiyi xuyao lie bu zaisha liyong yesheng dongwu guanli banfa*, 原住民族基於傳統文化及祭儀需要獵捕宰殺利用野生動物管理辦法) defines "traditional culture" as "the general term for the values, norms, religions, art, ethics, institutions, languages, symbols and all other aspects of life that have existed in the indigenous society for a long time and passed on from generation to generation."[28] Article 2.2 defines "ritual" as "the ritual activities and ritual acts of the traditional culture of the indigenous people, which are repeated according to their religion, beliefs or habits and passed down from generation to generation."[29]

These regulations adopted a Tylorian approach to culture: one that views culture as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society" (Tylor 1871: 2). This vision of culture embraces a commitment to an ideological frame of evolutionism that cultural phenomena

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[28] 「傳統文化：指存在於原住民族社會已久，並藉由世代相傳而延續至今之價值、規範、宗教、藝術、倫理、制度、語言、符號及其他一切生活內容之總稱。」

[29] 「祭儀：指原住民族傳統文化中，依其宗教、信仰或習慣，藉由世代相傳而反覆實踐之祭典活動及儀式行為。」

are those that survive the set of conditions under which they developed, and it requires indigenous peoples to conform to and enact conditions of life they never could have known themselves. Additionally, this approach is at odds with contemporary anthropological understandings of culture, which view it as a site of contested meaning, as fluid and changing, and as heterogeneous (Boyd 2013; Merry 2006; Preis 1996; Walley 1997).

In an institutional space insistent upon singularity and bounded categories (Weinauer 1996: 47), judges in the special units struggled to navigate the complexities of indigenous culture. One case provided an example of such a struggle. In June 2018, I traveled to the Hualien High Court to observe a case involving five Truku men prosecuted for illegally collecting rhodonite stones to use as decoration at their homes. I knew the men from my regular visits to their village. Rhodonite is listed as a semi-precious gemstone under the *Mining Act* (*kuangyefa*, 礦業法). They collected the stones on land they claimed to be part of their traditional territory but had not been formally registered with the county government. The prosecutors' office brought charges against the men, alleging they violated the *Mining Act* and the *Criminal Code* (*zhonghua minguo xingfa*, 中華民國刑法). I followed their case through the Hualien District Court, where they won on the grounds of a cultural defense, despite the fact that the *Mining Act* contains no cultural exemption—a first of its kind. The prosecutors' office exercised its absolute right to appeal, and the Truku defendants faced a new trial in the Hualien High Court on the same facts and law.

I knew the appellate judge assigned to the case. He had an impeccable legal mind and was very interested in indigenous justice. He also published on the intersections of Taiwan law and indigenous cultures and more than most judges understood the complexities attending indigenous cultures and legal protections. Even he, however, was puzzled about how to apply

anthropological concepts and categories to the case. Debating with the defendant's lawyer about the concept of culture and its implications for indigenous claims, the judge stated:

> Moreover, the traditional culture of Taiwan's indigenous peoples is actually not unified, solely a single ethnic group. The traditional cultures of mountain ethnic groups, plains ethnic groups, even seaside ethnic groups and so on, may not be the same, not to mention the different ethnic groups. How do you define it in this situation? It is also a question of which generation to demarcate, for example, from the Qing to the Japanese to the ROC government . . . The same thing, maybe the same people in different times and different regions are not the same—what point should mark the beginning of culture? And if a certain ethnic group has migrated many times over the years, is it true that the lands that they have inhabited from north to south are all traditional territories? And the competent authorities have not set out their view on this content and it has become an uncertain legal concept?[30]

These comments captured the judge's struggle to translate "culture" into a legally legible concept, ultimately concluding it was fraught with complexities that militated against its use as a reliable tool for dispute resolution. In a later conversation, the judge explained:

> Culture is very hard to understand. The term is used all over the place, but it is unclear. There are no writings, so I get elders so I can hear about the old times or stories they heard. But when I ask elders in the village to tell me about their culture, one tells me one thing and another tells me something somewhat different. I have to figure out the real story. It is very hard. (Interview 069)

Like James Clifford's (2005) well-known essay on the 1997 Mashpee trial, finding no singular, coherent narrative the judge was at a loss about how to apply the concept of culture to the conduct of the Truku defendants.

Like the concept of indigeneity and ethnic typologies, constructing the concept of "culture" was important work in the special indigenous court units, yet there was little

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[30] Taiwan Hualien High Court 106 [2017] Case No. 37 (June 10, 2018, hearing transcript): 「且臺灣原住民的傳統文化實際上並無統一，光是一個族群內，山地族群、平地族群、甚至海邊族群等等，且斷代要斷在哪一代亦是問題，例如從清、日治到國民政府。。。同一件事情，也許同一民族在不同的時代、地區處理的方式也不相同，究竟該以何點作為其傳統文化的源頭？若某個族群多年來多次遷徙，難道從北到南只要居住過的領域皆為其傳統領域？此些容主管機關皆未定調，而成為不確定的法律概念？」

understanding about its meaning or its contours. Understandings of indigenous culture in the special units tended to see it as a list of characteristics enclosed within the four corners of a document that encompassed indigenous experiences and practices distant from their contemporary manifestations (see Chapter Six). Moreover, where the concept would otherwise have presented an opportunity to secure indigenous rights, such as in the form of cultural defenses, institutional incentives encouraged indigenous persons not to invoke it. Shrouded in ambiguity, confined to a list of characteristics, and largely inaccessible to indigenous peoples, the concept of "culture" constituted an uncertain and contested terrain for securing indigenous peoples' rights to customary and traditional practices.

Conclusion

The present legal framework protecting Taiwan's indigenous nations reflects the persistence of imperial and colonial systems and categories of administration. The artificial divide between mountain-based and plains-based groups embedded in Taiwan law has resulted in the exclusion of the island's lowland indigenous peoples from official indigenous recognition. Those mountain groups having official recognition are protected by an uneven, often conflicting terrain of law. In place of pursuing legislative means for securing indigenous rights, the government has turned to the special indigenous court units. These special units have become the principal institutional bodies working to secure indigenous rights on the island. Compromises in their creation, however, have led to a weak form of pluralism. In many respects, the special units appear and function as ordinary courts—their special role tending to remain invisible, latent, and silent. Yet, as we will see, at times conditions permitted the special courts to take on an exceptional role as spaces for performing new kinds of identities and critiques of state power.

CHAPTER THREE

The Hallowed Halls of Justice:

Towards An Ethnography of Court Infrastructure

A Case in Court: Rakaw's Hut

A van beeped and a faceless hand waved out the window as it whizzed past me on my walk to the Hualien District Court. I was on my way to observe a case about Truku traditional territory. The van parked and 10 people tumbled out. My friend, Rakaw, the defendant in the case, his sister, and others from the village made the trip together from their mountain homes about 40 minutes away. They wore the same white rattan vests, with the traditional Truku "eye" motif stitched in red. We exchanged greetings and turned to face the courthouse.

The courthouse was a beautiful building. It stood stark against the blue Taiwan sky. The towering mountains of the Central Mountain Range, where Truku traditional territories were located, loomed close behind (fig. 6). This courthouse sat on the traditional territory of the plains-dwelling Amis Nation. The building was simultaneously awe-inspiring and foreboding. The Taiwan flag, representing the red earth, blue sky, and white sun of the ROC government—the government that had overthrown Qing dynastic rule in China in 1911 before fleeing to Taiwan in 1949 after the Chinese Civil War imposing martial law—fluttered atop the building. The golden scales of justice, the symbol of the Judicial Yuan, hung directly below the flag. This was a place where state ideals of justice intersected with daily life in a definite, and often forceful, form. It was a space of dense aesthetic, material, social, and political formations.

Figure 6. Hualien District Court, Hualien, Taiwan (Gao 2016)

The court building was low and wide with multiple entrances. Other judicial buildings flanked the courthouse: the prosecutor's office sat to the right and the judges' chambers and administrative offices sat on the left. A small forest park located in front of the courthouse served as a space of contemplation and relaxation. *Calophyllum inophyllum*, *Lagerstroemia subcostata*, *Ceiba pentandra*, *Terminalia catappa*, and old banyan trees grew among spectacular rock formations reflecting Hualien County's reputation as the home of stones. A public art instillation exhibiting a rotating scale with a brilliant red strip code and irregular black strip code—representing strong/good and evil/weak—reminded the public that "everybody is equal in the name of the law" (fig. 7).

Figure 7. Public art instillation at the Hualien District Court, Hualien, Taiwan (author)

Passing betel quid among us, we walked as a group not towards the main entrance but towards a distant entrance located back between the buildings to the left. This entrance, where the court hearing would take place today, looked innocuous. No sign, just a clear sliding glass door with security personnel behind it. We walked silently, everyone lost in thought. The Truku village's access to and use of their traditional territory was at stake, as was the freedom of their friends and community leader, Rakaw.

Rakaw walked resolutely towards the judicial body that had become one of the principal institutions mediating between the Taiwan state and indigenous peoples. I wondered if facing down mountain boars and poisonous cobras while hunting on his ancestral lands made facing down the Taiwan state just another daily challenge, but this seemed different. Rakaw understood the mountain terrain, the winding trails, the tracks of animals, the calls of birds, and the ancestral

spirits inhabiting the mountain. Here, he was an outsider, just like me: a foreigner on an unfamiliar terrain of law and of culture. But, unlike me, he was a foreigner on his own land, even if it was the traditional territory of another indigenous group.

We walked through the sliding glass doors and passed through metal detectors. The entrance opened to a space filled with plants and light from skylights above. We walked to the waiting room reserved for litigants and the general public. We sat facing electronic screens identifying case numbers and courtrooms. A repeating court television program mumbled about domestic violence and drunk driving. Signs on the wall set out the courthouse rules. One of these rules was, "No betel quid chewing." No one paid any mind. They passed around more betel quid. As the time for the hearing neared, the group stood up. Holding hands they formed a circle. Rakaw led a Christian prayer in Truku language. It was a very conspicuous display of alterity and solidarity in a space otherwise dominated by Han Chinese ethnicity, Mandarin Chinese language, and Buddhist and Taoist ideas about spirituality.

We sat back down and waited. People passed around a large Bible. They nervously checked their phones. We waited longer. A light finally came on indicating we should proceed to Courtroom 4. We filed out. Rakaw's legal aid lawyers met us on the way. Arriving at Courtroom 4, the electronic docket on the wall next to the entrance identified his case number with the special denomination, *yuan* (原), indicating Rakaw was a person with indigenous status.

We entered the courtroom. Uniformed bailiffs with guns, handcuffs, and batons stood in the corners. Rakaw and his lawyers walked through the wooden gate and sat down at a table to the right. The prosecutor was already sitting at the table to the left. The judge had not yet entered, but the clerk and court recorder were busy preparing for the hearing. I sat with the other members of the village in the gallery, facing the judge's bench, the lawyers, and Rakaw.

Confusion ensued as village members asked why I was sitting with them and not at the table with Rakaw. I explained I would have to pass the lawyer's exam, which was very difficult, before I could cross the little gate separating us from them. Someone remarked that they would "ace it." People chuckled.

The judge entered. The bailiff called everyone to stand. We stood. Villagers in the audience pulled each other up. The judge sat, and the bailiff directed us to sit. Surrounding, wrapping, and emanating from the judge were symbols of the Taiwan state—flags, scales of justice, robes. The words spoken were Mandarin Chinese. The judge and courtroom staff were Han Chinese. The date identified by the judge was the ROC national year—*minguo* (民國) 106, or 2017—a date calculated from the founding of the ROC government in 1911. The crimes alleged were those set out in the ROC Criminal Code. Rakaw was charged with *qiezhan* (竊佔, secretly taking government land) under Article 320, Item 2, for coordinating and participating in the construction of a small bamboo hut on his community's traditional territory. There was little indication that a new court unit designed to address indigenous peoples' cultural differences was about to start trial.

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The special indigenous court unit presiding over Rakaw's case was intimately embedded within the Hualien District Court, which, in turn, formed part of the national court infrastructure. This infrastructure was established and maintained by the Han Chinese-dominated Taiwan state. The promise of justice provided by the special indigenous court units, in their relation to the national court infrastructure, manifested itself through materials—concrete, glass, and wires—in architectural structure but also through representational practices—discourses, language, and narratives—about law and justice, which were dominated by non-indigenous understandings. It

also took form through individual encounters with these materialities and discourses, as both indigenous and non-indigenous peoples brought with them different expectations, experiences, and knowledge into court buildings and courtrooms. Justice in the special units was thus multivalent, encompassing a range of materialities, rationalities, and experiences.

The Judicial Yuan (*sifayuan*, 司法院), together with the Executive Yuan (*xingzhengyuan*, 行政院), Legislative Yuan (*lifayuan*, 立法院), Examination Yuan (*kaoshiyuan*, 考試院), and Control Yuan (*jianchayuan*, 監察院), form the five branches of the ROC government. The Judicial Yuan is vested with the power of adjudication, discipline, interpretation, and judicial administration, and it oversees the national court system. Today in Taiwan there are 22 district courts (*difangfayuan*, 地方法院), six high courts (*gaodengfayuan*, 高等法院), one Supreme Court (*zhonghua minguo zuigaofayuan*, 中華民國最高法院), and one Constitutional Court (or Council of Grand Justices) (*dafaguanhuiyi*, 大法官會議) in the national court system (Chiu and Fa 1994). The national courts employed hundreds of judges and supporting staff, and expenses account for 1 percent of the national government budget per annum (Chang 2018b: 348).[31]

Additional courts require additional judges with large capital and recurrent expenditures. Taiwan's special indigenous court units formed such a new addition, requiring new investments in such things as administration and planning. Little information is publicly available about special unit expenditures, but these court bodies handled large volumes of cases. For example, Taiwan district courts saw 9,230 new criminal cases involving indigenous persons in 2014; 10,831 in 2015; and 11,106 in 2016, and Taiwan high courts saw 459, 546, and 571 new indigenous cases during the same years (Judicial Yuan 2018b: 5). Likewise, district courts saw

[31] For example, the judicial budget in 2011 was 19,341,773 New Taiwan Dollars (NTD) while the national budget was NTD 1,769,884,184 (Executive Yuan 2011).

639 new civil cases involving indigenous persons in 2014, 716 in 2015, and 766 in 2016, and high courts saw 43, 88, and 105 new indigenous cases during the same years (Judicial Yuan 2018b: 8-9). Of these cases, some addressed or involved issues related to indigenous customs and traditions. For instance, alleged violations of the *Controlling Firearms, Ammunition and Knives Act* (*qiangpao danyao daoxie guanzhi tiaoli*, 槍砲彈藥刀械管制條例)—the law regulating indigenous peoples' use of firearms for traditional hunting—in the district courts numbered 48 in 2014, 50 in 2015, and 105 in 2016. Likewise, alleged violations of *The Forestry Act* (*senlinfa*, 森林法)—the law regulating access to and use of natural resources on traditional territories for many indigenous communities—in the district courts numbered 177 in 2014, 270 in 2015, and 199 in 2016 (Judicial Yuan 2018b: 7). To my knowledge, formal statistics about outcomes in these cases were not publicly available.

The special units were thus active institutions adjudicating cases and disputes involving indigenous persons, although the vast majority of these cases involved quotidian matters rather than sensitive cultural issues (see Chapter One). The high volume of cases, coupled with the lack of legislative effort to amend or create new laws protecting indigenous peoples, positioned the special units as significant, if not among the principal, institutions mediating between and among the Taiwan state and the island's indigenous peoples.

While the previous chapter introduced the specifics of Taiwan's special indigenous court units, this chapter situates them within the broader national court infrastructure. Hard infrastructure—the pathways and technologies that permit commerce, exchange, and travel, such as bridges, railways, roads, and water supplies—concern the physical components of interrelated systems enabling and sustaining societal living conditions. Recent scholarship has moved away from concentrating solely on these physical networks to examining soft infrastructure—the

constitutive cultural, economic, and political structures that formulate the foundation of any infrastructure—to study its place in society (Shelton 2017: 19). This chapter interweaves the hard and soft infrastructural elements constituting and underlying Taiwan's courts, especially the special indigenous court units, echoing Brian Larkin's (2013: 331) definition of infrastructure as technology entangled in political domains.

Courts of law and the sense of social order they promise carry us back and forth between sweeping narratives of law and order at a national scale and the specific, tangible materialities of specific actors involved in specific disputes. Taiwan's special indigenous court units added another layer by revealing the co-existence of different and competing narratives of history, identity, meaning, normativity, and ontology on the island. In the following, I consider how the special units were a mix of materials, meanings, and practices shaping human relations and experiences through the resolution of disputes about indigenous custom and tradition. While architecture and design provided the scaffolding for the special units' operation in the form of concrete and ideas, they did not determine how people entering this space experienced or used the special units, often doing so in different, and sometimes contradictory, ways. In an environment where the court was tasked with respecting indigenous cultural differences, but managed by non-indigenous actors who applied only non-indigenous understandings of justice, the special units were poorly equipped to secure justice for indigenous peoples in any robust sense. As indigenous peoples watched the special units arrive, they also witnessed the order and justice the units represented undermined by legal protections that never materialized, weak institutional knowledge of indigenous cultures, contradictory understandings of its purpose, and near total lack of indigenous representation.

Here, I interrogate the special indigenous court units as part of the Taiwan national court infrastructural system. Doing so lays bare countervailing understandings and usages from many different actors. It also advances a form of infrastructural literacy that sees courts as heterogeneous, quotidian, and situated but also containing logics of depth and hierarchy that manifest in design, management, and maintenance. This chapter thus approaches the special units as both abstractions and material assemblages (Carse 2017b: 35), focusing on elements of power, design, flows, perspectives, and mobility. Examining the special units in terms of judicial infrastructure, I emphasize the degree to which these courts bodies were spaces of significant Han Chinese state power but also that anticipated and unanticipated fractures in that power, generated by encounters between indigenous and non-indigenous actors in the special units, enabled other forms of expression, interaction, and practice.

Anthropologists, Infrastructure, and Courts of Law

From electrical grids to shipping containers, anthropologists have considered a range of infrastructural systems. These studies approach infrastructure by examining the interplay of upstream and downstream effects of particular technological systems and the ways infrastructure tends to operate on multiple levels concurrently. This literature highlights how infrastructure systems execute technical functions by mediating exchange across distance and binding people and things into complex heterogeneous systems and by operating as entextualized forms—things lifted out their settings (Bauman and Briggs 1990: 73)—that have relative autonomy from their technical function.

Anthropological literature on infrastructure has a long history of analyzing specific technologies, including concrete (Abourahme 2015; Harvey 2010), ports (Bear 2017, 2011), oil

exploration (Weszkalnys 2014), roads (Khan 2006; Dalakoglou 2010; Dalakoglou and Harvey 2012; Yazici 2013), shipping (Heins 2016, 2015; Birtchnell and Urry 2015), water supply (Anand 2011), and wind energy (Howe and Boyer 2016), among others. More recent work has turned to examining infrastructure as a concept (Carse 2017a, b; Carse and Lewis 2017; Collier 2011; Dalakoglou and Harvey 2012). These literatures represent a spectrum of approaches, one side tending to emphasize upstream politics (biopolitics, globalization, technopolitics) and the other tending to emphasize downstream aesthetics (affect, semiotics), while both recognize that these ends are intimately connected.

Laura Bear (2017), for example, explores the emergence of a globalized form of financialized infrastructure and traces its linkages to a longer history of transformation in state practices that moved the control of fiscal policy from state to financial markets. Thomas Birtchnell and John Urry (2015) likewise look to the global as they explore the movement of cargo as it travels from factories through global production networks via supply chains to consumers, finding that the shift to a post-mobile world in manufacturing and goods leaves much uncertain about the future of cargo systems. Similarly, Matthew Heins (2015) examines how global containerism and American transportation networks have mutually influenced one another, revealing global containerism as a complex process in which a variety of scales and actors possess agency and power.

At the national level, Stephen Collier (2011) draws on the concept of biopolitics to examine how Soviet-era electrical planning reveals forms of political rationality that underlie technological projects, finding that the post-Soviet transition shifted from an electrical system organized through a system of allocation to one regulated by consumer demand, providing material evidence of a transfer of American neoliberal ideas into Russian thinking. Similarly,

Bear (2011) examines forms of state planning in the Kolkata Port Trust in India, showing how neoliberal governance policies made interactions between bureaucrats and citizens ambiguous and opaque as they promoted decentralized, speculative planning and stimulation of public-private partnerships.

While infrastructure can express and represent state power, the effects cannot simply be read from their prior conceptualizations. They also generate complicated, and sometimes contradictory, experiences for the people who engage with them. Penelope Harvey (2010) shows how concrete enhances the state's capacity to produce reliable, predictable structures; yet, it is also constantly challenged by the instability and heterogeneity of the terrains to which it is applied. Naveeda Khan (2006) documents the disjunctive feelings among local people about the creation of the first multilane motorway in Pakistan. Filip De Boeck (2011) describes the pride of slum-dwelling Congolese forcibly displaced to a new settlement to make way for elite urban housing.

Like electrical grids and shipping containers, courts of law are infrastructure, too. They formed an essential element of the Taiwan judiciary, creating a network of actors and spaces facilitating the flow of ideas, materials, and people that enacted state ideas about justice, normativity, and power. In many ways, courts constituted a nexus of materials, meanings, and practices through which the legal power of the state flowed, yet their operation was never wholly determined as new cases brought with them new issues, judicial actors had their own approaches and experiences, and courtroom interactions shaped the resolution of disputes.

Viewing courts through the rationalizing aspects of the state, they emerge as sites of significant state power where the state imposes financial penalties, restricts freedom, and metes out violent punishment of citizens found to be guilty of wrongdoing. Within the same view, one

also sees considerable effort made to dilute the perception of unrestrained power through the design and operation of courts. Viewing courts in terms of aesthetics, one also sees unforeseen encounters as individuals engage with state and non-state actors, buildings, and symbols in unanticipated ways as they bring their own experiences, feelings, and understandings into the courtroom. In the case of indigenous litigants, encounters with state courts often included the introduction of different understandings of law, sociality, and ontology, exemplified in the anecdote that introduces this dissertation. The analysis presented here tacks between the rationalizing (focusing on state logics) and aesthetic (concentrating on individual encounters) dimensions of Taiwan's national courts, revealing how they constituted spaces dominated by Han Chinese actors and understandings but also as unstable spaces as individuals interacted with the courts in different and sometimes unsettling ways.

Appearance and Design: From Concrete to Language

Returning to the Hualien District Court building structure, built in 1965, the brick and mortar structure housing the criminal division of the District Court was a formidable rectangular building of concrete, glass, iron, and wood. It was geographically located near the Hualien County Government Office, Hualien County Health Department, Hualien County Local Tax Bureau, and Hualien County Audit Office, making it part of a complex of local government buildings. Owing to the presence of a nearby military missile base, the Hualien District Court's height was limited to a regulatory 14 meters (Judicial Yuan 2018d). The building was topped with the ROC flag. Emblazoned on its white façade were large, gold traditional Mandarin Chinese characters announcing: *taiwan hualian difang fayuan* (臺灣花蓮地方法院), or Taiwan Hualien District Court. Its design was not influenced so much by Han Chinese architecture as

Western-style architecture. The building was set far back from the main road, separated by a 10,669m^2 forest park split down the middle by a long asphalt lane lined with towering royal palm trees—an ornamental tree regularly used at ROC government buildings (Judicial Yuan 2009). Notably, nowhere was it acknowledged that this courthouse sat on the traditional territory of the Amis Nation.

Concrete formed a key element of the courthouse's aesthetic. It appeared everywhere: concrete columns, concrete kiosks, concrete sidewalks, concrete walls, painted concrete bamboo fences, even concrete sculptures in the garden. Scholars have noted how concrete is deeply symbolic of the state's capacity to produce predicable, reliable structures but that it also has its limitations. Penelope Harvey's (2010) examination of concrete in provincial Peru reminds us that the image of power that concrete affords is a compromised one in that its stability and predictability is secure only insofar as it is surrounded by and embedded in specific relationships of care. The singularity of concrete is something easily disrupted: it is vulnerable to heavy loads, neglect, water, and temperature, and its strength tends to diminish over time. Similarly, Nasser Abourahme (2015) shows how concrete in a Palestinian refugee camp mediated life in unintended ways by spilling over into property markets, regulatory agencies' authority, old social and geographic hierarchies, and the generation of new and unexpected social associations.

From a distance, the Hualien District Court courthouse appeared solid and stately. Upon close inspection, however, its solidity revealed numerous disruptions. Cracks ran across the courthouse walls, likely due to the many earthquakes Hualien County experienced each year. Sidewalks were repaired with new concrete, creating a patchwork of different colors along walkways. Broken parts and worn parts of sculptures suggested the climate and stresses to which the concrete was constantly exposed. These disruptions, together with similar disruptions in other

materialities of the courthouse, like glass, iron, and wood, offered a visual reminder of the limitations of this structural material. In so doing, they also suggested disruptions in and limitations of state power. The promise of courts for predictability and stability, like the promise of concrete, was ultimately one that was never fully stable as it was constantly challenged by the specificity of the cases and individuals involved. Such challenges could become amplified in an ambiguous institutional space, like the special indigenous courts, where new actors—indigenous peoples—brought with them different understandings of law, reality, and sociality that challenged state assumptions about these things.

The Hualien District Court courthouse was, of course, also embedded within other infrastructures. The courthouse was connected to electrical, Internet, market, transportation, and water supply infrastructures. Roads, for example, provided access to the courthouse by connecting it to a transportation network covering the region, which in turn connected it to the rest of the island. Anthropological studies of roads show that while roads are often seen as revolutionary paths to modernity, they are fraught with contradictions and tensions. Naveeda Khan (2006) describes Pakistani people's uncertain feelings about the creation of the first multilane motorway in Pakistan. Berna Yazici (2013) shows how urban inequality was produced not only through segregated social spaces but also on the move in traffic, in Istanbul. Dimitris Dalakoglou (2010; see also Dalakoglou and Harvey 2012) demonstrates how a cross-border highway in South Albania was a site of anxiety as locals came to terms with the new ethics of the market economy, emerging nationalisms, and mass emigration abroad.

In the Hualien District Court courthouse, inequalities were produced not just by law and government policy but also by distance. Distances from indigenous communities in rural and remote mountainous regions made access to urban-situated courts, like the Hualien District Court

courthouse, challenging. Challenges arose in efforts to coordinate the use of vehicles, obtain and maintain driver's licenses, travel and time costs, and adequate state road maintenance (see Chapter Seven). Physical distances emphasized the conceptual distance from the state and the salience of the local community. The multilayered infrastructural network attached to courts of law could not be taken for granted, and the disruptions occurring across these networks further suggested instability in state power.

Stepping inside the courthouse, the courtrooms would look familiar to anyone who has tuned into television law dramas like *Matlock*, *Perry Mason*, *Law & Order*, or *L.A. Law*, with the notable exception that there was no jury box. The arrangement of the courtroom was meticulously regulated by the Judicial Yuan (2018a). It was divided by a low "bar" separating legal actors from the general public (fig. 8). Beyond this bar, the judge's desk was elevated above the room. In front of the judge sat the court clerk's and judicial assistant's desk. In many courtrooms, the table on the left was designated for the prosecution and plaintiffs, while the table on the right was designed for defendants, although courtrooms varied. These desks faced one another, not the judge, reflecting the adversarial nature of Taiwan court proceedings. Between them sat a small single-seat desk reserved for witnesses. Benches ran along the front of the bar for persons waiting to testify. Behind this bar, seating was arranged for the viewing public as well as judicial actors in training. These seats faced the judge, lawyers, and litigating parties, giving the courtroom the look of a small theater. The walls of the courtroom were dark wood paneling and a humming air conditioner hung high on one of the walls, operated by the bailiff with a remote control. Projectors hung suspended from the middle of the ceiling, projecting pictures and text onto the blank walls behind the parties' heads. Small, dark cameras hung in corners of the room (fig. 9).

刑 事 法 庭 布 置 圖

附圖二

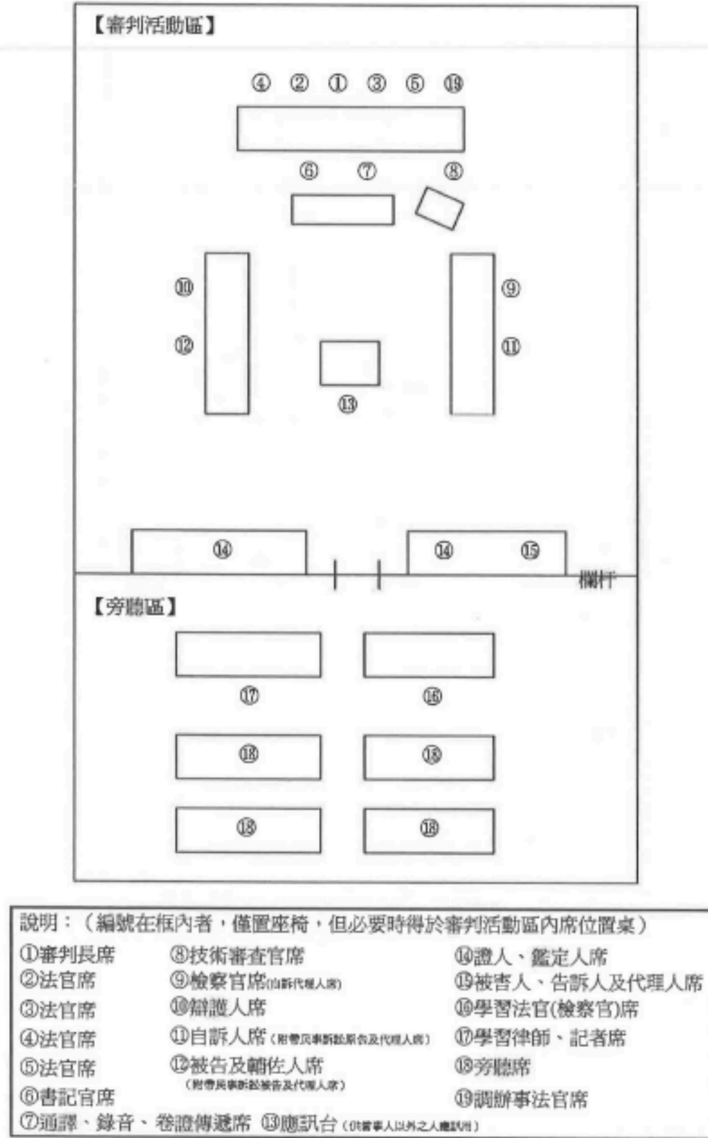

Figure 8. Criminal courtroom layout (Judicial Yuan 2018a)[32]

[32] The diagram reads as follows:

Criminal Courtroom Layout

[Trial Area]

Railing

[Audience Area]

Note: (The number in the box refers only to a seat, but if necessary to a table in the trial area)

(1) Judicial bench
(2) Judge
(3) Judge

(8) Technical review officer
(9) Prosecutor (private prosecutor agent)

(14) Witness and expert
(15) Victims, witnesses, and agents

Figure 9. Interior of the Hualien District Court, Civil Division, Hualien, Taiwan (author)

It is important to emphasize that the special indigenous court units were not specific sites. Rather, they were constituted anew each time in the courtroom by the presence of a specific judge and an ethnic marker for the case (see Chapter Two). Deficiencies in judicial education, coupled with an uncertain terrain of legal protections and no acknowledgement that a special court unit was in session, gave the special units an ephemeral presence. Oftentimes, the case number, with the character, *yuan*, marking indigenous litigants, was the only overt indication of

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(4) Judge
(5) Judge
(6) Law clerk
(7) Translation, recording, and certification of authenticity
(10) Defense
(11) Private prosecutor (plaintiffs and agents)
(12) Defendant and assistant (defendant and agent in ancillary civil action)
(13) Response desk (for use by persons other than the parties)
(16) Judges (prosecutors) in training
(17) Lawyers in training and reporters
(18) Gallery
(19) Transfer judge

the special units' presence. Hence, describing the special units in terms of infrastructure largely consists in describing the ordinary court infrastructure of Taiwan.

As proceedings begin, the reverence accorded to the judge was a conspicuous display of the court's power, and by extension, the state's power. Everyone in the courtroom stood when the judge entered. Only when she sat down could the parties, their legal counsel, and the audience sit. The judge was seated approximately one meter above all other courtroom actors, perched high with a view of the entire courtroom. Her wooden desk, the "bench" as it is called in Western legal traditions, was large and acted as a barrier between her and the rest of the courtroom. The ROC flag stood behind her, indicating that her authority emanated from the Taiwan state. The scales of justice hung above her head. Having its roots in Roman mythology, this symbol represented the judiciary's impartial weighing of evidence. The judge wore a black robe with blue lapels, a color that distinguished her from other courtroom actors and signified the unbiased nature of justice (Interview 114).

It was the judge's responsibility to manage the proceedings. During trial, she introduced the case number, the issues, and prior determinations. She informed parties about their choices. She decided when and for how long lawyers spoke. She advised witnesses about their responsibilities. She questioned the lawyers, parties, and witnesses. She instructed courtroom staff. She made determinations about evidence. Ultimately, she issued the final decision. At no point did she mention or otherwise indicate that she was a judge in the special indigenous court unit. In general, courtroom actors must defer to her authority. Lawyers could not even leave their tables to cross the open space between themselves and the bench, the "well," without her permission. The judge thus appeared saturated with power, and such perceptions of power in

indigenous cases were only amplified as one recalls that Han Chinese persons, not indigenous persons, served as judges in the special indigenous court units.

Yet, Taiwan's turn to an adversarial system in 2002 shifted power within local courtrooms, by degrees moving control of litigation from the judge to the litigants. In this adversarial system, the judge's role was that of an impartial referee between the parties, rather than being actively involved in investigating the facts of the case. For example, judges did not typically initiate an inquiry. That responsibility was left to prosecutors in criminal cases and plaintiffs in civil disputes. Judges decided, often when called upon by legal counsel rather than of their own motion, what evidence would be admitted. Rules of evidence were based upon a system of objections of adversaries. It is important to bear in mind that Taiwan retains strong elements of an inquisitorial system. For example, while judges in adversarial systems rarely ask witnesses questions during trial, Taiwan judges regularly did so. Further, plea-bargaining and settlement agreements eroded adversarial dimensions of court operation as they avoided encounters within the court. As noted, plea-bargaining procedures, in particular, generated perverse incentives in cases involving indigenous custom and tradition as they pressured indigenous defendants to plead guilty rather than to fight for their customary lifeways (see Chapter Seven). These dimensions of authority, impartiality, and contest within Taiwan courtrooms were neatly captured by the English slogan of the Judicial Yuan (2018c), where alliteration runs almost confusingly wild: "Clean, Crystal, Considerate, Competitive Judiciary."

The Hualien District Court courtroom was also a space populated—both physically and discursively—with texts. At the beginning of a court hearing, the judicial assistant handed the judge a large paper file wrapped in colored twine. In criminal cases, this package consisted of, among other things, the prosecutor's charging papers and investigative report, the defense

lawyer's filings, expert reports, and exhibits. In civil cases, this package consisted of pleadings (complaint, answer, counterclaims, and cross-claims), motions, discovery, expert reports, and exhibits. These were supplemented with a variety of documents and forms specific to court institutions, such as affidavits, applications, declarations, invoices, summons, witness statements, and so on. Together with the ROC Constitution and any relevant codes or ordinances, and perhaps prior case law, these were the principal texts circulating within the courtroom.

In the context of matters involving indigenous customs and traditions, these texts were often supplemented with studies about indigenous peoples dating to the Japanese colonial period (1895-1945) (Interview 067). The court did not view these texts as identifying alternative sources of normativity but rather practices to which indigenous peoples must conform in order to be recognized as "indigenous." Parties could also supplement these texts with international human rights instruments, like the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), and domestic indigenous protections, such as the Basic Law. The weight accorded to these texts, however, largely depended upon the judge's individual preferences and views (see Chapter Five).

Texts in Taiwan courtrooms did not sit idle. Rather, courts considered texts through the lens of a civil law tradition emphasizing, among other things, selection of rules over synthesis of rules. This tradition guided judges towards a reading of general laws that drained them of their normative content in favor of specific laws typically offering limited protections. Yet, some judicial and legal actors in Taiwan sought out creative ways of incorporating indigenous customs and justice practices into their legal analysis (see Chapter Five).

Language forms another part of infrastructure (see Bear 2011: 56; Dalakoglou 2010: 138). It is the mechanism by which information about infrastructure networks is defined,

exchanged, expressed, and shared. On the courthouse façade hung large, golden Mandarin Chinese characters. Signage within the courthouse and in the courtroom (fig. 10) was likewise written in Mandarin Chinese. Legal forms, briefs, and courtroom texts were printed in Mandarin Chinese. Legal actors conducted discussions in Mandarin Chinese. Given that Mandarin Chinese was the official language of Taiwan's justice system, disputes in local courts were at all times framed within Han Chinese language ideologies and discourse. Notably absent was any recognition of indigenous languages as a language of justice. Indigenous languages were supplementary to Mandarin Chinese: inconveniences to be addressed through special courtroom translation procedures rather than being authoritative means of communication in their own right.

Language also formed an important site of contest in indigenous cases. Judges and lawyers debated Mandarin Chinese courtroom transcriptions in real-time during trials, revealing assumptions about indigeneity having the capacity to shape case outcomes (see Chapter Four). While many indigenous peoples spoke Mandarin Chinese (Yeh 2015: 19), indigenous litigants strategically used language in the courtroom by refusing to use Mandarin Chinese or code-switching between Mandarin Chinese and their mother tongue to compel Han Chinese judges to recognize that a different culture was present (see Chapter Six). Further, the Judicial Yuan recognized that, historically, colonial and state authorities used language to assimilate and subjugate indigenous peoples. On this basis, it created the special interpreter program, but deficiencies in this program sometimes left indigenous actors feeling like their voices were inadequately represented (see Chapter Seven). Language—in documents, in courtroom discussion, in transcription practices, in language games, in interpreter programs—constituted a central site through which the special indigenous court units took shape.

Figure 10. A sign inside the Hualien District Court, Civil Division, written in Mandarin Chinese reads: “Everyone is equal before the law. Within the law, everyone is free.” (author)

In manifold ways, the Hualien District Court courthouse reinforced perceptions about Taiwan state power. State actors, design, language, laws, procedures, ornamentation, symbols, and texts reminded entrants that this is a place where the ROC government dominates. Yet, cracks in the materialities of the courthouse building, uncertainties about the special indigenous court units, debates about language and texts, and adversarial methods of adjudication suggested an undetermined field of contest and unstable state power. Other activities further suggested a tempering of state power. Recent conversations in Taiwan about introducing a jury system (Lewis 2018), exploratory use of indigenous sentencing circles (Interviews 023 and 071), discussions about developing a mobile court unit (Interview 105), and efforts to streamline procedures for using indigenous expert witnesses (Interview 082) indicated a willingness to

distribute power within the courthouse. Yet, while the Hualien District Court constituted no Star Chamber,[33] significant power imbalances remained between the state and citizens, particularly for indigenous persons entering the court.

Flows: People, Information, and Materials

Courts not only present certain perceptions about power; they also regulate movement of people, ideas, and materials. Choreography of movement constituted a critical dimension of Taiwan courts. In Courtroom 4 of the Hualien District Court, the judge entered and exited the courtroom through a narrow door behind her bench. This door remained locked at all times. It led to a narrow passage seen by few people. It branched off into a dizzying array of corridors. Some led to a special elevator reserved for judges, which transported judges up to their chambers. Others led to clerk's offices. Still others led to different courtrooms. Finally, a special corridor led to the parking lot reserved for court staff. Additionally, this hidden web of corridors was not accessed equally. Sliding glass doors operated by keypad codes divided up this network, restricting movement and limiting access to certain court actors.

Criminal defendants (who have already been arrested) were guided through a similar system of backdoor corridors. They entered and exited the courtroom through a special locked door. This door led to a corridor containing holding cells and police offices. At the end of the corridor was a door leading to the parking lot and the armored bus used to transport defendants to and from the local jailhouse.

[33] The Star Chamber was an English court of law used to supplement the common law and equity courts from the late fifteenth century to the mid-seventeenth century. Drawing its power from the king's sovereign power and operating in secret, it was not bound by common law and later became synonymous with arbitrary use and abuse of power (Burn 1870).

The movement of the general public, lawyers, and litigants was regulated through yet another set of procedures. At the Hualien District Court courthouse, the public entered through a sliding glass door at the front of the building. After passing through metal detectors, parties registered at the front desk while everyone else proceeded into the courthouse building. The public was generally free to roam the courthouse, with the exception of entering private offices, private corridors, and courtrooms hearing cases involving domestic violence or family law matters. As they waited for their hearings to begin, litigants and the general public had the option to sit in a designated waiting area, set apart by sliding glass doors, with air conditioning and comfortable seating. The public, lawyers, and litigants entered Courtroom 4 through the rear of the room. As noted, the room was not an open space where people could walk or sit wherever they wanted. It was internally divided such that litigants and their counsel could cross the "bar," but the viewing public had to remain outside the bar.

In this way, Taiwan court design coordinated the movement of three discrete categories of people who must never intersect: (1) open circulation of spectators, lawyers, litigants, and witnesses; (2) restricted circulation of prisoners and police staff; and (3) secure circulation of judges, clerks, and bailiffs. Thomas Gieryn's (2018b: 113) observation about American courthouses applies here as well: arranging spaces and passages on a courtroom floor is something like designing an electrical circuit where the wires must never cross, lest the system of justice short out. Seen in this light, Taiwan courts were spaces of movement and separation, differentially guiding people's movements and insulating their interactions.

It was not only movement of people that courts regulated; they also choreographed movement of information and materials. In the Hualien District Court courthouse, the court carefully controlled the distribution of evidence in a case. In criminal cases, the prosecutors'

office submitted information concerning the alleged offenses to the judge, who reviewed it, and made determinations about which information to produce to the defendant's lawyer as part of the information exchange, or "discovery," process. The court also controlled confidential information about defendants and victims. This information was regularly recorded in court forms but was redacted from documents accessible to the general public. In criminal dockets posted for public viewing, for instance, the middle character of the accused's three-character name or the second character in a two-character name was replaced by a large "O" to protect the individual's identity. In addition, judicial orders and hearing transcripts were made available only to lawyers in the case. Like courthouse corridors, the flow of information within courthouses was also internally restricted. Judges, for example, could only access information about their own cases; they could not see other judges' cases (Interviews 058 and 067).

Movement of materials—electronic and physical—was likewise strictly managed within the court. In the Hualien District Court courthouse, paper files of cases were kept in storage rooms under filing systems managed by judicial assistants. Judicial assistants transported these bound records to and from judicial chambers and courtrooms. In addition, separate offices within the courthouse maintained the many paper records of applications, invoices, and other documents used by the court. Recordings and transcriptions of oral argument and witness testimony were also saved on Internet servers accessible only to the lawyers involved in the particular matter.

The regulated flows of people, information, and materials were critically important to court operation. These regulations did not simply determine movement; they also introduced and reinforced hierarchies and inequalities in the judicial system. Generally, judges had wide access to spaces and materials within the courthouse. Even their movement, however, was relegated to their own cases. The general public also had differential access to court spaces as those speaking

Mandarin Chinese and understanding state law and procedure had the ability move around the courthouse in ways more efficient and informed than those who did not.

An irony of the contemporary Taiwan court system was that while indigenous peoples were the only ethnic groups on the island having a specially dedicated court unit, their movement in courthouses remained among the most restricted. Few judges had indigenous status; thus, indigenous peoples were largely unrepresented in positions of power within Taiwan courtrooms. Likewise, few lawyers had indigenous status, which conceptually and physically limited indigenous peoples' direct access to courtroom information and materials and restricted their ability to manage the litigation affecting them. Since courts did not rely on indigenous custom and tradition as sources of normativity, indigenous customary norms were excluded from the principal legal texts circulating in courtrooms used to determining indigenous litigants' fate. Indigenous languages were likewise seen as merely supplementary to the language used in courts. Thus, despite the creation of special indigenous court units, Taiwan courts remained in many ways foreign spaces where indigenous persons and views were largely excluded.

Perspective: Drama, Intimacy, and Power

Imagine for a moment yourself as Rakaw arriving at the Hualien District Court courthouse. This is your first time at a courthouse. Its enormous size is intimidating. Its symbolism represents a government that has systematically discriminated against you and your people and is now seeking to put you in prison for building a small structure on territory your community has occupied for generations. The laws used in the court are not your own. The language is not your own. The people are not your own. You have been told about a special unit

in the court that aims to respect your culture, but there is no indication of its presence or that it knows anything about you or your community.

As you walk to the courtroom, you pass a special room set aside for private meetings between lawyers and clients. On the wall next to the courtroom door is an electronic docket identifying your case. The date on the docket is calculated using the ROC calendar year, 106 (or 2017). It identifies your Mandarin Chinese name but not the Truku language name you use in daily life. It uses an ethnic designation, *yuan*, to mark you as an indigenous person but does not identify your Truku heritage or the name of your specific village. It references a state criminal code number but does not refer to your customary law of *Gaya*. This is a space that conveys to you in nearly every way that it is not your space.

You enter the courtroom through the back of the room and pass through a swinging gate into a special section at the front. The friends and family who traveled with you stay on the other side of this gate. You are alone. You face the Han Chinese prosecutor seeking to put you in prison. Your Han Chinese lawyers sit down next to you. You have met them a few times before, but you have heard rumors that they prefer to make arguments that advance a particular political agenda rather than ones that will win your case. Moreover, you are unsure if they understood what you told them about your customs, lands, or the reasons why you built the small hut. You lean back to have a short conversation with them and to answer some last-minute questions. The Han Chinese judge enters, and you are told to stand. With no evidence that this rumored special indigenous court unit is present in the room, the trial begins.

In the midst of all this, you see the American researcher sitting with your family and friends. You give him a wink.

Observing Rakaw, his emotional response over the course of this litigation appeared to be less fear than fiery determination. He walked resolutely towards the courthouse. He spoke confidently and loudly to reporters from Taiwan Indigenous Television who came to cover his case. He organized and led prayers in Truku language in the courthouse. His testimony in a later court proceeding left a powerful impression about life as an indigenous person in Taiwan, delivering a strong rebuke of the government policies that have historically marginalized indigenous peoples (see Chapter Six). At one point, village members who traveled with him to the hearing laughed when they realized they were looking to Rakaw for comfort and support when he was the person on trial, not them. I asked Rakaw at one point why he seemed so confident. His answer was, "I am not confident. Everything is unfair. But I have to win. This is for our community" (Interview 047). Recognizing the odds against him and his community, Rakaw was an individual on a mission.

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In the controlled flows of information, materials, and people within the court, the courtroom is the one place where they all congregated. As Gieryn (2018b: 116) phrases it, "The gerbil tubes to justice all end at the courtroom." The courtroom was fastidiously arranged to facilitate communication around these elements—people, information, and materials—to resolve disputes. Courtroom design, and the lines of sight and hearing it created, quite literally enacted principles central to the Taiwan legal system. In criminal courts, these principles included the right to legal counsel, the right to confront witnesses, and the right to attorney-client privilege, following Taiwan's criminal justice system reform in 1997 (Wang 2011: 15-22).

For example, indigenous defendants in Taiwan were given access to free legal representation regardless of income level. This procedure gave life to a right to legal counsel, but

at times its mandatory nature introduced a significant burden on indigenous persons (see Chapter Seven). Lawyers and their clients also had private meeting spaces in the courthouse, and they sat together at specially designated tables far enough away from others to have private conversations out of earshot. This provided substance to a right to attorney-client privilege. Criminal defendants and their legal counsel also directly faced witnesses proffered by the state and were allowed to question them, ensuring a right to confront their accusers.

There were few secrets in the courtroom. The judge addressed the parties in a manner that all could hear. Tables and desks had microphones to amplify and record peoples' speech. A computer screen projected documents, exhibits, and transcripts. These documents were also projected onto walls above the parties' heads. Everyone sat within view of one another, including the audience. This design gave the courtroom the feeling of dramatic theater. All lines of sight and hearing in the courtroom were directed towards the principal courtroom actors. This intimate arrangement compelled all eyes and ears to participate and focus on the central drama unfolding. Yet, if it was intimate, it was careful not to be too intimate. Witnesses were set apart from litigants and aggressive lawyers who may intimate them. Lawyers had room to converse with their clients without fear of being overheard. Judges had room to call clerks and lawyers for private sidebar discussions. A long wooden "bar" separated the general public from the main courtroom actors.

The design of Taiwan courtrooms reflected a jurisprudential belief that intimacy compelled engagement of those involved. The room was arranged to bring together the judge, litigants, witnesses, clerks, assistants, bailiffs, and the public, as well as all the information and materials bearing on the case, into one place where they were allowed to congregate. It was arranged so that lines of sight and of hearing facilitated communal sharing of the legal

proceeding. In doing so, it created an intimate space in an otherwise colossal building, motivating people to be engaged while also reminding them that the goings-on here were particular and personal.

State ideas about justice predominated in courtroom design and, in cases involving indigenous customs and traditions, were amplified. Han Chinese judges sat perched high above all indigenous actors. Lines of hearing in the courtroom could be obstructed by differences in language. Lines of sight in the courtroom could be obstructed by different understandings of justice and normativity. In its intention to place indigenous peoples on an even footing with Han Chinese actors through a rationality of justice and politics embedded in courtroom design, as well as the development of special indigenous court units, the judiciary further marginalized them by insisting upon arrangements and procedures that reinforced the values of mainstream Taiwan society alone.

A Moveable Court: The Politics of Mobility

At the request of Rakaw's lawyers, the judge agreed to visit the location where Rakaw and other community members built the small bamboo hut. Rakaw was performing a traditional ceremony next to the structure at issue as I arrived at the village, using smoke and verbal invocations to call his ancestors to help him win the case both for himself and for their community. Forty-seven community members, mostly elderly women and men, had made the 15-minute scooter journey from the village and were standing around waiting to see what would happen to Rakaw and their months-long community effort to build the hut. Rakaw stood by himself, looking out across the river valley that divided his village's traditional territory, his back turned to the growing crowd. A fire crackled beside him. His arms were outstretched,

encompassing the whole sky and territory. After drinking a cup of rice wine in a single swallow, he called out in a loud voice to the ancestral spirits in Truku language. I later inquired about this display of traditional spirituality and its connection to his earlier Christian prayer in the courthouse. As noted, he explained there was a division of labor in spirituality: "Here, ancestors are responsible for the land and the people. Out there [gesturing beyond the village], God is responsible for everything. So, it makes sense" (Interview 059). Vernacularization was not simply a matter of top-down translations of norms and precepts into local vernaculars; it was also jurisdictional, as some global precepts were simply not viewed as being within the purview of or relevant to local matters.

Right on schedule, the judge arrived in her black government sport utility vehicle. The vehicle, driven by a uniformed police officer, was adorned with the Hualien District Court insignia. Six other sleek black government vehicles arrived with her. When the SUV parked, she emerged in a dark formal suit along with her judicial assistant. A small entourage of police officers, with the ROC flag emblazoned on their shoulders, gathered around her. Other police officers quickly took up strategic spots around the site. Some set up a video camera to record the events. Others walked around taking photographs and videos of the area. Still others took measurements of the hut and the roadway. Others walked around taking notes on pads of paper.

There were far more state actors present than normally seen in the courthouse. They were also different actors. These were not bailiffs but police officers, giving the scene the feeling of a significant criminal investigation underway. For many members of the Truku village, particularly elderly members who stayed in the village, these were the first Han Chinese police officers they had seen up close. If the number of police intended was an assertion of state power, it appeared to miss the mark. Community members laughed quietly to themselves about the

number of police. Someone cracked, “You think any more’s in there?” as we watched police officers pile out of a vehicle. Villagers milled around freely, stepping in front of police officers as they took notes or pictures. Among the villagers there appeared to be little anxiety about the police presence. In fact, any anxiety appeared to be on the part of the state, as it overcompensated with sheer numbers of actors.

The agents, language, symbols, and technology of the Taiwan state stood out here. Surrounding these representations of state power were ubiquitous displays of indigenous Truku life. Huge, colorful murals depicting Truku hunters and painted concrete sculptures representing their special hunting knives ran along the roadway to the hut. The villagers’ conversations in Truku language and Taiwanese drowned out the police officers’ conversations in Mandarin Chinese. The bamboo hut and the lush greenery of Truku traditional territory stood in marked contrast to the gray, cracked concrete of the Hualien District Court courthouse. Likely invisible to many of the Han Chinese judicial actors and police was the carefully cultivated nature of this greenery, reflecting many generations of Truku agroforestry. I must admit that I did not see it either until after several months of visiting this village and then I did so only after it was directly pointed out to me as I apparently sat on an edible plant.

The vacated and dilapidated police station, located a stone’s throw from the bamboo hut, also suggested a withdrawal of state authority. Years earlier, local police built the small station to regulate access to the mountain road, ostensibly for environmental protection and public safety. Police required travelers to show identification cards and sign-in to enter the high mountain region. This road led to the village’s traditional territory. Members of the village felt that these regulatory measures were explicitly designed to limit their access to this land. Later, the village staged a protest that received island-wide attention, boldly walking past the guards at the police

station without their identification cards in a move to reclaim their free and open access to their ancestral lands on pain of fine or arrest. The recent history of protest at this location was likely part of the reason for the overcompensated performance of state police power during the site visit. Ultimately, local police abandoned the station. This abandonment had effects beyond access to traditional territory. Hunters in the village no longer felt any need to register their guns or to file hunting applications. These activities suggested that villagers believed they had greater room to engage in customary activities, although it was also suggested that registering guns and completing hunting applications were not particularly strong community priorities even before police vacated the station (Interview 074).

A Han Chinese police official took it upon himself to guide the judge around the site. That was too much for Rakaw and several other villagers. They followed closely behind the official and made their views known. At one point, the official gestured toward a line on the ground and explained to the judge that it demarcated Taiwan national property. Rakaw angrily yelled into the official's ear in Mandarin Chinese: "You say this line marks ROC land. This is our land! You came here, and you took our territory without asking!" A few moments later, the official pointed to a faded metal sign standing next to the road and explained to the judge that it indicates this is national land. Again, Rakaw angrily yelled into the official's ear: "You say this sign says this is ROC land. This is our land! You put your sign on our land without telling us. Now you claim the land is yours!" These heated exchanges went on for 30 minutes. Throughout Rakaw was unabashed and forceful, and the official conspicuously pretended not to hear the indigenous man standing next to him yelling into his ear. This was an overt expression of refusal: this space was adamantly and without compromise the Truku community's space, not the Taiwan

state's space. Villagers followed Rakaw as he asserted his community's original claim to the land, translating for one another what he said into Taiwanese and Truku language.

The judge was an engaged observer. She gave instructions to police and to her staff. She listened carefully to the police official. She also listened carefully to Rakaw. After the police official completed the tour, Rakaw took his turn. He walked the judge first to the fire where he called the ancestral spirits and explained to her what this place meant to him and to his community. Next, he took her to the hut and described the purpose of the structure and the rationale behind its design. He explained that the community modeled the hut on the makeshift huts that hunters traditionally used to rest and clean animals while they were away in the mountains. This structure was a simple one-story rectangular structure made of bamboo and steel scaffolding set on a bare concrete foundation. Bamboo windows propped open to offer air circulation and light. He explained to the judge that the community planned to use the hut to teach young people in the village about Truku culture and language. He said, "Our children do not know about Truku culture, language, or customs. We need a place where we can teach them about these things, about our traditional lifeways, *Gaya*."

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In general, courts stay put. They are immobile and do not travel. In this case, circumstances were such that the judge felt she could benefit from visiting the location of Rakaw's alleged offense. Her order granting the site visit request was entirely within her discretion; there was no mechanism for litigants to force her to accept such a request. It stands to reason that site visits lend themselves to certain kinds of disputes, notably cases involving territorial disputes and property damage, because traveling to the location enable judges to get a better grasp of the relevant setting. For a number of reasons, judges often denied inspection

requests. The reasons included the view that courts were chiefly concerned with settling disputes under law, not investigating facts; unsafe conditions for the judge; and expenses associated with organizing such an endeavor (Interview 087).

The Judicial Yuan (2018b: 24-25) recently came to a realization about the intimate connection between indigenous territory and culture. Training for special indigenous court unit judges now encouraged the use of site visits to obtain a better understanding of local circumstances (Judicial Yuan 2018b: 17-22). Some judges took this to heart. As one example, around the same time as this site visit, another judge in the Pingtung District Court conducted a site visit to a Paiwan cemetery allegedly improperly destroyed by developers.[34] The Judicial Yuan also made it one of their mid-level goals to create a circuit court (*xunhui*, 巡迴) (Judicial Yuan 2017a: 36) that would "ride circuit," so to speak, conducting hearings and trials in indigenous villages. The mobility of justice was thus increasingly becoming part of the conversation about securing indigenous rights on the island (Interviews 087 and 118).

But what exactly happens when a court leaves the courthouse and becomes mobile? What happens to the power of the state as it enters an indigenous space? What becomes sayable and unsayable as special courts visit a village? Gieryn (2018a) considers similar questions as he examines the operation of a makeshift mobile court in Longjia Village in southwest China. He recounts how PRC judges replicated much of the appearance and operation of an ordinary court: folding tables displayed placards reading "plaintiff" and "defendant"; a large sign with the emblem of the PRC read, "Mobile Tribunal of the Gong County People's Court"; litigants took turns pleading their cases; judges held sidebar conversations with litigants to mediate the dispute; and judges finally rendered a judgment. Gieryn notes that by the end of the proceeding, despite

[34] Taiwan Pingtung District Court 106 [2017] Case No. 7 (April 16, 2018, site visit order).

having little experience with formal legal institutions, the litigants reported being content with the outcome and that they accepted the legitimacy of the process. He hypothesizes that the performance of the mobile court as an institution of justice made the litigants believe that they received a just outcome, which in turn indicates an ability to transport and make institutions having persuasive power—churches, courts, laboratories—mobile.

Like the mobile court in Longjia Village, the Hualien District Court during the site visit used state insignia, dress, formalities of process, and language to perform its authority as a state institution, but close inspection of this event also suggests an unstable state power. Rakaw's smoke ceremony staked a uniquely indigenous claim on this place. His behavior confronting the police official also indicated a sense of boldness not reflected within the courtroom. The colorful artwork and sculptures, and general din of Truku language during the site visit, reinforced perceptions that the state was the foreigner here, not indigenous people. Rakaw's complaints about unjust takings of indigenous land illuminated and historicized the land in ways that had not been done in the courtroom. The dilapidated police station also suggested a withdrawal of state authority. Moreover, movements here could not be carefully choreographed like they could at the courthouse; intersections ordinarily avoided or prohibited were now direct and open. The extent of police protection also signaled anxiety about a potential loss of control in this space, resulting in an almost humorously overcompensated display of state power.

Making the court mobile thus exposed new assemblages and dimensions of power. Out here, in the village, state assumptions about history, language, normativity, and power were destabilized, made unsettled. While there was no question that everyone felt the power of the Taiwan state, mobility brought into relief questions about the extent of its power. In certain respects, the visit also brought the special indigenous court unit into line with prior expectations

of its indigenous subjects. One of the elders grabbed my elbow during the visit and, gesturing towards the judge and Rakaw, said: “This is the important part [of the special indigenous court]. That it includes our knowledge. The judges know nothing. We must take our customs to the court, or it must come to us” (Interview 082).

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These ambiguities and question marks about state power continued as the site visit concluded. Having completed their visit, the judge and her entourage piled into their sleek government vehicles and drove away. They left behind a lone police officer tasked with obtaining the signature of someone—anyone—who would serve as a documented witness to the site visit. Rebuffed at every turn, he was not in an enviable position. Villagers would look at the form (written in Mandarin Chinese) and silently walk away. One man snatched the form out of the officer’s hand. Huffing loudly, he threw it on the ground. Embarrassed, the officer picked up the form, wiped it on his pants leg, and sought a signature from someone else. He never got one.

As the lonely police officer drove away, people started talking about the judge’s visit. They milled around in the street, chewing betel quid and drinking rice wine. They discussed the misguided police official and the large number of police officers that accompanied the judge. Their conversations slowly turned to the bamboo hut, admiring its construction and speculating about its future. After a few minutes, someone called for a group photo. We gathered together and took a picture beside the bamboo hut with the beautiful river valley behind us. Everyone smiled. It felt like documenting a small victory.

Conclusion

This chapter has considered Taiwan's court infrastructure, examining the actors, architecture, design, language, materialities, movements, regulations, and symbolism in the Hualien District Court courthouse. It highlighted the extent to which these dimensions reinforced perceptions of Taiwan state power within the court. The unquestionable power of the state to define events, ideas, and people manifested itself in the architectural design of the court building and the rooms within the building, the laws and procedures used, the language used to talk about these laws and procedures, and the Han Chinese actors who dominated the courtrooms.

Yet, that power was never complete. Rakaw's case also shows how court infrastructure refracted unstable state power. Cracks marked the concrete walls of the state courthouse. Access to courts was never assured due to road conditions in the mountains. Cases involving indigenous custom and tradition had their genesis in acts of refusal, such as constructing buildings on traditional territories classified as national lands. Unseen acts of refusal also emerged, like refusing to register guns or to apply for hunting permits. State power also appeared to erode as the court stepped outside the courthouse and onto indigenous territory. This was evident in the behavior of the Truku villagers who, despite encountering a strong expression of Han Chinese state power, directly confronted these authorities and the narratives about indigenous lands they rehearsed. Indeed, the overcompensated police presence and the dilapidated police station further signaled unstable state power. Even the need to create a unique court unit—notably, the only one set up to manage particular people groups—suggested the limitations of state law for securing justice for all peoples on the island. Later, we will also see the ambivalence of judicial actors about the special units as they debated whether the special indigenous court units were, in any substantive sense, really "there" (see Chapter Five).

I conclude with a few remarks about how these observations contribute to anthropological literature on infrastructure and long-standing theoretical discussions on the state. First, this chapter has considered the spaces where law and legal actors come together and how these spaces are connected to a broader network of actors and spaces designed to facilitate the flow of state ideas about justice, normativity, and power. It has done so with the aim of laying out the institutional context within which Taiwan's special indigenous court units were situated. The special units were not stand-alone judicial bodies; rather, they were deeply embedded in the Taiwan national court infrastructure. Understanding this infrastructure was critically important for understanding the special units. More specifically, I have examined how the two ends of infrastructure—politics and aesthetics—intersect in a particular case at a particular courthouse. In essence, I have argued that understanding cases involving indigenous customs and traditions in Taiwan's special indigenous court units requires recognizing both the rationalizing dimensions of national court design and operation reflecting Han Chinese state values and the aesthetics of individual person's encounters with court actors and institutions, such as Rakaw's interactions with state actors during the site visit and Truku villagers' conduct within the courthouse. Further, these were not one-way encounters, as the lonely signature-seeking police officer would no doubt attest. Later, we will consider in-depth how infrastructural agents, specifically judges, encountered indigenous differences in disputes over custom and tradition and how these encounters shaped activities within the special units.

Relatedly, and secondly, borrowing from Foucaultian ideas about governmentality, theorists of the state tend to focus on the rationalizing aspects of state power in different parts of the world. When pushed on whether Foucault's ideas can be so easily imported, scholars have pointed to the contingencies that obstruct the full emergence of Foucaultian governmentality in

particular geopolitical contexts (see, e.g., Scott 1998). What remains intact, however, is the assumption about the relationship between the state and its citizens as one of disciplinary power—diffused or centralized—working on state subjects. This chapter has departed from this assumed relationship by suggesting that rationalities embedded in and flowing through institutions were but one dimension of understanding how the state intersects with its subjects. We must also attend to how people experience the state in everyday life (see Das and Poole 2004; Khan 2006). This kind of exploration—one for which ethnography is uniquely suited—has the potential to yield a different picture of the practical relationship between the state and its citizens, as one of moving together and apart, rather than one of disciplinary power issuing out (see also Li 2007). My study of the people in Taiwan courts—the judges, lawyers, and litigants—and the ways they encountered one another and the national court infrastructure suggests the many different forms, practices, and spaces through which the state was continually experienced and solidified but also undone through the illegibility and instability of its own documents, practices, and structures. While the tension-filled spaces of Taiwan's special indigenous court units in many ways embodied Han Chinese state power, they were also spaces where assumptions about law, sociality, and reality could become suddenly unsettled. As we find later, such moments of instability at times created a unique space for debate and experimentation about indigenous identity, law, and state power.

Epilogue: Rakaw's Hut

Rakaw and the other village members later returned to the Hualien District Court to hear the judge's ruling. It had been 481 days since the police began their investigation into the bamboo hut and 204 days since the first court hearing. Everyone was on edge. The lawyer paced

back and forth, giving assurances to Rakaw while privately confiding to me, “I have no idea what the judge will do. Absolutely no idea.” We talked about his strategy and agreed that it was good but significant uncertainty remained. The judge had not signaled in any particular direction. There was no telling whether Rakaw would walk out that day as a free man or be imprisoned for several years.

Rakaw and the village members again held hands. The lawyer and I joined them. Rakaw led a Christian prayer in a mixture of Truku, Taiwanese, and Mandarin Chinese. At the end of the prayer, the light indicated we should proceed to Courtroom 4. We had been in this courtroom every month or every other month for almost one year. Everyone gravitated to the seats they occupied throughout the trial with the exception of Rakaw and his attorney, who took new seats in the audience section. There was no pomp or circumstance this time; the judge was already seated at her bench. The lawyer sat alone in the front row, staring down, not making eye contact with the judge. In a formal tone, the judge read her sentence: “Because the community did not know and were not notified that the hut was on national land, the defendant is found not guilty of the allegations.” The lawyer’s shoulders began to shake, and he covered his face with his hands. Village members reached across and rubbed his back.

When we filed out of the courtroom. Nearly everyone was in tears. They gave each other hugs and passed around tissues. This was a moment that determined the fate of their friend and, in certain respects, their traditional lands. I noticed that Rakaw was one of the few people not crying. As people settled down, he walked up to the lawyer, gave him half a smile, and slapped him hard on the shoulder. As he passed me, he shook my hand hard and gave me another wink. He walked out of the courthouse alone without looking back or saying a word.

Ultimately, the Hualien prosecutor's office exercised their absolute right to appeal and Rakaw later faced another criminal trial about the construction of the hut on his community's traditional territory. In a surprise ruling, the Hualien High Court threw out the prosecutor's case, fully acquitting Rakaw. Happy endings—although hard fought and always uncertain in Taiwan courts—were possible.

CHAPTER FOUR

Legal Stereoscopy:

Indigenous Rights, Historiography, and Interdisciplinarity

Law in Relief: Stereopsis and Occultation

> **Stereoscopy:** *noun* 1. The practice of using a stereoscope, an instrument for obtaining, from two pictures (usually photographs) of an object, taken from slightly different points of view (corresponding to the positions of the two eyes), a single image giving the impression of solidity or relief, as in ordinary vision of the object itself.
>
> \- Oxford English Dictionary

Previous chapters placed Taiwan's new special indigenous court units in geographic, political, social, and temporal context. Chapter Two introduced Taiwan's indigenous Austronesian peoples and described the special units' history, purpose, and structure. Chapter Three situated the special units within the broader national court infrastructure, describing the ways in which they were entangled in political rationalities and individual aesthetic experiences. This chapter turns to the terrain of legal protections for Taiwan's indigenous peoples flowing through the special units. While international human and indigenous rights, and domestic statutes and regulations, are the focus of the analysis, the chapter does not proceed from a positivist assumption that law is a neutral or purely normative medium of communication free from political interference. Rather, it considers these legal protections from a combination of perspectives seeking a more textured and robust understanding of indigenous rights in Taiwan. Considering them from both positivist and constructivist perspectives, the chapter approaches Taiwan's domestic indigenous legal protections from the position of positive law, as a legal practitioner might, and the experiences of those subject to law, indigenous peoples, blurring the line where this distinction is drawn. In doing so, the chapter offers an alternative indigenous

rights historiography in Taiwan, one framed in a paradigm seeking to create room for indigenous perspectives and voices in considerations about rights and legal protections. In referring to this as "historiography," I aim to emphasize that the story told here is a positioned one. It attempts to rewrite the history of indigenous rights in Taiwan by highlighting the legacies of colonial, imperial, and authoritarian rule embedded in these rights through the lived experiences of indigenous peoples subject to them (see also Miller 2009).

As the analysis engages positivist and constructivist forms of analysis, the chapter does something more: it explores how the fields of law and anthropology may collaborate to produce a deeper understanding of law than either can offer on their own, although attention to real-time events suggests disruptions that entail different sorts of responses from law and anthropology, such that their amplification is not always tidy. In so doing, the chapter considers interdisciplinarity. The concept of interdisciplinary research is familiar to many academics as a method of analysis drawing on knowledge from two or more academic fields. Fundamentally, it is about crossing boundaries, combining perspectives, and synthesizing knowledge (Adler and Flihan 1997). In practice, however, it is a difficult concept to articulate and an exceedingly complex one to execute, given that disciplines have their own vocabularies, professional literatures, favored research methodologies, and funding sources. This dissertation, at its core, is an interdisciplinary one, connecting law and anthropology. Yet, in my experience, blending perspectives of law and anthropology provides an unsatisfactory result. Sitting so close together (Geertz 1983), they tend to mold the other in their own image (Riles 2006), occulting rather than clarifying the unique insights each discipline offers on the subject.

The following is an attempt to approach interdisciplinary research from a different direction: one oriented toward complementarity over integration, a stereoscopic vision. Rather

than merging the perspectives of law and anthropology, an eye is assigned to each, where their unique perspectives are offered side-by-side, constructing viewpoints that play off one another to form a three-dimensional image of the legal protections flowing through the special units, although the image that is ultimately produced also suggests the presence of disruptions. As such, I argue that law and anthropology's most productive partnership lies not in separation or merger but in tension.

My legal lens adopts a positivist understanding of law and draws from my experience as a legal practitioner. Positivistic approaches to law, sometimes described as a "black-letter perspective," focus on clearly defined legal duties building on applicable law and enforceable legal requirements (Buhmann 2016: 87). This view presents law as law departments ordinarily approach it, focusing on legal coherence on the basis of legal sources exclusively (legislation, doctrine, and jurisprudence). It finds its origins in the idea that law should be viewed as a system resulting from the will of legislators, which lawyers should apply but not question (Foblets, Leboeuf, and Yanasmayan 2018: 8), although, as will be seen, in practice this view at times incorporates constructivist approaches. Through this lens, I engage in legal analysis of the laws under consideration, employing conventions of legal writing to emphasize this point.

My anthropological lens adopts a constructivist understanding of law and draws from my fieldwork and personal experiences in Taiwan. Constructivist approaches to law attempt to bring the social into the law, seeing it as something lived and practiced beyond what is printed in black and white. This view highlights the messy dimensions of law—the complex interactions of people, the random events, and the strange coincidences that make up daily life and understandings. It considers the existence of law, not through formal tests of validity but through the influence of networks of professionals with recognized authority, coalitions formed around

special issues, national and intergovernmental organizations, and norms and ideas more generally. Under this view, the legal system is never complete but rather always in a process of being reconstituted. Through this lens, I approach these laws through ethnographic observations recorded in my research fieldnotes.

Connecting this framing to an earlier discussion, this analysis explores the connections between two rubrics about law—an "anthropology of *law*" and an "*anthropology* of law" (Goodale 2017: 5-6). Placing these perspectives side-by-side reveals the epistemological conundrums and intellectual leaps required to understand a system—a system of rules, of practices, of cultures. It shows the importance of untidy moments that tend to get minimized in, if not altogether erased from, formal approaches to law as different actors draw upon, experience, and understand these norms differently. It also complicates assumptions about where to look for law, unsettling the distinction between traditional institutions of law, like courts, and "law in action" (Burns et al. 2008: 314). I make no claim that either lens is the "correct" view. Rather, it is in their complementarity that new insights may emerge about state law at its intersection with indigenous cultures. A stereoscopic approach provides new depths of understanding by enabling multiple disciplines to work together as a matched set and together act, ultimately, as a single unit (fig. 11). To reinforce this approach, I adopt a metaphorical formatting convention in this chapter, where I present each viewpoint in turn: law (positivism) in the left (eye), ethnography (constructivism) in the right (eye), indicated by the inclusion of brackets. At the end of each subsection I extract the important points revealed at their interface. The intention is to read the discussion in each subsection together, forming a stereoscopic image of the issue.

Figure 11. Viewed through a stereoscope these two images combine to form a three-dimensional image of the Taichung High Court, Taichung, Taiwan (author)

First, I consider how the ethnographic methods applied in this project can be viewed stereoscopically, pairing my description of social science research methods with an anecdote describing my actual research. Second, I juxtapose the Kuomintang (KMT) policies used to construct a "One Chinese" national identity against a Puyuma (Pinuyumayan) elder's memories of these same policies. Third, I place the proliferation of indigenous rights protections in the early 2000s in context with a Bunun hunting expedition in Taiwan's Central Mountain Range. Fourth, I pair recent Taiwan government policies advancing piecemeal pluralism with indigenous demonstrators' responses to President Tsai Ing-wen's August 1, 2016 apology to the island's indigenous peoples. Pairing legal rights and regulations with their lived experience reveals the imbrications, contradictions, and complexities at work in law, and the extent to which the line demarcating law from society can be seen as an arbitrarily constructed one. Tacking between positivist *(p)* and constructivist *(c)* perspectives advances an understanding of law as a verb, as a lived practice involving an intermingling of ideas, people, and texts.

Methods *(p)*

A. Background

Here, I briefly consider the research methods applied in this project. In Chapter One, I described these methods using terminology familiar to anthropologists and social scientists: "observation," "participant-observation," "interviews," and "archival research." I presented these activities as neat groupings—antiseptic, bounded, and supported by the authority of academic texts, like Russell Bernard's *Research Methods in Anthropology*. I noted that I observed 70 court proceedings in Taiwan's special indigenous courts; that I participated in daily activities at District Court and High Court in Hualien; that I worked with a law center specializing in indigenous issues; that I interviewed 133 actors involved in the special units; that I had many more informal conversations with these and other actors; and that I reviewed 40 court decisions on indigenous customs and lands at all levels of Taiwan courts. These familiar activities constituted the primary methods by which I gathered information for this dissertation.

B. A Messy Research Landscape

While these descriptions of activities—observation, participant-observation, interviews, archival research—are common in social sciences research, they leave much out. In particular, they obscure the extent to which the ethnographer and processes of ethnography are necessarily always embedded in the social, making it an inherently, but productively, messy exercise of interpretation. In so doing, these categories elide critical dimensions of positionality, representation, and structures of power shaping the production of knowledge in my ethnographic research. I gestured towards these issues when I described how my positionality as a Caucasian North American male lawyer impacted my interactions with research partners. I noted, for instance, how some individuals found the experience of engaging with me unsettling. Sometimes

this was due to my connections to state institutions. Other times it was related to my physical appearance. Still other times it was connected to my prior experience in Taiwan. I also alluded to a kind of Heisenberg indeterminacy that intervened in my fieldwork through my physical presence in courtrooms, impacting the interactions among courtroom actors and, in certain instances, possibly even influencing case outcomes to some degree.

I aim here to emphasize the messiness of ethnographic research and the manifold ways social encounters influenced the data collected for and used in this dissertation. The information presented here is not an objective set of data points. Neither is it a subjective recounting of my personal imagination. Rather, it is a blend of the two, involving an interpretative exercise. In this respect, considering ethnographic research is a good starting place for exploring a form of stereoscopic analysis, as ethnographic research involves acts of interpretation across different ways of knowing: comparing and contrasting data sources, identifying patterns, placing them in the context of contextual data, and relating all these back to theory and practical questions. In this regard, anthropological concepts, such as "thick description" (Geertz 1973) and "rich points" (Agar 2006), share in this intuition about the need to interrogate practices from multiple angles and develop a contextualized understanding of them.

[*Methods* (c)]

November 14, 2017 — A Bunun village, eastern Taiwan

I squatted in a house in a Bunun village in eastern Taiwan preparing to interview one of the village elders about contemporary weaving practices. Drying White Ramie (*Lief* in the local Bunun dialect) hung in long strands on the wall of the room. I recalled being told as a boy in Taitung that weavers prefer White Ramie over Red Ramie or Mountain Ramie because it has the fewest joints, making the threads longer and stronger. Alongside the drying White Ramie hung

beautiful textiles of brilliant blues and rich blacks, with intricate and complex patterns. In the corner sat a loom on which a new textile was being woven.

The elder entered dressed in a traditional royal blue dress. She shuffled over to greet me. We sat down and she asked: “What are you doing here?” A good question. My project was on criminal prosecutions and civil litigation in Taiwan’s special indigenous court units, and here I was squatting with a Bunun weaver. Few criminal or civil matters involved indigenous weaving—to my knowledge, none. Indeed, what was I doing there?

“I am here studying Taiwan’s indigenous peoples and state law and how they relate to one another,” I replied. “I have been spending a lot of time in the Hualien District Court, and most of thing the things I have observed deal with men’s activities, not women’s activities. Things like hunting animals, gathering stones, collecting wood from fallen trees.” She nodded. I continued, “So, I want to know more about how women’s practices may have changed in ways that may not be obvious by just looking at court cases but are still somehow connected to state law. Also, I am just curious to learn more about Bunun cultural practices, like weaving.”

She smiled. “Good, so let us talk. I am happy you want to learn about this,” she said. We then talked about various topics: White Ramie cultivation and how it has changed since her grandparents grew and harvested the plant, the importance of weaving in Bunun society, the symbolism in pattern design, and the use of other materials, like boar hair and plant materials, in textiles. I scribbled notes in my field notebook, took photographs of the textiles, and occasionally checked to make sure my audio recorder was still recording. I was happy to see my field notebook filling up with information and to learn about the textiles I had seen since I was a boy.

She stopped me suddenly, “Excuse me, I need to step outside for fresh air.” Cooling her face by waving her hand, she stepped outside.

When she returned, we resumed our conversation. A few minutes later, she asked again if she could step outside. I replied of course it was no problem, and she stepped out. I waited, examining the textiles on the walls and reviewing my fieldnotes.

When she returned, I offered to reschedule. “I am very sorry, would it be better to reschedule our discussion for another time?”

“No, this is fine,” she replied. “It is your eyes and face. Your eyes are a strange color, like a snake. Do they have a color? They make the room spin around me, and I get sick in my stomach. We can continue, no problem, I will just look at the ground.”

I laughed and apologized for my eye color, realizing I had never really paid much attention to it. We continued the interview. She stared at the ground for the remaining time. Self-conscious now, I did the same.

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“Methods” in Stereovision. These two images of ethnographic methods come together to form an image of ethnographic knowledge as something charged, something produced out of real-life encounters of people, most often in the context of meaningful differences between these people. The first image recounts ethnographic methods as social scientists ordinarily describe them. Through a positivistic lens, it describes these research activities as neat and bounded categories carrying with them the authority of academic texts and widely accepted disciplinary practices. This is an important view insofar as it connects these research activities to a wider set of norms and professional expectations beyond the particular researcher. Yet, as Werner Heisenberg (2007: 25) observed, “We have to remember that what we observe is not nature herself, but nature exposed to our method of questioning.” These bare categories of activities offer limited insight into the actual character of knowledge generated by these methods.

The second image offers another view of research methods. It considers a specific ethnographic moment; one focused on quite literally on "seeing." The researcher's different-looking eyes and face were a significant disruption to the research. This small anecdote highlights the extent to which the knowledge generated through interviews is anything but a clean and uncontaminated "interview." Rather, responses to physical difference shaped the interview, framing how the researcher and research partner addressed one another. This is not, I would argue, a lamentable thing. In its own way, it generated insights. The form of our interaction became just as meaningful and relevant as the content of our discussion (see Riles 1998). These were the non-instrumental, aesthetic dimensions of ethnographic research. Indeed, complexities like this were part of nearly every ethnographic encounter of my research. Even the physical act of flat-footed squatting, which was the preferred method of sitting, was an unfamiliar body position for me and required concentration that consistently distracted me from my fieldwork. Yet, it also provided new insights into the everyday life of my research partners. The simple act of squatting was itself a new perspective from which to view the world (see also McGranahan 2014: 26).

Placing these perspectives side-by-side offers insight into the ethnographic production of knowledge. "Truths" emerging from my ethnographic research were impacted by my selection of methods and the encounters these methods inspired. The knowledge ultimately generated through this project was something co-constituted between myself, the researcher, and my research partners. In short, while my methods included interviews, they were never just "interviews": they were *exchanges* situated in a particular place at a particular time using particular modes of communication involving particular actors having different assumptions,

concerns, objectives, and understandings. The ethnographic methods used in this project were thus intimately entangled in aesthetic experiences and epistemological framings.

"One Chinese" ***(p)***

A. Background

Understanding the legal protections applied in Taiwan's special indigenous court units begins with understanding Taiwan's history. During the early period of Japanese control of the island, colonial administrators did not apply modern law to indigenous peoples. Rather, local police preferred to resolve disputes in the field. Colonial administrators regarded indigenous customs and traditions as "habits" or "old habits" and allowed the police to use these customs to help resolve disputes among indigenous persons. Indigenous custom and tradition were thus an important local part of the normative system of Japanese control of indigenous regions. These norms, however, were never applied in Japanese colonial courts (Chang 2018a: 6). Ironically, it was because Japanese colonial administrators did not follow the "rule of law"—as the principle of governance where all persons and entities are accountable to laws that are equally enforced and independently adjudicated (United Nations 2004)—that some indigenous groups maintained their autonomy during this period (Interview 001).

That changed in 1945 when the exiled KMT government brought its formal legal system from Mainland China and imposed it upon the island's indigenous and native Taiwanese populations. In the post-1945 period, legal protections affecting indigenous peoples underwent three stages of development (cf. Chang 2016): (1) a "one Chinese" policymaking period, (2) a period of "seeing culture like a State," and (3) most recently, a present transition to "pluralism." Here, I address KMT efforts to cultivate a sense of Chinese national identity.

B. Nation-Building as "One Chinese"

Initially, KMT policymakers took the position there was little to no difference between the Han Chinese ethnic majority and indigenous peoples. These policymakers constructed an image of the island's inhabitants as a single Chinese ethnicity, erasing the cultural differences between Chinese and indigenous peoples and arguing that indigenous peoples were one of the Chinese peoples (e'Akuyana 2009: 306; Wang 2004). The KMT government adopted many of the management strategies of Japanese colonial administrators (Gates 1981), but unlike Japanese administrators, the KMT did not recognize indigenous custom or tradition as authoritative. Instead, the hegemonic discourse advanced by KMT authorities conceptualized all of Taiwan's peoples, both indigenous and native Taiwanese, as "Chinese" (Chun 1996).

This historical reading finds support in other literature on Taiwan identity construction during the period of martial law. Megan Greene (2016) shows how the KMT shaped a preferred vision of Taiwan identity by attempting to erase the island's Japanese colonial past, replacing any sense of Japanese identity with a sense of Chinese identity. To accomplish this, the KMT removed references to Japan on monuments and textbooks and replaced them with references to China's history that presented Taiwan as either being taken away from or returned to China (Greene 2016: 21). Cultivating a sense of Chinese-ness was a critical political strategy for the KMT as it transitioned to power on the island (see Rigger 2002).

Yet, KMT activities were not simply about reconfiguring Taiwan's Japanese legacy. They were also about constructing a sense of Chinese-ness that erased intra-island cultural differences to promote Taiwan as the new home of China. This mentality is exemplified by a 1986 Taipei District Court case where the court noted there was no term for "indigenous" in

Mandarin Chinese (Chang 2016: 3).[35] Having no other terminology, the decision identified the indigenous defendant as a person "born in the backwoods."[36] As noted, it was not until 1994 that the Taiwan government formally incorporated the term *yuanzhumin* (原住民, indigenous people) into law, which later became *yuanzhuminzu* (原住民族, indigenous peoples) in 1997. Even with this important change in law recognizing Taiwan's indigenous groups, as late as 2003 the Chiayi District Court reminded indigenous defendants that they were now members of "civilized society" and, therefore, must abide by national law.[37] The court stated:

> Moreover, according to Tsou customary laws, the defendant Jia is the successor to his father's position. It is clear that the two defendants are members of civilized society. As the incumbent and future Tsou tribal leader, they should have known that 'not stealing property' is an ethical command that is universally applicable and is against the law. Thus, the defendants could not argue that they were excused because of ignorance of the law.[38]

Constructions of indigenous cultures as uncivilized continued to linger beyond Taiwan's official recognition of indigenous peoples as the judiciary worked to sweep indigenous peoples into the fold of the Chinese "civilized" state framework (Chang 2016: 3).

Even during this period, however, new understandings about the distinctiveness of indigenous peoples began to emerge. This is exemplified in the practice of reserving seats for *shanbao* representatives in elected assemblies. In 1972, when the ROC government held so-called "supplementary elections," one of the 36 seats was reserved for a *shanbao* representative, to be elected by the entire indigenous electorate on the island. Since the introduction of the first

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[35] Taiwan Taipei District Court 75 [1986] Case No. 26. While the judges noted there was no formal term for "indigenous people" in Mandarin Chinese, there existed a long history of informal, often derogatory, terms for indigenous peoples in Taiwan, such as *huana* (Taiwanese: savage-barbarian) or *shanbao* (山地, mountain people) (see Chapter Two).

[36] *Id.* (「出身窮鄉僻壤」).

[37] Taiwan Chiayi District Court 92 [2003] Case No. 151.

[38] *Id.* (「另依公知之鄒族習俗，被告甲○○將來亦有可能繼承其父之頭目職銜，顯見二人均為文明社會之成員，且為該原住民族現在與未來之精神領袖，彼等當認識「不得搶奪」乃放諸四海皆準之道德規範與法律誡命，是本案被告並不存在對於刑法禁止規範不知或認識錯誤之情狀」).

reserved indigenous seat in the Legislative Yuan, this quota system expanded to a total of six reserved seats in 1992, although it has not guaranteed the emergence of a separate party to represent indigenous interests or that indigenous representatives would work together on issues of common concern (Templeman 2018: 36).

[*"One Chinese"* (c)]

April 19, 2018 — Puyuma village in southern Taiwan

I traveled with a friend to a Puyuma village in remote Taitung County. We rattled up the steep mountain roads in my little car, talking about family, politics, and religion. We were travelling to speak with the father of one of our mutual friends about Puyuma traditional lands. He was a well-respected elder who ran a fish farm adjacent to his community's traditional territory—lands that were taken by Japanese colonial authorities and later claimed by the KMT government but now largely left unoccupied.

We finally arrived at the fish farm. Barking hunting dogs greeted us. After a brief introduction, we walked the premises. The earthy, fresh scent of petrichor hung in the air. The elder described the different kinds of plants bordering the farm and took us over to watch the speckled koi swim in the pond. Half an hour later we were seated drinking hot green tea and eating locally grown bananas.

The elder began to explain the significance of land to Puyuma people. Gesturing widely, he spoke in Mandarin Chinese. "Our culture is deeply connected to our land. Historically, we held our land as a community. We treated it as a resource open to the entire nation. If you worked hard, then you could use a bigger portion of the land. But, we also moved a great deal because we practiced slash and burn agriculture. You know, two main values among the Puyuma originate from our relationship to the land: sharing (*fenxiang*, 分享) and taking responsibility for

others (*chengdan*, 承擔). Our land was an open resource for everyone. Our relationship to land is inclusive, not exclusive. We shared it with one another and took care of one another using its resources. If a newcomer came to our *buluo*, we would share our land with them and make sure they would be taken care of."

He took a sip of green tea. "If another group wanted to live on our land, they would need to pay annual tribute, often in the form of rice or millet. If they did not pay tribute, then we would defend our land, sometimes by headhunting. During our grandfather's generation, the Japanese made us stop the tribute system because they saw this system as challenging their authority as the new power over the island. Then, the ROC government destroyed our social structure by creating a rival leadership system to challenge the traditional leadership system. And so we lost both our land and our social structure. It was not until decades later that we began to have the room to revitalize our culture and rediscover our land."

He refilled our teacups and offered us more bananas. He observed that what defines land as "traditional" was a complicated matter. "Puyuma territory was originally located farther north in the mountains. We were moved to this village by the Japanese colonial administration and they relocated, among other groups, the Bunun people to our original territory. When they moved us here, this placed us close to other indigenous groups, like the Paiwan peoples and Amis peoples, which created new kinds of conflicts with these groups."

He pulled out books containing maps of the region created by Japanese colonial administrators and offered a different account of Taiwan's transfer following Japanese colonialism. This was not a "return" of Taiwan to China; rather, the ROC constituted a new colonial authority. "When colonists came, they brought with them the concept of property and ownership. They made us register our land and divide it up. The introduction of these ideas about

private property created many new conflicts within my *buluo* that were never there before. It was also the source of many conflicts with the colonial powers. Recently, we have had a conflict concerning a dairy farm and tourist attraction, which is located on Puyuma territory. When the ROC government acquired Taiwan from the Japanese in 1945, the government told the Puyuma people that this land was state property and was not our land because they won the war against Japan, and they took over the land rights from the Japanese government. We told the government that this is our land, but they do not listen. They told us they could not believe us because we only have oral history, not written history, to prove it is our land."

He pointed vigorously at the maps. "But just looking around at the place names in this region, they are all Puyuma names made into Mandarin Chinese language. Our history and relationship to this land can been seen everywhere. Even the Japanese accepted our oral history, but the ROC did not. Our elders reminded the ROC government that they only came to Taiwan because they were also defeated by the Chinese Communists, so by their own thinking it was wrong for them to take this land. We told them the Japanese came and robbed our land. We asked the government, are you robbers, too? When they finally agreed to allow us to buy the land back, they classified it as reserved land, which makes the land nearly valueless because you cannot do anything with it. As a result, many Puyuma people simply abandoned their land."

We walked the premises again (fig. 12). He concluded with an impassioned defense of indigenous peoples' original claims to territory, invoking a clever gastronomic analogy. "Indigenous people are the original owners of the land, so we believe our opinions should be respected. We want to share with the immigrants who have come to our island, but they should not forget that we are the original inhabitants of the island. Colonial powers, like the ROC, should consult us and ask our permission regarding the use of our land. We are not a majority in

Taiwan, like the Han Chinese but a critical minority. We are like salt at the table: a little has a powerful impact on the entire meal."[39]

Figure 12. Dense foliage on Puyuma (Pinuyumayan) territory in southern Taiwan (author)

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"One Chinese" in Stereovision. These two images of identity construction offer different perspectives on how early government authorities in Taiwan cultivated a sense of national identity. The first image recounts KMT efforts to cultivate a sense of Chinese-ness as it reimagined Taiwan as the new epicenter of Chinese civilization. It examines the rationalizations

[39] A full transcription of this interview appears in the August 2018 issue of the NAIS Newsletter (2018).

embedded in KMT policies during that period that erased the island's history of Japanese control and influence as well as the intra-cultural differences among Han Chinese and indigenous peoples. It sheds light on the recent emergence of "indigenous" as a category and how Taiwan's legal institutions continued to rehearse earlier views of indigenous peoples as barbaric and uncivilized "others."

The second example offers an account of the KMT efforts to cultivate a Chinese identity from the perspective of the living memories of indigenous persons. It shows how indigenous persons and communities experienced KMT policies, how KMT policies upset local systems of ordering and involved confiscations of lands, and how these policies introduced new conflicts among indigenous groups as they placed indigenous peoples into new relations of contact and interaction. It also shows how indigenous peoples responded to KMT policies. The elder, for example, recounts how Puyuma people pointed out to the new KMT government the irony that it claimed to be an authoritative governing force after having just lost a war. To be sure, this story requires some generous historical reconstruction as the ROC government took control of Taiwan in 1945 and did not lose the Chinese Civil War until 1949. In addition, the oppressive nature of KMT policies became a source of moral capital for indigenous communities as they used it to emphasize their ethics, grounded in equity and sharing, to separate themselves from the repressive regime. Here, another irony emerges. To the extent that the current Taiwan government now uses human rights and indigenous rights as moral capital to distinguish itself from the PRC (deLisle 2019), the island's indigenous peoples would appear to be pioneers in this tactic in their responses to the KMT's post-1945 oppressive policies.

Placing these perspectives side-by-side offers insights into early KMT policies preceding and shaping Taiwan's contemporary indigenous rights framework. The policies enacted during

the period of KMT martial law involved an agenda of national identity-making grounded in an essentialized form of Chinese-ness that erased indigenous peoples' cultural distinctiveness. The indigenous rights framework that subsequently emerged involved modifications of the laws, policies, and mentalities concretized during KMT rule, which, in turn, had connections to policies enacted during Japanese colonial rule. Lawyers have noted the significant impact of this legacy of laws and policies on the content and scope of contemporary indigenous protections in Taiwan (Interviews 085 and 129), issues to which we turn next.

Seeing Culture Like a State *(p)*

A. Background

The year 2000 marked a shift in power on the island as the Democratic Progressive Party (DPP) took control of the Taiwan government. Under the leadership of President Chen Shui-bian's new liberal DPP government, the early 2000s saw a proliferation of indigenous rights protections. Under these rights, which had their roots in the indigenous rights movement in the late 1980s, the Taiwan government gradually began to see indigenous peoples as culturally and linguistically distinct from the Native Taiwanese and Mainlanders. More importantly, the government also began to see these differences as worthy of protection. As noted, this shift in thinking coincided with efforts to deal with Taiwan's uncertain status as a non-state and to secure a Taiwanese identity distinct from the PRC (see Chapter Two). Yet, while the Taiwan government recognized these differences, it also worked to control them by interpreting indigenous protections through a Han Chinese mindset (Chang 2016: 4-11). This was a period of "seeing culture like a state." Gaining momentum between 2000 and 2016, the Taiwan government finally acknowledged the existence of indigenous peoples' distinctive cultures but

insisted that the ability to address and classify them rested exclusively with the Han Chinese-dominated state. As such, the state served as the primary institution through which indigenous peoples and practices were made "legible" (Scott 1998) in law, policies, and politics. The resulting set of indigenous protections demonstrated a strong tendency towards selectivity and narrowing of norms.

Within a period of five years, from 2000 to 2005, the Taiwan legislature managed to pass and amend seven major laws impacting critical aspects of indigenous peoples' lives—autonomy, education, employment, guns, hunting, names, status, and territory—as part of a push by the new DPP government to protect indigenous peoples. These laws include the *Indigenous Peoples Employment Protection Law* (*yuanzhuminzu gongzuoquan baozhangfa*, 原住民族工作權保障法) (2001); *Status Act for Indigenous Peoples* (*yuanzhumin shenfenfa*, 原住民身分法) (2001); *Controlling Firearms, Ammunition, and Knives Act* (*qiangpao danyao daoxie guanzhi tiaoli*, 槍砲彈藥刀械管制條例) (2001); *Name Act* (*xingming tiaoli*, 姓名條例) (2002); *Education Act for Indigenous Peoples* (*yuanzhuminzu jiaoyufa*, 原住民族教育法) (2004); *Wildlife Conservation Act* (*yesheng dongwu baoyufa*, 野生動物保育法) (2004); *ROC Constitution* (*zhonghuaminguo xianfa zengxiu tiaowen*, 中華民國憲法增修條文) (2005); and, perhaps most importantly, the *Indigenous Peoples Basic Law* (IPBL) (*yuanzhuminzu jibenfa*, 原住民族基本法) (2005) (Gao, Charlton, and Takahashi 2016: 68).

The content and scope of these rights was wholly controlled and determined by the Taiwan state. The resulting set of rights frequently imposed requirements that were inconsistent with local practices. Moreover, the idiosyncratic and piecemeal manner in which this body of law was built created an uncertain terrain of legal protections of omissions, lacunae,

inconsistencies, and contradictions, which in turn formed significant obstacles to protecting indigenous peoples' lands and customary practices. Many legal frameworks, of course, contain internal contradictions and tensions. What made the contradictions and inconsistencies here so poignant was that this body of rights simultaneously promised robust protection for indigenous customary practices and placed indigenous peoples at risk of arrest and prosecution if they engaged in them. I focus here issues that arose in cases involving indigenous custom and tradition: firearms use, wildlife hunting, forest product collection, and mineral collection as well as legal issues under the IPBL and human rights instruments.

B. The Firearms Act | 槍砲彈藥刀械管制條例

In 2001, the Taiwan legislature amended Article 20 of the Firearms Act to decriminalize indigenous manufacture, possession, and use of hunting guns and bullets (Simon and Mona 2015: 12). This amendment meant that indigenous persons, upon approval from the Taiwan state, could use guns as part of their traditional practices. Approvals were based upon an application and registration process for each individual firearm.

Article 20 dictates that the firearms used by indigenous people must be "self-made" (*zizhi*, 自製). That is, indigenous persons themselves must make their guns; factory-made and store-bought firearms are strictly forbidden. The reason for this requirement related to a lingering concern from the period of martial law that factory-made or store-bought firearms would be more powerful and could be used to attack police or organize a political uprising (Interview 093). This requirement raised several concerns. First, homemade firearms were unsafe. Many of the homemade guns I observed during my fieldwork consisted of simple welded plumber's piping with a wooden gunstock attached. Lawyers and indigenous colleagues showed me grotesque pictures on their smartphones of severe injuries to hunters' hands and faces after their gunlocks

exploded. Second, the requirement was ambiguous. Who must make the gun? Can someone else with special skills do it? One judge noted,

> Few indigenous people really make their guns. There is someone in the village who has an expertise in making guns, and they make the gun. It puts them in a position where they have to lie to the court and say, "Yes, I made this gun," when it is unreasonable to demand that they, individually, made a gun. (Interview 087)

Taiwan courts added another condition not explicitly stated in the text of Article 20: homemade guns must be muzzle-loading firearms (muskets); breech-loading rifles using powder-based bullets (rifles or shotguns) were forbidden. Again, this condition reflected an institutional concern about the power of indigenous peoples' firearms and public safety (Interview 093). The court decisions that introduced this condition are worth considering because they offer insight as to how Taiwan courts constructed indigenous persons as legally legible entities. In these cases, indigenous peoples were legible only as peoples "frozen in time" (Niezen 2003a: 8).

This common law-like requirement had its roots in a case known informally as the 2008 Paiwan Gun Case. In 2008, police arrested a Paiwan hunter on the grounds that he made three homemade breech-loading firearms (shotguns) using an electric welder and grinding machines in his workshop. Prosecutors argued that the manufacture and possession of breech-loading firearms violated Article 20. Ultimately, the Pingtung District Court agreed and sentenced the man to three years imprisonment and a fine of 100,000 New Taiwan (NT) dollars (US $3,333) (Hsiang and Pan 2013).[40] The Kaohsiung High Court affirmed on appeal and sentenced the man to two years in prison and a fine of NT 100,000 (US $3,333).[41]

The language of Article 20 does not distinguish among types of firearms. It refers generically to *lieqiang* (獵槍, hunting guns). Faced with this broad language, the lower courts

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[40] Taiwan Pingtung District Court 99 [2010] Case No. 11.
[41] Taiwan Kaohsiung High Court 101 [2012] Case No. 34.

interpreted Article 20 as protecting muzzle-loading firearms only. They did so under the belief that indigenous peoples "traditionally" used muskets; consequently, the Legislative Yuan must not have intended Article 20 to cover firearms with rifling technology. Referencing a 1998 Ministry of the Interior statement concerning indigenous firearms, the High Court stated:

> Self-made hunting guns refer to the living tools of the indigenous peoples which are used exclusively for hunting and living in accordance with their traditional customary law. . . . The barrel of the guns are filled with black gunpowder, fired from the bottom or detonated by another method, it shoots the shot, not using bullets with casings or bullets with gunpowder.[42]

In 2013, nearly five years after his initial conviction, the Taiwan Supreme Court overturned the Paiwan man's conviction, observing that the IPBL requires the Taiwan government to protect indigenous peoples' culture and customary practices and that Article 20 does not distinguish among types of firearms.[43] Thus, there existed no stipulated restriction on the type of homemade firearms indigenous peoples could make, own, or use (Hsiang and Pan 2013). Specifically, the Taiwan Supreme Court stated:

> There are no restrictions in the law, both "muzzle-loading" or "breech-loading" firearms should be included. Additionally, hunting is one of the traditional ways of living for indigenous peoples and is part of their ritual culture. Through hunting, indigenous peoples learn courage, mutual help, and survival skills. It is also important to share hunting experiences and achievements with other community members, gaining recognition and enhancing status among his people in the community. Indigenous peoples' homemade hunting firearms are, therefore, an important part of their traditional lifeways, customs, and cultures.[44]

Subsequent court decisions and National Police Agency regulations, however, interpreted

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[42] *Id.* (「自製獵槍，指原住民傳統習慣專供捕獵維生之生活工具。。。以逐次由槍叉裝填黑色火藥於槍管內，打擊底火或他法引爆，將填充之射擊物射出，非使用具有彈頭、彈殼及火藥之子彈者。」).

[43] Taiwan Supreme Court 102 [2013] Case No. 5093.

[44] *Id.* (「法律既未設有限制，無論「前膛槍」或「後膛槍」均應包括在內；又狩獵係原住民族傳統維生方式之一，並與其祭典文化有關，原住民在狩獵過程中，可訓練膽識、學習互助精神及生存技能，亦得藉與族人分享狩獵經驗與成果，獲得認同，提昇在部落族人中之地位，故原住民族自製獵槍獵捕野生動物，乃其傳統生活習俗文化之重要內容。」).

this ruling narrowly. These decisions and regulations maintained that the only acceptable breech-loading hunting firearm used by indigenous peoples were nail guns, similar to those used in building construction projects (Yi 2016). Calls have grown for the Taiwan government to permit indigenous hunters to purchase factory-made muskets (but not rifles) on the grounds that they are safer firearms, but presently indigenous hunters may only use homemade muskets (or nail guns) for their hunting practices (see Sasi 2018).

C. Wildlife Conservation Act | 野生動物保育法

The Wildlife Conservation Act regulates use of Taiwan's wildlife for cultural, educational, academic, or economic benefits. In 2004, Taiwan legislators amended Article 21-1 to allow indigenous peoples to hunt for "traditional cultural or ritual hunting, killing or utilization" purposes. Hunting is defined as "the use of drugs, hunting equipment or other tools or methods to catch or kill wildlife" (Art. 3.12); however, certain hunting techniques are prohibited, such as the use of nets, poison, or traps (Art. 19.5). Some indigenous hunting traditions involve the use of nets and traps, but the regulations limit hunters to homemade muskets (or nail guns), as described above.

Indigenous hunters must apply to go hunting with county officials. Authorities later review their kills to ensure they are in compliance with the authorizations provided to hunters, failure for which could result in a fine and potential taking of their hunting instruments.[45] Notably, these regulations imposed requirements inconsistent with actual hunting practices. For example, they required indigenous peoples to hunt only a limited number of animals and only certain animals (Simon and Mona 2015: 12). Additionally, Taiwan police at times abused this

[45] A recent amendment to Article 5-2 of the Firearms Act, intended to expand indigenous people's control of their firearms, permits hunters to keep their gun if caught engaging in a misdemeanor offense but not if they commit a felony-level offense (Interview 087).

application procedure, resulting in arbitrary arrests and prosecutions of indigenous hunters (see Chapter Two).

Article 21-1 permits indigenous hunting only for "traditional cultural or ritual hunting, killing or utilization" purposes. This phrasing conflicts with the more expansive language of Article 19 of the IPBL, which permits indigenous peoples to hunt wild animals for "traditional culture, ritual or self-consumption" purposes. Article 21-1 contains no self-consumption exemption. In 2009, the Council of Agriculture and Executive Yuan Council of Indigenous Peoples (CIP) issued a joint interpretation clarifying that indigenous hunters may hunt for personal consumption so long as the hunter shares the meat with family or others, which is seen as a traditional practice (Everington 2009).

The Wildlife Conservation Act permits indigenous hunting only in specifically designated locations. Hunting in national parks and designated "scenic areas" is strictly prohibited (Wildlife Management Measures, Art. 3). Recalling that many indigenous peoples' traditional lands were nationalized and turned into national parks when the KMT took control of the island (see Chapter Two), this regulation places a significant limitation on indigenous hunter's ability to hunt on their traditional game lands.

As noted, only certain species may be hunted. Article 4 classifies wildlife into two general categories: protected species (endangered, rare and valuable species, and other conservation-deserving wildlife) and general wildlife (all other wildlife). Article 18 prohibits hunting of protected species unless the population exceeds the carrying capacity of the land or for educational purposes. Endangered species in Taiwan include mountain hawk-eagle, *Nisaetus nipalensis* (*heshi jiaoying*, 赫氏角鷹). Rare and valuable species include the pangolin, *Manis pentadactyla pentadactyla* (*chuanshanjia*, 穿山甲). Other conservation-deserving species

include the Formosan rock macaque, *Macaca cyclopis* (*taiwan mihou*, 臺灣獼猴), and Formosan Reeve's muntjac, *Muntiacus reevesi*.[46] Certain indigenous groups, like the Bunun, Paiwan, Rukai, and Truku Nations, traditionally hunt these species. Although using the practice of wildlife hunting for the transmission of cultural knowledge would ostensibly fall within the exception for "educational purposes," indigenous hunters continue to be arrested and prosecuted (Simon and Mona 2015: 12).

D. The Forestry Act | 森林法

The Forestry Act protects Taiwan's forests and forest resources. Article 15 guarantees indigenous peoples' access to traditional territories and to the natural resources on these lands, although the act nowhere defines the term "traditional territory." Article 56-3 stipulates that indigenous peoples' access to and use of traditional territories and resources is contingent upon such access and use being related to "traditional living needs and activities," which is likewise undefined. Article 30 requires prior approval before indigenous peoples may use forest products from "conservation forests," which under Article 22 constitutes a wide range of forestlands potentially overlapping indigenous traditional lands. Like other laws, the Forestry Act appears to be inconsistent with the more expansive protections under Articles 19 and 20 of the IPBL that permit indigenous peoples' access to wild plants and fungus for "traditional culture, ritual or self-consumption" purposes.

Taiwan court decisions reveal the posture judges sometimes take towards indigenous peoples' engagement with forest landscapes and traditional lands. As one example, the famous case known informally as the 2008 Smangus Beechwood Case involved the prosecution of three Atayal Nation men from Smangus village who collected pieces of a beech tree for use in their

[46] In 2018, the conservation level for the Formosan macaque and muntjac was downgraded to "general animals" (*yiban dongwu*, 一般動物), but unlicensed hunting is still punished (Qiu 2018).

village. The tree had fallen during a heavy rainstorm and blocked the main road to the community, and the men moved the tree to the side of the road. Later that day, officials from the Forestry Bureau chopped and took away the most valuable parts of the wood. After a tribal meeting, members of the Smangus village sent the men back to collect the remaining wood for village decorations. While gathering the wood, Forestry Bureau officials arrived and arrested the men, charging them with theft of forest products under Article 52 of the Forestry Act.

The Hsinchu District Court convicted the men, fining them NT 160,000 (US $5,333) each and giving them suspended sentences of six months imprisonment (China Post 2010).[47] The court decision identified the men, not by their Atayal Nation identity but under the pan-indigenous appellation of *yuanzhumin*. Further, the court made no effort to interrogate the concepts of culture or tradition. It also made no effort to consider the Atayal custom of *Gaga* guiding the defendants' conduct that led to their arrest. Instead, the court focused on the black letter law of the Forestry Act.

In a striking statement, the court articulated indigenous peoples' engagement with forest landscapes as lawless:

> It may be seen that although the use of land by indigenous peoples should be highly respected, it must still be applied in a manner and scope determined by law. It is not completely unregulated by law. Therefore, there is no basis for the defense of freedom from punishment of the defendants in this part.[48]

Within the same sentence highlighting respect for indigenous use of land and natural resources, the only recognizable "law" to the court was state law, not indigenous custom or oral tradition.[49]

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[47] Taiwan Hsinchu District Court 96 [2007] Case No. 4.

[48] *Id.* (「可見原住民族對於土地之使用，雖然應加以高度之尊重，惟仍須依法定之方式、範圍加以運用，非謂全然不受法律之規範。故被告等此部分之辯解亦無從資為免罰之依據。」).

[49] The Taiwan High Court upheld the District Court conviction on appeal, sentencing them to three months imprisonment with a NT 71,000 fine (US $2,366) (Taiwan High Court 96 [2007] Case No. 2092).

It also suggests a clear hierarchy of law, where state law trumps indigenous custom. Even when the court recognized the latter as existing, it was not efficacious in the court's view as state law was. Statements like this reflected Taiwan judges' assumption that indigenous peoples' relationship to territory was devoid of any form, or at least any effective form, of traditional regulation, despite the presence of well-known customary rules in many indigenous communities (see Reid 2010).

E. The Mining Act | 礦業法

The Mining Act (*kuangyefa*, 礦業法) regulates the extraction and use of Taiwan's mineral resources. The act maintains that all minerals on the island, marine zone, and continental shelf are owned by the Taiwan state. Scheduled minerals include marble and precious stones, like jade and rhodonite. Certain indigenous groups, like the Truku, collect these semi-precious stones for ceremonial or decorative use. Earlier discussion, for instance, considered the case of five Truku men prosecuted for collecting rhodonite for decorative use at their homes (see Chapter Two). Unlike other laws, no exception is made in the Mining Act for indigenous peoples' gathering or use of mineral resources on their traditional territories. Again, in what has become a recurring theme thus far, this contrasts with Article 19 of the IPBL, which permits indigenous peoples' access to minerals, rocks, and soils for "traditional culture, ritual or self-consumption" purposes.

Issues related to land and mineral extraction tended to be particularly concerning for state actors. While wildlife and forests could be managed, mineral extraction was seen as permanent and irreversible. Issues surrounding mineral extraction, therefore, touched not just on matters of sovereign power but also on sovereign existence. Xiang Gao, et al. (2016: 76) note that the

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Nearly five years later, the Taiwan Supreme Court remanded the case to the Taiwan High Court and the men's convictions were overturned (Taiwan Supreme Court 98 [2009] Case No. 7210).

Taiwan government has resisted indigenous rights to land and self-governance over territory and natural resources, instead concentrating its efforts on securing indigenous cultural practices, like hunting and gathering. Elevation of cultural values was seen as more consistent with liberal democratic understandings of cultural rights underpinning a liberal democracy, while granting additional autonomy outside of state structures directly threatened state sovereignty. The lure of liberalism has compelled the Taiwan government to focus on cultural rights, even as it inflicts violence on indigenous communities (see, e.g., Povinelli 2002). Processes for localizing indigenous rights in Taiwan thus demonstrated a pattern of emphasizing those protections perceived as less threatening to state authority and power, i.e., cultural rights over rights to land.

These concerns arose in Taiwan courtrooms as judges addressed the scope of indigenous rights, such as protections for collecting minerals and hunting wildlife. In one criminal prosecution, the judge expressed his apprehension as follows:

> The [Indigenous Peoples] Basic Law lets indigenous people do anything under the statute. This is very dangerous because all of them could go collect stones. Those do not come back. What would be left? . . . If I follow the district court opinion, things would go out of control. For example, wild animals that are protected would disappear.[50]

During this hearing, the judge referred to the IPBL as "dangerous" (*weixian*, 危險) a total of 16 times. Statements like these suggest deep suspicions about the connections between indigenous practices and land, and about indigenous custom and tradition more generally. While the judge initially drew a distinction between renewable and non-renewable resources, ultimately all indigenous practices were viewed as deeply threatening Taiwan state interests.

F. Indigenous Peoples Basic Law | 原住民族基本法

Of Taiwan's indigenous rights protections, the IPBL is the most comprehensive domestic

[50] Taiwan Hualien High Court 106 [2017] Case No. 1430 (October 18, 2017, hearing).

legal instrument (Simon and Mona 2015: 11). Passed two years before UNDRIP in 2005, the IPBL was adopted by a KMT-dominated Legislative Yuan that was hostile to the DPP, who at the time controlled the Executive Yuan. Indigenous legislators holding seats for the KMT party drafted and supported the IPBL. Indigenous peoples also formed an important part of the KMT's electoral base. Moreover, the IPBL was not a self-executing law, so voting for its passage did not immediately tie the KMT down. These factors might explain why the IPBL ultimately passed in the KMT-dominated Legislative Yuan (Simon 2009: 15; 2014: 23; Bekhoven 2016: 227n139).

Notably, the IPBL also passed at the eleventh hour of the 2005 legislative term. Consequently, it did not receive much attention from either DPP or KMT legislators (Interview 112). Once it passed, members of the Executive Yuan reviewed the law and saw that it conflicted with other many domestic laws. A constitutional issue, however, would potentially arise if the Executive Yuan asked the Legislative Yuan to review the law, and the Legislative Yuan refused. To avoid this issue, President Chen Shui-bian stopped then-Premier Hsieh Chang-ting (謝長廷) from requesting that the Legislative Yuan review the IPBL. As a result, the version of the IPBL that passed by the Legislative Yuan containing multiple conflicts with other Taiwan laws was the version that remained.

In content, the IPBL explicitly recognizes the significance of indigenous rights, promising that indigenous peoples shall have legal rights, including the right to create an autonomous zone, the right to control natural resources, and the right to approve or reject development projects within indigenous reserved land (Mona and Simon 2011: 3). Article 1 sets out the basic purpose of the IPBL: "protecting the fundamental rights of indigenous peoples, promoting their subsistence and development and building inter-ethnic relations based on coexistence and prosperity." Among other things, the IPBL provides for the creation of a Tribal

Council system to promote the independent development of indigenous tribes at their own will (Art. 2-1); it promises the government will guarantee equal status of indigenous peoples and help implement indigenous peoples' autonomy (Art. 4); and it guarantees that the state will protect and promote the development of indigenous peoples' knowledge of biological diversity (Art. 13). Article 19, which protects specific indigenous cultural activities, merits close inspection.

Article 19 states in relevant part:

> Indigenous persons may undertake the following non-profit seeking activities in indigenous peoples' regions and the sea areas be [sic] promulgated by the central indigenous competent authority:
> 1. Hunting wild animals.
> 2. Collecting wild plants and fungus.
> 3. Collecting minerals, rocks and soils.
> 4. Utilizing water resources.
>
> . . . The activities in Paragraph 1 can only be conducted for traditional culture, ritual or self-consumption.

The article contemplates four indigenous practices: hunting, forest product collection, mineral collection, and water use. It protects these activities under four conditions: (1) that they are performed by "indigenous persons," (2) that they take place on "indigenous peoples' regions," (3) that they are for "non-profit" purposes, and (4) that they involve "traditional culture, ritual or self-consumption." Regarding the first element, Article 2.3 defines indigenous persons as "any individual who is a member of any of [sic] indigenous peoples," where Article 2.1 defines "indigenous peoples" as "the tribes who regard themselves as indigenous peoples and obtain the approval of the central indigenous authority upon application." Chapter Two considered several complications and deficiencies within this system of legal recognition. Article 2.3 defines the second element, "indigenous peoples' regions," as "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 characteristic." Chapter Two likewise

considered a case involving five Truku men prosecuted for collecting rhodonite on traditional territory that had not been formally registered. Third, these practices must be for “non-profit” purposes. The food and substances that indigenous persons collect cannot be used for economic motives, such as trade or business.

Finally, these activities must be for “traditional culture, ritual or self-consumption.” As noted, this provision conflicted with many other domestic regulations in that it provided broader protection for indigenous practices than other laws. Yet, compared to international norms this provision was far more restrictive. Scott Simon and Awi Mona (2015: 11) note the progressive narrowing of indigenous subsistence rights in Taiwan as hunting, trapping, and gathering practices shift in meaning from international covenants (e.g., ILO 169) to international declarations (e.g., UNDRIP) to Taiwan domestic law (e.g., IPBL). Article 19 thus demonstrates a progressive narrowing of the scope of indigenous subsistence rights through processes of vernacularization (Merry 2006, 1996).

As a “basic law,” like the *grundgesetz* in the German civil law tradition, the IPBL is not a self-executing legal instrument. It requires enactments or amendments of other laws to bring its principles into practical and legal effect (Simon and Mona 2015: 11). Until changes in law are made, it remains primarily a guiding philosophical document, similar to the United States Declaration of Independence, which is not itself a legally enforceable document but rather a document that guides American thinking about liberty and justice (Joffe 2009: 305).

For concrete implementation measures, the IPBL required the government to create a promotion committee to coordinate matters related to the law (Art. 3); to create budgets supporting indigenous autonomy, infrastructure, economic development, and land development (Arts. 5, 15, 18, 21); and to review all laws, regulations, and administrative measures to correct

those that are incompatible with the principles in the IPBL within three years after it went into effect (Art. 34). By 2019, the Indigenous Peoples Basic Law Promotion Committee had met 11 times and had worked to develop and increase budgets for promoting the IPBL's principles (Executive Yuan 2019a). There had been, however, little activity in the domain of legislative measures making Taiwan laws consistent with the IPBL (Gao, Charlton, and Takahashi 2016: 68). In fact, the lack of legislative activity, and the lack of political will to do so, were significant reasons why the government turned to the judiciary and created the special indigenous court units (Judicial Yuan 2017a: 2; 2018b: 2).

In significant ways, this legislative inactivity enshrouded IPBL in legal ambiguity. It was a comprehensive law passed by the Legislative Yuan but never fully implemented through supporting legislation. Its place in the hierarchy of Taiwan law was thus unclear. Consequently, Taiwan judges struggled to make sense of the IPBL, diverging widely in how they addressed it in discrete disputes. Both judges and lawyers reported that IPBL's status in litigation largely depended upon the individual preferences and understandings of the presiding judge (see Chapter Five). Reflecting the uncertainty surrounding the IPBL, in 2017 the Taiwan Supreme Court appealed to the Taiwan Constitutional Court—a first for the Supreme Court—in the case of Wang Guang-lu (王光祿 or Tama Talum), a Bunun hunter, for an interpretation about whether the IPBL or domestic statutes prevailed in a conflict of laws (Focus Taiwan 2017). As of this writing, the Constitutional Court had not yet made a decision about whether to accept the appeal.

The adoption of UNDRIP at the UN General Assembly in 2007 brought about renewed interest on the island in protecting indigenous rights and human rights generally. One week after the UN adopted the non-binding declaration, officials in the CIP declared that the IPBL was consistent with the principles in UNDRIP and committed themselves to continued efforts to

strengthen the IPBL (Wang 2007). The Taiwan government has yet to clearly express its position or endorse the UNDRIP, but it has passively stated that the Declaration has many common advocations with the IPBL (Covenants Watch 2016, para. 125). In this regard, it is worth noting that President Tsai's (2016) official apology to Taiwan's indigenous peoples on August 1, 2016 makes no mention of UNDRIP.

G. The Two Covenants Act | 公民與政治權利國際公約及經濟社會文化權利國際公約施行法

In 2009, the Legislative Yuan formally incorporated the ICCPR and the ICESCR through the *Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights* (Implementation Act) (*guomin yu zhengzhi quanli guoji gongyue ji jingji shehui wenhua quanli guoji gongyue shixingfa*, 公民與政治權利國際公約及經濟社會文化權利國際公約施行法), giving human rights protections in both covenants the status of domestic law (Tsai 2015: 296). Yu-jie Chen's (2019) analysis of the Implementation Act shows how the law emerged through the sustained efforts of advocates, civic groups, political leaders, and scholars, and how the heated conflict between the KMT and DPP over the right to self-determination shaped much of the discussion surrounding implementation of the ICCPR and ICESCR.

In content, the Implementation Act states its purpose (Art. 1), grants the human rights provisions in the ICCPR and ICESCR domestic legal status (Art. 2), and refers to the two covenants' legislative purposes and interpretations by the Human Rights Committee (Art. 3). It requires the government to respect human rights (Art. 4) and to coordinate across government institutions and agencies to promote and implement human rights (Art. 5). Concerning concrete implementation measures, the government must set up a human rights reporting system (Art. 6), create a budget to support implementation of the provisions of the two covenants (Art. 7), and to

review all laws, regulations, and administrative measures to correct those that are incompatible with the two covenants within two years after the law goes into effect (Art. 8). Article 9 provides a buffer time for the Executive Yuan to decide when the law would go into effect.

Provisions within the two covenants, and the jurisprudence interpreting them, address indigenous peoples and protect their customary lifeways. Article 27 of the ICCPR protects the right of ethnic minorities to "enjoy their own culture." Human Rights Committee General Comment No. 23 (1994) clarified that Article 27 protects indigenous peoples and their cultural practices. Likewise, Article 15 of the ICESCR protects the right of everyone "[t]o take part in cultural life." Committee on Economic, Social and Cultural Rights General Comment No. 21 (2009) clarifies that under Article 15 indigenous cultural practices should be recognized, respected, and protected on an equal basis. There is also a growing body of "views" interpreting these rights in the context of specific disputes. For example, the contours of indigenous peoples' right to hunt and fish under the ICCPR are set out in *Apirana Mahuika et al. v. New Zealand*, Human Rights Committee View on Communication No. 547/1993 (adopted 27 October 2000); *Jouni Lansman et al v. Finland*, Human Rights Committee View on Communication No. 1023/2001 (adopted 17 March 2005); *George Howard v. Canada*, Human Rights Committee View on Communication No. 879/1999 (adopted 26 July 2005); *Angela Poma Poma v. Peru*, Human Rights Committee View on Communication No. 1457/2006 (adopted 27 March 2009), among others. Granting these instruments the status of domestic law would appear to advance indigenous peoples' interests and rights significantly.

Yet, Taiwan has no clear regulations regarding how these laws relate to other domestic laws (Chang 2018a: 13). According to Article 141 of the Taiwan Constitution, the government should respect treaties and the Charter of the United Nations so as to promote international

cooperation, advance international justice, and ensure world peace. Based on this, one may conclude that "the Covenants should enjoy a superior status over other domestic laws, and new legislation should not contradict the Covenants" (Tsai 2015: 296) and that the covenants occupy a position of authority above other laws in Taiwan. Thus, in instances of a conflict of laws, the ICCPR and ICESCR should be applied first (Chang 2018a: 12-13).

In practice, applications of human rights in Taiwan courts were mixed. In the five-year period between the date of ratification and 2014, court decisions referenced the ICCPR and ICESCR in a total of 207 cases (Covenants Watch 2016, para. 9). In 2016, the Taiwan Supreme Court recognized Articles 2 and 3 of the two covenants, their legislative intent, and the interpretations of their respective committees as part of Taiwan law.[51] But, given there was no juridical precedent that accords *stare decisis* on these matters, (Chiu and Fa 1994: 7; Simon and Mona 2015: 13), the Supreme Court's decision did not bind lower level courts.

Accordingly, courts took different approaches to the human rights protections encapsulated in the Implementation Act. Some judges referred to the two covenants and used them in their legal reasoning.[52] Other judges were more skeptical and avoided discussing human rights, often citing a lack of normative specificity: "They [human rights instruments] are abstract, they are not specific about the particular issue or the fact of the culture" (Interview 093). Still others went farther. During one hearing, a judge flatly told a lawyer representing indigenous defendants to stop referencing human rights: "You cannot use the ICCPR in Taiwan."[53] In general, lawyers reported that many judges were unfamiliar with how to make interpretations of domestic laws that gave effect to the Taiwan state's human rights obligations (Covenants Watch 2016, para. 10). Judges made similar complaints about lawyers: "Many of the lawyers practicing

[51] Taiwan Supreme Court 105 [2016] Case No. 984.
[52] E.g., Taiwan Taitung District Court 102 [2013] Case No. 93.
[53] Taiwan Hualien High Court 106 [2017] Case No. 37 (December 6, 2017, hearing).

in the court do not know about human rights; they are not well trained" (Interview 046).

In private, some judges expressed exhaustion with human rights. One judge summarized the issue as follows: "Everybody wants to argue human rights, no matter what the issue, human rights come up. . . . Human rights come up in indigenous cases, murder, labor, juvenile, housing, on and on, in lots and lots of cases" (Interview 119). The judge's comments suggested a degree of "human rights fatigue," expressing exasperation as lawyers repeatedly articulated human rights-based arguments (see also Meili 2014: 650). This fatigue may also signal a new mentality towards human rights, one that is more complex than the potent horror at the violations in the 1930s and 1940s that inspired their creation.

In conclusion, as the Taiwan state began to recognize indigenous peoples' distinctive cultures and to seek out ways of protecting them, it also insisted that the authority to do so lay exclusively with the state. Rights to firearms, to hunt wildlife, to gather forest products, to collect minerals, and to engage in customary practices and traditions were articulated and controlled by the Taiwan state. Indigenous peoples' legibility in law, policies, and politics during this period were subject to the whims and preferences of the Han Chinese-dominated state, often caught between competing KMT and DPP political visions of Taiwan. This body of law formed an inconsistent, piecemeal, and uncertain terrain of legal protections that presented significant obstacles to protecting indigenous peoples' lands and customary practices.

[*Seeing Culture Like a State* (c)]

October 3, 2018 — Bunun traditional territory in central Taiwan

I joined four Bunun hunters on a hunting expedition on their traditional territory in the steep peaks of Taiwan's Central Mountain Range. We arrived together at the base of the mountain in a stripped down blue van. It was getting late, but we could still see the lush

mountainside where generations of Bunun peoples have hunted wild game, engaged in agroforestry, collected mushrooms and wild plants, and lived their daily lives. Pointing up, one hunter said, “Bunun people think of the mountains as a refrigerator. When we need something, we go up the mountain to get it. But, the law only allows hunting for ceremonial use, not daily use. This does not fit our traditional practices.” The other hunters nodded their heads in agreement.

They began by laying out our gear: headlamps, bottles of water, waterproof boots, homemade muskets, long traditional hunting knives, a homemade backpack, and a jacket. I got the jacket. The hunters inspected their muskets, showing me with pride the craftsmanship of their homemade firearms as well as the special precautions they had to make.

Pointing to the gunlock, one hunter said, “Look, this is a part of a basketball. I cut a basketball, and I put the rubber across the gunlock to keep the power dry. You know, we get our gunpowder from firecrackers, cutting them open, because you cannot buy it. We have to keep the powder dry otherwise it may ignite unevenly and explode the lock. It could explode your hand or shoot the gunlock back into your eye. This has happened to hunters. Very dangerous.”

Showing me a small dented metal ball, he said, “We must also make our own musket balls. We do it by melting down nails we buy at the store, the hardware store. We mold them into balls, but again this can be dangerous if they are made incorrectly.”

He reflected on this, “It makes no sense that the law makes us use these homemade muskets. This is not our tradition. My father’s gun was a Japanese rifle, not a musket. We have had to learn to use muskets, as if this is our tradition.”

The butt of the musket exhibited the Taiwan police alphanumeric registration code in white paint and the indigenous gun owner's name in Mandarin Chinese, not in Bunun. I picked up the gun, feeling its weight. The long barrel and solid wood stock made it heavy and awkward.

I placed my camera and audio recorder in the van. I did not take them with me because I wanted no photographic or audio record of the hunt. The hunters had completed all the proper application paperwork for the hunt and for recovering their hunting guns from the police office vault; I reviewed it. Yet, I got a sense of unease from the hunters, an unease stemming from the fact that laws and policies that seemed so clear on paper take new form on the ground, a form that often worked against them. This also explained the selection of nighttime for our hunt, darkness offering some cover from the equivocations of law on the books and law in practice and the ambiguities around where those lines are drawn. So as I laid my camera on the seat of the van, one of the hunters smiled. We set off.

"We will take the easy road for you." I looked up wondering, first, where the road was and, second, how this was going to be easy. Our direction appeared to be straight up the mountain with no discernable path. The hunters walked to the base of the mountain and paused, setting down small cups with rice wine and betel quid. They offered a prayer in Bunun language to the spirits in the mountain. I was later told they informed the spirits they would like to go into the mountain to hunt for food and asked for permission to do so. Upon completion of the prayer ceremony, we turned on our headlamps and began our nightlong journey up the mountain.

The hunters bounded up the mountainside carrying their equipment with ease. Carrying nothing, I lagged far behind. They slowed down, allowing me to catch up. This was more than a hunt. This was a walk through a space of memory. Stories about ancestors living on the land and defending their territory, about traveling with their fathers to collect the heads of Japanese

soldiers, about learning their culture and language from their parents, about teaching the same to their children, about rules of hunting and the adaptations they have made to their hunting practices, about victorious hunts, about near-death experiences—these stories occupied hours of our time as we walked up the mountain. They shared these stories with little reference to the American researcher joining them. They code-switched among Bunun, Mandarin Chinese, and Taiwanese so frequently that I found myself constantly asking them about the ongoing conversation.

During our trek, they explained the social significance of hunting for men in their community: "Hunting is so important. It is not only a way of getting meat but also a way of building a man's reputation in the community by showing courage, diligence, and generosity. It is so important that a man's gun becomes like his best friend. If a man is a good hunter, he will be respected in the village and have high standing."

They recited the intricate set of rules guiding the hunt. Available wild game included boar, deer, flying squirrel, and goat but not Asiatic black bear, which belonged to the same category as persons in Bunun cosmology and was strictly off-limits. Originally, every family had their own hunting ground, and a hunter was limited to his family's traditional land. Over time, however, this rule became less strict as people forgot the location of their family's traditional land. Many rules center on protecting animals, forests, and the mountain. Hunters may not kill pregnant animals or baby animals. In general, they may not hunt during the mating season. Hunters will also regularly change their hunting ground to keep animal numbers high. They will exchange information about animal numbers and avoid areas where numbers are low so as to permit animal populations to recover. As one hunter stated, "We depend upon this land. We must take care of it and take care of the animals to ensure we can continue hunting and continue our

culture." In fact, much of the mountainous land on their traditional territory is so steep that it is inaccessible to hunters, providing wildlife a range free from human intrusion to live and reproduce. The hunters noted an added benefit to hunting: patrolling for illegal logging. They regularly came across illegal logging activities and reported these activities to the police in order to protect the mountain foliage and fauna.

Rules about hunting did not end in the mountain. There were strict rules about what to do with meat once the hunt was competed. The hunters explained that the Sky Father provided everything in the hunt and, as a result, no part of the animal could be wasted. They related humorous stories about the lengths to which people would go to observe this rule. For example, one of their fathers believed he had to eat the rancid part of an animal, which made him very ill. Meat must also be shared with the village within a hierarchy of distribution: the person who killed the animal gets the most meat, accompanying hunters get the second most, and the rest of the village gets the remaining meat. Sharing is a central ethic within their Bunun village. Hunters must share meat with anyone that requests it, believing that such sharing will be noted by the ancestors who will take care of the hunter and provide more animals on the next hunt.

After eight long hours, we finally arrived back at the van with the hunters' kill: four Formosan Reeve's muntjac. It was a good night of hunting, if exhausting. We turned off our headlamps and watched the day break over the mountain. I could see landmarks, like waterfalls and rock exposures, we had passed in the night. I recalled the stories the hunters told at each point. Laying out the small barking deer, more stories were told—this time about the successful techniques each hunter used to hunt the animal that night. One of them recalled my stumbles in the darkness and acted some of them out. We laughed together. Cringing, I wondered if I had joined the panoply of stories told on future hunting expeditions. We piled in the van. As we

drove away the driver said, “Okay, let’s go home. Maybe we left a few of those Forestry Bureau police up there looking for us.”

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“Seeing Culture Like a State” in Stereovision. These two images of law offer different perspectives on indigenous rights in Taiwan. Coming together, they show how Han Chinese assumptions, interests, and preferences dominated indigenous rights protections, creating a piecemeal and inconsistent body of law having an uneasy fit with indigenous life. It also shows how indigenous peoples, in the context of hunting, adapted their practices to address these ambiguities. The first image recounts the proliferation of legislation, jurisprudence, and policies enacted in the early 2000s designed to protect indigenous customs and lands. It examines the black letter laws and jurisprudence creating a field of indigenous peoples’ rights to firearms, hunt, collect forest protects and minerals, and seek self-determination and dignity through human rights. This lens highlights the ambiguities and inconsistencies in Taiwan’s indigenous rights protections but also the extent to which these rights were connected to ideas about history and state authority. As global indigenous rights norms made their way into local laws and regulations, processes of vernacularization resulted in emphasizing norms deemed consistent with liberal democratic ideals, such as rights to cultural practices, over those perceived as threatening state sovereignty, like rights to land. Likewise, these norms exhibited progressive narrowing as they moved from the global to the local scales and were further circumscribed in court decisions and police agency interpretations.

The second image offers an example of how Taiwan’s indigenous peoples lived out this ambiguous system of legal protections. It focuses on how a group of Bunun hunters confronted uncertainties in law and the ways legal protections intersected with their practices and daily

lives. For example, notwithstanding a seemingly clear right to hunt, indigenous hunters changed their hunting practices from daytime to nighttime, in part to avoid confrontations with state authorities. Growing up using rifles, these hunters had to learn to use muskets in order to perform a version of being "indigenous" that they, themselves, never knew. Domestic protections also put them in danger, as hunters were forced to make their own firearms. Notably, nowhere in this system of protections was there any formal recognition of the many and diverse indigenous customs regulating firearms, hunting, land use, or other practices.

Placing these perspectives side-by-side offers insights into Taiwan's indigenous rights legal framework. It accomplishes this not by juxtaposing law "on the books" with law "in action," but by blurring where this line is drawn. Courts constructed indigenous people as "frozen in time" as they interpreted generic statutory references to "firearms" as muzzle-loading firearms. Police used the hunting applications required by law as a basis for arresting indigenous hunters. Courts assumed indigenous peoples' relationships with forest landscapes was lawless. Judges took widely diverging views of the status and applicability of the IPBL and human rights treaties. Similarly, indigenous hunters adapted their hunting practices to address ambiguities in law and enforcement. They also had to learn to be "indigenous" in the eyes of the Taiwan state. Yet, this juxtaposition also points to common features. Both state actors and indigenous hunters, for instance, expressed deep concerns for protecting animal species and curbing illegal activities, such as logging, in the mountains.

Pluralism *(p)*

As noted, initial efforts bringing the principles of the IPBL into legal and practical effect were sparse. In September 2007, the Council of Agriculture and CIP issued a joint ruling stating

that Atayal peoples from the Smangus and Cinsbu sub-nations in Hsinchu County could use the natural resources within their traditional territories for cultural, ritual, or personal purposes (Minority Rights Group International 2008). Passed in response to the lower court decisions in the Smangus Beechwood Case described above, this ruling was significant because it marked the first time the Taiwan government officially recognized indigenous peoples' traditional territory.

The next activity occurred seven years later when the Legislative Yuan amended a local governance law on January 20, 2014, extending certain self-governing rights to majority indigenous towns (Jennings 2014). This law provided that qualifying towns could elect their own local representatives rather than falling under non-indigenous mayors of the larger surrounding cities. It also gave local leaders the authority to rename local government departments and a measure of autonomy over spending decisions.

On December 16, 2015, the Legislative Yuan amended the IPBL by adding a new Article 2-1, which stipulated that: "In order to promote independent development of indigenous tribe at its will, the tribe should establish Tribal Council. The tribe which ratified by the central authority in charge of indigenous affairs shall be considered as public juristic person." To bring this provision into effect, the Legislative Yuan is currently reviewing the *Draft Law on the Establishment of Tribal Public Corporations* (*buluo gongfaren zuzhi shezhi banfa caoan*, 部落公法人組織設置辦法草案). This law aims to return certain self-determination and self-governance powers to indigenous peoples by permitting indigenous groups to incorporate as a "tribal public corporation." Under this system, indigenous groups would be recognized as "legal persons" and operate as semi-autonomous entities, like counties, having the power to govern certain internal affairs. Ultimately, they remain will under government oversight (Interview 034).

On January 4, 2016, the CIP enacted the *Regulations for Indigenous Peoples or Tribes*

Being Consulted, Obtaining Their Consent and Participation (*zishangqude yuanzhuminzu buluo tongyi canyu banfa*, 諮商取得原住民族部落同意參與辦法) based on Articles 21, 22, and 31 of the IPBL. This regulation aimed to empower indigenous groups to become more involved in process of development planning, land-use, research, and regulation. In several respects, however, these regulations were divorced from the social reality of indigenous peoples' daily lives. Article 2, for example, stipulated that members of an indigenous village must establish their household registration in the village rather than allowing the village to determine the qualifications for membership on its own. Article 5 decreed that the "village council" was the highest institution of executive power in the village. Article 11 limited the power of village officers. These articles forced indigenous villages to set aside local forms of decision-making and regulation in favor of a council format advanced by the Taiwan government (Covenants Watch 2016, para. 76).

A watershed moment occurred on August 1, 2016, when President Tsai Ing-wen, whose paternal grandmother was reportedly a member of the Paiwan Nation (Sui 2016), represented the ROC government and extended a formal apology to Taiwan's indigenous peoples for their oppression and exploitation by Han Chinese people (Tsai 2016). In the apology, she committed her administration to promoting indigenous self-government stating: "In the future, the ideals of indigenous self-government will be realized step by step."[54]

Following the apology, President Tsai's administration established the Indigenous People's Transitional Justice Committee (Presidential Office 2017). This committee would comprehensively handle affairs concerning culture, governance, language, and native title. It includes representatives from each of the island's 16 officially recognized indigenous nations as

[54]「未來，原住民族自治的理想，將會一步一步落實。」

well as three representatives for *pingpuzu* (lowland) ethnic groups. Among its many activities, the committee has proposed legislation, such as the *Draft Act Governing Indigenous Historical Justice and the Restoration of Indigenous Rights* (*yuanzhuminzu lishi zhengyi ji quanli huifu tiaoli*, 原住民族歷史正義及權利回復條例). This act demands that the Taiwan government acknowledge the historical injustices committed against Taiwan's indigenous peoples and commits the government to strengthen indigenous peoples' cultural and land rights (Office of the President 2019). Further, Tsai's "Four-Year National Development Plan (2017-2020)" identifies socio-economic development, education, culture, and ethnic diversity as one of its six strategic policies (National Development Council 2017).

On February 14, 2017, the CIP issued *Regulations for Demarcating Indigenous Peoples Land or Tribal Land Area* (*yuanzhuminzu tudi huo buluo fanwei tudi huasheban*, 原住民族土地或部落範圍土地劃設辦). The regulations provided a legal foundation for defining traditional indigenous lands (Hetherington 2017; Wu, Chiu, and Chung 2017). They delimited approximately 800,000 to 1.8 million hectares of land as indigenous territory, but controversially they applied only to public lands, not private lands. Some indigenous activists felt that the regulations unfairly ignored a sizeable portion of their territory by excluding private lands (Mata Taiwan 2017). Others estimated the regulations enabled indigenous peoples to claim approximately 90 percent of their traditional territory (Chandran 2018). Regardless, the private property exemption undermined indigenous self-determination and reflected a lack of appreciation by the Taiwan government for what land and territory represented to indigenous peoples. It not only constituted an extinguishment of indigenous rights to those lands, it also did not serve natural resources or conservation objectives (Charlton, Gao, and Kuan 2017: 145-146).

On June 5, 2019, the Legislative Yuan passed the *Culture Basic Law* (*wenhua jibenfa*, 文

化基本法). The law stipulates that culture, including the right to create and participate in cultural activities, is a basic right and that the government should introduce cultural policies that promote diversity, protect the right to self-determination of different ages and ethnic groups, and facilitate international dialogue (Lin 2019; Executive Yuan 2019b). While the act nowhere explicitly mentions indigenous peoples, it is designed to "realize multiculturalism" and thus may become a future resource for securing indigenous autonomy and self-determination.

These laws, policies, and regulations suggest that Taiwan is on the cusp of a new era of indigenous rights, one oriented, albeit tentatively, towards pluralism and protecting indigenous autonomy and self-determination (Chang 2016: 11).

[*Pluralism* (c)]

August 1, 2016 — Ketagalan Boulevard, Taipei

At 9:30 a.m. on August 1, 2016, standing in front of the Presidential Building in Taipei, President Tsai Ing-wen began her apology on behalf of the Taiwan government to the island's indigenous peoples for their historical mistreatment. Televised nationally, representatives from each of Taiwan's 16 indigenous nations attended the event. Making such an apology was significant as it obligated the Taiwan State to confront difficult issues, ones that may potentially challenge its control over territory and citizens. Further, in making the apology Tsai did what no other government leader in Asia has done before and became only the fourth government leader ever to make such a formal apology to indigenous peoples.

"It's bullshit" (Paiwanese: *Caqi*). I joined a group of indigenous demonstrators sitting under a tent watching President Tsai's apology in real-time on their smartphones. The comment came from a man wearing Paiwan attire sitting next to me, his eyes fixed on his smartphone screen. The demonstrators had slept outside the previous night, joining a larger two-day

occupation of Ketagalan Boulevard (named for the local indigenous Ketagalan people), the road leading to Taiwan's Presidential Building. Several hundred indigenous demonstrators arrived yesterday to make their presence known at Tsai's apology, waving banners and gun cut-outs made of Styrofoam, singing songs, and taking turns giving speeches using crackling and screeching mobile microphone systems.

Earlier the previous evening, police officers wearing riot gear forcibly tore down a tent set up by indigenous demonstrators, leaving the demonstrators exposed to the rain. During the night, there were several clashes with police as demonstrators found themselves surrounded on all sides. In one location, ten indigenous demonstrators were dramatically encircled by what looked to be over one hundred police officers. By the end of the evening, the ratio of police officers to indigenous demonstrators approximated 3:1, with possibly many more police waiting in the line of police buses parked along the side of the boulevard. The evening was tense.

The demonstrators had come not to protest Tsai's apology but to demand representation and concrete action on the unequal treatment and economic inequality of indigenous peoples. One indigenous demonstrator expressed it this way: "Our voice has not been heard. We have been excluded from everything. The government must take this seriously and give us a voice." If Tsai's apology attempted to address this concern, the heavy-handed actions of police directly outside the Presidential Building stood in marked contrast. This was a stark reminder about the disunity of the state and the diversity of actors, interests, and practices that actually comprise the projected image of a unified state (Abrams 1988; see also Geertz 2004). Yet, if it was a reminder of the state's disunity, that did not mean it was a falsity (Aretxaga 2003) as the indigenous demonstrators who encountered police experienced firsthand.

We sat huddled together on red stools, watching Tsai's speech (fig. 13). It was mostly silent. Everyone was concentrating, listening to her words and watching her body language. Occasionally, someone mumbled or grunted. As Tsai closed her speech, one man wearing Amis attire said, "Some good, some bad. I am happy she is setting up plans and dealing with nuclear waste, but she did not describe what she means by indigenous self-government, which is the most important issue, or how she plans to strengthen the Basic Law."

Figure 13. Two young Paiwan men watch President Tsai's apology to indigenous peoples on their smartphone on August 1, 2016 (author)

Other demonstrators took a different view. The Paiwan man who said, "*Caqi*," made this remark as Tsai called for action: "I call upon all citizens to seize the opportunities offered by this day—to join together, work hard, and build a county of justice, a country of true diversity and

equality."[55] I wondered what calls for action like this, commendable as they were, felt like from an indigenous perspective. The Paiwan man's remark suggested he saw it as serving a political agenda seeking merely to use indigenous cultures to concretize a native Taiwanese identity that ultimately left them out.

Soon, the place was buzzing again. Invited speakers shared their understandings of Tsai's apology to the crowd. One demonstrator grabbed me by the arm and told me to come with her. She took me out from under the tent and pointed emphatically to a large red sign hanging between two trees, saying, "This is what Tsai needs to remember." It read: "Indigenous peoples are not Republic of China peoples."[56]

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"Pluralism" in Stereovision. These two images of Taiwan's shift towards pluralism come together to reveal a piecemeal and tentative system of indigenous self-governance grounded on incorporating indigenous peoples into the state legal framework. The first image recounts the executive and legislative measures enacted to share state power with indigenous peoples. These measures included joint rulings affecting particular indigenous groups; legislation reconfiguring indigenous representation in urban spaces; regulations to secure indigenous consultation through a mandated village council system; legislation converting indigenous nations into public corporations; a presidential apology; the creation of a transitional justice committee; and regulations for delimiting indigenous lands on public lands. This lens shows the ways in which power-sharing in Taiwan turned on incorporating indigenous groups into the legal framework—village councils, tribal public corporations, public property laws—rather than

[55]「我請求所有國人，藉著今天的機會，一起努力來打造一個正義的國家，一個真正多元而平等的國家。」
[56]「原住民族不是中華民族。」

empowering them as separate entities. Yet, there appeared to be political will to expand this understanding of indigenous self-determination as President Tsai noted it would be a “step by step” process.

The second image offers an account of indigenous peoples’ responses to President Tsai’s apology in the moment of hearing it. Their responses were mixed. Some found in her apology reasons for hope. Others saw it as simply more state rhetoric. It was unclear the extent to which indigenous demonstrators were comfortable with a form of self-government based on legitimacy and authority as juridical subjects within the Taiwan state. The sign, “Indigenous peoples are not Republic of China peoples,” suggested a more robust division between the indigenous peoples and the state, although recent scholarship suggests that indigenous groups prefer being incorporated as juridical subjects (Mona 2019: 622). This lens also cleavages within the Taiwan state on the matter of indigenous self-determination: the lofty promises in President Tsai’s apology stood in marked contrast to the aggressive police surrounding indigenous demonstrators.

Placing these perspectives side-by-side offers insights into Taiwan’s efforts towards decolonization. Measures seeking to expand indigenous self-determination have done so through a piecemeal system focused on converting indigenous peoples into legal subjects. As such, the mark of state control in these efforts remains strong insofar as these measures remained within a frame of state generosity. Converting indigenous peoples into legal subjects rather than autonomy groups, the state retained the power to determine when, where, and how it would share its power with indigenous peoples, although even the state appeared to lack unity about how to do so. Just as the state lacked unity over indigenous self-governance, so did indigenous peoples as they demanded concrete action but did not always agree about the character or scope of those actions. Yet, framed in a positive light, these measures were steps upon which ongoing dialogues

and relationship-building could potentially lead to new and more expansive forms of self-determination for Taiwan's indigenous peoples (Mona 2019: 609).

Conclusion: Horizons of Interdisciplinary Encounters

"*Where the telescope ends, the microscope begins. Which of the two has the grander view?*"
Victor Hugo (1862)

Each time we cross disciplinary boundaries, there is an opportunity for stereopsis—an opportunity to permit an intermingling of ideas that reveals new dimensions on a wider whole. In this process, we exchange not only information but also our perspectives on issues: we exchange our ways of knowing and seeing the world. Victor Hugo's metaphor of the telescope and microscope is instructive in this regard. Both the telescope and microscope reveal things that are not observable to the naked eye alone, and side-by-side they reveal horizons of knowing and seeing that are beyond the reach of each individually. Hugo leaves open the question of whether the telescope or the microscope has the grander view. Here the answer is not one or other, or both together; rather, it is their engagement with the other. It is in their contradictions and tensions that new forms of understanding emerge, although this does not suggest that all ways of seeing are equally valid or able to see things in the world.

In stereopsis, a third image emerges from two images through a cognitive process of resolving disparities between the images (Li et al. 2016). Similarly, three-dimensional depth emerges on a topic through resolving the disparities between two different perspectives, bringing into relief not only different epistemological frameworks but also different ways of seeing the world. A key component is creating sufficient space where alternate, seemingly invalid ways of seeing can be expressed. As I discuss later, under certain conditions the special indigenous court

units itself served as such spaces insofar as they permitted new performances of indigenous identity and critiques of state power. In a word, they intermittently formed unique fora for "agonism," or debate, about belonging, custom, and law (cf. Schaap 2003).

When I consider law now I see different images and hear different voices: images and voices embodying disparate attitudes, beliefs, habits, obligations, rules, and traditions—disrupting dichotomies of law "on the books" and law "in action," law and custom, tradition and modernity. Law appears as stories with events, characters, and plots about what can and should happen. Law appears as something rich, not in its vaulted isolation as double-institutionalized norms (Bohannan 1989) but as a verb—as a lived practice involving an intermingling of ideas, people, and texts.

These encounters also influenced actors appearing in the special indigenous court units. During our interactions, judges and lawyers explored new legal resources, such as *in pari materia*, to bridge the gap between the purpose of the special units and Taiwan's civil law tradition. Judges joined me on trips to villages to speak informally with community members about their customary laws. Lawyers developed new arguments that included invoking the authority of the special units, and attempted to explain to judges the complexities in concepts of culture and tradition. Indigenous peoples similarly experimented, on their own, with codifying their customary laws to protect hunters in the community.

When these actors encountered laws and legal processes in the special units, they did so, of course, from their own perspectives. Judges and lawyers did not become anthropologists, and indigenous litigants did not become lawyers. Likewise, as much as I may have strived to be, I never became a Taiwan lawyer or an indigenous person. In the course of our interactions, however, we did more than share information: we shaped one another. In our own ways and with

different levels of engagement, we tried on these images, expressing them in our own voices and from our own perspectives. While our attempts at expressing these alternatives may have been imperfect, they nonetheless moved us beyond our immediate horizons, forming part of our personal selves as we uncovered previously hidden meanings and workings, and came to understand that what may seem, at first, to be simple or obvious was anything but.

CHAPTER FIVE

Courts of Being and Nonbeing:

Searching for Ontological Salience in a Special Indigenous Court Unit

"The special indigenous court is definitely there working to help indigenous people."
District Court judge, September 22, 2017

"*No, the indigenous tribunals do not really exist.*"
Lawyer, October 13, 2017

Being and Becoming Something

The quotations above suggest a paradox. Some legal actors believed that Taiwan's special indigenous court units existed and served a robust role in securing indigenous peoples' rights and justice. Others felt that the special units were not really there at all; rather, they were simply ordinary courts under a different label. Notably, both of the legal actors quoted above regularly handled cases involving indigenous persons. They also practiced in the same judicial space. In fact, at several points, they were in the same courtroom working on indigenous cases. Yet, they fundamentally disagreed about whether or not the special units were really "there."

Disagreements like these were a common feature of my research. I regularly heard conflicting accounts about the special units, sometimes while standing in the courtroom.

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Judicial Yuan representative (Interview 090)

> "Yes, the special indigenous courts are present in both the district courts and the high courts. They used to be in just nine courts, but now they are in all the courts across the island."

Truku Nation member (Interview 082)

> "They [special indigenous courts] are a good development. They do many good things for indigenous peoples. It is very helpful."

Bailiff (Interview 081)

> "There are no indigenous courts or special indigenous courts, just the courts."

Judicial Yuan representative, Speech at Opening Ceremony of Law Center for Indigenous Peoples, Taitung, Taiwan (March 12, 2018)

> "We created the special indigenous courts five years ago in nine district courts, which are designed to respect indigenous cultures and traditional customs."

High Court judge (Interview 069)

> "Yes, they [special indigenous courts] are there. . . . Judges in the district courts receive special training in indigenous issues, these judges are the special indigenous court division, but at the appellate level all judges get these cases. There are three of us. It doesn't necessarily mean they have any special knowledge about indigenous people."

Lawyer (Interview 066)

> "They [special indigenous courts] do not exist yet. They have not started. Everything is just the same. You just treat the case the same as any other case."

District Court judge (Interview 039)

> "There are no special indigenous courts in the district courts, only judges who receive special training in indigenous customs. No special courts."

Legal scholar (Interview 025)

> "There is not enough to call them 'special indigenous courts.' . . . The judges must apply the same law and same procedure. Only a different court in name. The institution is very, very limited."

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Conflicting accounts about the special units covered the range of legal actors. As such, differences of opinion were not easily separable into discrete categories, like institutional role (judge, lawyer), court level (district court, high court), or geographic location (eastern Taiwan, western Taiwan). These differences in opinion about the status of the special units indicated that the units occupied an ambiguous and contested place within the Taiwan judiciary. This, in turn, impacted the special units' ability to fulfill their objectives of "respecting indigenous cultures" and "securing indigenous peoples' judicial rights."

These disagreements may be framed in terms of ontology. The concept of ontology concerns the question, “What is there?” (Quine 1948: 21). Stefane Corcuff defines ontology as reflection on “the very existence of the object under consideration and the conditions of its being” (2010: 236).[57] Questions of ontology direct attention to the nature of being and how things come into being, asking: what is “real” in the world? Previous chapters placed Taiwan’s special indigenous court units in context, discussing their history and structure, their connections to Taiwan national court infrastructure, and the laws they had at their disposal to accomplish their purpose. Chapter Two described the special units as impermanent judicial bodies consisting in specially trained Han Chinese judges and prosecutors overseeing criminal prosecutions and (most) civil matters involving indigenous persons. The special units were not specific sites; rather, they were constituted anew each time in the courtroom by the presence of a specific judge and an ethnic marker for the case. Chapter Three emphasized the degree to which the special units reflected Taiwan’s ordinary courts through their actors, appearance, design, language, laws, movements, procedures, symbols, texts, and technologies populating and embedded within them. Yet, fractures also emerged through cracks in materialities of court buildings, alternative narratives of history and normativity, acts of refusal by indigenous actors, changes in place, and withdrawals of state authority. Chapter Four described the legal protections used by the special units, highlighting how they formed an inconsistent, piecemeal, and uncertain terrain of rights that created obstacles to protecting indigenous peoples’ lands and customary practices.

In this chapter, I build on these themes and begin to bring them together. I look directly at the special units and ask, if there was so much disagreement among special unit practitioners about the special units’ existence, what exactly were they? Were the special units really there, and, if so, under what conditions were they there? To answer these questions, I consider the

[57] The original text states, “l’existence même de l’objet dont on parle et sur ses conditions d’être.”

special units as institutions, specifically as organizations—as organized bodies of people. Examining the special units as organizations enables us to scrutinize the particulars of their operation in detail, bearing in mind that these units were always entangled in a broader setting of political rationalities and individual experiences.

I approach institutional ontology from an anthropological perspective. Much has been written about the so-called "ontological turn" in anthropology (Venkatesan 2010; see also Palecek and Risjord 2013; Heywood 2012), which, broadly speaking, maintains that there is no fixed and stable concept to which everything else can be reduced but rather products of processes of "construction," "performance," or "invention" (Heywood 2012: 147). Under this approach, insofar as anthropologists are concerned with alterity, this is not a matter of culture, representation, epistemology, or worldview but of "being": worlds as well as worldviews may vary. From the perspective of the ontological turn, sociocultural anthropology has tended to focus on what Heidegger (1927: 11) calls "regional ontologies," or the specific ways (human) beings are framed within a fundamental ontology (Jackson and Piette 2015: 12). Seeking to move beyond these regionalisms, anthropologists have argued that we must be open to differences of many kinds. Anthropologists following the ontological turn have focused their attention on multispecies approaches in an effort to bridge the human-nonhuman animal distinction and better understand what is specifically human (Descola 2013; Kohn 2007; Simon 2015). Considerations about ontology have also figured into recent studies of indigenous issues in Taiwan as scholars examined representations of indigenous peoples, indigenous studies, and the Taiwan state (see Simon 2014, 2015, 2018; Simon and Mona 2015).

Inspired by these approaches, this chapter considers the ontology of a court institution—notably, one designed to facilitate justice for ontological "others," or subalterns (see Chapter

Two)—as a constructed and performed space. In doing so, it concentrates on the special units themselves. It looks closely at the daily activities and work life of legal actors in the special indigenous court units and the challenges they faced in handling cases involving indigenous custom and tradition. I make the case that the special units exhibited a pattern of punctuated ontology.[58] That is, they tended to operate as ordinary courts do; yet, certain kinds of encounters—specifically, those causing legal actors to reflect on their assumptions about law, culture, and the world, i.e., moments of self-conscious awareness—created conditions for the special units to emerge as extra-ordinary juridical bodies. This shift in ontology from ordinary to extra-ordinary (or exceptional) court bodies was significant as it had consequences for the actors (judges, lawyers, and indigenous litigants) within the special units and the outcomes of cases.

Anthropologists have long attended to organizations. The origin of anthropological interest in complex organizations is usually credited to the industrial anthropological research conducted by the University of Chicago in the 1920s and 1930s inspired by the work of Max Gluckman (Jordan and Caulkins 2013: 2). Since that time, interest in organizations has exploded as anthropologists have studied corporations (Briody 2013), business enterprises (Dahles and Koning 2013), governments (Neyland 2013), education (Greenwood 2013), laboratories (Hine 2001; Latour 2003), nongovernmental organizations (Roper 2013; Tucker and Caulkins 2013), and indigenous organizations (Holcombe and Sullivan 2013; Marsden 1994; Novo 2013). Anthropologists have, by all accounts, studied and continue to study a wide range of types of organizations. These studies highlight dimensions of coordination, practice, process, structure, technology, and global flows in the character and operation of organizations.

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[58] I do not intend by my usage of "punctuated" here to invoke an evolutionary teleological view of Taiwan's special indigenous court units. Rather, I intend my usage to refer to its ordinary meaning as "occurring at intervals" or "interspersed" (OED 2012).

Courts of law are also organizations, sometimes rather large ones where hundreds of people are employed (Mann 2009: 22; see also Collins 1997). As noted, Taiwan's national courts employed hundreds of judges and supporting staff. Taking the criminal division in the Hualien District Court as an example, this division had 18 judges and a large staff of administrators, judicial assistants, clerks, and bailiffs. Like many organizations, management of the criminal division involved budgets, bureaucratic practices, committees, divisions of labor, internal rules and regulations, offices, and so on. Forming a subdivision within the criminal division, the special indigenous court unit consisted of nine appointed judges, each of whom had their own dedicated staffs of judicial assistants and clerks. In many respects, the special units followed the ordinary procedures of the broader criminal division, but judges also had flexibility to manage the courtroom according to their own particular policies and rules, and they brought with them their unique experience and knowledge.

Yet, even with the Judicial Yuan's public pronouncements and the official appointment of special judges in all of Taiwan's district and high courts, the existence of the special indigenous court units remained contested, both inside and outside of the court. Below, I consider dimensions of the special units beyond mere pronouncements and judicial assignments. I draw from interdisciplinary literatures on organizations to focus on five dimensions of courts as organizations: coordination, knowledge, rules, documents, and practice. I argue that together these dimensions suggest a punctuated existence for Taiwan's special indigenous court units that had a significant impact on their operations as well as outcomes for indigenous peoples.

Coordination: Purpose and Mission Drift

Organizations, of whatever kind, typically have a governing ethos. These often emerge in managerialism as crude Durkheimian "mission statements" encapsulating a shared mindset or goal (Hirsch and Gellner 2001: 4). Taiwan's special indigenous courts units did not have a specific mission statement per se but rather a general purpose. As noted, the Judicial Yuan established the special units to create a judicial body that would "respect indigenous cultures" and "protect the judicial rights of indigenous peoples" (Judicial Yuan 2017b; Xiang 2012). The special units would also help build a repository of case law addressing indigenous issues upon which future judges could draw (Interviews 002 and 047). The specific shape of the special units was left largely to individual courts as the Judicial Yuan provided nominal guidance about their form and operation (Interviews 045 and 071).

In my fieldwork, I observed wide variation among judicial actors concerning what it meant to "respect" (*zunzhong*, 尊重) indigenous cultures and protect "judicial rights and interests" (*sifa quanyi*, 司法權益). While all judges understood that these were the goal, given the lack of guiding principles or a coordinated ethos, judges had very different views about how to fulfill it. In general, they expressed three different understandings of the purpose of the special units: (1) to create room for indigenous cultural difference, (2) to have greater awareness about indigenous peoples' socio-economic condition, and (3) to assimilate indigenous peoples.

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District Court judge (Interview 071)

> "These courts send a clear signal that we must respect indigenous cultures. We must look at the Constitution and multicultural provision and the Indigenous Peoples Basic Law (IPBL). There is a clear signal that we need to do that . . . That this [indigenous peoples] case is different, so it is a signal to find ways to respect their differences."

District Court judge (Interview 068)

> "The court applies Taiwan's law to indigenous people, so they [judges] know about the context that they live in. For example, in drunk driving cases, unlike other places where there is public transportation, indigenous people have to drive home after drinking alcohol, sometimes a long distance, so there are more arrests for drunk driving here [in this county]. Also, unlike indigenous people or others living in cities with good jobs who can pay a fine instead of going to jail, indigenous people here do not have good jobs and therefore cannot pay a fine, so they go to jail."

High Court judge (Interview 069)

> "The [special indigenous] court is just designed to be friendly to indigenous people, to help them understand Taiwan law, not to help them or protect indigenous culture, whatever culture means, or fill in gaps [left by the Legislative Yuan in failing to pass laws enacting the IPBL's principles]. . . . The court is the same court as the other ones, it is just more friendly, get to know one another more but not to fill in the gaps left by the [Indigenous Peoples] Basic Law. Judges do not have jurisdiction to help indigenous people."

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Each of these judges believed that her or his approach fulfilled the Judicial Yuan's objective of respecting indigenous cultures and securing indigenous rights. Yet, their interpretations diverged widely, exhibiting even contradictory understandings of this purpose. The first position maintained that the special units required making room for indigenous cultural difference. The second position maintained that the special unit required awareness of indigenous peoples' socio-economic situation. The third position maintained that the special units simply required putting on a happy face and explaining Taiwan law to indigenous peoples in the courtroom.

As one might expect, these understandings shaped individual judges' management of indigenous cases. Those seeing the special units as making room for indigenous peoples felt a responsibility to investigate and understand indigenous cultures and customary practices. Those seeing the special units in terms of indigenous peoples' socio-economic situation felt a responsibility to be informed about and mindful of indigenous peoples' situation. Those seeing

the special units as putting on a friendly face felt a responsibility to take time to explain the law. Notably, only judges who interpreted the special units' purpose as making room for indigenous differences reported any difference in case outcomes (Interview 071). The other judges recalled no instance where reflecting on the socio-economic situation of indigenous peoples or the need to explain Taiwan law had any impact on their decision-making (Interviews 068 and 069).

Having only a generally stated aspirational purpose as the mechanism to persuade judicial actors to bond together under a common understanding of the institution, there was significant "mission drift" across the special units. Joan Tucker and Douglas Caulkins (2013: 365-366) describe how a Jamaican NGO shifted from a focus on its mission to a focus on maintaining its own existence. They recount the struggles of the Combined Disabilities Association, a disability rights NGO established and operated by peoples with disabilities in Jamaica, as it encountered issues of strategy, funding, programming, and personnel sustainability. In the process of pursuing its mission of advocacy, the NGO began to shift towards addressing various social welfare needs among its members and the wider constituents of people with disabilities. In doing so, the organization "blurred the lines" between advocacy and social service as it interspersed non-advocacy activities into its advocacy agenda, causing significant mission creep.

Here, mission drift in the special units was not so much away from a central mission as a struggle to construct a coherent mission for the special unit. This drift in understandings about the purposes of the special units—cultural accommodation, socio-economic awareness, or assimilation—had a critical impact on their daily operation. I regularly heard comments from judges and lawyers that "it depends on" (*yaokan*, 要看) the individual judge when assessing central features of the special units, including whether she or he would take indigenous culture

into consideration or would consider indigenous legal protections, such as those encapsulated in the IPBL or international human rights instruments.

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Paiwan Nation member (Interview 121)

> "We make [Indigenous Peoples] Basic Law and human rights arguments in many cases, maybe most, but *it depends on* the judge about whether they are effective or not."

Lawyer (Interview 115)

> "I just wrote a filing and argued using the ICCPR. But *it depends on* the judge how strongly they look at this law. You cannot just rely on these [human rights] arguments."

High Court judge (Interview 093)

> "*It depends on* the judge about whether they place the [Indigenous Peoples] Basic Law in the principle of hierarchy of Taiwan law, but the [Indigenous Peoples] Basic Law is abstract and it is not clear where it fits in."

District Court judges (Interview 068)

> When asked to describe how they analyze indigenous hunting practices, several judges agreed, "*It depends on* the judge."

High Court judges (Interview 045)

> "*It depends*. If the judge is more liberal, he may decide that the [Indigenous Peoples] Basic Law and ICCPR and human rights are over domestic law, but if the judge is more conservative, then the judge may decide it is not as important in the hierarchy of law."

Lawyer (Interview 029)

> "I often make arguments with the [Indigenous Peoples] Basic Law and international human rights law, ICCPR and ICESCR, but *it depends on* the judge about whether, about their effectiveness."

Lawyer (Interview 028)

> "Yes, the judge refers to them [ICCPR and ICESCR]. But, whether they work *depends on* the judge. Some judges do not think they are really part of Taiwanese law."

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It is important to bear in mind that mission drift also had effects beyond the daily operation within the special units. To the extent that the Judicial Yuan regarded these special units as building a repository of jurisprudence about indigenous issues, these diverging understandings were a critical hidden feature shaping that body of knowledge.

Knowledge: Specialization and the Productivity of Insufficiency

Understandings in law, like in most disciplines, are often conventionalized through training that members may draw on to execute a shared "professional vision" (Goodwin 1994) in dealing with common issues and problems that arise. These are the socially organized ways of seeing and understanding events recognizable to a particular professional discipline. One of the features most frequently associated with Taiwan's special indigenous court units was judges' specialized training in indigenous cultures and laws. According to legal actors, specialized knowledge was a critical factor distinguishing the special units from ordinary courts of law.

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High Court judge (Interview 069)

> "Judges in the district courts receive special training in indigenous issues. These judges are the special indigenous court division."

District Court judges (Interview 068)

> When asked what features beyond training made the special units unique, one judge shrugged his shoulders and said, "That's it."

District Court judge (Interview 058)

> "One thing: education about indigenous cultures. The judges in the special indigenous court units have more training and understanding of indigenous peoples."

Judicial Yuan representative (Interview 047)

> "When creating the indigenous courts, the focus has been on training for judges, lawyers, and interpreters. . . . The focus has been on training and education for more culturally sensitive courts, not changing laws."

High Court judge (Interview 045)

> "Judges are taught through special programs to be culturally sensitive to these [indigenous] issues. This is what separates them from other courts."

Legal scholar (Interview 001)

> "The aboriginal courts are not standalone courts; rather, they are trained judges in the various districts."

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According to these views, the Judicial Yuan created a special, epistemic judicial body, set within the national court framework, equipped to understand and handle the unique complexities of cases involving indigenous customs and traditions. Earlier chapters described this training and identified numerous inadequacies: training was only 12 hours per year (perhaps even as low as six hours); it was compulsory only for the first year; appellate judges reported receiving no training; training programs used the same experts; and no examination tested subject matter competence (see Chapter Two). Referencing these bases, many actors concluded that judicial training in the special units was grossly inadequate.

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Paiwan Nation member (Interview 107)

> "The judges are supposed to be trained in indigenous cultures, but they never know anything."

District Court judge (Interview 076)

> "The training is not enough. You cannot know all you need to know in such a short time. There is much we need to understand about indigenous peoples."

Lawyer (Interview 066)

> "They get no training, I think . . . No training about indigenous cultures. I have not seen any sign that they have any special education."

Legal expert (Interview 063)

> "The judges may be training for a while. That is not enough to immerse and know how to make the right decision."

Lawyer (Interview 062)

> "The government just create the special courts with very little training. The judges are just trained to become judges and do not understand indigenous cultures . . . And the government cheats because they say they create a 'special' court, but they do not require a certificate like other 'special' courts. The judges know nothing."

Lawyer (Interview 029)

> "Judges only have a little, small training in indigenous issues. Not enough."

Lawyer (Interview 007)

> "They [special units] are normal courts run by Han Chinese judges with little to no special training in indigenous issues and applying the same statutes and law as they do in normal court proceedings."

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Other actors noted that even if this training were sufficient, in appellate cases only one judge on a panel of three judges may have had any training in indigenous cultural practices and, recalling that judges assigned to the special units are often junior judges, typically she or he was not the one making the final decision (Interview 091). Still others noted this training was all beside the point due to other structural limitations: "The judges have more training and understanding of indigenous people, but it is really ineffective because the [Indigenous Peoples] Basic Law is not a 'law,' and there are statutes that limit what judges can do. There is simply no way to help indigenous people" (Interview 058). Grounding the special units' ontology in knowledge alone appears to be a shaky proposition indeed.

Yet, for some judges, this training had an ironic effect. In seeking to equip judges with special knowledge, it compelled some judges to acknowledge that they *did not* know about indigenous cultures. In terms of Plato's (1968) Allegory of Cave, this training was not the bright light of understanding upon emergence from the cave but rather the dim recognition that one was still within the cave and needed to take additional steps. Some judges, in reflecting on their training, recognized that they did not understand the cultural practices of a particular indigenous group and sought additional knowledge through independent study or the assistance of experts.

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High Court judge (Interview 093)

> "There are so many complexities with indigenous cases. The training is helpful, but to understand and be respectful of their customs, I must either seek an expert professor or seek a more respectful approach and ask the Kuba Committee for suggestions about Tsou hunting."

High Court judge (Interview 069)

> "There is some training for judges, but it does not necessarily mean they have any special knowledge about indigenous people. . . . In this region, there are more indigenous cases, so judges must personally and by themselves do research about indigenous people."

District Court judge (Interview 068)

> "In cultural cases, like hunting, we will use experts from their particular village. Their culture is very complex. It is important that we ask experts from the particular village, not the community but their village."

District Court judge (Interview 046)

> "The biggest challenge is understanding the [indigenous] culture. So, we will use officials from tribes and elders to explain traditional practices. To find an expert witness, we ask the tribal government to provide a recommendation. We also have a list of people for each tribe."

District Court judge (Interview 023)

> "I sometimes need elders to come into court as experts to testify about hunting practices in that tribe. I asked the elder, 'Does everyone in the community come and ask the elders for permission to go hunting before they go to receive a blessing or do they just go without asking?' The elder said, 'About 80%.' Well, did that make it a traditional practice or not? What was I supposed to do?"

High Court judge (Interview 010)

> "Yes, there is training for judges. . . . Sometimes I must use expert anthropologists because there is so much to understand. I recently used an Atayal community member and an expert anthropologist in a case."

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Some judges, thus, recognized that their training revealed significant complexities in indigenous cultures, motivating them to seek out additional information. There was, however, no formal protocol established for this process (Interviews 001 and 046). Administrative procedures also sometimes presented an obstacle to using local experts. According to some, judges faced pressure from court bureaucrats not to call village experts to testify due to administrative complications and expenses (Interview 084). The use of experts also did not always solve the knowledge problem insofar as experts' testimony sometimes complicated judges' preconceived assumptions about the concepts of culture and custom (Interview 023).

It is important to note that other judges, of course, had a different response to this training. Some judges preferred not to rely on experts and instead turned to texts written about indigenous peoples dating to the period of Japanese colonization (Interviews 001 and 084; see also Tsai 2015: 302n45). Others believed that it was, on its own, entirely sufficient, particularly when coupled with personal experience. In court, I observed judges state such things as, "I have heard about these practices," and listened as the judges invoked their personal experiences with indigenous cultures, suggesting this was not an area in which one needed special expertise. As one might expect, these representations did not always align with local understandings. For example, one judge told indigenous defendants, "I have experience with indigenous people, and I have researched them. I have lots of research. No communities just collect rocks without wanting to sell them or get some benefit from them."[59] This statement stood in contrast to Article 19 of the IPBL, which explicitly recognized the connection between indigenous culture and the extraction of rocks, minerals, and soils. Moreover, these defendants had just been acquitted in the district court where the judge called an expert witness who testified to the cultural dimensions of collecting rocks and minerals within this indigenous community.

Regarding other legal actors in the special units, Taiwan prosecutors also participated in training programs about indigenous custom and tradition similar to the training Taiwan judges experienced. Despite this training, there was a growing perception in the Taiwan legal bar that prosecutors were becoming increasingly hostile to indigenous cultural defenses (Interview 056). As noted, the prosecutor's office in Hualien filed a legal memorandum arguing against the use of indigenous custom and tradition in analyzing indigenous criminal defendants' behavior (Interview 061). Defense lawyers could also voluntarily obtain training about indigenous custom and legal issues, but there was little incentive to do so (see Chapter Two).

[59] Taiwan Hualien High Court 106 [2017] Case No. 37 (June 20, 2018, hearing).

To the extent that training can create a "disciplined" (Collins 2005: 8) set of actors drawing on and employing a shared body of knowledge about indigenous cultural practices, inadequacies in the educational framework of the special units left these units comparatively undisciplined. As with understandings about the special units' purpose, judges showed a range of responses to their training. The degree to which judges worked to understand cultural differences depended, in large part, on a reflexive turn. Where judges used this training to reflect on their lack of knowledge, they tended to be more willing to examine these cultural differences critically. Ironically, then, one of the most effective features of judicial training was that it was sufficient enough to get some judges to recognize it was *in*sufficient, motivating them to seek out additional sources of information regarding indigenous cultures.

Unruly Rules

Organizations are cohesive social units arranged around rules governing behaviors, interactions, and processes. As a special type of institution, organizations include both formal rules, such as laws and constitutions, and informal constraints, like conventions and norms (North 1994: 97). Political economist Elinor Ostrom (2005: 37) envisions institutions as a hierarchy of multiple sets of rules: "operational rules" governing day-to-day interactions; "collective-choice rules" (for choosing operational rules); "constitutional rules" (for choosing collective-choice rules); "meta constitutional rules" (rules for choosing constitutional rules); and, at the highest level, the biophysical world.[60] These approaches emphasize the prescriptive, or rule-based, dimensions of institutions and organizations.

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[60] Douglass North (1990: 47) envisions a similar hierarchy of levels of formal rules: constitutions, statutory and common law, specific bylaws, and individual contracts.

The question here is: What distinctive rules make the special units unique as institutions set within the broader national court infrastructure? The first set of rules concerns jurisdictional scope. The special units' jurisdiction is grounded on "identity" rather than "case type" (Tang 2013: 19). As noted, the Judicial Yuan gave the special units jurisdiction over all criminal cases where an indigenous person was a party and in civil cases where both parties were indigenous persons (and a select set of civil cases involving a single indigenous party) (see Chapter Two). Being both too broad and too narrow, this jurisdictional scope tended to distract from the goal of respecting indigenous cultures.

In the criminal context, these jurisdictional parameters meant that the special units handled mostly drunk driving, drug, tort, and fraud cases involving indigenous persons. Only a fraction of the cases involved customs or traditions of indigenous peoples (see Chapter One; see also Tang 2013: 19). Ninety-eight percent of criminal matters overseen by the special unit in the Hualien District Court, for example, involved quotidian issues seen as having little or nothing to do with indigenous customs or traditions. Because cases involving indigenous customs and traditions were mixed in with all the other, and far more numerous, criminal matters, they tended to fall through the cracks.

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High Court judge (Interview 093)

> "Judges generally do not pay attention to them [culture-related cases] really because they are just mixed in with all the other cases. There is no time or motivation to separate these cases out from all the others."

High Court judge (Interview 087)

> "Customary issues are so few, so judges do not pay attention to them out of all the other cases."

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In the civil context, this jurisdictional scope at times was too narrow as some matters involved indigenous customs and traditions where no indigenous party was present, for example in the registration and transfer of indigenous reserved land by two non-indigenous landowners. These cases were not assigned to the special units because they involved only non-indigenous persons even though these matters overtly addressed ownership and development of indigenous traditional lands and territories (Tang 2013: 19).

This jurisdictional scope at times also captured non-indigenous persons. Criminal cases involving both indigenous and non-indigenous defendants were assigned to the special units. It was presumed that judges were equipped to treat indigenous and non-indigenous litigants differently, but that became much more complicated when faced with actual cases. According to lawyers representing indigenous defendants, the presence of non-indigenous defendants in the same criminal matter worked against their clients' ability to raise cultural defenses.

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Lawyer (Interview 091)

> "In one case, for example, the court quickly processed all four Han defendants and found them all guilty. Then, when we tried to raise a cultural defense for our indigenous defendant, we faced a huge uphill battle. How could we convince the court to find our client not guilty when the court just found all the others guilty? Like the other defendants, the court found him guilty without considering his cultural defense."

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Additionally, this feature raised concerns about depriving non-indigenous defendants of their right to choose a legal procedure (Tang 2013: 20).

In addition to jurisdictional scope, legal actors referenced compulsory legal representation and interpreter services as two other rule-based features of the special units. These rules revolved around indigenous peoples' access to lawyers and courts, which in many ways sits at the heart of the Taiwan's approach to justice for indigenous peoples (see Chapter Seven).

Technically, these rules were not part of the special units in that they were passed as separate measures; nonetheless, many legal actors conceptualized them as key elements of the units.

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Judicial Yuan representative (Interview 097)

> "One of the unique features of the indigenous courts is using interpreters. We have been working on regulations strengthening the use of interpreters in indigenous cases, like writing a handbook."

Lawyer (Interview 073)

> "The judges will bring a translator, if necessary. That is one feature of the indigenous courts. They know there are language issues for indigenous peoples."

Judicial Yuan representative (Interview 047)

> "Some things make the special indigenous tribunals unique. One thing is compulsory legal defense, which is free for indigenous people. . . . There is also the use of translators. Even the translators do not know the legal terms, so we have created a program to teach them about the law."

High Court judge (Interview 045)

> "Besides judicial knowledge, lawyers are another feature of the indigenous courts. Lawyers are mandatory in these cases. The court must also provide a qualified interpreter in indigenous cases."

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Article 31.6 of the Code of Criminal Procedure guarantees free legal services to indigenous litigants. Article 5 of the Legal Aid Act classifies indigenous persons as members of a class who are "unable to receive proper legal protections for other reasons." Under these laws indigenous litigants received free legal assistance regardless of their level of income. While the ostensible purpose of this process was to secure indigenous judicial rights, at times it placed a significant burden on indigenous persons. In certain criminal matters, for example, indigenous defendants had no right to decline an assigned lawyer (Interview 087). Those who lived far away from city centers where law offices were located had to travel to meet their lawyers at their own

expense and time. For many indigenous defendants, particularly indigent persons, this could be a significant burden (Interviews 003 and 032).

Further, free legal representation came with a dubious distinction. Under Article 31.6, only two groups in Taiwan qualify for legal representation regardless of income level: indigenous persons and mentally incompetent persons. On this point, one judge observed, "This Article is ridiculous. The law says they must appoint a lawyer for indigenous people and mentally impaired people. You can see the discrimination here" (Interview 087). As noted, indigenous cases were also often assigned to private attorneys who had little incentive to study the unique particularities of indigenous rights laws in Taiwan, leaving the quality of representation an open question. Further, given the wide jurisdictional scope of the special units, public funds spent on free legal representation of indigenous persons had little connection to the stated goal of addressing indigenous cultural differences, leading some to conclude that this guarantee was largely wasteful (Tang 2013: 19).

The official language of Taiwan courts is Mandarin Chinese (Organic Act of Courts, Art. 97), and the Judicial Yuan recognized that language presented a problem for many indigenous and other non-Chinese persons. In 1995, the Taiwan High Court developed a special interpreter program. Under this program, indigenous litigants could request an interpreter who speaks their language. By the end of 2016, the Taiwan High Court had generated a list of 35 interpreters who were fluent in nine indigenous languages—15 in Amis; eight in Paiwan; four in Bunun; three in Tsou, Rukai, Truku, and Sedeq; two in Sakizaya; and one in Kavalan (Judicial Yuan 2018b: 29). The Judicial Yuan also recognized that interpreters needed to understand the basics of Taiwan law and thereafter created a legal training program for them (Interview 047).

One issue was that the interpreter program did not guarantee that the interpreter spoke the same dialect as the litigant. Lawyers reported their clients were often dissatisfied with interpreters because they spoke different dialects, sometimes with significant consequences in legal proceedings. One lawyer recalled a hearing where the interpreter, who came from a different village and spoke a different dialect than his client, interpreted his client's testimony as having the exact opposite meaning than his client intended (Interview 040).

Interpreter services were also infrequently used in the special units. A 2018 Judicial Yuan internal review found that across all three levels of the Taiwan court system, there were 24 instances of using interpreters in 2014, 26 in 2015, and 12 in 2016 (Judicial Yuan 2018b: 29-30). As a point of reference, the total number of new cases involving indigenous persons in the criminal divisions of Taiwan District Courts was 10,831 cases in 2014 and 11,106 cases in 2015 (Judicial Yuan 2018b: 28). Assuming this constituted all cases involving indigenous persons during these years, Taiwan courts used interpreters in a fraction of 1 percent of indigenous trials in 2014 (0.22%) and 2015 (0.23%). This led the Judicial Yuan to conclude that "[r]egarding the actual use of special interpreters in recent years, currently the use of interpreters is still not a widespread state of affairs"[61] (Judicial Yuan 2018b: 30).

On this point, despite having high caseloads of matters involving indigenous persons, judges reported few instances of ever using indigenous interpreters (Interview 119). Transcripts of hearings also indicated judges did not recognize the significance of linguistic issues in the courtroom. For example, in the 2008 Smangus Beechwood Case involving the prosecution of three Atayal men for collecting beechwood (see Chapter Four), when the defendants informed

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[61] 「由近年度使用原住民族特約通譯的實際情形看來，對原住民族來說，目前需要原住民族通譯的情形尚非普遍情形。」

the judge they could not speak Chinese, the judge told them they needed only to "say the key points" in Chinese, whereupon they decided to remain silent (Reid 2010: 56-58).

The unruliness of special indigenous court unit rules, then, also appeared to make them a relatively weak source of organizational objectivity. Jurisdictional scope tended to distract away from the general goals of the organization. Legal representation placed a burden on certain indigenous litigants and did not always ensure quality representation. Legislation underlying guarantees of legal representation also surreptitiously rehearsed discriminatory understandings of indigenous peoples' intellectual capabilities. Further, the interpreter program did not address dialectical differences within indigenous languages and was strikingly infrequently used.

Documents: The "Character" of Culture

Sociologist Dorothy Smith (2001: 160) writes "texts (or documents) are essential to the objectification of organizations and institutions and to how they exist as such." In a similar vein, recent anthropological literature has emphasized that documents are not simply instruments of organizations, but rather they are constitutive of organizational rules, ideologies, knowledge, outcomes, and organizations themselves (Hull 2012: 253). They are, to borrow Bruno Latour's (2005: 39) term, "mediators" of human action. Concentrating on the materiality of documents, this literature considers dimensions of aesthetics, affect, and signs. Aesthetics highlight the way users of documents respond to form in documents. For example, Annelise Riles (1998: 386) argues that United Nations negotiators measured success not by getting the document they wanted but by satisfying "the aesthetics of logic and language." Affect shows how people encounter documents in terms of their emotional responses to them. Ann Stoler's (2009) work, for instance, highlights how documents provoke anxieties in colonial administrators when

writing on controversial matters. Semiotics emphasizes the way documents link to people, places, things, and forms of sociality. For example, Aradhana Sharma and Akhil Gupta's (2006: 12) work shows how documentation practices can be more significant than the actual reality they purport to represent. Running through these three thematic streams is an attention to the ways documentation practices construct subjects, objects, and socialities.

In many respects, courts of law are driven by documentation procedures. Documentary practices in courts include the creation of paper and electronic case records, court orders, fee schedules, judicial decisions, legal filings, police reports, rules of court, and so forth. These documents bear markings of the court system, such as colored paper, docket numbers, formatting, insignia, signatures, and stamps. They include persons both inside and outside court offices, such as police offices certifying delivery of process, notary publics verifying authentic signatures, etc. Courts also have detailed internal rules relating to access to and maintenance of documents. In short, documents are fundamental to court operation.

Importantly, court documents do not just refer to events that occurred, rather they are in themselves working with the reader to accomplish institutional tasks (Smith 1990). Ellen Pence (1997: 93) observes in her study of battered women in the United States that domestic violence case records were organized to record what "of institutional significance" occurred at each processing occasion. Domestic violence case records recorded an "incident," which precipitated the opening of a case file that documented select information about who did what, when, and for what purpose. These were not verbatim accounts of what occurred but rather a collection of information deemed institutionally significant for resolving the dispute.

Documentation used in courts reflect and reconstitute established ways of seeing things. They reflect assumptions that cases are about incidents and individuals, not social conditions or

communities, as evidenced by legal captions, recitations of facts, and court orders. They reproduce divisions between legal subjects (holders of rights over legal objects) and legal objects (things over which legal subjects hold rights) and between and among legal subjects through constitutions, statutes, regulations, and court decisions and filings. They indicate that the authority of law derives from the state, apparent in official stamps, signatures of state actors, and references to state laws and procedures. They embody language ideologies and temporalities, evidenced by the completion of forms in certain languages and identifying certain temporal conventions. Behind all of these features, court documents reflect a belief that documents matter. Further, legal advocates who enter legal frameworks are not immune to this process. They too often adopt the practices of professional discourse in court documents, reflecting the ideological assumptions of the legal framework.

A look at the documents in the special indigenous court units was telling in terms of both what they showed and what they did not show. In nearly all respects, documents in the special units were like all other documents produced in Taiwan courts. The color, composition, format, language, letterheads, paralinguistic signs, organization, and stamps were all the same. They were maintained in the same way as other court documents. They involved the same sets of institutional actors. There were no overt indicators or any discernable effort made by the judiciary to distinguish the special units as unique judicial institutions through documentary practices. Returning to an earlier theme, this observation is revealing in terms of just how intimately bound up the special units were with Taiwan's ordinary court system, reflecting and reconstituting dominant discourses in the national courts (see Chapter Three).

Yet, there was one small, seemingly innocuous marker in court documents that indirectly indicated the presence of the special unit: the case number. Recalling that the term for

"indigenous peoples" in Mandarin Chinese is *yuanzhuminzu* (原住民族), in all criminal (and some civil) cases involving indigenous persons the docket number included the character, *yuan* (原). As noted, this Chinese character signaled to the court that an indigenous party was involved in the matter. Given that the special units had exclusive jurisdiction over matters involving indigenous persons—its jurisdiction being grounded on "identity" rather than "case type"—this character also signaled the presence of the special units. The use of special characters in case numbers was not uncommon in Taiwan; these characters often indicated special case types, such as finance cases or cases involving famous persons (Interview 101). No other set of ethnic groups in Taiwan, however, were assigned such a marker—not the island's Chinese *waishengren* (Mainlander) or *benshengren* (Native Taiwanese) (Corcuff 2002; Gates 1981), and not foreigners. In this respect, the special units were pioneers in the Taiwan judicial system in creating a court body designed especially to serve an ethnic category (Tang 2013: 19).

A sample case number for an indigenous criminal case looked like this:

102 年度原訴字第 61 號

Broken down into its constituent parts, the case number contained the following:

102 年度	原	訴字	第 61 號
ROC national year (2013 in Gregorian calendar)	Marker indicating indigenous litigant	Case type (Ordinary criminal case)	Case Number

The publicly available electronic criminal docket on the Judicial Yuan's website also used this term, *yuan*, in a column referring to the case type (fig. 14). In a twist of irony, the single visible indicator marking the presence of the special units was a racialized denomination squeezed between indicators of state temporality (ROC national year) and state normativity (case type and

number), all of which was represented in the Mandarin Chinese language of the dominant Han Chinese society.

臺灣花蓮地方法院

筆數	類別	年度	字別
31	刑事	106	侵訴
32	刑事	106	重訴
33	刑事	106	原交易
34	刑事	106	原交簡上
35	刑事	106	原易
36	刑事	106	原易
37	刑事	106	原易
38	刑事	106	原易
39	刑事	106	原易
40	刑事	106	原易
41	刑事	106	原訴
42	刑事	106	原訴
43	刑事	106	原訴
44	刑事	106	原訴
45	刑事	106	原訴

Figure 14. Hualien District Court online docket using the marker, *yuan* (原), to indicate indigenous parties (highlighted in red) (Judicial Yuan 2018c)

According to judicial officials, use of the *yuan* character was part of an internal case assignment system. Cases involving indigenous parties were given this character so that internal bureaucrats could assign the case to the appropriate court unit (Interview 039). In a similar fashion, financial cases were assigned the special character, *jin* (金), so that they could be sent to the appropriate special unit. Some judicial actors thus maintained that this was merely a case-type marker, not a racial marker of indigenous peoples (Interview 090).

This explanation was nearly always followed by comments like, "there is no racism in Taiwan" or "race is different here than in America" (cf. Brown 2016). I regularly heard statements like this from Taiwanese research partners about the state of indigenous relations with mainstream Taiwan society, but such comments elided the economic, historical, political, and social context surrounding contemporary indigenous issues, not to mention the centuries of systematic and violent oppression of indigenous peoples on the island.[62] Moreover, these statements were all the more striking coming from legal actors specifically trained to understand these complex issues. In the same conversation dismissing racial tensions in Taiwan, legal actors were quick to note the prevalence of stereotypes about indigenous peoples, specifically that they were perceived by mainstream society as chronically unemployed and often drunk (Interview 009; see also Bekhoven 2018: 153; Jennings 2016; Cheng 2010: 1).

According to judges, when they saw the *yuan* character in the criminal docket they sometimes assumed it was "another drunk driving case" (Interview 039). In addition, I observed proceedings where lawyers invoked these tropes in the courtroom. A remarkable exchange occurred during one civil proceeding involving the destruction of a Paiwan cemetery.[63] The

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[62] On the issue of race relations, during my fieldwork there was little public discussion about racism or ethnocentrism in Taiwan. Taiwanese colleagues often said there were few racial problems on the island, although indigenous peoples and many Southeast Asians with whom I came into contact strongly disagreed. As one example of the hidden dimensions of race in Taiwan, during my fieldwork public outcry ensued after a Taiwanese kindergarten posted an advertisement on social media stating the kindergarten would "not accept applications from people not from predominantly English-speaking countries, or who are black or dark-skinned" (Hioe 2018b). Separately, as a personal anecdote, my physical self as a Caucasian man was often a spectacle. In many places I traveled to conduct research, a general din of *waiguoren* (外國人, foreigner) or *laowai* (老外, foreigner) followed me along the streets, into restaurants, community centers, and court buildings, often accompanied by people pulling out their cameras and video recorders. Sitting with my family in restaurants, parents would bring their children up to our table, point at our family, and say *ado-ah* (Taiwanese: foreigner, literally "tall nose"), and have their children repeat it. To give a quantitative sense of this experience, I maintained notes for one month on the number of times I heard these terms used in reference to my family or to myself. The final tally was 173 times, or 5.6 times per day. The issue of racial relations in Taiwan was far more complex than simply assuming an absence of racial tensions because they are not discussed publicly.

[63] Taiwan Pingtung District Court 106 [2017] Case No. 7 (May 18, 2018, hearing).

defendant development corporation's attorney questioned an indigenous witness during cross-examination about her husband's drinking habit. Projected onto the walls behind the parties, the judicial assistant transcribed the following exchange:

1	被告訴訟代理人[ ]律師	Defense counsel
2 3 4	既然他那麼重視，為何他沒有 自己去公所了解？	Since he is so important, why didn't he go to the office to understand it?
5	證人	Witness
6 7 8 9 10	他人很木訥，除非讓他喝酒， 他才會多話，平常一句話都沒 有，也因為這件事我們話才比 較多。	He is inarticulate, unless he drinks alcohol he will not have much to say, he does not usually talk, also due to this situation we have no words.
11	. . .	. . .
12	被告訴訟代理人[ ]律師	Defense counsel
13 14	酒量好不好？	How well can he hold his liquor?
15	證人	Witness
16 17 18 19	沒什麼酒量好不好的問題，他 又不是天天喝，而且工作時也 不會喝，一個人的時候也不會 喝。	There is no problem with his drinking. He does not drink every day and he does not drink when he works. He does not drink when he is alone.

A few things are noteworthy about this exchange. The transcription is, in respects, a literary representation of the oral utterances made in the courtroom. Terms, such as "為何" (*weihe*, why) in line 2, for example, were turns of phrase typically reserved for formal, written Mandarin Chinese. The lawyer did not use this phrase during the hearing. He instead used the more commonplace "為什麼" (*weishenma*, why) used in spoken language. The court clerk, in real-time, modified this utterance to its literary form, *weihe*, in his transcription.

Similarly, the lawyer's question in line 13—"How well can he hold his liquor?"—was not his initial utterance but the product of a negotiation within the courtroom. The court clerk, again in real-time, transcribed his initial utterance as, "Does he drink a lot of alcohol?" (*he hen duo jiu ma*, 喝很多酒嗎?). Projected up onto the screen, the question drew an outcry from the

Paiwan plaintiffs and their lawyers, not only because it was irrelevant to the proceeding, but because it served no purpose other than to discredit the woman's husband by playing upon a common stereotype of indigenous peoples as chronically drunk. To address this outcry, the judge asked the lawyer to rephrase his question. The lawyer then dictated to the clerk the question recorded in the transcript, which is another familiar question to many indigenous peoples in Taiwan—"How well can he hold his liquor?"—misunderstanding that the issue was not the wording but rather its invocation of a stereotype about indigenous alcohol consumption.

Third, the transcript did not document the judge's oral admonishments or instructions to the lawyer to rephrase the question. Between the lawyer's question and the witness's response, the judge sternly rebuked the lawyer for asking a question about her husband's alcohol consumption habits, stating he would allow no more questions like that. My fieldnotes capture this tense exchange as follows:

> The lawyer just asked the witness on cross-examination about whether her indigenous husband drinks a lot. Entirely irrelevant question. Gasps from the audience. Gasps from the plaintiffs' lawyers. One of the lawyers raises an open hand and looks pleadingly at the judge. The judge stops the questioning. He turns to the defense lawyer and reprimands him for asking the question. The lawyer changes his question to ask how well he can hold his liquor. . . . The judge tells the lawyer he will not allow any more questions like this. The judge is clearly upset. People in the audience are very agitated, grumbling. The Paiwan man sitting next to me clucks, looks at me, and shakes his head. After the judge's rebuke, the witness answers that her husband has no drinking problems. Seemingly unaffected, the lawyer moves on to other topics.

These kinds of exchanges set the boundaries about what was sayable and unsayable about indigenous identity and culture in the courtroom. These were micro-moments of interactions and decisions having a powerful effect, in their accumulation and in their pivotal determinations, on the conduct of hearings and the resolution of disputes (Rosen 1989: 3). Returning for a moment to the matter of court documents, negotiations over transcripts in real-time show how these documents were sites of institutional knowledge formation. These transcripts were not rote

records of events or statements but crafted documents involving altered statements, literary reframings, and selected details deemed institutionally relevant. This raised a question about the reality of the court session itself. The co-produced official transcript and the unrecorded courtroom exchanges among legal actors and indigenous actors went on to live various lives. The official transcript became a key document of court institutional knowledge. The unrecorded courtroom exchanges formed a different layer of knowledge, shaping the proceedings and outcome in less obvious, but just as important, ways.

In contrast to the judicial representatives' statements, use of the character *yuan* in Taiwan case identifiers did not unproblematically designate a quotidian case-type; rather, it labeled a people-type, carrying all the socio-historical baggage, so to speak, of assumptions, prejudices, and stereotypes about indigenous peoples. Less obviously, this nomenclature also contributed to constructing indigenous peoples as a homogenous group, individual nations being lumped together under a general designator of *yuan*. In this regard, special unit judges inconsistently inquired about indigenous litigants' national identity in cases involving custom and tradition and only rarely in quotidian matters like drugs or fraud cases. Again, unlike tribal courts in other contexts, Taiwan's special units were tasked with adjudicating disputes involving all indigenous peoples in Taiwan, not a specific indigenous nation, which likely contributed to lumping indigenous peoples together into a homogenous category.

The "character" of special indigenous court unit docket numbers were nominal, seemingly insignificant markers for distinguishing the special units from other court bodies, but they covertly invoked understandings of indigenous peoples that potentially shifted attention away from the special units' general objective of respecting indigenous cultures. Tacking the

special units to the presence of the character *yuan* thus provided an unstable foundation for the special units.

Praxis: Practice and the Extra-Legal

Coordination, knowledge, rules, and documents offered an unsettled account of whether the special indigenous court units were, in any substantive sense, really "there." Scholars have also looked to the characteristic practices occurring within organizations (Mutch 2003; Lave and Wenger 1991). I take inspiration from the practice-based theory of sociologist Pierre Bourdieu (1977, 1980) who offers an analytic vocabulary for thinking about how individuals make choices and how those choices are structured by the individual's position and socialization within the larger field. Bourdieu's approach permits serious consideration about individual behavior and decision-making without losing sight of its social connectedness.

In particular, I draw on Bourdieu's (1977: 73-87, 214; 1980: 53) concepts of "disposition" and "habitus," where "disposition" refers to a "way of being," "inclination," and "predisposition," often of the body, which collectively constitute the "habitus," "a system of dispositions," which in turn organizes action, "produces practices," and constructs and reproduces social structures and worlds. While habitus does not determine behavior, the individual is generally predisposed to act in accordance with the social structures that have shaped him or her.

Scholars compare the flexibility of practice to the musical practice of jazz musicians (Power 1999: 49). Jazz musicians stay within certain musical boundaries and follow a particular style but may improvise on a musical theme. Loic Wacquant (1992: 22-23) quotes Bourdieu:

> *habitus is in cahoots with the fuzzy and the vague*. As a general spontaneity which asserts itself in the improvised confrontation with endlessly renewed situations, it

> follows a *practical logic*, that of the fuzzy, of the more-or-less, which defines the ordinary relation to the world. . . . the logic of practice is logical up to the point where to be logical would cease being practical.

Fields, another central theme in Bourdieu's thought, operate as structured spaces organized around particular types of capital. David Swartz (1997: 117) observes that "field denotes arenas of production, circulation, and appropriation of goods, services, knowledge, or status, and the competitive positions held by actors in their struggle to accumulate and monopolize these different kinds of capital." Law forms one such field, operating as a space where participants struggle over the appropriation of the symbolic power implicit in legal practices and texts (Bourdieu 1987: 808). The "field" of law is thus disciplinarily and professionally structured, as it is organized around a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values, and rules of legislation, regulation, and judicial precedent (Bourdieu 1987: 805). These activities and practices are comprehensible as an integrated whole because they are strongly patterned by tradition, education, and the daily experience of legal custom and professional usage. Thus, the causal link between habitus and fields is history, which serves as their mediator (Bourdieu 1980: 54).[64]

I pull out these elements of Bourdieu's practice theory for a purpose. Specifically, due to ambiguities in law and institutional structure in the special units, improvisational elements played a significant role in judicial actors' habitus—that is, how they developed a legal decision-making ethos and set of experiences that framed and empowered them to resolve cases. I show how these uncertainties compelled judges to improvise and look beyond law to address the mismatch in institutional expectations and the legal resources at their disposal (see also Friedman

[64] Interestingly, history in Bourdieu's thought appears to serve a similar function as the concept of God in Gottfried Leibniz's philosophy in mediating Cartesian dualisms of *res cogitans* and *res extensa* (Bourdieu wrote his postgraduate thesis on Leibniz's *Animadversiones*) (Weik 2010).

2012). It is here in these improvisational practices that the special units found the greatest case for existence, if only as itinerant institutions.

As noted, Taiwan law has created a piecemeal, uneven terrain of legal protections for indigenous peoples as it drew upon approaches developed under colonial systems and contained significant inconsistencies and contradictions (see Chapter Four). Taiwan's civil law tradition added additional complexities, for example, conflict of laws rules like *lex specialis*, which emphasized selection among laws over synthesis of laws and worked against indigenous protections. Furthermore, forged in a legal field emphasizing principles of freedom and equality was a judicial habitus that conflicted with protections, seemingly giving indigenous peoples special treatment, exemplified by a judge repeatedly calling the IPBL "dangerous" (*weixian*) during a hearing. While perhaps not a majority view, other judges echoed the sentiment that indigenous protections were inconsistent with constitutional principles of equality and fairness.

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High Court judge (Interview 119)

> "The [Indigenous Peoples] Basic Law violates the Constitution because it does not include equal treatment of people, indigenous people and everyday people. . . . The [Indigenous Peoples Basic] law treats Han Chinese people differently, giving preference to indigenous people over Han Chinese and other people."

High Court judge (Interview 069)

> "It [the IPBL] can open up to everything, which is dangerous. It is too big. Anybody can claim to go hunting. They can just go hunting and kill all the animals."

Hualien High Court 106 [2017] Case No. 1430 (October 18, 2017, hearing)

> "The [Indigenous Peoples] Basic Law lets indigenous people do anything under the statute. This is very dangerous because all of them could go collect stones. Those do not come back. What would be left?"

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To deal with these ambiguities and tensions within the Taiwan legal framework, and reaching the point where the "logical would cease being practical," judges improvised. Again, as

a civil law tradition, there was comparatively little room for judges to get creative, which only accentuated the significance of these inventive approaches. Moreover, the adoption of these approaches was associated with a particular set of conditions—notably, encounters with “other” knowledges, worldviews, and ontologies. The anecdote introducing this dissertation is suggestive of these kinds of moments, as the district court judge confronted indigenous understandings of spirituality and quietly inspected his courtroom for ancestral spirits. The complexities of being asked to “respect” indigenous cultures but given few clear tools to do so, combined with encountering an indigenous “other,” compelled some judges to look to extra-legal resources. Extra-legal, as I intend the term here, is not synonymous with “illegal” or “inappropriate,” but rather it refers to something “extra” to the law, i.e., not specifically prescribed by statute, regulation, or ordinary practice (Nagel 1983: 482).

In my fieldwork, I observed four creative practices among judicial actors. These practices involved innovative approaches to criminal intent, balancing interests, legal hierarchy, and human dignity. It is important to clarify that not all judges used these strategies; many did not. In fact, some judges expressly emphasized their inability to be creative: “There is really not much we can do. Our hands are tied. . . . Taiwan judges have much less power. Very little power. They cannot be creative and find new ways, like judges in America. They have to follow the law” (Interview 069). Moreover, those that did use these strategies used them in different ways. The point here is to emphasize the creative range of responses judicial actors developed to resolve conflicts in cultures, expectations, and resources.

Criminal Intent. Criminal statutes in Taiwan contain a *mens rea*, or intent or knowing (*xingshi yitu*, 刑事意圖), element. One cannot, for example, commit the crime of theft if one had a good faith belief that the property was one’s own or one had a claim to the property. Rather,

one must have an intent to take the property of another person. As noted, special unit judges were not permitted to draw on indigenous custom or tradition as a source of law in their evaluations of indigenous criminal conduct, so some developed a work-around: reading an indigenous mindset into the criminal intent element of a statute (Interviews 001, 009, 056, and 087). The Judicial Yuan, in fact, regarded this as a useful way for judges to address indigenous cultural differences in criminal matters (Interview 047).

Below are two examples of judges using this strategy, noting the peculiar results this strategy generated.

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District Court judge (Interview 009)

> The judge described a criminal case in which an indigenous defendant got into a heated argument with his neighbor. The defendant went home, grabbed his hunting gun, and returned to the neighbor's house. Feeling threatened, the neighbor called the police. The police arrived and arrested the defendant. Prosecutors charged the indigenous defendant with assault. In court, the defendant argued he was only preparing to go hunting according to his cultural tradition and had no intention to harm his neighbor. Further, he did not know that the presence of a gun would cause his neighbor to become fearful. The judge concluded that the man did not have the requisite intent to harm his neighbor because he acted according to his custom of hunting.

Legal scholar (Interview 001)

> The scholar described a criminal case in which an indigenous defendant was accused of theft. The judge stated that indigenous peoples were societies without clear understandings of personal property; rather, they were predominantly communal property societies. The judge reasoned that the indigenous defendant did not commit the crime of theft because the defendant did not—indeed, *could not*—form the requisite mental intent to take the property of another because the defendant did not have a clear concept of private property. The judge explained that this belief that the defendant "could not" form the requisite intent was critical to his decision as it forced him to acquit the defendant.

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This strategy also figured into the Taiwan Supreme Court's reasoning in the 2008 Smangus Beechwood Case when it concluded that the Atayal defendants did not have the requisite *mens*

rea to commit the crime of theft.[65] Under the court's reasoning, the Atayal men who collected the protected beechwood did not intend to take the wood away from others; rather, they only intended to take back what they believed was their property.

Attempting to read an indigenous mindset into the intent element of criminal statutes was one way for judges to introduce indigenous understandings of conduct and normativity into legal analysis. A great deal, however, hinged on the individual judge's willingness to accommodate indigenous differences as well as her or his knowledge of indigenous cultures. The examples above reveal the complexities of attempting to incorporate indigenous worldviews into legal analysis. While this strategy resulted in acquittals for some indigenous defendants, it did not always fit empirically with indigenous defendants' worldviews. At times, it also inadvertently reinscribed ideas about indigenous inferiority. For example, constructing indigenous persons as unable to form the mental concept of private property suggested a degree of mental incapacity for indigenous peoples compared to the Han majority.

Balancing Interests. The issue of balance regularly arose in conversations with judges. When asked about the greatest challenge of handling indigenous cultural matters, one judge stated, "Making the balance between respecting tradition [of indigenous peoples] while still maintaining the status of the law" (Interview 046). To find an equitable resolution in cases involving indigenous custom and tradition some judges engaged in a balancing act. That is, they sought to balance the interests of the indigenous party with the competing interests of Taiwan society, weighing their respective interests to determine a fair outcome. The balancing test thus involved more than simply evaluating the individual interests of the parties; judges took a wider view of the broader social interests at stake. In so doing, they stepped out from behind the strictures of formal rule-based reasoning to confront squarely the concerns of Taiwan society

[65] Taiwan Supreme Court 98 [2009] Case No. 7210.

(McFadden 1988: 586). In many instances, they attempted to create a space for indigenous peoples' cultural claims up to the point where these claims began to conflict with significant public interests. Below are two examples of judges engaging in such a balancing act.

: : :

High Court judge (Interview 087)

> A High Court judge reported that he looked for ways to dismiss cases involving nominal illegal hunting by indigenous hunters. For example, in cases where a Tsou hunter failed to follow hunting application protocols, but killed only a single, non-threatened species of animal, the judge would consider dismissing the matter or, if he could not, would issue a small fine. By contrast, when illegal hunting involved multiple animals or protected species, he felt that this began to infringe upon Taiwan public interest in protecting certain animal species and was less inclined to dismiss such cases.

High Court judge (Interview 045)

> A High Court judge reported a case in which a Thao community wanted to recover part of their traditional territory. This territory was covered by water from a reservoir dam near an adjacent lake. Examining Taiwan law, a similar legal case in Japan, and international human rights instruments, the judge concluded that the community's rights had indeed been violated, but concerns about public welfare—specifically, access to hydroelectricity and clean water—overrode the community's claim. On this basis, the judge ruled that the reservoir dam should remain.

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In both circumstances the law, under a rule-based analysis, dictated a particular result (conviction for the hunter and reparations for the community), but the judge weighed the competing interests to determine what, in her or his view, would be equitable under the circumstances. In each instance, the judges engaged in an operation of identifying the elements to be weighed and the legal effect of the outcome, discussing each of the elements, and declaring a winner based on the results of the weighing procedure. Notably, the judges' weighing procedure was oriented toward result and outcome (i.e., whether the defendant should go to jail; whether the dam should be removed), rather than evidence or rules.

Of course, much depended upon the value assigned by the judge to the respective competing interests. Oftentimes, this balance weighed in favor of the wider Taiwanese public. Because of this, the balancing approach could become an *enfant terrible* of judicial reasoning (McFadden 1988: 586), but judges at times turned to this strategy to carve out a space for indigenous interests where none existed formally in law.

Hierarchy of Laws. Taiwan has a hierarchical system of law. Within this hierarchy, legal rules descend in importance from the Constitution to statutes and legislation and, finally, to regulations (Chiu and Fa 1994: 4).[66] Respect for the hierarchy of laws is fundamental to the rule of law as it determines how the different levels of law apply in practice. As noted, the IPBL occupied an ambiguous status within the Taiwan legal framework (see Chapter Four). Judicial actors strongly disagreed about where the IPBL fit into this hierarchy. For some judges, "The [Indigenous Peoples] Basic Law is on the same level as the Constitution" (Interview 068). For others, "The [Indigenous Peoples] Basic Law is between the Constitution and all other laws" (Interview 023). For others, "The [Indigenous Peoples] Basic Law . . . is at the level of statutes" (Interview 093). Still others maintained it was "below statutes" (Interview 045). Some judges simply refused to commit to a position, "The [Indigenous Peoples] Basic Law falls into gray zone" (Interview 045). The human rights instruments incorporated into Taiwan domestic law faced a similar level of uncertainty (Interviews 121, 093, 075, 073, 045, and 028).

Recalling an earlier observation, "it depend[ed] on" the individual judge how the IPBL and human rights instruments were treated in specific cases. Some judges used the space offered by this uncertainty to creatively rearrange the hierarchy of Taiwan law in order to include indigenous and human rights protections. Other judges saw this uncertainty as an indication of

[66] Notably absent in Taiwan's hierarchy of laws is case law, which, as a civil law tradition, formally binds only the case at hand. As noted earlier, however, precedent often had *de facto* binding force in Taiwan courts (see Chapter Two).

the weakness of indigenous rights relative to other rights in Taiwan and excluded them. Below are two examples.

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District Court judge (Interview 023)

> The judge identified a significant problem generated by assuming the IPBL was equivalent to ordinary statutes. In instances of conflicts of law, principles of statutory construction, like *lex specialis*, directed attention away from the IPBL towards other, more specific laws with far narrower protections for indigenous peoples. He believed the way to counteract this problem was to rethink the hierarchy of Taiwan law. In his view, if indigenous protections were to be taken seriously, the hierarchy of law must be modified to the Constitution, the IPBL, and then to other all other laws and regulations. In his view, placing the IPBL above statutes resolved the concerns raised in conflicts of law and ensured protection for indigenous peoples. He believed that this view was gaining traction among Taiwan judges.

High Court judge (Interview 045)

> The judge observed that Article 34 of the IPBL stated the government must respect indigenous practices "in accordance with law." For him, the fact the Taiwan legislature had not amended or enacted any laws supporting the IPBL meant that, in the event of a conflict of laws, existing statutes trumped the IPBL. The IPBL was, thus, below other state statutes in the hierarchy of Taiwan law. As such, the judge ultimately concluded that the IPBL was a "false promise" to Taiwan's indigenous peoples.

: : :

Most judges agreed that ambiguities in legal hierarchy left indigenous rights in a highly vulnerable position. To this point, as noted, during my fieldwork the Taiwan Supreme Court appealed to the Constitutional Court for guidance about the status of the IPBL within the hierarchy of laws (Focus Taiwan 2017). Creative approaches to legal hierarchy was thus another mechanism judges used to resolve conflicts of law, but, again, these ambiguities could work against indigenous rights protections by further limiting recognition of indigenous rights as judges declined to apply them.

Human Dignity. Immanuel Kant (1785) is often regarded as the source of contemporary understandings of human dignity. Human dignity (*renxing zunyan*, 人性尊嚴) concerns the

intrinsic worth or value of all human beings, possession of which entitles them to respect and fundamental rights. Notions of human dignity are referenced in various fields, including human rights, international and constitutional law, bioethics, political science, among others. Some Taiwan judges have turned to Kantian ideas of human dignity as an alternative normative foundation for indigenous rights.

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High Court judge (Interviews 093 and 087)

> The judge stated that the IPBL "was not direct law at all" because it had no penalties or punishments. In his view, the IPBL was a source of law, not law in itself, and was grounded in natural law and Kantian understandings of human dignity: "The [Indigenous Peoples] Basic Law relates to natural law, which is higher than the Constitution or human rights. Human rights relate to state law. Human dignity, which is what the [Indigenous Peoples] Basic Law is about, is higher than human rights and the Constitution. . . . Only human dignity can solve the problem of respecting indigenous peoples' cultures."

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Using a similar mode of analysis, the Taipei District Court, while not directly invoking natural law or human dignity, noted the "cultural essence" (*wenhua jingsui*, 文化精髓) of indigenous peoples through customs passed down for generations, which profoundly affected their ideas and behaviors.[67] The Atayal defendant had been charged with violating the Forestry Act and Criminal Code for burying his mother according to Atayal custom in a regulated forestland. Acquitting the defendant, the court reasoned that finding a violation of law in these circumstances would strip the indigenous defendant of his dignity.

In looking to normative sources beyond positive law, natural law was seen as an alternate foundation for indigenous rights. It is unclear, however, whether human dignity is an unproblematical lodestar for securing indigenous rights. Insofar as human autonomy is generally ranked as a central, perhaps even necessary, content of human dignity (Mahlmann 2012), the

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[67] Taiwan Taipei District Court 101 [2012] Case No. 1139.

concept has an uneasy relationship with indigenous rights, which in general are held collectively. In fact, the concept of human dignity was used to limit indigenous rights protections. For example, the Hualien District Court stated:

> At this time, the state should give the highest respect to indigenous peoples' land and use of natural resources. Unless indigenous peoples' traditional culture and use of ceremonies have caused serious irreversible damage to land and natural resources (for example, using excavators or other equipment to cut down trees) or infringe upon the human dignity of others (for example, stealing or robbing others of legally collected forest products), otherwise the state must not arbitrarily restrict it.[68]

While human dignity can serve as a foundation for indigenous rights, it could also operate as a limitation on their scope.

Yet, the turn to human dignity was not simply a kittenish twist for judges. It came at a time when Taiwan has been working through critiques about indigenous relations with the state under the crude light of a protracted history of discrimination and mistreatment of the island's indigenous peoples. In significant ways, ideas of human dignity aligned with the general purpose of the special units in respecting—dignifying—indigenous cultural differences.

Itinerant Institutions. Pulling these points together, in the struggle to make sense of an institutional mandate to respect indigenous cultures and yet given few tools to do so, judges in the special units improvised, developing creative strategies for resolving cases involving indigenous cultures. They turned to incorporating indigenous worldviews into statutory elements, finding an equitable balance of indigenous and public interests, rethinking the hierarchy of domestic laws, and drawing on normative sources outside of positive law. A critical dimension of these activities was that judges looked to extra-legal resources. The judges who turned to these

[68] Taiwan Hualien District Court 105 [2016] Case No. 26 (「此時國家對原住民族之土地及自然資源利用應給予最高之尊重，除非該傳統文化及祭儀之利用行為已對土地及自然資源形成嚴重不可逆轉之侵害結果(例如:使用挖土機等機具大量盜伐林木等) 或有侵犯他人人性尊嚴 (例如:竊取或搶奪他人已合法採集之森林產物等) 之情形，否則國家不得任意限制。」).

improvisational practices were largely ends-oriented, directed towards securing indigenous rights in an ambiguous legal framework, and did not appear to be driven purely by instrumental logics (cf. Riles 2006). Nor were they bound by legal categories or the possibility of only two opposing results (guilty, not guilty), or even to the "correct" regimented talk of positive law (cf. Mertz 1992). Rather, in their improvisation they adopted strategies that pushed the limits of what was possible in judicial thinking, looking both within and without the law to craft a set of workable approaches.

These struggles and the creative approaches judges adopted to deal with them did not occur in a vacuum. Rather, they were precipitated by encounters with indigenous alterity. In the courtroom, judges confronted indigenous actors and participants living according to different rules and with different understandings of the world: Paiwan and Tsou Nation hunters used firearms in their wildlife hunting; Atayal and Truku Nation community members gathered beechwood and rhodonite stones; Thao Nation communities made claims to traditional territories; Truku Nation communities articulated different ways of viewing Taiwan history and land; Atayal Nation people buried loved ones in the mountains according to tradition; and indigenous peoples around the island had different understandings of property. Later chapters describe how indigenous actors strategically used language and framed disputes in the courtroom to amplify their cultural differences as well as spoke indigenous languages and behaved in ways that unintentionally amplified these differences (see Chapter Six). These encounters formed the backdrop to judges seeking the assistance of local experts, engaging in independent study, and, importantly, developing creative solutions to address the special challenges cases involving indigenous custom and tradition posed. Again, judicial responses to these encounters varied as judges brought with them different understandings of the purposes of the special units and drew

upon different techniques for resolving indigenous peoples' cases. While some judges were creative in response to these encounters, others felt distress, labeling indigenous practices as "dangerous" and questioning whether the concept of special protections for indigenous peoples was consistent with Taiwan principles of justice. There thus existed a range of responses—from creative to fearful—to encounters with indigenous "others" in the special units.

Punctuated Ontology and the Reflexive Turn

In my search for whether Taiwan's special indigenous court units were really "there," aspects of coordination, knowledge, rules, documents, and practices suggested that the special units were unsettled institutions. Having only a soft organizational ethos, the special units exhibited relatively significant mission drift, ranging from accommodating indigenous cultural differences to greater awareness about indigenous peoples' socio-economic condition to assimilating indigenous peoples into Han majority society. Knowledge was also weak within the special units as judicial training about indigenous cultures and legal protections was generally inadequate, although for some judges this weakness motivated them to engage in self-study or to seek out expert assistance. The unruly organizational rules of the special units tended to distract from the general goal of the special units to respect indigenous cultural differences. Documentary practices within the special units consisted of ordinary court documents, with one distinctive difference—the use of the character, *yuan*—which simultaneously distinguished indigenous cases from others and surreptitiously introduced assumptions and stereotypes about indigenous peoples.

Praxis within the special indigenous court units largely replicated the practices of ordinary courts, but creative practices within and around judicial habitus offered a clue to the

ontology of the special units. Namely, the ambiguity of having an institutional mandate to respect indigenous cultures and provided with few tools to do fulfill this objective, combined with an encounter with indigenous “others,” were important conditions that motivated some, not all, judges to seek out analytical tools from extra-legal sources to resolve cases involving indigenous custom and tradition. In these moments, the special units emerged as something more than ordinary courts dominated by routine understandings of and approaches to law. In general, the special units operated as ordinary national courts, with very few notable differences. They tended to follow the general aims of the national court infrastructure; they drew on the common training of judges, supplemented with nominal training about indigenous cultures; they utilized the same documents; and they managed cases like ordinary cases. At times, however, something exceptional happened: judges worked to find creative strategies, sometimes looking beyond the law, to incorporate indigenous peoples’ cultures, knowledge, and views of the world. They worked to infuse indigenous mental states into criminal statutes. They focused on balancing interests rather than formal rules. They reconfigured the hierarchy of domestic law and thus rule of law in Taiwan. And, they looked outside of positive law towards natural law.

This was not, however, simply a top-down imposition of judicial creative practices. Rather, these creative practices were responses to indigenous differences encountered in the courtroom; not mere differences, but perceived powerful differences compelling judges to reflect on their assumptions about law, culture, and reality. It was in these moments of self-conscious reflexivity that the special units found their greatest case for existence as they were emancipated by degrees from the strictures of ordinary legal process to address indigenous customs and traditions. Importantly, these reflexive moments were flashes rather than sustained runs. The special units were thus itinerant, emerging in different places at different times. They were also

diverse. There was no “one” special unit; there were special units employing different strategies to deal with different issues. The common thread binding them was a willingness of judges to engage in self-reflexive thinking. To the extent that the special units were “there,” they were less the product of a special mandate, specialized knowledge, particular rules, or documentary forms than the expression of a self-reflexive awareness of judges about the limits of Han Chinese ideas about law, culture, and reality.

These moments of punctuated existence, as the special indigenous court units shifted from ordinary to extra-ordinary court bodies, were significant as they influenced how judges considered indigenous cases and impacted how courtroom actors interacted with one another. They were also significant in their variation. Special unit judges had mixed responses to encounters with indigenous “others.” They also developed different strategies to resolve the tension generated by having an institutional mandate but few tools to accomplish it. These features indicate that the special units were a diverse set of institutions having different understandings of their institutional role, different levels of knowledge about indigenous peoples, different attitudes towards indigenous difference, and developing a range of pluralistic responses to indigenous custom and tradition, all coexisting within the same institutional framework. To the extent that the special units would build a repository of case law upon which future judges could draw, the multiple manifestations of the special units forms the backdrop to such a body of jurisprudence.

CHAPTER SIX

Performing Indigeneities:

At the Intersection of Law and Indigeneity

DRAMATIS PERSONAE.

DEFENDANT, Atayal Nation criminal defendant.

ELDER, Amis Nation elder.

JUDGE, non-indigenous District Court judge.

JUDICIAL OFFICIAL, non-indigenous Judicial Yuan official.

LAWYERS, indigenous and non-indigenous lawyers at a law center for indigenous peoples.

LEADERS in a Truku village.

RAKAW, Truku Nation elder.

MEMBERS of Atayal, Paiwan, and Truku Nation villages.

PANEL OF JUDGES, non-indigenous High Court judges.

WITNESS, Atayal Nation elder and uncle to Defendant.

PROLOGUE.

The discussion to this point has largely concentrated on how Taiwan's special indigenous court units were connected to the state apparatus, notably in their institutional history, embeddedness in national court infrastructure, uneven legal framework, and administrative actors. Throughout, however, indigenous actors have intermittently emerged as significant actors in their own right: pushing for legal reform and institutional innovation, engaging in cultural practices in postures of refusal, adapting customary practices to address ambiguities in law, challenging state power over land and natural resources, and contesting prevailing stereotypes about indigenous peoples.

This chapter turns its attention directly to the ways indigenous actors engaged with Taiwan's special indigenous court units. I concentrate in particular on performances of indigeneity and how these displays shaped interactions between indigenous and non-indigenous actors in disputes over custom and tradition.[69] Scholars observe that such performances are fundamental to understanding the contextual, emergent, and processual nature of indigeneity as indigenous persons fashion and refashion identities through embodied speech and action (Graham and Penny 2014a: 2). For both indigenous individuals and groups, these performances often entail deeply contextualized and historically contingent creative acts.

Performance analysis has its roots in ideas articulated in Aristotle's *Poetics* (1986), the notion that life is action and that staged drama is designed to imitate life. As William Shakespeare (1623: 36) observed, "All the world's a stage," reminding us that performance is a part of everyday life and social interaction. Thus, conceptualizing life as performance has a long

[69] Throughout this chapter, I refer to indigenous "performance" recognizing that the term leaves much out of consideration and has potential to offend. I use this term with the understanding it has entered analytical parlance and has the capacity to shed new light on important dimensions of indigenous experience with respect to Taiwan's special indigenous court units (Johnson 2014: 149).

history. Until the mid-twentieth century, the social sciences largely ignored the performative aspects of human social life. Around this time, scholars from diverse fields began to turn to performance analysis as a way of interpreting culture and human life. Sociologist Erving Goffman (1974), language philosopher John Austin (1962), and folklorist Richard Bauman (1974; see also Bauman and Briggs 1990), among others, laid the foundation for a "performative turn." This intellectual turn aimed to bring greater attention to context and address the constitutive nature of everyday performance, illuminating how meaning and action merge in a non-reductive way, revealing the constitutive power of repetitive acts, imitations, and miming of conventions (Alexander and Mast 2006: 16).

Scholars of indigeneity have utilized performance theory to analyze displays of indigenous identity. Howard Morphy (2006: 471-472) observes that indigenous performances serve as "sites of persuasion" in that indigenous persons attempt to "get their versions of history and regime[s] of value acknowledged and disseminated to wider audiences." Through this dialogic process, indigenous actors draw on histories and traditions to "make" (Butler 1990, 1993) themselves and engage with broader publics through iterative acts of performance. As bodies in space and time, these performances leave traces marking exclusions and inclusions, which enable and disable their ability to represent—their communities, their identities, and themselves (Coole 2007). In so doing, they also structure the possibilities for destabilizing power (Rai 2010: 288). Scholars have examined performances of indigeneity across various contexts including art museums, classrooms, courts of law, hobby groups, international bodies, museums, sports teams, and urban spaces (see Graham and Penny 2014b). These studies demonstrate how indigenous performance can be a powerful means of asserting, constituting, and expressing

indigenous identity in a historical context where the stakes of being identified and recognized as "indigenous" have reached new heights with the emergence of a global discourse on indigeneity.

I draw on Elizabeth Povinelli's (1998b, 2002) work on Australian Aboriginal identity to examine how indigenous persons in Taiwan were compelled to perform their identities in ways that mainstream society could accept and understand. Scholars of Taiwan have used her work to examine the paradoxes of indigenous recognition for modern-day indigenous peoples (Friedman 2018; Ku 2011; Yang 2011). I find that performances of indigeneity—or, perhaps more properly, "indigeneities"—in and around the special indigenous court units were multivalent, involving a repertoire of techniques where the pitch and tone of creative acts of indigenous identity changed in response to context, goals, and understandings. To capture these nuances, I supplement Povinelli's account with other thinkers—Audra Simpson, Ludwig Wittgenstein, Erving Goffman, and scholars of indigenous performance. While liberal multiculturalism politicizes culture, drawing indigenous peoples into expressions of cultural identity that further marginalize them, Taiwan's special units, at times, opened spaces for indigenous aspirations and perspectives that were not over-determined by mainstream society. I emphasize here indigenous peoples' agency as theorizing agents making varied, sometimes seemingly inconsistent, sense of their identities in relation to the Taiwan state (Baglo 2014: 137). In this regard, the chapter continues the exploration of how the special units opened, by degrees, a space in which indigenous actors could debate and contest the terms of their identity and association with the Taiwan state.

Performances of indigeneity in and around Taiwan's special indigenous court units occurred along a spectrum. At one end, performances included dramatic displays of indigeneity, what Bernard Perley (2011) calls "charismatic Indigeneity" and Alcida Ramos (1994) refers to as the "hyperreal Indian," which were self-conscious and amplified performances of indigenous

identity often drawing on popular imaginings of indigenous peoples. At the other end, they included low-key performances, what Greg Johnson (2014) calls "bone-deep indigeneity," which occurred in unheralded places and involved the unmarked and unremarked work of managing a broken legal system. Just as important were the mixed and tortuous performances of indigenous identity occurring between these extremes.

In analyzing displays of indigenous identity within the special indigenous court units, I highlight dimensions of self-consciousness and amplification, that is, the degree to which participants were conscious or unconscious of their behavior and the degree to which their behavior amplified or played down indigenous identity. Graham and Penny (2014a: 13) observe that paying attention to charismatic and low-key performances can teach us a great deal about what it means to "be" indigenous and what matters for people who claim this identity. In that sense, this chapter also addresses ontology, what "being" indigenous meant in the special units. In offering a space for multifaceted displays of indigeneity as well as critiques of state power, Taiwan's special units served as fora for debates about difference and non-identity.

I take seriously the idea that performance is part of everyday life and social interaction. To keep this theme at the forefront of the analysis, I "stage" this chapter as a drama. I use the structure of a theatrical text as a metaphor to foreground how the special indigenous court units shaped indigenous performance and how such performances, in turn, shaped the special units.

FRONS SCENAE. Law in Monochrome, Life in Color

In her analysis of performances of Maasai identity at UN meetings, Dorothy Hodgson (2014: 62) observes that the UN offices, events, and publicity associated with indigenous peoples are often suffused with "culture as collage"—art, artifacts, icons, images, and performances of

indigenous peoples drawing on and reproducing tropes of indigenous peoples as artistic, "authentic," colorful, and spiritual—displays in which indigenous performers are also complicit. Courts in Taiwan, including the special indigenous court units, were far from this description. No art, no artifacts, no icons, and no images of indigenous peoples inhabited Taiwan courthouses. This absence was made all the more notable by the many representations of indigenous persons adorning other local public buildings: signs in the main hospital were written in Amis language, the local library exhibited artwork made by indigenous artists, and larger-than-life portraits of indigenous persons hung on the walls of the local train station.

As noted, the court's design, organization, practices, and symbolism reflected and reinforced the interests and values of the Taiwan state. Indigenous peoples' customs, identity, and methods of dispute resolution were conspicuously absent. Indigenous custom and tradition was recognized not "as law, but as fact" (Kerruish and Purdy 1998: 153) to be proved through evidence. State law was viewed as authoritative, requiring maintenance and fine-tuning, while indigenous custom was something to be "discovered," as something "always already there" to be excavated but never regarded as guiding (Demian 2003: 110). The only visible marker of any recognition of indigeneity was the presence of a Chinese character, *yuan* (原), in the docket number. Moreover, all this occurred in a framework of indigenous protections that had stalled: the Indigenous Peoples Basic Law's promise for changing Taiwan law remained unfulfilled, and Taiwan courts had few tools for securing indigenous justice. Consequently, courts were largely left to view indigenous cultures through the monochrome texts of black letter laws and jurisprudence that largely excluded indigenous views and justice practices (cf. McCloud 2018).

Yet, the previous chapter suggests that the bright line between monochrome law and colorful life is never so distinct as the special indigenous court units offered an uncanny glimmer

of something different. Although not having strong coordination, robust specialization, clear rules, or distinct documentary practices, these special units operated as everyday institutional spaces mediating between Taiwan's ethnic Han Chinese and indigenous societies. At a fundamental level, their purpose was to facilitate communication across these cultural divides. While there was great variation among judges about how to enact that purpose, to the extent that the special units were oriented towards indigenous cultural differences, they were uniquely positioned to introduce the "color" of cultural life into legal proceedings. The color alluded to here is not a reification of indigenous peoples as "colorful"; rather, it is a reference to the shades and tones of real life: the experiences, interactions, and meanings of daily life on which the norms of black letter law and jurisprudence overlay. Already we have seen how the line demarcating social life and black letter law is an arbitrarily constructed one,[70] and the special units were in a unique position to capture something of the "culture as collage" approach used in the UN bodies Hodgson describes, not through visible representation but through a facilitated discursive space—a space that fostered negotiation and debate and invited discussion with contradictory views (Macalik, Fraser, and McKinley 2015: 1). The special units opened, by degrees, a space for pluralistic expressions of indigeneity and critiques of the state that may not have been otherwise possible in other state institutional settings, suggesting, as Rosemary Coombe (2007) phrases it, the work of rights at the limits of governmentality.

ACT ONE. Tensions and Torsions in the Politics of Representation

Elizabeth Povinelli (1998b, 2002) explores the relationship between "recognition" of indigenous tradition by the multicultural, liberal settler state and its simultaneous construction of

[70] Additionally, black letter law and court decisions can themselves be rich sources for ethnographic study. Rebecca French (2009), for example, argues that such sources can shed new light on social shifts chronicled in anthropological, sociological, and religious studies literature.

aspects of native society. She argues persuasively that within the act of recognizing indigenous identities, liberal multicultural discourses are loaded with contradictions and embedded within power relations. Building on the Lacanian concept of "meconnaissance" (2002: 39, 276n14), she shows that multiculturalism aspires to welcome and solicit a plurality of ways of life while reserving a power to refuse behaviors and ideas that are offensive to it. For her, "law is one of the primary sites through which liberal forms of recognition develop their disciplinary sides as they work with the hopes, pride, optimism and shame of indigenous and other minority subjects" (2002: 184). A "cunning"—inspired by Georg Hegel's (1837: 47) "cunning of reason" (*List der Vernunft*) (Povinelli 2002: 17)—resides within liberal multiculturalism: in the moment of acknowledging and seemingly conceding to cultural difference and expression, the politics of recognition authorizes, and in so doing disciplines, regulates, and constrains alterity. To be recognized, therefore, indigenous peoples are required to "transport to the present ancient pre-national meanings and practices in whatever language and moral framework prevails at the time of enunciation" (1998a: 23). Thus, politicians send a triple-message to disempowered indigenous communities: your culture is fundamental to your lifeways; your culture makes no rational sense in the assessment of your lifeways; and you are expected to perform a culture that you never could have known yourself (i.e., a pre-contact culture as authentic) (cf. Povinelli 1995: 516). This triple-message emanates from other sources as well. Indigenous peoples often find themselves caught up in activities of self-monitoring and regulating who and what they are. Performance is, thus, a site where indigenous persons "struggle to inhabit the tensions and torsions of competing incitements to *be* and *identify* different" (2002: 13, emphasis in original).

Povinelli's understanding of "recognition" can be brought into relief by comparing it to the work of philosopher Charles Taylor (1994). Taylor, while acknowledging the Hegelian

(master-slave) dialectic, argues that the "recognition" and preservation of encapsulated and constrained cultural identities is part of what the good life can be, for which institutional provision should be made. Whereas Taylor expresses optimism about the possibility of reconciliation through creating a regime of reciprocal dialogue oriented toward a fusion of horizons (Schaap 2003: 530), Povinelli sees an *in*capacity of liberal states to recognize alterity (Merlan 2018: 233). In her view, inherent in liberal multiculturalism's logic of recognition are inevitabilities of derangements and rearrangements of subjectivity.

Audra Simpson (2014) builds on Povinelli's work and advances a similar thesis with respect to the performance of indigenous identity. She explores how the social sciences construct indigenous peoples into subjects on the basis of cultural difference. Social scientists, much like settler society in liberal multiculturalism, require indigenous peoples to express a specific version of cultural difference, of "otherness," instead of an autonomous one, independent of settler and colonial provisions (2014: 20). Narratives of indigenous peoples show that culture has become the test of indigeneity rather than legal agreements, such as treaties. Indigenous peoples, in turn, adopt this language of difference and culture in ways that contribute to their disempowerment. Shifting away from a narrative of resistance, Simpson explores the concept of refusal as indigenous groups refuse "to let go, to roll over, to play this game," rejecting the hierarchical relationship between the state and society (2016: 330). Simpson, herself, conducts an ethnography of refusal (2014: 102; see also Simpson 2016), examining what happens when ethnographers refuse the language of difference and culture, and substitute in its place the language of citizenship, politics, and sovereignty.

A recent example in Taiwan politics exemplifies the contradictory approaches embedded in liberal multiculturalism. On December 25, 2018, Tainan City councilor Ingay Tali, an Amis

man, took the oath of office in Amis Nation language, wearing traditional Amis attire and turning his back to the portrait of Sun Yat-Sen, former leader of the KMT and founder of the Republic of China, hanging in the legislative chamber (Hioe 2018a). He later explained that he aimed to bring attention to how indigenous peoples had been forced to assimilate into Taiwan's ethnic Han Chinese framework, offering a broad critique of the ROC governmental framework. While his actions won him accolades among indigenous activists, his performance drew outrage from the local government. The city declared his oath invalid on the grounds that it was conducted in Amis language. Coincidentally, the very same day the Legislative Yuan passed the *National Language Development Act* (*guojia yuyan fazhanfa*, 國家語言發展法), which stated that all languages spoken in Taiwan would be treated equally without limitations placed on their usage (Fang and Kao 2018). Thus, while Taiwan has worked to shape itself into a liberal multicultural society, the city government nonetheless found it offensive and threatening that Mr. Ingay would use indigenous language in his oath. On January 8, 2019, the city capitulated and recognized Mr. Ingay's oath in Amis language (Tali 2019).

Indigenous persons entering the special indigenous court units faced the "cunning" of multiculturalism as they negotiated the contradictions of acceptance and expectation of Taiwan society. The three "scenes" below track different performances by indigenous actors in a civil case hearing involving a Paiwan village destroyed by a typhoon in 2015. The village brought a lawsuit against the county government alleging that it improperly maintained the river adjacent to their community. During the typhoon, the river flooded, washing away their homes, personal belongings, fields, and access routes to traditional lands.

The first scene recounts how community members strategized to address mainstream stereotypes and understandings of indigenous identity. The second scene describes how the

community acted as sophisticated legal actors, downplaying cultural difference and emphasizing legal practitioner-like erudition. The third scene shows how the community unconsciously performed everyday practices that accentuated their cultural difference, seemingly at odds with their other strategic displays of identity. These three scenes—from a single court hearing—introduce the multitudinous, tortuous, and sometimes contradictory performances of indigenous identity that occurred in the special indigenous court units.

Scene 1

In July 2016, I joined a group of Paiwan community members in southern Taiwan making plans for a trial the next day in the Taitung District Court. They were coordinating transportation for villagers who want to travel to the courthouse, a two-hour journey by van from the mountains to the city. During the meeting, a debate took place about what they should wear to the courthouse. The discussion went as follows.

"What should we wear?" someone asks.

"Traditional clothes," another answers.

"And hats? We could show up dressed in traditional clothes, all of us," someone else proposes.

"No. Not traditional clothes," the organizer says. "That makes us look ancient. . . . Let's wear something that shows we are together, in unity, that we are here but not like we are in history."

This debate continued for a while longer. Ultimately, the group agreed to wear matching plain black t-shirts—black being a traditional color of formal Paiwan dress.

The next day, 22 members of the village showed up outside the district court building. They dressed in the same plain black t-shirt, but some wore additional elements of traditional

attire, such as bracelets, pants with small silver studs, and wrapped skirts. I was told that later there were lingering disagreements about the matter of dress, and some people decided, on their own, to wear formal accessories.

As the hearing began, the group filed into the back of the courtroom, filling up the gallery. More people stood outside the door. This was a strong visual display of Paiwan solidarity. A sea of Paiwan villagers in plain black t-shirts directly faced the judge.

A month later, I spoke to the judge, and he raised the issue of the community's dress. He said, "Did you see they were all wearing the same clothes? They will do this. Indigenous people will come to the court, if the case is something the village is worried about, related to their culture, they will come together dressed in their traditional clothes."

The Paiwan community members were strategic about their dress in the courtroom. Ronald Niezen (2003a) observes that courts of law tend to frame indigenous culture as static and "frozen in time." To mitigate this, the village adopted a version of dress that avoided such an interpretation of their culture. Yet, not all members of the community were in agreement. Individually, some decided to wear elements of formal wear despite the decision of the larger group not to do so. Consequently, the performance of indigeneity in the courtroom was uneven, displaying different understandings of identity as individuals approached the issue of dress in different ways.

Moreover, the judge failed to understand the community's message. He did not recognize that the community members wore ordinary t-shirts, not formal dress. While the community regarded their display as tempering their cultural difference, the judge nonetheless viewed them through a logic of cultural difference. He reconstructed their dress as yet another performance of

charismatic indigeneity, wearing what he believed to be "traditional clothes" despite their explicit intention and collaborative efforts to avoid this interpretation.

Scene 2

Over the course of the months-long trial, the Paiwan community dutifully collected and bound all the case filings, court orders, maps, riverbed diagrams, and hearing transcripts into a single volume. I had an occasion to flip through the tome. It was full of sticky notes, marks in the margins, highlighting, underlining, etc.—it was a well-worked collection of documents. During hearings, members of the audience passed this volume around the room as individuals requested it. The tome bounced from hand to hand, sometimes high up in the air. When the volume reached its destination, the person who requested it would open it, often loudly scraping among the pages. The person and her or his neighbors would then point to the text and mumble audibly. This was such a conspicuous and distracting display that at one point the county government's lawyer sat staring at the action in the audience and did not hear a question from the judge.

During the hearing, a member of the audience simply had enough of the opposing lawyer. The lawyer was sitting in his chair discussing specifications about the riverbed and arguing that it was maintained properly when a Paiwan man sat straight up. Holding up with the volume, he confronted the lawyer, stating loudly in Chinese, "But you said just the opposite last time. Look here. [Pointing to a page] You say the opposite!" The bailiff took a step toward the man. He leaned back, grumbling to his neighbors.

If there was a subtext to this display, it was, "We know this game of law, too." This was a performance demonstrating the village's investment in the case as organized, sophisticated legal actors in their own right. The community came to each proceeding carrying this bound set of materials with them. They studied the materials outside the courtroom, evidenced by the sticky

notes, highlighting, and quick work in finding desired passages and photographs. In certain respects, their conduct suggested they were *more* capable than the legal actors in the courtroom, indicated by displays of correcting the lawyers. Here, indigenous cultural difference was largely set aside, replaced by a performance of legal aptitude and, more generally, modernity within the courtroom.

Scene 3

In the midst of strategic decisions about attire and passing around large volumes of legal documents, members of the Paiwan community sat in the back of the courtroom and spoke to one another in Paiwan language. They made jokes, gave instructions, explained what was going on, and offered commentaries to one another about the proceeding using their mother tongue. Sitting in the back, the whispered din of Paiwan language made the courtroom feel in some ways like an ordinary community meeting at the cultural center in the village.

And just like a village meeting, as the hearing progressed the potent and distinctive smell of betel quid grew as members of the community sat and chewed it as they watched the courtroom drama unfold. It was not simply its pungent smell; it was also the sound: in the empty space of formal silences in the courtroom and between the single-speaker turn-taking format of legal proceedings one could hear chewing and sucking as community members, men and women, worked betel quid in their mouths. Strong associations exist in Taiwan between indigenous peoples and use of betel quid (Ma et al. 2017). Paiwan language and betel quid were powerful aural and olfactory indicators of an indigenous presence within the courtroom. They also made the community members more "out of place" in the Han-culture suffused courtroom, where there were not supposed to be aural or olfactory interruptions.

These usages of Paiwan language and betel quid were largely unconscious displays of Paiwan identity. There were, in Erving Goffman's (1959: 208) theorization of "impression management," the image one gives off, rather than gives, to the world—unintentional behaviors in the image of ourselves we convey to the world. In the village, these were unmarked features of daily life. But, sitting here in the back of the court, the symbolism of these acts was powerful. Many in number, dressed all the same, in full view and earshot of legal actors, the Paiwan members in attendance "occupied" this area of the courtroom as their own. No signage indicated they could do so; in fact, signs expressly prohibited talking during proceedings and chewing betel quid. Yet, in this courtroom on that day, this was their space as they engaged in unconscious behaviors ordinarily confined to the boundaries of the village.

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"Being" Paiwan during this court proceeding was multivalent. Displays of indigeneity involved self-conscious adaptations to address preconceived notions about indigenous persons. Other displays eschewed indigenous difference to emphasize "modern-ness" as sophisticated state actors. Still others unconsciously reinforced indigenous cultural difference. These displays negotiated the "cunning" of multiculturalism in Taiwan. To "be" indigenous in the special indigenous court was a complexly layered phenomenon. These layers attached to different levels of consciousness about indigenous identity as well as varying amplifications of difference. Further, different actors approached performance of identity in different ways such that, as a whole, the presentation of Paiwan identity was uneven, sometimes even contradictory, in the courtroom.

The discussion above indicates the complex assemblages of performances of indigenous identities that could occur in the span of a single court hearing. I explore in the sections that

follow other dimensions of indigenous performance that arose in the special units. Many of these displays could be analyzed as above, within a framework emphasizing contradictions embedded in a legal system that claimed to support indigenous difference while simultaneously seeking to domesticate indigeneity. Performances challenging this framework often get framed in a rhetoric of "resistance," where indigenous actors engage in, for example, activities James Scott might characterize as "weapons of the weak" (Scott 1985), such as failing to appear in court. But this framework assumes prior recognition of a hierarchy between the state and indigenous societies. What if indigenous peoples do not understand their actions in those terms or, at least, intersperse other understandings (cf. Keesing 1992: 5)? Audra Simpson's work on indigenous "refusal" moves in this direction, shifting away from approaches tending to overestimate the place of the state and treating suppression as an all-encompassing frame. Under this account, indigenous actors refuse to "play the game" of the state, rejecting the existence of a hierarchy between state and society.

As discussed below, performances of indigeneity in and around the special units at times adopted this posture, this countenance, of refusal. Noted earlier, these displays came in the form of assertions that national land was indigenous land and that there were other political orders and other normative possibilities than those assumed by the Han Chinese-dominated state. At other times, "refusal" took the form of taking matters into their own hands by attempting to strike a balance between indigenous customary practices and state expectations through codifying customary norms or taking on the role of managing a derailed legal framework of indigenous protections. In important respects, these performances of refusal were facilitated, but not determined, by the particular space of the special units as they opened a playing field for expressing alternative narratives about identity, land, and law.

ACT TWO. Language Games

In September 2018, I arrived at the Taiwan High Court with a lawyer friend to observe an appeal involving an Atayal man. The prosecutors' office charged the man with possessing illegal firearms and ammunition and then threatening to use one of the firearms to harm another person. The issue before the court was whether the man possessed the firearms for a legitimate purpose within the meaning of Article 21-1 of the *Wildlife Conservation Act* (*yesheng dongwu baoyufa*, 野生動物保育法). The defendant's uncle, an Atayal elder, appeared before the court to testify that the defendant's father, his brother, used the guns for traditional hunting purposes in accordance with Atayal custom.

At the previous hearing, the Atayal defendant failed to show up. His lawyer called to remind him of the hearing, but the defendant claimed to have forgotten, leaving his lawyer in the awkward position of having to explain his absence to the High Court. The lawyer told me later he anticipated that the defendant would not show up: "Sometimes defendants, indigenous defendants, are upset because they think the case is unfair. So they do not show up. They try to make the court change the date for them" (Interview 110). The judges ultimately granted the defendant a short extension of time.

As the hearing began, police led the defendant into the courtroom in handcuffs. Between the prior hearing and this one, the defendant had been convicted of stealing a spark plug from a weed eater. It also turned out the defendant was in the middle of a third prosecution for allegedly taking someone's truck he found parked on the side of the road and used to drive his elderly mother up into the mountains. He defended himself saying that, based on his Atayal culture, he did not know it was wrong to use the spark plug or the truck and that he intended to return them both.

The hearing took place before a three-judge panel. The presiding judge called the Atayal witness to the stand. The following exchange took place:

The judge asked, "Can you speak Mandarin Chinese?"

"A little," the witness responded, nodding.

Raising an eyebrow, the judge looked at the other members of the panel and at the defendant's lawyer, who had recommended the witness.

The judicial assistant walked over to the witness carrying an affidavit. Under Articles 186-189 of the *Code of Criminal Procedure* (*xingshi susongfa*, 刑事訴訟法), witnesses must read aloud and sign a written affidavit, affirming they will tell the truth. The affidavit was in Mandarin Chinese, and the witness could not read it. The judicial assistant stood over him and read the text to him line by line. The witness repeated what the assistant said verbatim and signed the form.

Speaking slowly and deliberately in Mandarin Chinese, the judge asked, "What do you know about the defendant's guns?"

The witness stared quietly at the judge.

The judge repeated the question.

The witness answered the question in Atayal language. Behind him, four members from the Atayal village sat in the gallery. He turned around, and spoke to them in Atayal language. One of the villagers told him what to say in Mandarin Chinese. He repeated what she said to the judge: "His father used the guns. He used them for hunting."

The judge asked, "What did he hunt for?"

Anticipating the question, the witness responded with a list of items in Atayal language, counting them on his fingers. Again, he turned to speak to the villagers behind him. After telling him what to say, he turned to the judge and said only, “Flying squirrel.”

The judge asked, “Did his father ever take the defendant hunting in the mountains?”

After a pause, the witness responded in Mandarin Chinese, “No.” The villagers behind the witness erupted. He turned around and they had an intense conversation in Atayal language. He then turned back to the judge and said, “Yes.”

This went on for 20 minutes. The judge was patient but appeared skeptical. At the end of the hearing, the judge told the defendant’s lawyer that he was satisfied the guns were used for customary hunting practices. This issue was, therefore, resolved.

We stepped out of the courtroom. The lawyer spoke to the witness and to the villagers in Mandarin Chinese, offering his assessment of the proceeding. The Atayal witness’s Chinese language ability was relatively strong, more so than his testimony in the courtroom suggested.

After everyone left, I asked my friend, “What just happened in there?”

He replied, “Earlier, I spoke with some people in the village. We needed a witness to tell the judge that the guns were from his father and were used for traditional hunting purposes. But if you just say that, the judges may not believe you. So, they talked about using their mother tongue. They had heard that other people do this, that they use their mother tongue to make the court see that their culture is different. So, they decided to speak in Atayal language to the judge. The witness was very nervous, and his Chinese is so-so. He also cannot read, so it was sort of like a performance but also sort of a more comfortable way of talking for him.”

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The witness's usage of Atayal language served both a disruptive and a meta-communicative function. Ludwig Wittgenstein's (1953) concept of "language games" is helpful in this regard. Wittgenstein is familiar to many anthropologists through his private language argument—the idea that a language understandable by only a single individual is incoherent (1953: 256)—which was influential in semiotic approaches to cultural interpretation (e.g., Geertz 1973: 12-13). Scholars ranging from sociologist Pierre Bourdieu (1987) to linguist Charles Goodwin (1994) have also addressed Wittgenstein's concept of language games in analyses of law and legal process.

In his later work, Wittgenstein (1953: 23) argued that every word we speak is part of a "language game," such that speaking is fundamentally "part of an activity, or of a life-form." Generally, language games are the conceptual parameters we share that make it possible to identify and produce signs and create relations of signification and representation (Xanthos 2006). It is similar to sharing in an inside joke: you only get the joke if you are in on the joke. In the same way, you only understand language if you are familiar with the shared rules and concepts of the language. Like playing a game with someone, to use language there must be some common understandings. Language, understood this way, is inextricably tied to context.[71]

Language games also exist at different levels of abstraction. Wittgenstein identifies "families" of language games (1953: 65-71). Learning a field of study, such as law, for example, involves learning the related language games of interpreting legislation, courtroom procedure,

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[71] One may draw a connection between language games and speech acts (Xanthos 2006). According to John Austin (1962) and John Searle (1972), when we speak, we are preforming illocutionary acts, such as affirming, promising, asking, suggesting, refusing, etc. When we promise to do something, for example, we do not promise to do it just any way. Rather, we promise to do something in the future, something that will not necessarily come about on its own but that we intend to do and the promisee views as positive and valuable. That is similar to the concept of language games: our semiotic practices are rule-guided practices. In language, words are not presented by chance but rather they find their legitimacy and relevance within a set of rules determining their use.

drafting complaints, witness interrogation, and so forth (Gozzi 1998: 190). These language games may be considered part of a larger family group of language games we may identify as "the Justice System."

Here in the courtroom, actors played multiple language games in the same institutional space. The judge engaged in a language game of courtroom procedure within the larger family of "Justice System" language games in Mandarin Chinese. The indigenous witness strategically played a different language game: the language game of customary hunting in Atayal language. The witness, thus, intentionally played the "wrong" language game, so to speak, to accentuate his and the defendant's cultural difference.

Other legal actors and indigenous persons reported that indigenous litigants and witnesses, at times, strategically spoke only their native language, or code-switched (Grosjean 1982: 145) between Mandarin Chinese and their native language, in an effort to compel the court to recognize their cultural difference (Interviews 003 and 073; Conference on Indigenous Lands, Taipei, Taiwan, May 27, 2016). One lawyer recounted an amusing story where his Paiwan client pretended not to be able to speak Mandarin Chinese but also could not speak his mother tongue very well. As a result, his client's testimony consisted of an extended soliloquy of Paiwan-sounding, but largely unintelligible, words. The defendant later explained his reasoning to the lawyer: "I wanted the judge to understand that a different culture was in the courtroom; that he should be sensitive to my culture. That they have to use my language to talk about it" (Interview 073).

The theatrics of performing the "wrong" language game in the courtroom served a meta-communicative function. These linguistic performances operated as communicative devices to impress upon judicial actors that another culture was present in the courtroom and that

indigenous participants should be addressed in such terms. This was a “meta” language game in that participants’ refusals to play the ordinary court language game staked a claim about the language game that *ought* to be played in the courtroom. What from one perspective constituted the “wrong” language game was, under another a language game of a higher order, a game conveying a metapragmatic instruction that judges should be reflexively aware of language use and its connection to mainstream Han Chinese ideas about culture and normativity.

Notably, for this communicative operation to work effectively, judges had to share in the rules of the “meta” language game. The structure of the special indigenous court units facilitated this sharing of rules about communication. As an institutional space of specially trained judges with a mandate to “respect” indigenous cultural differences, including its provision of special interpreters, the court offered a forum for certain critical commentaries to take place—here, through a dislocation of language. Judges in the special units reported that they were aware of this game and its purposes. As one judge stated,

> Have you seen when indigenous people use their indigenous language in court? Sometimes they will do this even when they can speak Mandarin Chinese. . . . But I know why. They are not trying to make trouble, I do not think. They want me to know that they have a different culture, that they are not Han Chinese. I know this. (Interview 058)

The institutional space of the special units, while remaining state-dominated bodies, offered an opportunity to create a judicial environment where reflexive thinking about language and state power could occur. It was a space where performances of indigenous identity had an opportunity to be “heard” (Torrest and Milun 1990: 649), albeit sometimes imperfectly (as noted in the vignette concerning attire). Indigenous actors took advantage of this discursive space, using it to emphasize their difference strategically and allow difference to operate as its own form of critique of state power. The next vignette explores this theme further as legal actors and indigenous actors debated how to frame situations.

ACT THREE. Frame Disputes

In performance analysis, the situation in which one finds oneself can be understood as an organizing frame of reference. Erving Goffman (1974) spoke of such a frame as addressing the question, "What is going on here?" To answer such a question, an individual organizes her or his experiential situation (1974: 7-9). One's definition of a situation depends, then, on one's reading of the frame. For instance, in developing a frame of reference, a defendant on trial may ask herself, "What is going on in this courtroom?" If the accused recognizes "Your Honor" or the coercive control of the institution, she then organizes the experience according to the particular frame: here, courtroom bureaucratic control (Asma 1997). Having recognized that she is subject to control of the judge and court system, the accused may submit to this authority and act accordingly. Authority, control, and power are significant issues that play a part in defining a court-related frame, particularly for how accused subjects perceive their situation.

But what happens when participants cannot come to an agreement about the framing of a given situation? For example, what if one of them refuses to recognize the authority, control, and power of the court and, therefore, the situation they are in? Goffman calls these moments frame disputes (1974: 321-338), instances when parties with opposing versions of events openly dispute with one another about how to define what has been or is happening. Goffman finds that such debates are "exceptional grounds" (1974: 322), which they may well be in the realm of experience more broadly, but in the special indigenous court units these debates took on particular significance as indigenous actors interacted within the court.

Goffman also recognizes that frame disputes may be of different orders. Lower order disputes involve disagreements about how to perceive events. Citing Kenneth Pike's work, Goffman (1974: 322-323) provides several examples of such disputes occurring in courts of law:

Was the man carrying a gun when he robbed the house? Did the driver run through a red light when he hit the man? In the parlance of the example above, did the Atayal defendant maintain the gun for cultural purposes, like hunting? Higher order disputes involve disagreements, not about how to perceive events which they now agreed upon but why the parties initially disagreed. Again, in the parlance of the example above, the Atayal witness's language game attempted to reframe the debate as a conflict over cultures, not a conflict within the law.

Frame analytics opens a space for a micro-analysis of law by examining how "the law" is framed and reframed in interactions and the ways in which legally delineated interactions shape and reshape reality (see also Mertz 1992). Here, frame debates among indigenous and legal actors in the special indigenous court units occurred across multiple levels.

Scene 1

First, we may return to the example in Chapter Three of the district court site visit. During the court's site visit to observe the Truku bamboo hut allegedly constructed on national land, the following encounter took place:

> Pointing to the ground, the official explained to the judge that this line demarcates national property. Rakaw angrily yelled in the official's ear: "You say this line marks ROC land. This is our land! You came here and took our territory without asking!" Moving on, the official pointed to a faded metal sign, explaining that it states this is national land. Again, Rakaw angrily yelled in the official's ear: "You say this sign says this is ROC land. This is our land! You put your sign on our land without telling us. Now you claim the land is yours!"

The official's actions, in pointing to a marked line on the ground and a metal sign as evidence of boundary markers, drew on state understandings and presumptions about state control of land. Rakaw, the Truku defendant accused of secretly taking state property, contested this framing by offering his own based on his village's historical occupation and use of the land and the unjust taking of their land by the ROC national government.

While the site visit was not an official court proceeding, the stakes were nonetheless high. Much depended upon whose framing prevailed. The state official and Rakaw competed for control over the framing, but the official held the benefit of presumption. It was precisely that presumption of state power that Rakaw sought to disrupt by forcefully historicizing the debate and emphasizing his village's connection to the land.

Scene 2

Three months after the site visit, the special indigenous court unit held another hearing about the bamboo hut. This hearing involved oral arguments from the village's legal aid lawyers and statements made by the Truku community members. Rakaw, as a community member and defendant, had an opportunity to make a statement to the judge. When it was his turn to speak, he offered a fiery account about life conditions in the village:

> We are poor and have nothing, no money, no jobs, we have so little in the village. This land and our traditional land is important to the community. It is where we get our food, it is part of our daily life. What kind of country would take away our land? What kind of country would make us use their identification cards to access our own traditional land? What kind of country would change the land laws and then tell us we cannot use our land as we need to? What kind of country would take away the little that we have?

The refrain, "what kind of country," hung in the air of the courtroom. It left a powerful impression about the condition of being an indigenous person in Taiwan. Like the site visit, it operated to reframe the discussion away from one about a violation of state law to one about the abuses of power and neglect of responsibility by the Taiwan state in its treatment of indigenous peoples. Rakaw's comments contextualized the prosecution, wrapping it in a history of colonial and cultural oppression giving rise to a socio-economic situation where indigenous peoples live in conditions of abject poverty, unstable employment, and restricted access to traditional lands and natural resources.

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The special indigenous court units facilitated these kinds of framing debates by serving as spaces where indigenous cultural differences were acknowledged and alternative understandings could be vocalized and debated. Considering frame disputes reveals the discursive space carved out within the Taiwan court system, but it also highlights a second feature: the extent to which dimensions of indigenous recognition were contingent upon the attitudes and preferences of individual judicial actors. This observation shifts the focus away from simplifications of indigenous persons confronting "the state" or "the law" (see Abrams 1988: 82; Foucault 1978: 103; Geertz 2004: 583; Stoler 2009: 50). In fact, indigenous participants never confronted those concepts any more than one confronts "colonialism," "Christianity," or "capitalism" (Keesing 1992: 6). Rather, they confronted the individual judge who adjudicated the case, the state official who led the site visit, the prosecutor who brought the charges, the legal aid lawyer who defended them, the bailiff who guarded the courthouse, and the police officer who made the arrest—each having their own personal background, motives, and private agendas embedded within broader aims of control, integration, profit, and so forth (Keesing 1992: 6-7). Here, for example, the individual preferences of the judge shaped the kinds of performances and expressions of indigenous identity that could occur within the court. It would be a mistake, however, to ignore the creative decisions of indigenous litigants as they responded to these limitations and the potential for these creative displays to influence judges.

In the instance above, for example, the judge provided relatively wide latitude for frame disputes and their implicit and explicit critiques of Taiwan state power. Yet, this judge also had her limits. In an earlier proceeding in March 2018, two Truku men (from the same village as Rakaw) were accused of killing a Formosan Reeve's muntjac without a hunting permit. The men

maintained they were not guilty on the grounds that they were hunting according to Truku tradition, which was protected by the Wildlife Conservation Act. Displeased with being in court, the men's countenance was sullen, they mumbled their answers to the judge, slouched down, and refused to look at her. The judge found this unacceptable and quickly made it clear that such behavior would not be tolerated. In the end, the hunters dropped their cultural defense, taking a guilty plea in exchange for a summary proceeding. Their lawyer later observed, "She is a good judge, but she gets angry very quickly. I tell my clients to watch out. I told these two, but they did not listen. They ignored the judge. You saw. So we had to deal with an angry judge. What were we going to do?" (Interview 079).

As the special indigenous court units made room for framing debates they served as sites for resolving the "real" (Goffman 1974: 2). In these examples, competing paradigms were at play: state power and authority on the one hand and indigenous original claims to territory on the other. Through their interactions, judicial officers and indigenous persons—echoing Gieryn's (2018b) observation about courts of law as "truth-spots"—settled disagreements about the "realness" of indigenous culture and territory, Taiwan history, and state power. The special unit offered, by degrees, a space for these debates to play out.

Place, power, preference—these contextual factors shaped the contours of frame disputes in the special units. During the village site visit, the Truku community used the change in place as an opportunity to amplify their indigenous cultural difference: holding a smoke ceremony, speaking in Truku language, and articulating a historical narrative about indigenous original claims to land. Within the courtroom, Rakaw continued to amplify difference but changed tactics by focusing on the role of the state in creating socio-economic conditions perpetuating indigenous marginalization, poverty, and inequality. Yet, there were limits. The two Truku

hunters, in refusing to acknowledge the court's authority, had to deal with the emotional state of the judge and ultimately decided it was too risky to defend their cultural practices at trial. Such were the risks of refusal. Contextual dimensions, thus, played a key role in the frame disputes arising in the special units and whether more or less amplified performances of indigenous difference were effective or possible.

ACT FOUR. Codifying Custom

In May 2018, a Truku colleague invited me to his village to participate in a community discussion about internally regulating hunting. The idea was to create a document similar to one developed by Thao hunters a year earlier in which the Truku community would "codify" its customary oral tradition of *Gaya*. The draft document, entitled *Community Hunters' Self-Management and Self-Discipline Convention Provisions* (*buluo lieren zizhu guanli zilu gongyue tiaowen*, 部落獵人自主管理自律公約條文), had a dual function. First, it would internally regulate hunting practices so as to manage natural resources. As such, it was an expression of autonomy and self-determination for the group. Second, it would be used to defend hunters in criminal prosecutions. As my colleague put it, "We will be able show the covenant to the judge and say, 'Look, here are our rules. They are here. Our hunter followed Gaya.' This covenant will help protect the hunters" (Interview 074).

Thirty-eight members of the village—34 men and four women—arrived at the cultural center in the village to discuss the hunter's covenant. Several leaders in the community, to my knowledge all men, had worked with two biologists to draft the document. The leaders had not consulted any lawyers in this process. I raised this point with my colleague, who was one of the

leaders. His dismissed the idea, saying, "Why? They do not know Gaya. With this document, we may not need them anyway."

Numerous points of disagreement arose during the meeting. The management of hunting identification cards was a particularly heated point of debate. Some community members wanted hunters to have individual cards, which would identify them by name, number, and a photograph. Others felt that this was inappropriate because it ignored familial elements of hunting. They wanted the family to manage hunting cards where the family as a unit would control who could go hunting, when, and for what animals. After a very intense debate, participants adopted the family-based approach.

Of particular note was the manner in which the participants went about "codifying" the customary concept of Gaya. For the Truku, Gaya is the sacred law passed down from their ancestors (*Otoç*) regulating relations between people (e.g., property rights, reciprocity, sexuality, sharing meat and alcohol) as well as between people and non-human persons (e.g., trapping and hunting) (Simon and Mona 2015: 6). Gaya is thus explicit with respect to treatment of game animals (*Samat*), including norms about appropriate and prohibited hunting practices. A Gaya group is made up of one or two close relatives together with other distant relatives or marriage affinities (CIP 2016: 40). Ancestral spirits enforce Gaya, which my Truku colleagues translate as "law" (*fa*, 法) when speaking Mandarin Chinese, in the immediacy of this life rather than in the afterlife. As a result, hunters who violate Gaya risk falling off a mountain or getting bitten by a poisonous snake, whereas those who abide by Gaya will be rewarded with a bountiful hunt (Simon 2015: 699; Wang 2008: 28). Moreover, the entire community is affected by Gaya, such that the ancestors inflict punishments not only on individuals but also on the Gaya group (CIP 2016: 40). Successful hunting is thus a sign of moral righteousness in and of the community. In

this way, Gaya is "a comprehensive way of life" for the Truku people (Simon 2015: 699). Fernando Pecoraro, a Catholic priest who developed a Taroko (Truku)-French dictionary, described this holistic feature of Gaya as follows: "Effectively, GAYA is at the center of the life of the Taroko, the source, criteria and the judge of their entire personal or social life from birth to death—and after! GAYA is certainly the most sacred reality for the Taroko" (Pecoraro 1977: 70; see also Simon 2012a: 173).

At the meeting, leaders passed around a printed draft of the hunter's convention. They formatted the document as one might expect to see in a state document, preparing it in Mandarin Chinese language and organizing the text into three columns: article number on the left, proposed language in the middle, and explanatory notes to the right. Because many of the community members could not read Mandarin Chinese, one of the leaders interpreted the document for the group, reading the document line by line in the village's Truku language. Of particular note was that while issues concerning the management of hunting identification cards drew considerable debate, discussions about Gaya inspired little.

Under the heading, "Community Hunters' Hunting Standards (Gaya)" (*buluo lieren zhi shoulie guifan*, 部落獵人之狩獵規範 (gaya)), the leaders outlined the substantive content of Gaya, divided into three articles. The first article described the creation and maintenance of hunting trails. The second article defined the hunting range, which, according to Gaya, consists of family hunting grounds. The third article outlined customary hunting practices under Gaya. The explanatory note stated, "This section specifies that tribal hunters shall observe the customary hunting traditions and the hunting etiquette and ethical and moral norms."[72] The substantive text identified the following features of hunting:

[72] 「本條明定部落獵人應遵守之狩獵傳統慣習及狩獵禮儀暨倫理道德規範。」

Other important hunting practices

1. Strictly observe appropriate hunter's demeanor. One cannot talk about bad news and cannot engage in obscene behavior.

2. Persons who are in mourning or in celebration are temporarily not allowed to participate in mountain hunting activities.

3. Hunting prey must be in moderation. The meat must be brought back in full. It is forbidden to abandon prey, which is a reckless waste of natural resources and offends the ancestral spirits.

4. After the activity is over, the traps on the hunting ground must be completely removed and recovered.

5. Maintain the habitats of wildlife and plants. One must maintain the natural environment by not leaving garbage and not destroying others' agricultural or forestry crops. Electrocuting fish, poisoning fish, and dynamiting fish are also prohibited.

6. Do not arbitrarily collect, burn down, deforest, or excavate stone blocks. But this does not apply in the case of activities for the custom of life, culture, or the needs of the hunter organization.

7. Do not steal the hunting prey of others.

8. Follow the rules of other community traditions.[73]

Later articles established a disciplinary committee to determine penalties for violations, which included warnings, one-year suspensions, and abolition of a hunter's license.

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[73] 「其他重要狩獵行為規範如左：
一、須嚴守獵人風範；禁談不吉祥言論，不做傷風敗俗的行為。
二、遇喪事及喜事者，均須暫時不得參加進山狩獵活動。
三、獵捕獵物須適可而止，獵獲肉類須全數帶回，禁止拋棄獵物，暴殄天物，觸犯祖靈。
四、活動結束後，獵場上的陷阱獵具必須予以全部拆除收回。
五、維護野生動植物棲息地，維護自然環境、不棄置垃圾、不破壞他人的農林作物；並禁止電魚、毒魚、炸魚。
六、不任意採集、焚毀、砍伐森林植被及挖掘移動石塊。但為生活慣俗、文化或經獵人組織認可之需求者，不在此限。
七、不竊取他人之獵獲物。
八、其他部落傳統所應遵循之規範。」

There are several points of interest in these provisions. First, they regulated certain hunting practices expressly prohibited by Taiwan law, such as the use of traps (Wildlife Conservation Act, Art. 19). These provisions most directly indicated that the document served as an assertion of Truku autonomy and self-determination. Other portions of the covenant referenced non-indigenous law, such as requiring hunters to use “legal” (*hefa*, 合法) hunting guns, which, while undefined, appeared to incorporate standards from state law. Second, they bound hunting activities closely to the ethics and spirituality of a broad moral landscape that governed engagement with animals, the environment, other hunters, the group, and ancestors.

In this regard, the covenant embodied a particular normative logic. The customary concept of Gaya shares some features with state law, and in others it differs. For example, state law is often seen as seeking unity and certainty, tending to abstract and become dislocated from local circumstances (Rooij 2018: 128). Customary law, like Gaya, tends to be local and more flexible in its normative structure. Likewise, state law tends to separate activities into discrete elements, each having its own standards and punishments. For instance, in wildlife hunting, Taiwan law separately regulates guns under the *Controlling Firearms, Ammunition and Knives Act* (*qiangpao danyao daoxie guanzhi taioli*, 槍砲彈藥刀械管制條例), animals under the Wildlife Conservation Act, land under the *National Parks Law* (*guojia gongyuanfa*, 國家公園法), and property under the *Criminal Code* (*zhonghua minguo xingfa*, 中華民國刑法). Under Gaya, these are all part of an integrated system. Animals, environment, guns and traps, people, and territory are bound together in a constellation of etiquette, ethics, morals, practices, and taboos. The matter of violation is also addressed differently. Punishments following violations of state law are meted out against the individual violator while both the individual and the community may be subject to punishment for violations of Gaya (Wang 2008: 28).

Yet, as anthropologists have long noted, these appear not as differences in kind but of degree. The normative structure of indigenous custom, for example, is similar to state law, particularly common law in common law traditions in that neither are written into statutes and both can be fluid and adaptable (Hamilton and Webster 2015: 273). In a similar vein, recent proposals for law reform in other geopolitical contexts note the ease of using common law tools, such as legal analysis and synthesis, to advance greater recognition of indigenous legal traditions (Napoleon and Friedland 2016). Further, indigenous custom, elaborated through oral tradition and codified as "law" through ceremonial and ritual forms (Churchill 2002: 17), is not so different from the ceremonial and ritual surrounding legislative or parliamentary processes of codification (Rai 2010). Moreover, as discussed in Chapter Eight, at a fundamental level both state law and indigenous custom revolve around "stories." That is, "laws"—whether they are state statutes, city ordinances, private laws like contracts, or oral traditions—provide guidance to groups about how certain stories of characters, events, and plots *can* and *should* end (Paskey 2014; Edwards 2016; Chesler and Sneddon 2017). Understood this way, the Wildlife Conservation Act instructs about what can and should happen when someone illegally kills a protected species (jail or fine) in much the same way Gaya instructs about what can and should happen if a Truku hunter engages in obscene behavior (falling off a cliff or harm to the community). In their character, functionality, and impact, state law and indigenous custom appear along a spectrum of normative possibilities.

In this connection, some Taiwan judges reported having a revelation about indigenous understandings of normativity when adjudicating hunting cases. As one judge noted, "I learned I could not separate guns and hunting in these cases. They go together. So, when I have a hunting case it frequently involves a gun issue. The other way, too. I had to recognize that these two

things go together in their culture" (Interview 120). Other state bodies have also begun to recognize the integrated dimensions of indigenous culture. The Judicial Yuan noted in its internal review of indigenous cases, "After the establishment of the special indigenous courts, from a large number of practical cases, it was discovered that the indigenous peoples' cultural and land rights, etc., are all linked to indigenous peoples' customary lifeways" (Judicial Yuan 2018b: 24-25).

The Truku community aimed to convert their cultural difference into a state law-like format by codifying their orally transmitted custom of Gaya. In doing so, they created an intellectual framework for capturing central ideas of Gaya and connecting them to mainstream legal constructs. This process, however, did not come without risks. For example, indigenous justice practices, once unwritten and flexible, tended to become more rigid and unyielding in the form of codified law (Miller 2001: 14-15). What was an orally transmitted and flexible set of Gaya norms was now enshrined in written language. Further, the language used in the hunter's covenant was Mandarin Chinese, not Truku language, and thus not in the mother language of the group. Language ideologies (Kroskrity 2000) were, therefore, at play that could lead to interpretations of Gaya norms inconsistent with ordinary understandings. Additionally, the document limits the local variations in interpreting Gaya occurring across and within Truku communities to the four corners of the covenant. The inclusion of provisions seeking to expand the document to other dimensions of social life, such as those generically referring to "other community traditions," reveal concerns with rigidity and inflexibility in the written text.

In addition, because cultural understandings are not shared uniformly, codified law is thought to privilege particular viewpoints and particular sectors of a society (Keesing 1992: 195-196). The hunter's covenant negotiation process and final document privileged those in a

position to speak and write in Mandarin Chinese. Specifically, it privileged the small set of Mandarin Chinese-speaking Truku leaders involved in the initial drafting of the document. Moreover, since Truku men were the principal hunters, the codification process tended to privilege men's voices over women's voices in the community, even though the entire group abided by and was affected by Gaya.

Further, codification of indigenous concepts connects to a larger process of systematic simplification of indigenous culture and society, similar to processes of simplification Laura Nader (1999) observes and what Elizabeth Povinelli (1993: 126-128) refers to as "cultural editing." The codification process was a self-imposed simplification of the social and cultural reality of the community into a form accessible to mainstream legal officials. The system of Gaya was now reduced to approximately eight sentences. In respects, the process also involved self-imposed "cultural editing" as the community adjusted their customs to bring them in line with state standards, such as requiring the use of "legal" guns.

It is not simply that codified indigenous norms are inflexible, privilege viewpoints, or simplify indigenous culture; rather, as Bruce Miller (2001: 16) notes, indigenous peoples are also stuck with these codified laws in later years when political issues have shifted and new self-representations are needed. If Taiwan judges accept the Truku hunters' covenant, it would likely mean that the community would be stuck with these provisions for the foreseeable future. As noted, the political terrain of the relationship between the Taiwan state and indigenous communities was changing rapidly. One may speculate, but it would be difficult to imagine what political issues will emerge; yet, it is equally difficult to imagine that current self-representations of indigeneity and indigenous custom would be able to bear the burden of these changes.

An additional feature is that the codification negotiation process introduced new conflicts within the community. Participants struggled to create an identification system that simultaneously mimicked a state identification system but also recognized the customary role of the family in managing hunting activities. While they were able to resolve their differences, the battle for proper identification was intense, and its lingering effects on social relations in the community remained to be seen.

Converting Gaya into state-like "codified" form was part of a process of attempting to self-regulate, as an assertion of autonomy, and at the same time to connect indigenous custom to mainstream legal constructs. Yet, this came with risks—issues of rigidity, privilege, simplification, foreseeability, and conflict attended the process—and, ultimately, it was unclear whether courts of law would recognize the document as authoritative, instructive, or negligible.

ACT FIVE. Managing a Broken System

In October 2017, I attended a meeting at a new law center that would serve indigenous peoples living in eastern Taiwan. Before my arrival, the center had already had a somewhat colorful history. The prior year, a successful and skilled legal aid lawyer applied for and secured government funds to create the center with the idea that it would focus on cases involving indigenous custom and tradition. Being non-indigenous, she met with resistance from indigenous legislators who preferred that the center only hire indigenous lawyers (Gerber 2017). This caused months of delays and ultimately the director position was eliminated due to a lack of suitable candidates. Indigenous legislators were not the only one who questioned the new law center. The Hualien Bar Association openly opposed it, fearing it would interfere with the local legal market by taking away cases and income that would otherwise go to local lawyers. In a relatively small

market, the reverberations caused by the new center were very real indeed. After receiving assurances concerning the scope of the center's activities the bar association dropped the issue.

Ultimately, a well-respected indigenous lawyer and scholar took the helm, and the Legal Center of Indigenous Peoples (*falu fuzhu jijinhui yuanzhuminzu falu fuwu zhongxin*, 法律扶助基金會原住民族法律服務中心) was born. The Center would represent indigenous defendants in cases involving controversial cultural matters, such as fishing, forest product and mineral collection, gun use, and hunting—it would not represent indigenous persons in quotidian matters like drunk driving or landlord-tenant disputes, which would be left to legal aid lawyers and local attorneys in private practice. Lawyers identified the specific need for the Center: "There is a significant lack of knowledge about indigenous cultures and rights among Taiwan judges and lawyers. This center will be one of the ways to fill that space" (Interview 083). At the official opening ceremony event, a speaker framed the need for the Center this way: "Taiwan has many protections for indigenous peoples, including the [Indigenous Peoples] Basic Law, but we have many steps to go. We have many protections for indigenous peoples, but they are not recognized or not used effectively. This Center is important for securing recognition of Taiwan's indigenous peoples" (Opening Ceremony for the Legal Center of Indigenous Peoples, March 12, 2018). In this regard, the primary function of the Center was to act as a "lubricant" to get indigenous defendants the best deals possible given ambiguities in legal protections for indigenous peoples in Taiwan (Gerber 2017).

The Center consisted of five lawyers with indigenous and non-indigenous status and five support staff, each of whom had special training and knowledge of local indigenous cultures and practices. Lawyers at the Center coordinated with a special committee consisting of one representative from each of Hualien County's six indigenous nations—the Amis, Bunun,

Kavalan, Sakizaya, Sediq, and Truku Nations. Combining their knowledge of law and culture, the lawyers and committee members evaluated cases, decided which ones to take, and determined the best way to represent indigenous defendants and their cultural practices.

The meeting I attended in October 2017, was the first meeting between the lawyers and indigenous representatives. I attended in my capacity as an advisor to the Center on international human rights protections and, being a lawyer and an anthropologist, my (perceived) aptitude at mediating realms of law and culture. I performed those duties that day by handing out boxed lunches of fish, rice, and pickled ginger. We—the director, two lawyers, representatives from the Amis and Truku Nations (the other representatives had scheduling conflicts), the director of an indigenous rights association, and myself—sat around a large conference table. The meeting began with a presentation by one of the Center's lawyers. His presentation emphasized the deficiencies of the present legal system and its failures to address indigenous cultural differences, outlining the ways in which the Center planned to remedy this problem. At the end of his presentation, the lawyer opened the discussion to the group. The following exchange ensued.

The lawyer said, "Those are the activities of the Center. We would like to invite you to share your concerns and thoughts. What questions do you have?"

The Amis elder representing raised his hand and quietly asked, "But what about our mouse problem? My village is overrun with mice. What will the Center do to help us?"

The lawyer had not anticipated this question, but he ably responded by identifying the resources available for the community's problems and then repeated the role the lawyers saw the Center playing in protecting indigenous customary practices through legal procedure.

The elder responded, "Then what will the Center do to promote education of young people in our cultures? And why not the mouse problem?"

It would be a mistake to assume the elder misunderstood the lawyer's presentation. Rather, his statement was a commentary about the socio-economic and cultural situation of his community and what he believed would be a more impactful role for the Center. In his view, state laws and legal procedures were remote and reactive solutions to daily problems facing the community. His comments conveyed skepticism about the Center's approach to securing indigenous futures through civil and criminal representation in the state legal system. His comments also left an impression on the lawyers who later noted, "The Amis elder, the old man, he thinks the Center is too limited, that we are not going about it the right way" (Interview 062).

Over the next year, lawyers at the Center assisted indigenous defendants in cases involving indigenous custom in the special indigenous court units. They offered knowledge about indigenous customs and territory to prosecutors and judges. They facilitated connections between courts and indigenous communities, for example, in identifying potential witnesses. They traveled to different indigenous communities giving presentations about legal developments and advising on cultural activities and access to traditional territory. They took on the case of Wang Guang-lu (Tama Talum), a Bunun hunter whose criminal case ultimately reached the Taiwan Constitutional Court and promised to be a watershed case for Taiwan's indigenous peoples. In effect, the Legal Center of Indigenous Peoples took it upon itself to manage, in part, Taiwan's broken system of legal protections for indigenous peoples.

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As indicated throughout this discussion, performances of indigenous identity come in many forms, not all of them dramatic presentations. Neither can they be characterized as simply embracing counterhegemonic positions against mainstream cultures or states (Graham and Penny 2014a: 17). Indeed, indigenous actors sometimes take on the responsibility themselves of

managing a failed or broken political or legal system. Greg Johnson's (2014) work on legal battles in Hawai'i emphasizes the ways indigeneity is dynamically performed at the visible and invisible ends of the spectrum to manage the broken system of law in Hawai'i. He argues that these practical performances of indigeneity, through state administrative law, are underappreciated assertions of indigenous authority and identity that deserve more attention. The "mundane but intense efforts that are propelling Indigenous interests vis-à-vis various manifestations and failures of governance" can also be "significant religious and cultural happenings" (Johnson 2014: 248, 265).

The Legal Center of Indigenous Peoples was an example of such a "mundane but intense" performance of indigenous authority and identity. A low-key, relatively unmarked and unremarked institution, the Center attempted to manage deficiencies in the Taiwan legal system by working everyday within Taiwan courts to protect the rights and lifeways of indigenous peoples. The lawyers, legal staff, and committee of indigenous representatives were using, indeed attempting to manage, the state court system to secure indigenous rights and interests.

It would be too much to say that the Center viewed the Taiwan court system and the state as an ally in this endeavor, but it shows that the state was not the only problem, or perhaps even the primary problem. Rather, state apparatuses, like courts of law, could be mobilized, if properly educated and managed, as Johnson emphasizes, to work for indigenous interests. The Center undertook such a project and worked tirelessly to advance indigenous peoples' interests in the courts with some success.

Like other performances of indigeneity considered in the sections above, the Center's "low-key" activities were contested—not just by outsiders but also by insiders among indigenous groups. Indigenous legislators and the Amis elder questioned the role of the Center and whether

it served indigenous interests appropriately and effectively. It is important to bear in mind that performances of indigeneity across the spectrum—from charismatic to low-key to in-between displays—were subject to internal and external pressures that shaped the kinds of performances that were possible.

EPILOGUE.

This discussion has attempted to provide a sense of the performances of indigenous identity occurring in and around Taiwan's special indigenous court units and how these displays shaped the constitution of interactions between legal actors and indigenous actors in disputes over indigenous custom and tradition. I have argued that performances of indigeneity in the special units were multivalent, taking different forms according to context, goals, and understandings. Expressions of indigenous identity involved repertoires of activism, documents, dress, edibles, framings, language, and norms across a range of conscious and less conscious decisions concerning higher and lower amplifications of difference. At times, they involved conscious amplifications of difference, such as the use of language games to compel judges to reflect on the significance of indigenous culture in relation to Taiwan law, and contests over control of situation framings, like emphasizing the history of colonial and cultural oppression of indigenous peoples. At other times, they involved unconscious displays that inadvertently magnified cultural difference, such as chewing betel quid or conversing in indigenous languages. Still at other times, performances were mixed as indigenous actors created documents, like the hunter's covenant, simultaneously as assertions of autonomy and mimicry of state forms of normativity. Finally, certain displays involved simply taking control of the broken legal system, for example, by creating a special legal center.

This range of conscious/unconscious strategies involving amplifications/de-amplifications of difference was tied to particular understandings about the state and the law. Some indigenous actors refused to acknowledge the hierarchy between the state and society. Others shaped themselves in ways they felt would address mainstream society's preconceived ideas about indigenous peoples. Still others viewed the state as a resource that could, with care, be managed and shaped to advance indigenous interests. It was also tied to particular individuals—the individual judge, the prosecutor, the lawyer, the legislator, the litigant, the elder. Judges, for example, were more and less open to indigenous actors' efforts to reframe disputes or critique state power. Lawyers advised indigenous litigants to behave in certain ways. Legislators conditioned support for indigenous institutions on what they viewed as sufficient indigenous representation.

Throughout this chapter I highlighted dimensions of (1) self-consciousness and (2) amplification in indigenous performance. These dimensions are helpful for understanding the various, and sometimes conflicting, expressions of indigenous identity arising in the special indigenous court units. The diagram below sets out graphically how the displays of indigeneity described above stand in relation to one another, although these were by no means fixed.

	Amplified	**De-Amplified**
Self-conscious	Language games Frame disputes	Attire (black t-shirts) Codifying custom
Unmarked	Indigenous language Betel quid	Law center

At one end of the spectrum, language games and frame disputes were self-conscious and amplified performances of indigenous identity akin to Perley's concept of "charismatic Indigeneity." We could add to these the dress and performance of indigenous ritual outside the

courthouse (Chapter One) and Rakaw's smoke ceremony during the court site visit (Chapter Three). At the other end of the spectrum, the indigenous law center was a relatively unmarked and unremarked display of indigenous authority and identity akin to Johnson's concept of low-key indigeneity. A range of performances occurred between these extremes: decisions to wear black t-shirts and codify customary law were self-conscious decisions to de-amplify cultural difference in the courts; on the other hand, usages of betel nut and indigenous language in the court were unconscious activities that inadvertently amplified cultural difference in the courts. Paying attention to charismatic, low-key, and in-between performances, can teach us a great deal about what it meant to "be" indigenous in the special units and in society, generally.

Pulling the discussion together, the special indigenous court units created, by degrees, a discursive space in which charismatic, low-key, and in-between performances could occur. The special units were a venue not only for the resolution of conflict but also for expressing identities and critiquing state power. Ambiguities in law and the structure of the special units often facilitated these moments. Designed to "respect" indigenous cultural differences but provided with little guidance or tools to do so, judges had to find creative ways to animate the aims of this institution. Some judges afforded wide latitude to indigenous litigants; other judges treated the cases as they would any other. Representations of indigenous identity and critiques of state power arising in Taiwan courts were unassured and uneven, but the special units offered an opportunity for dynamic forms of expression. In moments when the special units opened themselves as a stage for negotiation and expressing contradictory views, they emerged as exceptional juridical institutions. They became fora for debate—not just in the adversarial nature of proceedings but also in negotiating ontologies of indigeneity and the state. While the concept of "indigeneity" entered the special indigenous court units in predetermined forms (through state

laws, regulations on indigenous recognition, and mainstream assumptions about indigenous culture), the special units offered an opportunity for indigenous actors to contest and expose these forms through performances of difference and critiques of the state.

The special indigenous court units offered, by degrees, a setting, not for arriving at a common identity but for introducing and debating difference. The special units signal that one is not left with choosing either the optimism of Charles Taylor or the pessimism of Elizabeth Povinelli but also a middle space predicated on agonism (see Mörkenstam 2015: 635; Schaap 2003: 525)—one focused on debate and contest—demonstrating that such spaces can serve a meaningful role in indigenous recognition and state-indigenous relations without necessitating a leap to inevitable reconciliation or derangement.

<u>CHAPTER SEVEN</u>

From Thin to Thick Justice and Beyond:

Precarity across the Lawscape of Indigenous Rights in Taiwan

Introduction

Taiwan's indigenous peoples are a small minority, constituting approximately 2.3 percent of the island's total population (Executive Yuan 2016b). As late as 1983, only 6 percent of all indigenous peoples lived outside their traditional communities. By 2009, that figure had jumped to 39 percent. When adding short-term sojourners of indigenous youth who traveled to urban centers for schooling but maintained official registration in their home communities, approximately half of all indigenous peoples lived in urban centers in Taiwan. Many indigenous peoples residing in urban areas lived in industrial districts, finding work in semi-skilled labor, such as assembly line production, construction, truck driving, and other service jobs (Huang and Liu 2016: 299-300). Those who remained in rural, traditional communities typically occupied marginal regions with limited arable land and limited opportunities for employment.

Despite this recent migration from rural to urban spaces, indigenous peoples in Taiwan continued to lag behind mainstream Han Chinese society across metrics of education, employment, health, and life expectancy. A 2010 survey found that 60 percent of indigenous peoples aged 15 and above had an education status of junior-high school or lower (Lee et al. 2011: 62). Drop out and deferral rates were higher for indigenous students than for their non-indigenous counterparts, and they were nearly half as likely to attend tertiary level education programs (Hou and Huang 2012). Unemployment rates were 1.5 to 3 times those of mainstream society (Chiu 2005). Over 85 percent of rural indigenous peoples occupied the lowest income

brackets (Huang and Liu 2016: 304), and most indigenous peoples continued to live below the poverty line (Lemaitre 2017). Indigenous employment was further threatened by the introduction of foreign laborers competing for local jobs (Lee et al. 2011: 62).

In addition, indigenous peoples suffered from higher rates of alcoholism and poorer health outcomes. A 1995 study of four indigenous groups found alcoholism rates as high as 55 percent, much higher than rates reported 40 years ago (Chen and Chen 1995). In 2001, the average life expectancy of indigenous peoples was 67.4 years, 7.9 years lower than the national average, and the mortality rate among the indigenous population was 1.4 times higher than Taiwan's population as a whole (Cultural Survival 2018). Among the major causes of death, rural indigenous peoples had a statistically higher probability of death by accident or by liver disease than their urban counterparts or mainstream Han society, both of which were likely symptomatic of high alcohol consumption epidemic in indigenous communities (Huang and Liu 2016: 305).

Despite recent progress in indigenous legal protections and policy initiatives as well as rapid and dramatic social transformations in indigenous communities, many of Taiwan's indigenous peoples continued to live in conditions of precarious education, employment, health, income, and life. This has led researchers to conclude "the general well-being gap between indigenes and the majority remains huge, and in some areas is expanding" (Huang and Liu 2016: 304).

Previous chapters focused on features internal to Taiwan's special indigenous court units: their structure, embeddedness in national court infrastructure, laws, ontology, and performances. Recognizing the issues outlined above, this chapter takes the opportunity to step outside the special unit courtroom doors and explore a range of access to justice issues for Taiwan's

indigenous peoples. It considers the challenges of providing adequate legal services to an indigenous population increasingly migrating from rural to urban spaces but maintaining strong ties to traditional communities and cultural practices and living amid precarious conditions of poverty and discrimination. It begins to sketch the contours of a broader, more complex set of considerations about the challenges of law and access to justice in what may be envisaged as a generic indigenous context in Taiwan. Given the diversity of Taiwan's indigenous cultures, histories, languages, and lifestyles represented in urban, rural, and remote communities, a one-size-fits-all solution is unlikely to ensure optimal justice for all indigenous communities. Yet, many of the small indigenous groups and communities with whom I worked in eastern Taiwan shared similar challenges relating to law and access to justice. As such, my purpose here is not to outline all the challenges facing indigenous access to justice in Taiwan. More modestly, I offer an ethnographic account of on-the-ground work with indigenous peoples, lawyers, and judges in the geographic region of eastern Taiwan in 2017 and 2018.

The ROC government has taken steps to secure indigenous peoples' access to justice. Conceiving of "justice" in terms of courts and lawyers, state measures included the creation of special indigenous court units set within the district and high courts (Judicial Yuan 2012), free legal counsel for indigenous litigants (LAF 2017), and the provision of courtroom interpreters proficient in indigenous languages (Judicial Yuan 2018b: 29). As noted, these measures had significant deficiencies. Moreover, they addressed only those problems that had ripened into clear legal controversies and were framed in legal terms rather than those that might do so with the benefit of legal assistance. I argue here that meeting the challenges indigenous peoples face in Taiwan requires a wider understanding of access to justice, one that goes beyond simply access to lawyers and courtrooms. In this regard, I argue for a "thicker" concept of law and

access to justice that understands entanglements of social fields and law and that is oriented towards the underlying cause of an individual's or community's legal problems. Furthermore, I argue it is not self-evident that the appropriate or ideal solution is more security for indigenous rights and access to justice as processes for concretizing legal protections and access to legal services tend to limit or exclude indigenous voices and points of view. Rather, the proposal here is one of active postponement in an effort to advance an alternative approach to indigenous rights and access to justice grounded in a language of land and self-determination.

In working towards a thicker, more textured, understanding of justice, I draw on two concepts. The first is lawscape. Scholars variously refer to a lawscape as the range of rights and court decisions that apply those rights across jurisdictions (Berger 2015; Schnakenberg 2012; Ritchie 2012; Hyde 2004), jurisprudential developments following particular court decisions (Grear 2015), the reciprocal construction of space and normativity (Mazzoleni 2010; Philippopoulos-Mihalopoulos 2015), and "the socio-spatial-cultural-economic milieu as it relates to law and access to justice" (Pruitt and Showman 2014). Lisa Pruitt's articulation of lawscape most closely aligns with contemporary anthropological approaches. Pei-yi Guo (2011: 244), for example, describes the legalscape of land tenure and land cases among the Langalanga in the Solomon Islands as a fluid and irregular landscape of intertwined and co-evolved law and local custom. Suzana Sawyer (2004) likewise describes the legal-scape of various discussions about law as indigenous rights grassroots organizations in Ecuador challenged multinational corporations drilling for oil in indigenous territory. Recently, the 2018 American Anthropological Association Annual Meeting hosted a panel session entitled, "Tracing Plurality, Process and Persistent Injustice across the Rural Lawscape: Ethnographic Engagements with State and Tribal Courts," explicitly framed around Pruitt's idea of lawscape (AAA 2018).

My use of “lawscape” here draws from these approaches, seeing law as entangled with other social fields and normative orders. In drawing on the metaphor of a landscape, the concept of lawscape shifts the focus towards the ecological dimensions of law, as something embedded within and sharing space with a range of normative ecosystems and fields. In this regard, Pruitt (2014: 497) offers a useful analogy for what is meant by thicker access to justice: providing food to a hungry family. Providing food to the hungry fulfills an immediate and life-saving need, yet hunger often accompanies a host of other problems: lack of education, poor health, and joblessness. The most effective service would address both the immediate need and the underlying causes. Treating a symptom (e.g., hunger) of a larger problem (e.g., joblessness) is a limited panacea, although important in its own right. I consider law and access to justice in a similar way, responding to the limitations of law and access to justice for indigenous peoples in Taiwan in relation to the underlying problems that also need attention.

The second concept is precarity. Studies of precarity have accumulated in recent years. There are studies of precarious labor (Kalleberg 2009; Millar 2014; Molé 2010), precarious migrants (Bouali 2018), precarious youth (Allison 2012), and precarious academics (Thorkelson 2016), among others (see Millar 2017). Conferences have been organized around the theme of precarity; for example, a recent Max Planck Institute (2019) workshop focused on “urban precarity.” Central works theorizing precarity by Pierre Bourdieu (1998) and Guy Standing (2011) have emphasized the connection between precarity and labor. Examining unemployed and underemployed workers in Algeria in the 1960s, Bourdieu connects precarity with insecure employment. In a similar vein, Standing shifts the focus of precarity as a labor condition to focus on economic trends that create insecure labor relations, producing a socioeconomic category or class, the “precariat.” More recent studies, worried about the term’s promiscuity, have called for

a return to linking precarity with labor in an effort to preserve what is seen as a diminishing analytical purchase in the concept (Millar 2017).

The understanding of precarity taken up here adopts a wider view focused on linkages of law and life conditions. In so doing, I take inspiration from Judith Butler's (2004) work on precariousness and precarity.[74] Rather than placing labor at the center of conceptualizing precarity, she approaches precariousness as a generalized condition of human life. For Butler, precariousness concerns "a common human vulnerability, one that emerges with life itself" (2004: 31). This does not mean that all vulnerability is distributed equally as Butler recognizes differences in ability, age, class, gender, nationality, race, and sexuality, among other social distinctions that make some lives more "grievable" than others (2004: 30; see also 2010). In recognizing precariousness as a common existence and social condition of life, Butler approaches it as an ethical starting place. She thus cautions against impulses to escape too quickly from it. Rather, staying with precarity allows us to recognize the precariousness of "others" and troubles the binary notion of self/Other. As Millar (2017: 3) notes, Butler's argument echoes earlier approaches seeing precariousness as a resource with the potential for moving us toward the "other" (see Day 1952). This orientation frames the response proposed in this argument.

As noted, indigenous peoples in Taiwan continue to live in conditions of precarious education, employment, health, and life. Like other citizens, they had a right to access Taiwan courts of law, but their precarious conditions of life significantly obstructed meaningful access to legal institutions and practitioners. Further, as highlighted throughout this dissertation, rights protections for indigenous cultural practices and territories were precarious: core protections for

[74] Precariousness and precarity are related but not synonymous concepts. Precariousness refers to the unavoidable vulnerability that is a condition of our sociality. Precarity focuses on the specific ways that socio-economic and political institutions distribute the conditions of life unequally.

indigenous peoples were only partially enacted, laws conflicted, principles of statutory construction weakened legal protections, courts applied indigenous rights unevenly, human rights norms were selectively chosen and circumscribed, and indigenous peoples were constructed and essentialized in terms of cultural difference. The precarity of indigenous rights also contributed to the precariousness of indigenous lives. This is exemplified by such practices as the passage of laws protecting indigenous customary hunting activities, signaling to indigenous persons that they could engage in customary hunting; however, conflicts in law and enforcement practices placed indigenous hunters at significant risk of arrest and prosecution (Simon and Mona 2015: 12). My Truku colleague, Rakaw, perhaps best summarized the precariousness of contemporary indigenous life at the intersection of state law during his testimony to the Hualien District Court, reproduced here:

> We are poor and have nothing, no money, no jobs, we have so little in the village. This land and our traditional land is important to the community. It is where we get our food. It is part of our daily life. What kind of country would take away our land? What kind of country would make us use their identification cards to access our own traditional land? What kind of country would change the land laws and then tell us we cannot use our land as we need to? What kind of country would take away the little that we have?

Rakaw's testimony reveals the powerful intersections of lawscape and precarity as experienced by indigenous peoples in Taiwan. Here, I bring these concepts together to argue for a more textured understanding of law and access to justice for indigenous peoples in Taiwan, an understanding that considers culture, economics, sociality, and space beyond merely securing access to lawyers and courts. Pruitt (2014) identifies numerous factors that obstruct rural peoples' efforts to seek justice in the United States, among them confidentiality, economics, ethics, and spatiality. Given that over half of indigenous peoples in Taiwan reside in rural areas, many of these factors were germane to the indigenous context in Taiwan. Yet, indigenous life in Taiwan presented different obstacles to access to justice. Living paycheck to paycheck, facing

language barriers, and being forced into a foreign legal system with courts that did not recognize their customs or justice practices and had sparse knowledge about their cultural practices, dimensions of indigenous life posed substantial hurdles to meaningful access to the regulatory state, lawyers, courtrooms, and justice. Recognizing this reality, a conception of access to justice that addresses the unique challenges faced by indigenous peoples in Taiwan is necessary. Below, I focus on how normativity, spatiality, economics, order, language, policing, knowledge, and institutions affect indigenous law and access to justice. The point here is to emphasize the integrated nature of these various dimensions. Setting them out as discrete categories suggests they are separable, but I hope not to lose sight of their interdependence and overlapping nature, as seen in many of the examples to follow.

Normativity: Human Dignity and Historic Injustice

Indigenous rights protections in Taiwan occupied a precarious position. They had their roots in imperial and colonial governance technologies employing racialized systems of categorization and management of indigenous peoples. Indigenous protections also did not have the support of treaties or other political arrangements. Instead, these rights accumulated unevenly over time in circumstances where the regulatory state controlled acceptable and authentic forms of indigenous behavior, initially constructing the island's population as "One Chinese" and later controlling appropriate and authentic displays of indigenous identity. The judicial system ignored indigenous customs and justice practices; customary laws were neither codified nor systematically surveyed by the Judicial Yuan (Tsai 2015: 295). Efforts to pass more comprehensive protections for indigenous peoples resulted in laws that promoted indigenous cultural expression and autonomy but were never fully implemented through legislation.

Principles of statutory construction, like *lex specialis*, eroded indigenous protections. Institutional structures discouraged indigenous defendants from raising cultural defenses. Processes of vernacularizing human rights limited the scope of these protections. Courts of law inconsistently applied indigenous and human rights in disputes. In short, the framework of laws protecting indigenous peoples in Taiwan, while showing signs of growth, remained weak, leaving indigenous litigants with few legal recourses and their legal counsel with few tools to represent them effectively.

Why is it that indigenous rights tended to be in such a precarious position? One answer may be located in their normative authority. The foundation for many core international human rights instruments resides in the dignity of human beings. The Preamble to the Universal Declaration of Human Rights (Universal Declaration) recognizes "the inherent *dignity* and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The ICCPR and ICESCR observe that their rights "derive from the inherent *dignity* of the human person." The International Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Elimination of All Forms of Discrimination against Women refer to "the principles of the *dignity* and equality inherent in all human beings" and to "the *dignity* and worth of the human person and in the equal rights of men and women," respectively. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes the "the inherent *dignity* of the human person" and the Convention on the Rights of the Child refers to "the *dignity* and worth of the human person." The Convention on the Rights of Persons with Disabilities acknowledges "the inherent *dignity* and worth and the equal and inalienable rights of all members of the human family." Dignity, situated in a Kantian (1785) idea of the intrinsic worth or value of all human

beings, is thus a key element linking the rights pronounced in human rights instruments—both those historically characterized as "fundamental" civil and political rights and "aspirational" economic, social, and cultural rights (Evans 2009: 186)—to human persons.

Indigenous rights, on the other hand, locate their normative foundation on a different footing. Two of the most prominent international instruments relating to indigenous peoples are ILO No. 169 and the non-binding UNDRIP. Both instruments ground their rights in historic circumstances. For example, addressing the earlier ILO No. 107, the Preamble to ILO No. 169 provides,

> Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards.

The Preamble to UNDRIP likewise states,

> 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.

In grounding indigenous rights in historical circumstances, these instruments disrupt the narrative of human rights derived from the inherent and shared trait of humanity. To be sure, the concept of dignity is not entirely absent. Both ILO No. 169 and the UNDRIP refer favorably to the Universal Declaration, ICCPR, and ICESCR, thereby indirectly invoking the concept of human dignity, and Article 43 of the UNDRIP explicitly references the dignity of indigenous peoples. Yet, taking UNDRIP as the current "state of play" of indigenous rights, these instruments vest such rights in a particular set of historic circumstances or experiences (or bargains) and so fall outside the corpus of human rights generally vested in human dignity.

The current range of indigenous rights also contains both "universal" and "particular" rights. Some of the rights articulated in the UNDRIP inhere in all individuals or all cultural minorities by virtue of extant human rights protections, while others, most properly called "indigenous rights," attach to indigenous communities and individuals only. Moreover, for those rights attaching to indigenous persons, the UNDRIP does not always explicitly identify whether such rights are individually or collectively held. For example, Article 2 states, "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." The Preamble to the UNDRIP also invokes the Universal Declaration, ICCPR, and ICESCR, and by extension, their emphasis on individual autonomy over collectivity. Ultimately, Article 46 provides a backdoor to states allowing them to disregard their obligations to their indigenous peoples on the basis of territorial integrity and defense of sovereignty (Brown 2017).

Karen Engle's (2010) study of indigenous rights, while not directly addressing legal foundations, similarly notes the ongoing difficulty of locating a coherent normative theory of indigenous rights. Grounded in a particular set of historic circumstances and encompassing a mix of universal, particular, individual, and collective rights that are ultimately subordinate to state territorial and sovereign interests, indigenous rights inherently rest on an unsettled normative foundation. Thus, while the adoption of the UNDRIP suggests there is consensus "in principle" among states that indigenous rights are morally justified, there appears to be little consensus on why they are needed. Moreover, just as there is no consensus among states about how to identify and balance indigenous rights relative to other human rights, there is no consensus among indigenous groups themselves about how this is to be done (Gover 2011: 425).

The normative authority of indigenous rights at the international level remains contested and unsettled, filtering into processes of vernacularizing indigenous rights at the local level. The normative ambiguity of indigenous rights protections created interruptions in and opportunities for indigenous rights in Taiwan, as judicial actors worked to make sense of these rights and indigenous actors introduced new critiques of the state (see Chapter Five). Some judicial actors viewed the normative foundation of indigenous rights as fundamentally at odds with liberal ideas of equality. Others cautioned that this view did not necessarily reflect the broader judiciary but rather suggested an active judiciary working to make sense of a rapidly changing legal field (Interview 071). Other judges used these ambiguities to make indigenous rights work for indigenous peoples by engaging in such activities as reading indigenous mindsets into criminal statutes, balancing indigenous claims and public interest, rethinking the hierarchy of Taiwan law, and looking outside of positivistic law toward natural law. There was thus little consensus among the Taiwan judiciary about how to address indigenous rights protections.

Without a secure set of legal protections, guarantees of access to lawyers and courts amounted to little. This is not to say that there were no successful assertions of indigenous rights—indeed, there were—yet, a critical dimension of the Taiwan indigenous lawscape was a lack of consistency and security for these legal protections, leaving indigenous rights in a precarious position relative to other forms of rights.

Spatiality: Physical, Social, and Power Distances

Space constitutes another critical dimension of the indigenous lawscape. One aspect of space is physical landscape. As noted, over half of Taiwan's indigenous peoples lived in rural or remote regions far from lawyers' offices and courthouses. Few law offices were located in

indigenous communities, lawyers choosing instead to operate adjacent to courthouses located in urban centers. The dearth of lawyers in indigenous and rural communities and the surfeit of lawyers in urban spaces made access to legal counsel difficult. Courthouses, being located in urban centers, were also far from remote indigenous villages. Some indigenous defendants and litigants lived in such remote locations that they had to borrow vehicles and travel for hours to attend hearings at the local courthouse. Moreover, trials in Taiwan were spread across time, such that a single trial could be divided into multiple court sessions extended across months. Litigants thus had to make multiple trips to the courthouse month after month until the trial was finished.

Physical space was important in another respect. The geographic jurisdiction of each court around the island hosted a different constellation of indigenous nations. Few, if any, jurisdictions had the same conglomeration of indigenous peoples. Returning to the issue of rotation, judges rotated from one jurisdiction to another, taking with them the expertise they developed about indigenous communities in that particular area. Thus, relatively few jurisdictions had a stable judicial body of knowledge about indigenous cultures in the local region, and those jurisdictions that had such stability were often not located in regions with high densities of indigenous peoples. Legal actors and scholars recognized that judicial rotation was a significant obstacle to securing indigenous peoples' meaningful access to justice.

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Legal scholar (Interview 063)

> "Not that ideal to create a type of court. The judges rotate. You are assigned for a while and then go back to mainstream. . . . They just created a division and judges rotate through."

Judicial Yuan representative (Interview 094)

> "The rotation of judges is a big problem. . . . You have to realize that the special indigenous courts are not popular among judges, not considered important. They do not handle big issues. Taiwan's indigenous peoples are only 2% of the population. And to be

an expert it takes a lot of work and feels like a waste of time. Internally, in courts, there may be rotation standards, like 2 years or 3 years, and then you rotate to another area."

Lawyer (Interview 126)

"Nobody wants to be in Hualien. Every three years, judges can apply to transfer. So many judges go back to the big cities. So, all the judges in the case today are new . . . And that makes a difference because indigenous cultures in different areas are different. So, we lose expertise when judges move from one area to another."

Lawyer (Interview 132)

"Judges will rotate every September. Many judges want to go to back to the cities. They do not want to stay in the countryside. Judges will want to leave, apply to leave in September."

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Space is not only a material phenomenon; it is also a social phenomenon, such that space and society are mutually constitutive (Sack 1993: 326). As with other peoples living in rural regions (Albrecht and Albrecht 2004: 435), the sparseness of the areas where many rural indigenous peoples lived in eastern Taiwan cultivated tight-knit communities, typically with high levels of consensus on central values and morals. Features of connectedness and consensus ordinarily associated with rural communities could also be amplified in indigenous communities through ongoing, intentional efforts to preserve traditional ways of life and reclaim traditional territory.[75] Reflecting this, in cases involving indigenous custom and tradition, such as disputes over hunting or territory, community members would travel together to provide support to litigants and to demonstrate solidarity before the judge. Those who could not attend in person often kept abreast of the progress of litigation through close networks of kith and kin.

[75] This is not meant to imply, of course, that indigenous groups or communities were homogenous in their interests or values. In one of the communities with whom I worked, for example, the village was strongly divided about how to deal with certain land issues. Neither were they always in agreement about their custom and tradition. As noted, one elder reported in court testimony that approximately 80 percent of his village followed a particular custom, leaving the judge perplexed about whether or not it was a "real" custom given that some villagers did not abide by the practice (Interview 023).

Further, centuries of subjugation and ongoing efforts to preserve traditional practices impressed in some rural and remote indigenous communities a general ethic of law distance, if not law avoidance—a sense of being forced into, rather than participating in, the foreign Taiwan civil law tradition—and a corresponding reliance on traditional forms of dispute resolution (Tsai 2015: 340-341). A Sediq community member expressed this sentiment this way:

> The state legal system is not our system. We are forced to participate in the legal system. We must show up and participate in their foreign and expensive legal system. It is imposed on us. (Interview 003)

As such, self-identifying a legal need was a hurdle in and of itself as group, and community members were less likely to contemplate a state law solution to the problems they faced.

Indigenous sociality also impacted lawyers' representation of their indigenous clients. Due to close community networks and shared interests in protecting traditional culture and territory, lawyers sometimes had to deal with many community members when they represented indigenous clients. For example, in one case a lawyer had a single indigenous client accused of illegal hunting. Recognizing that the case potentially affected the entire community, other community members worked to influence the management of the case. What appeared to be a simple, low-level criminal hunting matter soon became something resembling a large class action lawsuit involving several interested, but not formally recognized, "parties." To manage this dimension of sociality, the lawyer formed a working group of community members that communicated with the lawyer about litigation decisions and mediated between him and the broader group (Interview 073).

If space and society are mutually constitutive, then so too are space and power. This is perhaps most evident in the litigants' and judiciary's varying mobilities. Indigenous actors were forced to travel, with few means and often at great expense, to courthouses and to the law offices

located near them. It was not that courts were immobile. Taiwan judges, for instance, sometimes conducted site visits to indigenous villages and traditional territories. Judicial actors, however, firmly controlled decisions relating to place and travel.

In recent years, efforts have been underway to address inequalities produced by the relationship between place and power. Training for judges by the Judicial Yuan now encourages judges to conduct site visits, and training sessions included visits to indigenous villages (Judicial Yuan 2018b: 17-22). Further, in 2017 the Judicial Yuan began discussions about the development of a circuit court system that would enable judges to conduct hearings physically in indigenous communities (Judicial Yuan 2017a). Legal practitioners, like lawyers and paralegals at law centers and legal aid offices, also increasingly traveled to indigenous villages to give presentations about legal developments and to meet with community members about potential legal problems.

Indigenous community spatiality thus altered the lawscape for indigenous actors. Indigenous litigants had to overcome substantial socio-spatial barriers to engage with the legal system. Lawyers were fewer and farther away. Courts were situated in distant urban centers. Judges rotated to other jurisdictions taking with them critical knowledge. Rural and remote indigenous communities sometimes had an ethic of law distance, or avoidance, and did not view courts as viable settings for resolving local problems. Compounding matters, persistently high poverty rates and marginality aggravated these challenges, making meaningful access to courthouses and other state institutions and actors difficult.

Economics: Altruism, Competition, and Conflicts

As noted, economic conditions in many indigenous communities were dire. Most indigenous persons lived below the poverty line and resided in areas with few opportunities for stable employment and income. These conditions, among others, inspired the creation of a free legal assistance program supported by a 2013 agreement between the Legal Aid Foundation (LAF) and the Executive Yuan Council of Indigenous Peoples to ensure indigenous persons received adequate representation in Taiwan courts (LAF 2017: 17; TAHR 2013). The LAF itself only began operation in 2004; as such, the provision of legal services to disadvantaged litigants was a relatively new system on the island. The program provided indigenous defendants and litigants with free legal representation regardless of their level of income. Both rich and poor indigenous litigants could obtain free representation while other members of Taiwan society had to satisfy a merit and a means test to receive such services (Latham & Watkins 2015: 640).

To provide a sense of numbers, in 2017 the LAF accepted 50,055 requests for representation. Of these requests, 5,250 were from indigenous persons, accounting for 10.49 percent of all legal aid grants that year (Judicial Yuan 2018b: 31). The majority of indigenous cases handled by legal aid offices involved civil matters, which comprised 56 percent of all cases, followed by family matters, comprising 20 percent, with the largest categories of civil issues being torts, ownership disputes, and loans (LAF 2017: 17).[76] The statutory basis of this system raised concerns about discrimination by associating indigenous peoples with persons with mental disabilities, and compulsory features of the system forced indigenous litigants to work with lawyers when they sometimes preferred to represent themselves.

[76] As a comparative note, the United States Constitution establishes a right to access court of law but does not establish an absolute right to representation by counsel in the context of civil cases. *See Chambers v. Baltimore*, 207 U.S. 142, 148 (1907). By contrast, the Taiwan Legal Aid Act guarantees indigenous persons legal representation in both criminal and civil cases, although the scope of the Act has limitations (Latham & Watkins 2015: 642).

Here, I consider economic pressures impacting indigenous cases. Part of Taiwan's legal aid system involved private attorneys who volunteered to participate in the legal assistance program and registered their affiliation with the LAF. Lawyers reported that they volunteered to participate in the program with the objective of both performing a service for the local community and ensuring a regular workflow (Interviews 011 and 092). While some of these lawyers worked for free, or pro bono, others worked for a reduced fee, what is sometimes referred to as "low bono."

Regarding low bono legal practice, there exists an assumption that lawyers who get paid reduced fees provide lower quality legal services (Herrera 2014: 6-7). Legal practitioners generally regard this as inaccurate. In a profession where reputation is significant and where lawyers have professional duties of competence and diligence to their clients (ROC Code of Ethics for Lawyers, Art. 25), lawyers generally have a strong incentive to provide quality legal services regardless of whether their client pays high or low rates. Yet, it is important to acknowledge the business nature of legal services and the pressures shaping lawyers' practices, particularly in how these pressures might influence lawyers' representation of indigenous persons.

While many legal matters presented similar fact patterns and procedural obstacles, indigenous cases displayed unique features that imposed new financial demands on lawyers. These included contracting third party services, such as experts and translators (if the litigant wanted to provide her or his own interpreter), and the costs of travel to and from rural and remote villages to coordinate with litigants and to learn about their customs and traditions. Activities like these were crucially important as they could have a positive impact on the outcome of cases (Herrera 2014: 8). Lawyers also had practical pressures that made developing a

specialty in indigenous cases difficult and uneconomical. As one lawyer noted, “Even I, I want to help indigenous peoples and spend time on the cases, but I must pay the rent, I must pay the staff. For practical reasons there is pressure to focus on the cases that pay more rather than the legal aid cases” (Interview 092). Moreover, indigenous matters involved specialized understandings of indigenous culture and laws. Since such training was not provided in Taiwan law schools, lawyers had to learn these on their own time and at their own expense. Given the relatively low number of cases addressing indigenous cultures, there was little incentive for lawyers to take time or expend resources to develop an expertise in this area. Thus, while the legal aid system guaranteed free legal counsel to indigenous persons, it did not ensure that lawyers have the resources to provide their indigenous clients the same quality representation as higher paying clients.

Another avenue for legal representation was pro bono legal services. While Taiwan lawyers were not required to perform pro bono work (Mo 2006), there were many avenues for providing pro bono services; bar associations, law clinics, law firms, and non-governmental organizations all had programs supporting pro bono legal services (Latham & Watkins 2015: 642). Attorneys who so desired could dedicate their time by providing free legal services to indigenous persons and communities. Again, financial pressures could distract from giving pro bono clients the same attention as paying clients (Interview 066), but there was yet another complication. Studies show that lawyers tend to prefer to deliver pro bono services removed “substantively and often geographically” away from their usual practice settings, partly to avoid conflicts of interests and partly for the sake of novelty (Abel 2011: 307). Many pro bono lawyers representing indigenous clients in eastern Taiwan did not have indigenous rights as their principal area of practice. These were lawyers handling corporate litigation, landlord-tenant

disputes, family law, and other civil and criminal matters who were interested in indigenous cases primarily, perhaps even precisely, because of the disconnection from their ordinary areas of specialization (Interview 003). While these lawyers' general litigation skills could be useful, many lawyers representing indigenous clients had little or no prior experience in handling complex matters addressing indigenous culture. Reflecting this, some judges complained about lawyers' lack of knowledge about domestic and human rights protections for indigenous peoples (see Chapter Four).

The provision of legal services to indigenous litigants encountered another obstacle: other lawyers. As noted, the Hualien County Bar Association openly opposed the creation of the Legal Center of Indigenous Peoples. Lawyers at the Center expressed concern that the bar association would impede the Center's work: "The Hualien Bar Association has been trying to stop the center from forming because they fear it will disrupt the market. They cannot formally stop it, but they can complain and potentially impact the effectiveness of the center" (Interview 062). It was only after the Center gave assurances to the bar association that it would handle only a small number of cases involving complicated issues related to indigenous culture and territory that the bar association ultimately dropped the issue.

Economic issues also preceded court cases. For instance, civil litigants in Taiwan had to pay a court fee to bring a lawsuit.[77] In addition to court fees there were other fees related to litigation, such as fees for photocopies, video recording, transcripts, translation, publication in official gazettes and newspapers, daily fees or travel expenses of witnesses or expert witnesses,

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[77] Under the *Code of Civil Procedure* (*minshi susongfa*, 民事訴訟法), court fees in civil lawsuits involving property rights were based on a progressive-decrease rate, which divided the price or value of the claim into a first NTD 100,000 unit and a decreasing additional fee for each NTD 100,000 unit of the claim (Code of Civil Procedure, Art. 71-13). For litigation involving non-property rights, the filing party must pay a designated fee, presently NTD 3,000 for the court of first instance and NTD 4,500 for appeal to the court of second or third instance (Code of Civil Procedure, Art. 77-14).

and compensation for expert witnesses (Code of Civil Procedure, Art. 77-23). Losing parties must often pay the fees that accumulate during the trial and appeals process. Moreover, indigenous litigants who desired to hire their own lawyers must pay attorney fees.[78] Being economically disadvantaged, indigenous peoples could rarely afford these court and lawyers' fees. As such, they had comparatively limited access to civil courts, which had a reverberating effect on Taiwan's special indigenous court units. One judge explained, "The special indigenous courts are officially in both the criminal and civil courts, both courts, but in reality, they are really mostly in the criminal courts because indigenous people cannot afford the fee, so they typically do not go before the civil courts" (Interview 045).

The economics of legal practitioners' professional practice and court fee structures thus had a strong shaping influence on the indigenous lawscape. Legal services and access to justice for indigenous peoples in Taiwan were about more than simply connecting indigenous persons with lawyers. Relying upon pro bono and low bono solutions for indigenous cases meant that lawyers often carried the burden of these benefits and were not always in the strongest economic position to subsidize legal fees. Moreover, they often did not have expertise or specialized knowledge about the cases they were handling, and there was little incentive to obtain such knowledge. Professional legal organizations also sometimes acted as obstacles to providing legal services. Pre-litigation economic barriers also significantly constrained indigenous peoples' access to certain court bodies, particularly the civil court system.

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[78] There was no statutory regulation of lawyer's fees in Taiwan, although the Taiwan Bar Association set standards for fees related to service item charges, total charges, and hourly payments (e.g., a maximum hourly rate of NTD 12,000 for complicated cases) (Chiu and Sung 2015: 4). The National Tax Administration (NTA) issued, for purposes of collecting taxes, the "Criterion of the Income and Expenses for the Professionals" in 2008, which recommended a NTD 40,000 fee for civil cases in municipalities and regular cities and NTD 35,000 for civil cases in country. Actual charges, however, were usually based upon agreement between the lawyer and her client and were typically higher than the NTA standard, but lower than the Taiwan Bar Association maximum (Chiu and Sung 2015: 5; see also Gobal Legal Insights 2018).

Order: Foreign Justice, Local Justice

Indigenous communities in Taiwan continue to look to custom and tradition as critical sources of identity and normativity in daily life. The many custom-guiding activities in indigenous daily life—accessing traditional territories, collecting forest products and minerals, cultural education, fishing, hunting, and weaving, among others—have been well-documented (see Simon and Mona 2015; Simon 2015). It was, in fact, this regard for traditional culture and custom, and the conflicts with state law that it engendered, that motivated the Judicial Yuan to create the special indigenous court units in 2013 (Judicial Yuan 2018b: 1-2). Yet, indigenous custom and traditional methods of dispute resolution continue to go unrecognized as authoritative or binding sources of normativity in Taiwan courts (Tsai 2015: 296).

Given that many indigenous communities were quite isolated, and history and tradition tended to orient community members away from state legal institutions, disputes were often handled internally. Research on customary law in Paiwan communities, for example, shows that Paiwan villages continue to rely on traditional methods of resolving disputes among members of their community. Grace Tsai (2015: 340-341) interviewed members of three Paiwan villages concerning resolution of inheritance disputes. The majority of interviewees reported that conflicts concerning inheritance were often resolved by a "family council" that consisted of senior members of the family, including the surviving parents; siblings, cousins, and extended family; and elder cousins of both parties. Members of the family council typically witnessed the partition of family property after a wedding event and, therefore, had knowledge about how the deceased parents allocated assets. Notably, Article 1131 of the *Civil Code* (*minfa*, 民法) provides for the creation of a family council, but this system was slightly different from the Paiwan family

council system in that eligible family members also included fourth degree relationships (e.g., brothers and sisters of grandparents).

Tsai (2015: 342) argues that elements of the Paiwan family council system could be integrated into the mediation sessions held by the Taiwan family court in ways that would provide an alternative to costly litigation and could restore the harmony of the Paiwan community. Other scholars note that Taiwan law itself provides room for the integration of indigenous justice practices in the civil, but not criminal, context. Article 757 of the Civil Code expressly recognizes custom: "No rights in rem shall be created unless otherwise provided by the statutes or customs."[79] While the Taiwan legal system was not drafted with indigenous peoples in mind, legal scholars maintain that Article 757 creates a space for integrating indigenous custom and tradition into the civil law system (Interview 001). The incorporation of indigenous custom and tradition into law would require critical reflection as it raises questions about who gets to speak for the community about customs and traditions (Keesing 1992: 195-196) and may enshrine practices that internally disadvantage certain portions of indigenous communities, for example, patriarchal and patrilineal customs that disempower women (Chen 2014a). Moreover, the issue of indigenous access to civil courts identified above remained a significant obstacle.

Other geopolitical contexts with large indigenous populations or substantial indigenous land situated in their territory sometimes encompass parallel or overlapping justice systems that serve indigenous communities. The effects of social shifts and the unique history and cultural identity of indigenous nations have resulted in a breathtaking diversity of institutional structures, processes, jurisdictional parameters, and kinds of norms across the globe. In the United States, for example, at one end of the spectrum is the Navajo judicial system, which includes courts of

[79] 「物權除依法律或習慣外，不得創設。」

record and precedent, producing a large body of case law that was accessible to legal professionals and scholars (Cooter and Fikentscher 1998a, b). Other Native American tribes created courts that were limited in scope, concentrating on matters related to particular dimensions of tribal operations, like gaming enterprises. Still others employed non-adversarial forms of dispute resolution, relying less on legal codes or jurisprudence and more on local ideas of authority and relational values to resolve disputes among community members (Cooter and Fikentscher 1998a, b). State systems also operate in partnership with tribal court systems. Pruitt (2014: 509) notes, for example, that Alaska Rules of Civil Procedure endorsed local dispute resolution in civil cases by allowing parties to "agree to resolve disputes, subject to court approval, by referring them to tribal courts, tribal councils, elders' courts, or ethnic organizations" (Rule 100(i)(4)). According to Alaska Chief Justice Dana Fabe (2013: 12), these tribal courts increased access to justice in ways that state justice administration could not:

> In many cases, tribal courts are handling relatively minor problems that would likely never reach the state court system, yet have a degrading impact on a community's sense of security and well-being. And some of the risky behaviors they seek to address, especially in young people, might never come to the attention of state law enforcement.

The Judicial Yuan has begun to see the value of juridical institutions specializing in indigenous issues, most notably in creating the special indigenous court units. Yet, these institutions were far from indigenous self-managed or co-managed systems of dispute resolution. Recognizing this, in 2017 the Judicial Yuan identified a long-term goal of "setting up of an indigenous court in order to practice the spirit of judicial autonomy of indigenous peoples"[80] (Judicial Yuan 2017a: 36), although it is unclear what the structure or operation of this court will look like.

[80]「研議承認。。。原住民族法院之可行性，以實踐原住民族司法自治之精神。」

Local justice, even when informally structured, can be an effective form of ensuring access to justice (Pruitt and Showman 2014: 510). Grounded in people's needs and capable of reflecting community understandings of justice and peacemaking, local justice could enable indigenous communities to mitigate problems of identifying legally cognizable issues, avoid costly travel and litigation in state courtrooms, and restore harmony among disputants in terms that are locally authoritative and meaningful. Concerns about privileging certain voices and internal oppressive practices, however, remain. Bearing these issues in mind, anthropologists have shown that people exercise evolving local law traditions upon recognizing an injustice, and local law traditions provide perhaps the most powerful framework for dealing with the contradictions inherent in legal frameworks grounded in imperial, colonial, and modern rule (Mattei and Nader 2008: 202).

Language: Interpreters and Literacy

Indigenous languages in Taiwan belong to a widespread language family group called "Austronesian languages," which includes all the languages spoken throughout the Pacific and Indian Ocean. On the island, indigenous peoples speak 42 different dialects of Taiwan's 16 officially recognized indigenous languages (Taiwan Today 2017; Jennings 2012). In recent years, Taiwan has taken steps to protect indigenous languages, most notably through promulgating the *Indigenous Language Development Act* (*yuanzhumin yuyan fazhanfa*, 原住民族語言發展法), which designated indigenous languages as national languages of Taiwan and provided that the government would establish a foundation dedicated to researching and supporting indigenous languages, including facilitating the development of more comprehensive writing systems and dictionaries.

As noted, the official language of Taiwan courts is Mandarin Chinese (Organic Act of Courts, Art. 71). Observing that indigenous peoples often live in traditional communities for long periods of time and thus may not be able to communicate fluently in Mandarin Chinese, the Judicial Yuan (2018b: 29) identified language as a key obstacle to indigenous people's access to justice. To deal with this issue, the Judicial Yuan implemented a special interpreter program for indigenous peoples. This dissertation has identified several deficiencies with this program: certain dialects were not represented, interpreters did not always have a robust understanding of Taiwan law or legal process, and the program was remarkably infrequently used in courts. Recognizing some of these deficiencies, the Judicial Yuan has recently undertaken efforts to strengthen the interpreter program, including the development of a legal training program for interpreters (Interview 047) and the development of a special handbook for judges and courtroom staff designed to streamline and harmonize the use of courtroom interpreters (Interview 118).

Observations in courtrooms suggest yet another issue related to language: literacy. As a matter of routine, courts asked indigenous witnesses to read aloud an affidavit written in Mandarin Chinese in which they affirmed the truthfulness of their testimony. Some indigenous witnesses, however, could not read the affidavits. I observed court clerks as they stood over the shoulders of witnesses and read the text aloud to the witness, which the witness repeated, and then asked the witness to sign the document. Entering a foreign legal system, coupled with linguistic issues, it was unclear whether these witnesses knew what they were affirming through their utterances and signatures. Further, many of these witnesses were elders in indigenous communities—the people the special indigenous court units relied on as experts in cases involving indigenous custom and tradition.

Statistics on indigenous literacy in Taiwan are unclear. Some commentators suggest indigenous peoples have slightly higher literacy rates than local Taiwanese due to the high rate of Christian converts who learned to read the Bible and hymns in their Romanized writing (Stainton 2009). Others maintain that indigenous peoples generally have low literacy rates (Li and Hsiung 2017). A recent survey of the Hla'alua people in central southern Taiwan concluded that "nearly all Hla'alua people, except for some elderly people, are literate in Mandarin" (Yeh 2015: 19). In my fieldwork, while I did not conduct a formal survey about literacy of the people living in the rural and remote Bunun and Truku communities with whom I worked, village meetings within these communities typically featured an individual assigned to translate and read aloud texts written in Mandarin Chinese in their mother tongue for the benefit of those who could not read or speak Mandarin Chinese fluently. These and other observations, like witnesses' inability to read witness affidavits, left an impression that literacy issues should not be taken for granted. The provision of interpreters for spoken language solves one dimension of the language problem, but recalling the significance of documentation in courts, the lack of translation services for key documents and legal materials—witness affidavits but also charging papers, evidence, hearing transcripts, legal pamphlets, police reports, and so on—was another area in need of attention for meaningful access to justice, particularly given that government language policies now categorize indigenous languages as national languages.

Policing: Puzzles and Points

A puzzle in the Taiwan legal system concerns the significant numbers of arrests and convictions of indigenous persons for hunting animals not listed as endangered, such as the Formosan Reeve's muntjac and Formosan serow, *Capricornis swinhoei* (*taiwan ye shanyang*, 臺

灣野山羊), but few to no arrests or prosecutions of non-indigenous or indigenous persons for hunting endangered animals, like the mountain hawk-eagle or clouded leopard, *Neofelis nebulosa* (*yunbao*, 雲豹). To give a sense of these numbers, estimates indicate that over 400 indigenous hunters have been put in jail since 2004 for illegally hunting wildlife species considered common species, while no (or very few) non-indigenous or indigenous persons have been arrested or prosecuted for illegally hunting endangered clouded leopard or mountain hawk-eagle (Interview 086).

This raises a question about conditions leading to indigenous peoples' arrest and appearance in Taiwan courts. Month after month, year after year, hunters from Bunun, Truku, and other indigenous nations appeared in Taiwan criminal courts for allegedly hunting non-endangered species, yet there were no arrests or prosecutions of Han Chinese farmers poisoning an estimated dozen or more clouded leopards each year and no prosecutions of Paiwan or Rukai hunters trapping mountain hawk-eagles. An ongoing study interviewed Han Chinese farmers and indigenous hunters about their practices. Non-indigenous farmers reported that they were not worried about being arrested by Taiwan police for poisoning endangered clouded leopards because the police would let them go. As a result, they saw no reason to stop the practice of poisoning (Interview 087). Indigenous hunters, on the other hand, consistently reported that they were very fearful about being arrested for hunting common, non-endangered species.

One explanation of this enforcement imbalance may be that indigenous and non-indigenous hunters simply hunted endangered species less frequently than non-endangered species, and police therefore had fewer opportunities to catch them. Statistics on rates of indigenous persons hunting specific species are not available, but researchers note that rates of hunting of mountain hawk-eagles, an endangered species, have increased over time due to

cultural shifts in Paiwan and Rukai communities: formerly, only chiefs could wear eagle feathers, but currently lay people may wear them as well, increasing the demand for mountain hawk-eagles feathers (Interview 087). Whether or not endangered species were hunted at the same rates as non-endangered species, it appeared that the practice was ongoing and increasing.

Another, perhaps more promising, possibility is incentives in policing practice. Jeffrey Martin (2007: 684) has shown how police officers in Taiwan do not mechanically apply the law but balance the duty to implement the law with Chinese moral norms of *qinq* (情, sentiment), mediated by *li* (理, reason). Incentives present an interesting space where considerations of sentiment and reason intersect. A significant difference in the cases above concerns the method of hunting. Indigenous hunters typically used firearms to hunt muntjac and serow and traps to hunt mountain hawk-eagles, while Han Chinese farmers poisoned clouded leopards. Reportedly, police departments awarded officers more points for making arrests for violations of law involving firearms (e.g., five points) than for violations involving endangered wildlife (e.g., one point). This point system figures into monetary awards and advancement for local police officers (Interview 087). Police officers, therefore, had economic and professional incentives to focus on hunting activities involving firearms over those involving traps or poison. This would perhaps explain, in part, the strange disproportionality of prosecutions of indigenous hunters for killing common, non-endangered species over killing endangered species: police were concentrating their efforts on hunting practices that involved firearms, disproportionately affecting indigenous hunters. This incentive system has conceivably shaped the indigenous lawscape, inadvertently forcing indigenous hunters to bear the brunt of a system focused on regulating firearms.

Knowledge: Education, Embodiment, and Experts

Meaningful access to justice means not just access to courts and lawyers but access to knowledgeable legal actors who are aware of and understand how to handle unique features of the indigenous cases they handle: the ways indigenous traditional culture informs daily life and the significance of indigenous connections to land, territory, and access to natural resources; the conditions in indigenous communities giving rise to issues ripening into civil disputes and criminal prosecutions; problems that indigenous persons or communities face that they may not identify as issues courts of law may help them resolve; and the domestic laws and international standards protecting indigenous persons and communities.

As noted, there was strikingly little indigenous representation within the judiciary or legal bar as only a handful of judges and lawyers on the island had indigenous status. Consequently, there was very little "native" knowledge within the judiciary about Taiwan's indigenous cultures. Close government regulation over the legal profession and low passage rates on the High Examination for lawyers and Special Examination for Judicial Officials for judges and prosecutors, combined with the marginality and precarity of indigenous life, correlates closely with this dearth of indigenous representation in the Taiwan judiciary and legal bar.

To deal with these issues, the Judicial Yuan created the special indigenous court units and provided training in indigenous cultures and relevant laws to judges and prosecutors. As noted, there were substantial weaknesses in this training: judges were only required to obtain 12 (or just six) hours of mandatory training (subsequent training was voluntary); the judicial training program tended to use the same experts; there were no examinations or other checks on judicial competency; and prosecutors seemed to be increasingly hostile to cases involving indigenous custom and tradition. While many legal actors viewed judicial knowledge as a key feature of the

special units, there was general agreement that judicial education about indigenous cultures was grossly inadequate. One Paiwan collaborator summarized this issue as follows: "The judges are supposed to be trained in indigenous cultures, but they never know anything" (Interview 107). Judges also noted there was very little incentive to or interest in participating in the special indigenous court units (Interview 094).

Lawyers representing indigenous litigants were in a similar position as judges. Taiwan legal education generally overlooked the cultures and customary rules of indigenous peoples. Lawyers could voluntarily participate in training provided by legal aid branches about indigenous cultures and related laws, but the time lawyers could dedicate to such training was often limited given that their principal areas of practice were in other areas, and cases involving indigenous custom were few. While there were some non-indigenous lawyers who very capably and enthusiastically represented indigenous peoples in court, the "indigenous bar," so to speak, was small. Earlier chapters considered in detail the strategies judges used to deal with the peculiar challenges arising in cases involving indigenous custom and tradition. It is worth briefly considering the strategies of lawyers "in the know"—i.e., those having knowledge of Taiwan's indigenous cultures and the domestic legal framework—handling these cases.[81]

This dissertation has indicated the important role lawyers served as mediators between indigenous peoples and the Taiwan state, exemplified in the anecdote about the lawyer shaking betel quid in his hand. Lawyers' strategies also included finding ways to bring judges into indigenous communities through site visits, instructing indigenous peoples to use their mother

[81] While this dissertation has primarily focused on space over temporality and strategy in the special indigenous court units, these issues have arisen in different ways throughout the text. Chapter Two highlighted the newness of the special indigenous court units. Chapter Four identified the legacies of colonialism and imperialism in Taiwan's indigenous rights legal framework. Chapter Five detailed the strategies judges used to animate the special units. Chapter Six documented the strategies indigenous litigants used to communicate different identities to the court through performances of indigeneity.

tongue while testifying, and creating special law centers. The discussion above noted how lawyers sometimes created working groups in indigenous communities. Enterprising lawyers also consulted with indigenous representatives and academic experts to fill in gaps in knowledge about local customs and traditions (Interview 073). To this end, they also built relationships with communities, taking time to get to know the leaders and community members (Interview 040). These lawyers took great pride when the communities recognized this relationship through ceremonies or gifts of decorated hunting knives, paintings, or photographs.

In the pragmatics of litigation, sometimes lawyers found that a more effective strategy was not to try to win a case but rather to not let it end (Interview 072). This observation connects the special units to matters of temporality. Lawyers knew that domestic indigenous rights were in such a state of flux, that delaying a case, or dragging it on, could potentially benefit their client should the law change in their favor. In a similar vein, sometimes lawyers aimed not at winning a civil lawsuit but rather surviving a motion to dismiss (Interview 072). Surviving such a motion, even if the case was not strong, could put significant pressure on an opposing party to settle on terms favorable to indigenous litigants.

In terms of legal argument, some lawyers saw the ambiguities in Taiwan's legal protections as advantageous. One lawyer observed: "Ambiguities in the legal framework allow for moving between different laws. Human rights law, constitutional law, basic law, domestic statutes, local ordinances and rules" (Interview 073). This is reflected in lawyers' strategic use of the Indigenous Peoples Basic Law (IPBL) and human rights treaties (see Chapter Five). Under this view, ambiguities in Taiwan's laws created an opportunity to draw on laws from many different areas. Yet, if there was opportunity, there was also risk, as lawyers knew that domestic

and international indigenous legal protections had an uncertain status among judges, and they adapted their legal arguments accordingly. One lawyer noted:

> Sometimes judges do not like those [IPBL and human rights] arguments. They just want me to give the easiest law to analyze. So, my strategy is that I will first give them the most directly related law, and then as the trial develops, I will put in structural arguments showing that this issue is bigger that this case. That the judge is solving a significant issue impacting all of the island. And then I may expand to something global, like human rights. But starting at human rights will not work. They [judges] are not receptive to this approach. (Interview 073)

State efforts to expand knowledge about indigenous custom and tradition in Taiwan courts were uneven. The judiciary has experimented with introducing indigenous sentencing circles in Chiayi County as a mechanism for getting the local community and family involved in decision-making and dispute resolution (Interviews 023 and 071). For instance, in one matter involving an indigenous man allegedly possessing an illegal gun, the presiding judge reported that the communication structure presented a significant obstacle for the sentencing circle. When the judge met with the circle of elders after the trial to consult about the case, the discussion turned into something resembling a law school lecture where the judge spoke and the elders listened. At the end, the circle of elders gave the same verdict the judge would have given, suggesting that the experimental sentencing program largely replicated ordinary court procedures (Interview 024).

Some Taiwan judges invited indigenous elders and representatives to testify about their community's cultural practices and territory. There was, however, no formal protocol established for this process and some judges reported pressure from bureaucrats not to call village experts to testify due to administrative complications and expenses. Others judges preferred not to rely on experts and instead turned to texts written about indigenous peoples dating to the period of

Japanese colonization. Moreover, using experts did not always solve the knowledge problem as their testimony conflicted with judges' assumptions about the concepts of cultures and custom.

The Judicial Yuan recently outlined several goals for the special indigenous court units, many of which address issues of knowledge within and around the special units (Judicial Yuan 2017b). Short-term goals included strengthening judicial training, developing a mandatory certification program for judges, and creating a section on the bar examination devoted to laws protecting indigenous peoples. Mid-term goals included creating a circuit court system, establishing an indigenous judicial advisory committee to assist Han Chinese judges handling sensitive cultural matters, and addressing cultural tensions arising in court cases through legislation. Long-term goals included investigating the feasibility of incorporating indigenous custom and tradition into legislation and setting up a separate indigenous court.

Indigenous peoples recognized that knowledge was a critical feature of this legal framework but some had a different gloss on the issue. One Truku elder explained he felt it did not matter that judges did not know about indigenous cultures. For him, the real value of the special indigenous court units was that it provided a venue for indigenous peoples to explain their cultures to judicial actors:

> Yes, they [judges] receive some training, it is not much, but that is not the important part of the court. The important part is they call elders from the villages to come and teach them about indigenous customs. That is the important part. That it includes our knowledge. The elders teach them what they need to know. (Interview 082)

This suggests that, at least for some indigenous persons, the authority of Taiwan national courts was grounded in the courts' capacity to incorporate indigenous voices in legal proceedings, not in Han Chinese judicial actors' knowledge about indigenous cultures. This view underscores the importance of considering administrative capacities to bring in indigenous experts, judicial

attitudes towards using such testimony, the economic burdens placed on indigenous claimants and witness, and language issues.

The lack of knowledge about indigenous custom and tradition was thus another important feature shaping the indigenous lawscape in Taiwan. There was little indigenous representation within the judiciary or legal bar. Programs designed to educate judges and lawyers about indigenous customs and justice practices were minimally effective. Efforts to expand knowledge within courts were uneven and tended to replicate the ordinary legal system. Judges' use of indigenous experts was inconsistent and, at times, such testimony was subordinate to texts dating to the early twentieth century.

Institutions: Structure, Jurisdiction, and Culture

Court institutions are, of course, also part of this richer understanding of law and access to justice. This dissertation has identified numerous issues with the institutional structure of the special indigenous court units. It has described the overly broad and unreasonably narrow features of the special units' jurisdiction. It likewise described how institutional structures, such as summary proceedings, discouraged indigenous defendants from raising cultural defenses. In fact, law centers came to recognize that summary proceedings presented such a significant obstacle to indigenous rights that they began training lawyers to avoid using such procedures in criminal cases (Interview 127). It has described the physical structure and arrangement of Taiwan courthouses and courtrooms as infused with Han Chinese actors, language, symbols, values, and processes. It has described how, due to the lack of clear guidance from the Judicial Yuan, judges in the special units differed substantially in how they interpreted the institutional expectations of respecting indigenous cultures and securing judicial rights.

Another issue is that court cases, by their nature, tend to focus on individuals over other interested parties, like communities. The cases discussed throughout this dissertation considered the actions and fate of discrete individuals: to wit, a group of Bunun plaintiffs suing the government for damage to their village, five Pinuyumyan hunters prosecuted as they prepared to hunt, five Truku men prosecuted for collecting minerals, a group of Paiwan plaintiffs suing developers for damage to their cemetery, a Truku man prosecuted for building a bamboo hut on national land, three Atayal men prosecuted for collecting beechwood, a Paiwan man prosecuted for making breech-loading firearms, an Atayal man prosecuted for burying his mother on national land, and hundreds of individual indigenous hunters prosecuted for hunting common wildlife species. At times, Taiwan courts attempted to incorporate community perspectives, but ultimately it was the conduct of individuals, cast as parties and perpetrators, that courts evaluated. Shifting the focus towards communities, rather than individuals, and adopting a historical framing that recognizes the discriminatory and repressive governance practices to which Taiwan's indigenous peoples have been subject would open courts to social units and understandings more accurately reflecting how indigenous peoples see themselves. This would take, however, a willingness to open the doors of the courtroom more broadly to the involvement of indigenous peoples, perspectives, and places.

One obstacle for making this move concerns the way Taiwan courts have conceived of indigenous peoples. Taiwan regulations adopted a Tylorian approach to "culture" that embraced an ideological frame of evolutionism and required indigenous persons to conform to and enact conditions of life they never could have known themselves. Further, in a judicial space insistent upon singularity and bounded categories, judges struggled to navigate the complexities of indigenous culture. While many judges concluded that certain behaviors, such as indigenous

hunting, presented relatively clear examples of indigenous "cultural" practices, they viewed other behaviors as having more tenuous connections to "culture," like the social dimensions of indigenous alcohol consumption (Interview 047). As one judge summarized the issue during a trial, "What is culture? That is not something that is even very clear."[82]

Applications of the concept of "culture" within Taiwan courts tended to essentialize indigenous peoples, rendering indigenous cultural practices and lifeways as phenomena guided solely by knowledge systems that reinforced the past and did not look towards the future (Blaut 1993). For instance, when laws employed generic terms, such as *lieqiang*, courts tended to interpret these terms according to practices from earlier historical periods. Under such interpretations, indigenous culture in Taiwan courts was imprisoned as heritage, institutionalizing a perspective that indigenous peoples were groups and communities for whom modernity had yet to arrive.

Essentialism emerged in yet another way. While there was widespread recognition of the variety of indigenous languages, cultures, and worldviews on the island, there remained a tendency by Taiwan courts to view indigenous peoples as relatively analogous, or at least not materially different from a justice perspective. Nowhere was this more evident than in the concept of the special indigenous court units themselves: a judicial innovation tasked with addressing issues relating to all of Taiwan's 16 officially recognized indigenous nations rather than specializing in a particular indigenous nation. It was also evident in the system of judicial rotation where there was little concern that judges took with them critical local knowledge as they rotated from one jurisdiction to another. It was further evident in court cases as judges inconsistently inquired about the indigenous nation or community with whom litigants self-identified, often identifying litigants generically as "indigenous."

[82] Taiwan Hualien High Court 106 [2017] Case No. 37 (October 18, 2017, hearing).

Moreover, resting behind all these considerations was a pervasive assumption that indigenous peoples were equated with culture. That is, laws protecting indigenous peoples, legal processes resolving disputes involving indigenous persons, legal actors, and oftentimes indigenous persons themselves, rehearsed and reified understandings of indigenous peoples as cultural, not political, entities. To be sure, indigenous peoples had political rights—they were Taiwan citizens, they voted, they owned property, they filed lawsuits, they had six reserved seats in the Legislative Yuan—but domestic legislation concerning indigenous peoples tended to emphasize protection of cultural practices over autonomy and self-governance (Gao, Charlton, and Takahashi 2016: 69). Earlier chapters documented how Taiwan laws and legal processes rendered indigenous peoples as social beings: first, as members of the ethnic Chinese majority and, then, as distinct ethnic groups deserving of rights determined by the state. The special indigenous court units, as a judicial innovation, explicitly carved out indigenous peoples from wider Taiwan society on the basis of ethnic difference. Recent efforts towards pluralism were situated within this paradigm of equating indigenous peoples with culture as the Taiwan state pursued indigenous self-determination through converting indigenous peoples into legal subjects.

While state law, legal objects, and legal procedures dominated discourse within Taiwan national courts, the special units offered a glimmer of something different. Throughout this dissertation, and emphasized in Chapters Five and Six, the special units emerged intermittently as powerful fora for debating indigenous-state relations. Conditions of having to make sense of an institutional mandate to "respect" indigenous cultures but provided few tools to do so, combined with encountering indigenous "other" knowledges, worldviews, and ontologies, compelled some special unit judges to reflect on their assumptions about law, culture, and reality. In these moments of self-conscious reflexivity, the special units were, by degrees,

emancipated from the strictures of ordinary legal process as judges sought out analytical tools from extra-legal sources to resolve cases involving indigenous custom and tradition.

These moments were not simply top-down judicial practices. They were the product of encounters within courtrooms among legal actors and indigenous actors. Lawyers strategically used ambiguities in Taiwan legal protections and worked with Taiwan legal procedure to accomplish results favorable to their indigenous clients. In important ways, they helped translate indigenous norms and customs into the language of law familiar to judicial actors. Indigenous actors spoke their mother tongue and dressed in traditional attire, sometimes inadvertently making the courtroom space their own. They explained their customs, traditions, and the importance of traditional lands to judges and lawyers. They offered different framings of history and state control lying behind disputes arising in the special units.

In these moments, new expressions of indigenous identity and critiques of state power emerged in the special indigenous court units—expressions and critiques that appeared to be unavailable in other state institutions. We already noted, for example, the consequences for the Amis legislator when he wore traditional attire, refused to face the portrait of Sun Yat-sen, and took his oath of office as a Tainan City councilor in Amis language. Of course, the special units did not always allow such expressions as some judges regarded indigenous difference as "dangerous" or became angry when indigenous litigants refused to play the courtroom game. The capacity of the special units to serve as agonistic spaces for debating indigenous-state relations was thus unassured, but in those flashes of self-conscious reflexivity they demonstrated how state institutions could work at, even beyond, the limits of Han Chinese ideas about law, culture, and reality.

In summation, the special indigenous court units appeared to be a step in a positive direction, but many features of state law and court institutions shaped the indigenous lawscape in ways that favored mainstream Han Chinese understandings of order and justice. There remained significant imbalances in legal power between the state and indigenous peoples in the special units. The jurisdictional scope of the special units distracted from close examination of cultural issues. Institutional incentives discouraged indigenous litigants from raising cultural defenses. Judicial actors differed substantially in how they understood their role in the special units. Cases focused on individual conduct and interests over community or group interests. Central concepts, like culture, were ambiguous and efforts to concretize these concepts essentialized indigenous persons and peoples. Behind all these issues, state laws and state court institutions tended to articulate indigenous peoples as social, rather than political, beings and in so doing worked to institutionalize indigenous peoples' disempowerment.

Conclusion: Precarity as a Proposal

What is justice? A great deal hinges on how one understands this concept. For the Taiwan state, justice was conceived in relatively thin terms of courts and lawyers. Here, I have not professed to identify—let alone suggest solutions for—all of the issues undermining indigenous peoples' access to justice. My goal has been more modest to explore a more robust, "thicker" concept of law and access to justice in indigenous contexts, bringing to bear what we know about the challenges facing these nations and communities in eastern Taiwan. As I have documented, indigenous peoples in Taiwan faced particular obstacles to achieving robust access to justice. These include challenges related to normativity, spatiality, economics, legal order, language, policing, knowledge, and institutions. Solutions concentrating solely on increasing access to

courts and lawyers ignored critical and unique features of indigenous lives and contexts shaping how they interact with the state, legal actors, the court system, and one another. A more textured understanding of law and access to justice would recognize and address entanglements of social fields and law and would be oriented towards the underlying causes of individual's and community's legal problems.

There are numerous solutions one may consider to secure indigenous peoples' rights and access to justice. For example, the Taiwan judiciary may work with indigenous peoples to expand efforts to incorporate greater indigenous representation in legal proceedings. This may include identifying ways of incentivizing indigenous youth to study law, rethinking the national administration of lawyers and judges, streamlining procedures for using indigenous expert witnesses, and strengthening programs incorporating indigenous justice practices. The Taiwan judiciary may also work with indigenous representatives to revise its legal culture. This may involve changing features of legal education to include systematic courses on indigenous rights and peoples and creating a professional certification program for judges. It may also involve restructuring of the special indigenous court units to articulate a clear set of goals, rethink its jurisdictional scope, find ways of codifying or integrating indigenous custom and tradition, address institutional incentives driving litigants away from cultural defenses, incentivize judges to participate in the program, and make the courts mobile by taking them into villages. Taiwan courts are on the forefront of courtroom technology (Interview 087), and spatial issues could be addressed through technology and transportation means, bridging geographic gaps through Skype and video-conferencing technologies[83] or "bus projects" transporting lawyers and law students into indigenous communities to operate free, temporary legal clinics.

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[83] Of course, technology has limitations, including the fact that not all indigenous peoples have access to the Internet. Efforts are currently underway to expand indigenous access to the Internet. In 2015, the

I propose however, that we set these solutions aside for a moment. We should do so because they start with a troubling presumption: that the state legal framework is the appropriate, perhaps even best, system. In liberal democracies like Taiwan, this framework has demonstrated a strong tendency to marginalize indigenous peoples through unequal power structures and discourses (Vermette 2008-2009). As noted, it also tends to render indigenous persons and peoples as social entities with *a priori* practices bound to a central "essence." Another approach—another vocabulary—might be able us to secure indigenous rights more effectively: an approach emphasizing not collective cultural claims but claims to land and self-determination (cf. Engle 2010). This would focus on political claims of self-determination over legal rights to culture. The point is not that such an approach would guarantee the security of indigenous peoples' rights and access to justice but rather that this has, as yet, been an unexplored and potentially productive approach.

In principle, self-determination may generate outcomes that are normatively desirable that cultural claims simply cannot. The obligation to respect individual rights in the exercise of cultural rights, for example, tends to place cultural rights in a subordinate position relative to individual rights. Cultural rights also tend to equate indigenous culture with traditional heritage. Further, there is matter of the manipulability of the category of "culture" itself. Moreover, cultural rights tend to be defensive in that they are designed to protect the group, without necessarily recognizing inequalities within the group, rather than to transform the power structures that create conditions leading to marginalization. In many ways, the full scope of cultural rights is coopted and undermined by the state legal framework.

Executive Yuan initiated the i-Tribe program that aims to boost wireless broadband development in rural and remote areas and provide free Wi-Fi service to indigenous groups and communities (Ruckus 2018).

Tackling and transforming the power structures that underlay indigenous marginalization could potentially be a productive step forward. It would require a new vocabulary, one based on land and self-determination. This would be an approach oriented towards decolonization rather than one focused on categories of race or ethnicity (Steinman 2012: 1074). Self-determination, in the strong sense of the term, would view these claims as political claims grounded in indigenous sovereignty; a weaker sense would articulate them generally as human rights. In the Taiwan legal context, a strong approach may involve a freestanding system under the control of indigenous peoples, similar to indigenous tribunals in other contexts, such as the Hopi Tribal Court in northeastern Arizona (Richland 2008). Such a system would not only be consistent with Taiwan's aspiration of being a state of "cultural pluralism," as articulated in the ROC Constitution (Art. 5 and Add. Art. 10), it would also be in line with aspirational goals of the Taiwan judiciary and contemporary dispute resolution activities ongoing in many indigenous communities.

To return to an observation at the opening of this chapter, the appropriate or ideal situation thus may not be seeking more security for indigenous rights and access to justice if such security is understood in terms of the state legal framework. Rather, the solution may be to temporarily and strategically stay with the precarity of this system, working to trouble the binary notion of self/Other and to shift power structures so that indigenous peoples have greater substantive involvement in the process of articulating and securing their rights, interests, and lifeways. Staying with precarity would keep at the fore the manifold ways state law and the legal system tend to marginalize indigenous peoples and lives. Illuminating these tendencies can serve as a critical resource for moving towards indigenous social justice. This postponement is thus not inactive. Rather, creating fora for debating difference, performing identities, and critiquing the

state—suggested by the special indigenous court units in their more enlightened moments—may be a productive step towards determining what indigenous peoples need and desire, empowering them as equal participants in identifying problems and developing solutions (Schaap 2003: 525). Under such an approach, evaluating the security of indigenous rights and access to justice would shift from a thin exercise of state courts and lawyers towards a thicker, pluralistic understanding of justice articulated by reference to the scope of autonomy guaranteed to indigenous groups and communities.

CHAPTER EIGHT

Opening Statement as Closing Argument:

Customs, Parables, and Sovereignty

Guideposts, Stories, and Turtles

How does one intervene in a story that is being told over and over again? A story that settler and colonial states tell about land, law, and indigenous peoples—that land belongs to the state, that law is "out there," that indigenous peoples are cultures. Perhaps the answer is yet another story. One that recognizes that matters of law, legal categories, and legal objects are (to invoke yet another story) stories all the way down.[84] This is a story that has the potential to de-privilege state understandings of land, law, and indigeneity in ways that can advance indigenous interests and perspectives.

This dissertation has interrogated Taiwan's special indigenous court units through the lens of legal anthropology, human rights, indigenous peoples, and the state. While other studies have considered established indigenous courts (Cooter and Fikentscher 1998a, b; Miller 2001; Nesper 2007; Richland 2005, 2008), this project followed the development of a new and ambiguous indigenous court institution in Taiwan and the practices that gave it life. In my

[84] This refers to the Hindu mythological story of the World Turtle (and similar stories of the World Elephant and World Serpent). According to the story, the World Turtle carries the Earth on its back and sits on the back of yet another larger turtle, which itself part of a never-ending column of increasingly large turtles that continues indefinitely. In philosophy, this story has been used as an expression of the problem of infinite regress (Nolan 2001: 533-534). It has also figured in legal reasoning. In *Rapanos v. United States*, 547 U.S. 715 (2006), the U.S. Supreme Court Justice Antonio Scalia drew on the work of Clifford Geertz (1973: 28-29) when he referred to a version of this myth:

> In our favored version, an Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies "Ah, after that it is turtles all the way down."

analysis, I drew upon three theoretical themes, what I termed "guideposts," to examine how understandings of indigenous culture and state law emerged in and shaped the interactions of courtroom actors and outcomes in cases involving indigenous custom and tradition. These guideposts helped explain how Taiwan's special units, in a phrase, put indigenous "culture on trial" as they worked through issues related to indigenous culture, custom, and identity. The heuristic device of "guideposts" not only guided the direction of this analysis; it also aimed to level the playing field by incorporating indigenous peoples' points of view and revealing how indigenous peoples were significant actors in their own right.

First, many of the cases in Taiwan's special indigenous court units arose out of moments of "refusal." Refusal, as a claim to a certain form of indigenous sociality, was the disposition that being and staying indigenous was articulated to ideas of a particular past but also at times to a desire to remain distinct from wider society. Rather than positing an *a priori* landscape of domination and resistance tending to overestimate the place of the state, refusal offered its own structure as groups refused at times to let go, to roll over, or to play the game. Cases involving indigenous custom and tradition in Taiwan's special units often had their genesis in activities that rejected the hierarchical relationship between the state and society. Both in and out of the courtroom, indigenous actors took opportunities to remind non-indigenous actors that this was not their land and that there were other political orders and other normative possibilities. Moreover, refusal informed ideas about indigenous sovereignty as indigenous groups acted, intermittently and strategically, "as-if" they had sovereignty, an issue discussed in greater detail below. Ironically, these "as-if" moments mirrored in certain respects enactments of sovereignty by the ROC government, which, as a de facto state, has had to strategically act "as-if" it were a

state to assert its position on the world platform, what Sara Friedman (forthcoming) refers to as "aspirational sovereignty."

Second, disputes over custom and tradition in Taiwan's special indigenous court units involved "encounters" of Han Chinese with indigenous cosmologies, epistemologies, and ontologies. The special units and the laws they applied explicitly framed indigenous peoples as different, articulating these differences across registers of culture, language, and socioeconomics. Examining interactions in the courtroom as encounters provided a useful orientation for considering engagements across constructed lines of commonality and difference in a legal setting. Lessons from practice theory directed attention to how judicial actors addressed indigenous difference in their daily practice, reminding us that while legal practice is structured and socially patterned, it also often involves creativity and extra-legal reasoning. Processes of vernacularization highlighted how global norms informed and were shaped by local contests and understandings of difference. Pluralism likewise offered a frame for considering the degree to which the Taiwan state legal framework reflected indigenous understandings of normativity and justice practices and also revealed the complications of drawing upon difference as a basis for securing indigenous rights.

Third, management of "ambiguity" proved to do critical work in Taiwan's special indigenous court units. The special units were saturated with uncertainty: blurry institutional purposes, conflicts between laws, gaps in knowledge, and vague guidelines, all of which occurred in an uncertain geopolitical context of a de facto state. In certain respects, managing ambiguities provided opportunities for state actors to consolidate their power and influence. In other respects, ambiguities introduced questions going to the core of understandings of law and justice. This opened the door to new types of conversations about indigenous identity and

critiques of state power. In these moments, the special units emerged as exceptional spaces for debate and experimentation about indigeneity and state power with the capacity to reshape state and local understandings of belonging, custom, and law.

Legal and indigenous actors' efforts to manage ambiguities in law and institutional structure, encounters between Han Chinese and indigenous views, and local practices of refusal exposed the fragility and instability of law in the modern state. Black letter law and jurisprudence often appear to be stable and firm; indeed, many legal institutions present them as such. But law is a lived thing: its existence and character are constituted by how those in life under law view and understand it. A concept of law that fails to explain particular or borderline instances of law begins to lose its claim to offer an account of social reality. In the special indigenous court units' efforts to articulate and address indigenous difference, law's mask of unity and efficiency quickly faded to reveal it as a human activity consisting in a nexus of social activities and narratives involving many different actors with different, and sometimes conflicting, understandings of justice, rights, fairness, and welfare. Understanding law requires considering not just abstract norms and technical processes but the variability, mutability, and indeterminacy of the life of law as it appears in real-time, in specific moments, in actual disputes, and in discrete encounters of individuals. As such, it also emphasizes the importance of empirical research when considering indigenous justice and legal theory, so that it is not built entirely on rhetoric or historic idealism but on the substantive life of law and how those living under law view and understand it. In fact, this may be the special units' greatest strength in working towards indigenous justice: that they so deeply revealed law as social practice and in so doing offered a space for critical reflection about using non-indigenous institutions and logics to protect indigenous peoples.

Taiwan's special indigenous court units were an institutional innovation where the social dimensions of law emerged clearly as legal actors and indigenous actors drew upon different knowledges, worldviews, and relations of power to resolve cases over indigenous custom and tradition. Indigenous representation within the Taiwan judiciary and the Taiwan legal bar was nearly non-existent. Judicial training in indigenous cultures and legal protections was significantly lacking. Domestic laws protecting indigenous peoples were piecemeal, incomplete, and contradicted one another. The category of indigeneity and its internal classifications had their roots in imperial and colonial understandings of indigenous peoples. Interactions between judges, lawyers, and indigenous litigants within the courtroom thus became critical mechanisms for working through these ambiguities and challenges. Indeed, the ROC government depended on these interactions as it turned to the judiciary to do the hard work of securing indigenous peoples' rights when legislators would not. In these interactions, legal actors and indigenous actors brought with them different understandings of law, reality, and sociality to resolve matters involving indigenous custom and tradition.

The effects of these interactions in the special indigenous court units went beyond resolutions of disputes. They also shaped the constitution of the special units. In many respects, the special units functioned as ordinary courts that reinscribed Han Chinese preferences and understandings of indigeneity and law. For legal practitioners working in the special units, this raised a question about whether the special units were really "there" in any substantive sense. In certain interactions, particularly those compelling judges to reflect critically on their assumptions about law and culture, the special units emerged as extra-ordinary spaces for exploring indigenous difference and addressing imbalances of power. I considered these moments in terms of punctuated ontology. In these punctuated moments, the special units exhibited wide variation,

as judges understood the special units' purpose, characteristics, and expectations in different ways. In so doing, Taiwan's special units formed an ad hoc and diverse set of institutions, principally acting as ordinary courts but enacting in moments of critical reflection a range of forms of pluralism as judges encountered indigenous difference and attempted to manage ambiguities in Taiwan's indigenous rights. Hence, in speaking about the special units, one must not assume that they consisted in a singular thing; rather, there were multiple performative manifestations of these special units. To the extent that the special units would build a repository of case law for use by future judges, these features formed the backdrop to such a body of law.

Here, instability of law had consequences far beyond immediate disputes as indigenous and human rights constituted a critical resource for Taiwan's enactment of sovereignty and served as a mechanism for distinguishing the country from the PRC. Taiwan must interact visibly with international norms to justify its existence as a sovereign state maintaining substantive, although not formal, diplomatic relations with other nation-states (Simon and Mona 2015: 4). Compliance with international law has been a crucial mechanism for accomplishing that goal, and cultivating an image of Taiwan as a model of human rights reaffirms critical distinctions between Taiwan and the PRC. The less secure indigenous and human rights claims appeared in Taiwan laws or in the regularity of court process, the less these claims could serve as resources for Taiwan's performance as a sovereign state.

Indigeneity and indigenous peoples have done important work to secure Taiwan's status in the international arena. Taiwan state organs and civil society NGOs have represented the country at UN meetings dealing with indigenous affairs since 1991 (Simon and Mona 2015: 5; Palemeq 2012), despite intense protest from the PRC (Horton 2018). The Executive Yuan Council of Indigenous Peoples (CIP) has signed Memoranda of Understanding (a type of

diplomatic agreement) on cooperation in indigenous affairs with Canada in 1998 (Government of Canada 2018) and New Zealand in 2004 (Munsterhjelm 2014: 125). Representatives of Taiwan's indigenous nations have engaged in cultural exchanges with many indigenous groups outside Taiwan, particularly those Austronesian communities across Oceania (see Johnson 2019). In addition, Taiwan's indigenous peoples have represented the island at the UN through participating in UN workshops and testifying before UN committees (Simon 2015: 698).

Indigenous rights have arguably performed another function for Taiwan: they provided a means by which to communicate with the PRC. Some have identified a metapragmatic function at work in Taiwan's indigenous rights as the ROC government used these rights to talk indirectly to Mainland China about its preferred mode of relations. One judge speculated:

> Taiwan can get some moral capital by treating its indigenous population with respect and dignity, and present this to China as how they should treat Taiwan. The relationship between Taiwan and indigenous people is a quasi-national relationship. It is like the relationship between China and Taiwan. If we treat our [indigenous] population with respect and autonomy, then China should do the same and treat Taiwan with respect and autonomy . . . I think this is why Taiwan has so many indigenous laws since 2001. It was advantageous to the Taiwanese government to model an appropriate relationship with indigenous people. (Interview 023)

Indigenous rights offered a platform for the ROC government to model for Mainland China, through its management of the island's indigenous populations, how the PRC should treat Taiwan. Again, the extent to which Taiwan laws have not secured indigenous peoples' autonomy and self-determination has undermined this message.

Disputes over indigenous custom and tradition arising in Taiwan's special indigenous courts were thus never about the particulars of disputes alone: they were always entangled in matters of human rights, international order, regional politics, sovereignty, and a vision of a future Taiwan.

Stories All the Way Down

I close by stepping back to consider what these observations reveal more broadly about law and sovereignty. Law and sovereignty have been circulating throughout this dissertation discussion: they framed the character of disputes, the engagements between state and indigenous actors, and the possibilities for justice for indigenous peoples. Here, I draw on the metaphor of a lawyer's opening statement to consider elements of narrative, or storytelling, threading through these concepts. For trial lawyers, the opening statement is an opportunity to frame one's side of the case through a compelling narrative. It is not a time for legal argument or for delving into factual details; it is an occasion to grab the decision-maker's attention, using language and imagery to frame the events through a story presented in the light most favorable to one's position (Wilson 2014).[85] In this regard, the chapter title's reference to "opening statement as closing argument" signals that the concluding observations made in this dissertation are an invitation to consider law and sovereignty through an alternative story, one illuminating dimensions of narrative deeply embedded within them.

First, I suggest that the Taiwan experience with indigenous peoples reveals laws-as-stories. That is, "laws"—criminal statutes, civil codes, common law jurisprudence, indigenous customs—constitute "if-then" stories about what can and should happen given a set of events, characters, and plots. Second, I suggest Taiwan's experience reveals the enactment of a particular form of indigenous sovereignty, "as-if" sovereignty, where indigenous peoples who lack official sovereignty strategically act as if they have such sovereign power. Constructed dichotomies between the state and indigenous peoples are blurred in these two "if" conditionals

[85] For instance, on the recommendation of a more senior attorney, as a practicing trial attorney I pinned to the corkboard attached to my law firm office desk a copy of William Blake's (1789) poem, "London." Before hearings, I would review the poem as I prepared my opening statement, drawing inspiration from its poetic descriptions of walking the streets of London to humanize and build a compelling story out of the otherwise dry and tedious details of the immediate dispute.

with implications for state-indigenous relations. If laws are stories, then Taiwan state law and indigenous custom involve similar fundamental operations. If sovereignty includes intermittent and tentative assertions of power without necessarily achieving total control, then indigenous sovereignty mirrors in certain respects the form of sovereignty enacted by the Taiwan state. As a final "if" conditional, if these observations are correct, they suggest the possibility of greater recognition of indigenous peoples' customs and traditions, as well as indigenous understandings of autonomy and self-determination.

Law, "If-Then" Stories

The role of narrative and rhetorical forms in law have been long recognized (see Brooks and Gewirtz 1996; Edwards 1996). Scholars have explored how law is the product of commonly shared, but often unacknowledged, narratives (White 1985); how narrative informs the ways legal actors speak and write about law (DeSanctis 2012); and how legal actors use narrative as a tool of persuasion (Bennett and Feldman 2014). The proposition advanced here is more dramatic than simply identifying the role of narrative in legal reasoning: the proposal here is that governing legal rules exhibit the underlying structure of a particular kind of story—an "if-then" story, what I loosely identify as a "parable." The argument is that governing rules are themselves a form of narrative, one defining a set of characters, events, and consequences embedded in an ongoing process of constitution and reconstitution. In a very real sense, law is made of stories. Under this view, lawmakers enact legal rules because they wish to dictate how some categories of real-life stories can and should end.

Skeptical readers may ask why this matters. It matters because stories matter. Indigenous legal traditions are often grounded in stories, narratives, and oral histories (Napoleon and

Friedland 2016: 733-734). For many indigenous peoples, stories serve as tools for thinking as well as normative resources. Earlier chapters, for example, considered the continued relevance of the Truku "born of wood, born of stone" origin story and the use of stories in courtrooms as indigenous litigants offered persuasive accounts of their communities' living conditions due to centuries of subjugation. John Borrows (2002: 13-14), similarly, recounts a case where the Navajo court referred to a traditional story of the "Hero Twins" to resolve a breach of fiduciary duty case,[86] leading him to conclude that this case "illustrates the relevance of stories to contemporary Indigenous jurisprudence." If state laws are stories, then the perception of statutes, regulations, and jurisprudence as being more authentic and authoritative sources of normativity over other forms of normativity begins to fade. The point here is not, as some have argued, that state law tools may be used to better incorporate indigenous stories (see Napoleon and Friedland 2016) but rather the stronger stance that state law does not occupy a privileged position relative to indigenous customs and oral traditions.

Stephen Paskey (2014: 58) argues that the "rule by which a decision-maker can grant a remedy, impose a punishment, or confer some benefit has the underlying structure of a stock story." He posits that "every governing legal rule" contains "the essential elements of a story—events, characters, and plot" (Paskey 2014: 78). All laws are stock stories, a story template stated in general terms. The key elements—events, entities, and consequences—are stripped of all but the essential details and reduced to an idealized model. A stock story serves as a story template, a model for similar stories with different events, entities, and details (Paskey 2014: 52).

[86] *In Re Certified Question II: Navajo Nation v. MacDonald*, 16 Ind. L. Rep. 6086 (Navajo, 1989).

Following Paskey, we may work through a particular example of a governing rule as a demonstration. Consider Article 20 of the *Controlling Firearms, Ammunition and Knives Act* (*qiangpao danyao daoxie guanzhi taioli*, 槍砲彈藥刀械管制條例):

> Indigenous people who manufacture, transport, or possess self-made shotguns, harpoon guns without approval, or fishermen who manufacture, transport, or possess self-made harpoon guns as tools for making a living without approval shall be sentenced to a fine of no less than NT$2,000 and no more than NT$20,000.

The statute contains the essential elements of a story. It includes characters (indigenous people, fishermen, and the decision-maker), at least two events (acts of manufacturing firearms and the judgment), and a consequence (the fine). There is also a plot: the elements are logically related and the penalty of a fine follows directly from the other elements. One may even say that the failure to obtain proper approval before manufacturing a gun disrupts an equilibrium that the penalty fine ultimately resolves.

Lisa Edwards (2016: 171-172) identifies several weaknesses in this line of reasoning. Paskey's argument maintains that because stock stories and rules have the same structure they must be the same thing. Yet, two things are not the same simply because they use the same structure. A governing rule may be a story because it has the same structure as a stock story, but one may just as easily say that a stock story is a rule because it has the same structure as a rule. Moreover, the formal structures of stock stories and governing rules, while similar, are not the same. Rules, as we commonly understand them, are not merely retrospective but prescriptive, using conditional language. That is, if the identified conditions happen, then this or that result will happen to the main character. A second difference is that rules take a neutral position with respect to the person to whom they are applied. Stories often concern particular persons, describing the plot in a way that communicates the preferred normative resolution for that party.

Rules, on the other hand, simply state that if the person was like these other persons in prior cases, the resolution should be the same. Furthermore, Paskey's model appears to work better for certain types of legal rules, such as conjunctive rules, but becomes harder to apply to other types of legal rules, like aggregative and balancing rules.[87] From this, Edwards concludes that "[w]hile a rule is not itself a story, a rule does identify the narrative point the parties should try to make with the stories they will construct—*the moral of their stories*, as it were" (Edwards 2016: 175, emphasis in original).

Where does this leave us about law as stories? It suggests that governing rules indicate the moral of a story around which other stories are woven. In this regard, they share in the character of parables. Parables, a term deriving from the Latin word *parabola* and Greek word *parabolē* meaning "comparison," are short fictitious stories that illustrate a moral attitude or truth (OED 2012).[88] Much has been written about the structure of parables (see Davis 1988). The intuition here is that parables are stories that instruct on a central lesson, but, of course, the meaning of that lesson is contingent upon the method of interpreting the text. A positivistic reading, for instance, would take meaning as obvious and referential while a semiotic reading would take meaning to be polyvalent with several shades in between (Davis 1988: 192).

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[87] A conjunctive rule is a rule with required elements, such as Article 20 of the *Controlling Firearms, Ammunition and Knives Act*. Aggregative rules are legal standards, often with a nonexclusive list of factors, e.g., the best interests of the child. Balancing rules are ones where two flexible standards are juxtaposed in contrast to one another, e.g., discovery rules balancing the burden of production against the likely benefit.

[88] Separating the term "parable" from its religious connotations is perhaps difficult. Parables are often associated with the traditions of storytelling appearing in the oral traditions and literatures of Judaism, Christianity, and Islam. I do not intend to import a religious element to this analysis; rather, I intend to use the concept of "parable" more neutrally as a shorthand way of referring to governing rules as if-then conditionals. The invocation of parables is not unfamiliar in considerations about law and legal analysis. For example, US laws shielding persons who act reasonably to help others in need are called "Good Samaritan Laws," in reference to the Parable of the Good Samaritan found in the Book of Luke 10:30-37 in the Bible (see, e.g., Va. Code § 8.01-225), and which have been enacted in all fifty US states. *Beckerman v. Gordon*, 614 N.E.2d 610, 612 (Ind. App. 1993).

Parables, like governing rules, conclude by bringing the then-and-there of the tale into the here-and-now of a particular result that can and should follow (Amsterdam and Bruner 2000: 113-114). Connections between these elements are constructed and reconstructed as users refer to the morals embedded in governing rules in different ways. It is this feature of parables that gave Sir Francis Bacon (1630: 329) pause when thinking about parables, aphorisms, and moral verses as sources of normativity. Their openness to a multiplicity of interpretations ultimately led him to reject them as normative sources (Brackett 2015: 1108). Yet, as we have seen throughout this dissertation, governing rules like laws, just like parables, require application, construction, and interpretation. There is simply no law "out there," hovering over us as a "brooding omnipresence in the sky."[89]

To illustrate these points, we may look at the rules governing an indigenous practice central to the analysis in this dissertation: indigenous hunting. We may first return to the conjunctive rule of Article 20 of the *Controlling Firearms, Ammunition and Knives Act*. The statute takes the form of an if-then story: "if" an indigenous person manufactures a particular type of firearm without proper approval from a designated authority figure, "then" the individual should be subject to this particular punishment. Second, consider the Truku customary concept of Gaya introduced in earlier chapters. This custom also takes the form of an if-then story: "if" a hunter belonging to this particular group engages in conduct that violates principles of Gaya, "then" the individual and group should be subject to this particular punishment. These two rules differ in their details—e.g., how they regulate the activity, the kind of punishments possible, who will mete out such punishments, and so on—but they fundamentally instruct on the narrative point parties should make when telling their stories.

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[89] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

Law is awash in storytelling (Amsterdam and Bruner 2000: 110). Clients tell stories to lawyers, who may choose to retell their clients' stories in the form of pleas and arguments to judges and juries. Litigants and witnesses enter courtrooms to tell their own stories through testimony, and criminal defendants tell stories through confessions. U.S. Supreme Court jurisprudence has magnified the role of stories in the sentencing phase of capital cases by permitting defendants to tell a no-holds-barred story of her or his life designed to persuade the jury that they do not deserve to be put to death.[90] By contrast, other stories are deemed too dangerous to allow in courts, as evidence is regularly excluded from trials on the basis that it would unduly inflame the jury. Judges and jurors retell these stories to themselves and to each other in the form of deliberations, findings, instructions, opinions, and verdicts. Then commentators, critics, and journalists tell their own stories of these cases. This endless telling and retelling, casting and recasting of stories is essential to the conduct of law. The argument here adds to this that the fertile ground from which these stories grow—black letter laws and jurisprudence—also consists of stories, as moral tales. There is simply no way around the fictive narratives that sustain socio-legal lives (cf. Motha 2015: 330). This may give little comfort to those seeking certainty in the law but nor can we shy away from the call to do justice to the past, which will require new constructions and understandings of law.

It is important to acknowledge that this account of law has the potential to occlude real suffering as stories can both break stereotypes and be filled with them (MacKinnon 1996: 235). It also does not address the issue of who gets to tell these stories: power imbalances in courts of law suggest that state actors have more substantive control over stories and storytelling than indigenous peoples. Yet, the recognition that laws are kinds of stories is potentially transformative. In the context of indigenous issues, this recognition de-privileges state law as a

[90] *Lockett v. Ohio*, 438 U.S. 586 (1978).

more authentic and authoritative source of normativity than indigenous oral traditions because all law—statutes, regulations, court jurisprudence, indigenous customs—are about the same storytelling task. If no fundamental difference between state law and indigenous oral tradition endures, there is potentially greater room for recognizing indigenous logics and normativity and, by extension, possibly greater room for expressions of indigenous autonomy and self-governance.

Sovereignty, "As-If"

A straightforward definition of sovereignty is self-rule. As it relates to indigenous peoples, the issue of sovereignty boils down to questions of: Who will decide what natural resources get developed? Who will decide what environmental rules apply? Who can regulate and enforce contractual agreements, provide remedies for negligent conduct, and adjudicate disputes over property? Who will decide the constitution governing the group? And who will decide questions like these? Generally, when the answer is the indigenous group, then the group has sovereignty. When the answer is a non-indigenous group, the group lacks sovereignty (Kalt and Singer 2003: 5-6).

Recently, scholars have moved away from unitary, totalizing approaches to sovereign power. Jessica Cattelino (2008), for example, argues for an interdependent understanding of sovereignty through the concept of Seminole "economic nationalism." The argument here invokes a similar move, conceptualizing indigenous sovereign power as something intermittent, nomadic, even consciously false.

Joseph P. Kalt and Joseph William Singer (2003: 6) observe that indigenous peoples possess three types of sovereignty: "de recto" sovereignty (sovereignty by moral principle or

right), “de jure” sovereignty (given by legal degree or legislative act), and “de facto” sovereignty (sovereignty by practice). Indigenous peoples and their supporters can often articulate a compelling claim to the first, petition for the second, but what ultimately matters is the third. This section examines the concept of de facto sovereignty and demonstrates how indigenous peoples in Taiwan are taking back control of their own futures. For many indigenous nations and communities in Taiwan, de facto sovereignty, as a return of genuine decision-making, is intermittent, dispersed, and tenuous, the consequences of which are only just being realized. Ironically, it is a form of sovereignty that strongly resembles the way the Taiwan state, given its ambiguous international status, enacts sovereignty.

Indigenous sovereign rights to manage their peoples, lands, and resources in Taiwan have been recognized in varying degrees over the past four centuries. During the mid-seventeenth century, the Dutch concluded treaties with indigenous villages, stipulating that these villages recognize the States General of the Netherlands as their governing lord. Regarding indigenous peoples as vassals of the Dutch East India Company, these treaties preserved features of indigenous sovereignty (Andrade 2010: 185-186). Indigenous villages, for example, kept their rights to lands and their territories could not be alienated without their consent. Treaty rights under this regime ultimately expired with the expulsion of the Dutch in 1662.

Several centuries later, during the 1999 presidential elections, indigenous representatives drafted *The New Partnership between Indigenous Peoples and the Taiwan Government* (New Partnership) (*yuanzhuminzu he taiwan zhengfu xin de huoban guanxi*, 原住民族和台灣政府新的夥伴關係). DPP candidate Chen Shui-bian signed the document and agreed with indigenous representatives that the New Partnership was the equivalent of a nation-to-nation treaty (Kuan 2010: 9; Mona 2007: 100; Simon and Mona 2013: 102). This was a significant development

because it suggested a relationship of political equality between the Taiwan state and indigenous nations. In 2000, the DPP converted the New Partnership into the *White Paper on Aboriginal Policy* (*yuanzhumin zhengce baipishu*, 原住民政策白皮書). This White Paper promised to recognize the sovereignty of indigenous peoples and to promote indigenous self-government, to conclude land treaties, to return traditional lands, to recognize the use of natural resources, and to strengthen indigenous political participation (Simon and Mona 2013: 102). These two documents formed the basis of the 2005 Indigenous Peoples Basic Law (IPBL), which promised that indigenous peoples would have legal rights, including the right to create an autonomous zone, the right to control natural resources, and the right to approve or reject development projects within indigenous reserved land (Mona and Simon 2011: 55). Ambitious in its scope, the IPBL required further legislation to give effect to its principles, which, to date, has not occurred, leaving the IPBL mired in legal ambiguity (Mona 2007: 194).

More recently, in 2014, the Legislative Yuan extended certain self-governing rights to majority indigenous towns, enabling qualifying towns to elect their own local representatives and gave local leaders the authority to rename local government departments as well as some autonomy over spending decisions (Jennings 2014). In 2015, the Legislative Yuan amended the IPBL to return certain self-determination and self-governance powers to indigenous peoples by permitting indigenous groups to incorporate as "tribal public corporations." In 2016, the CIP enacted regulations aimed at empowering indigenous groups to be more involved in the process of planning discussions and formulations for development, land-use planning, research, and regulation. In 2016, President Tsai Ing-wen (2016) issued her historic apology to Taiwan's indigenous peoples and committed her administration "to implement the Indigenous Peoples Basic Law, to serve indigenous historical justice, and to lay the foundation for indigenous self-

government." In 2017, the CIP issued regulations delimiting an estimated 800,000 to 1.8 million hectares of land as indigenous territory but controversially excluded private lands (Charlton, Gao, and Kuan 2017: 145).

Efforts to expand indigenous de jure sovereignty through the Taiwan formal legal framework have thus involved a piecemeal system focused on converting indigenous peoples into legal subjects. State law was, however, only one dimension of indigenous sovereignty. Indigenous peoples also took the initiative, in the absence of government action, to engage in forms of self-rule and management. The Amis community in Dulan, Taitung County, unilaterally declared the boundaries of their own traditional territory, which stretched three nautical miles into the Pacific Ocean (Zhang 2017). This community also operated a self-government system outside of the state structure based on their traditional organization (Bekhoven 2018: 193). The Truku created an ambitious self-government plan, inspired by examples from First Nations in Canada, in which they governed an autonomous region composed of their traditional territory. This plan included the creation of a court and a police force (Simon 2012b: 72-73, 95). Tsou and Truku communities codified their customary norms to self-regulate customary wildlife hunting practices. Indigenous communities treated their traditional territory as their own by building structures, like Rakaw's bamboo hut. Paiwan villages have continued to rely on traditional methods to resolve disputes among community members (Tsai 2015: 339-340). Indirect measures supporting decolonization have also included the creation of the Legal Center of Indigenous Peoples (Gerber 2017), the development of Taiwan Indigenous Television station (Smith 2014); and the i-Tribe broadband program (Ruckus 2018).

On January 8, 2019, members of the Indigenous Historical Justice and Transitional Justice Committee issued a joint declaration affirming indigenous sovereignty against PRC

territorial claims to Taiwan (IHJTJ Committee 2019; Hioe 2019). The joint declaration was issued in response to Chinese President Xi Jinping's January 2, 2019 speech in which he threated the use of force against Taiwan if it continued to resist reunification and urged Taiwan to accept the "One Country, Two Systems" framework (Hwai 2019). The joint declaration asserted a strong de recto claim to territorial sovereignty: "We, Taiwan's indigenous peoples, are determined to remain steadfast in guarding and preserving our Motherland. We have persevered for thousands of years, and we will continue doing this."[91] While criticizing the ROC government for only recently beginning to pay attention to historical and transitional justice for indigenous peoples, the joint declaration emphasized the need to build the country collaboratively: "Taiwan is a nation that we are all still striving to build together, along with other people who recognize this land for what it actually is."[92] Sovereignty, as conceived in the joint declaration, was a matter of stewardship and collaboration, of working together to build a country across differences.

These activities represented indigenous efforts to decolonize Taiwan. They were selective and intermittent forms of self-rule as indigenous communities created self-government systems, codified customary laws, built infrastructure, used customary justice practices, and promoted pragmatic coexistence with the Taiwan state government (see also Steinman 2012). These were expressions of "as-if" sovereignty: opportunistic performances of sovereignty that, while not being totalistic, were nonetheless meaningful and powerful in their own right as indigenous peoples embraced a practice conveniently captured in the Nike slogan, "Just do it," when it came to matters of self-governance (Kalt and Singer 2003: 6).

[91] 「這是我們守護母親土地的決心，台灣原住民族堅持了數千年，也會繼續堅持下去。」
[92] 「這也是我們與所有認同台灣土地的其他族群努力形塑的國家。」

The concept of “as-if” sovereignty draws on the Kantian concept of the “consciously false” (see Vaihinger 1935). The consciously false refers to the fact that human beings can never really know the underlying structure of the world, and as a result, we construct systems of thought and behave “as-if” the world fits those models. In the physical sciences, for example, certain phenomena have never been observed, but scientists behave “as-if” they exist and use them to create new and better constructs (Hacking 1999). These are fictions whose acceptance is justified on the grounds that they are non-rational solutions to problems that have no rational answers. These fictional concepts—these stories we tell—are “not subject, like hypotheses, to proof or disconfirmation, only, if they come to lose their operational effectiveness, to neglect” (Kermode 2000: 40; Rodriguez 2019).

In many respects, indigenous sovereignty in Taiwan was such a performative fiction but this did not detract from its potency. Having to do with anteriority, being-before, sovereignty for many indigenous peoples in Taiwan was not something subject to proof through laws or through moral claims; it was merely subject to neglect through a failure to enact it. Acting intermittently and strategically “as-if” they had sovereign control, indigenous peoples worked to take back control of their own futures. These “as-if” performances constituted enactments of a particular narrative about indigenous organization and power on the Taiwan landscape.

Understanding of sovereignty as “as-if” connects to an earlier theme: refusal. For many indigenous peoples in Taiwan, sovereignty was not a matter of waiting for the state to recognize their de recto claims or to create de jure rights to secure their self-governance. Rejecting the hierarchical relationship between state and society, there was little reason to accord the state such power. Indigenous sovereignty was instead something to be enacted. It was something that was always there, subject only to its neglect. It was not that indigenous people ignored or refused to

acknowledge the existence of the state. Instead, indigenous sovereignty lay latent in the background, ever waiting to surface, intermittently and opportunistically, in spaces of ambiguous power, government inaction, or bald assertion.

Here, we find an analogue to the way the Taiwan state enacts sovereignty. The ROC, while being a founding member of the United Nations and former recognized government of all of China, now has effective administration only over the island of Taiwan and its associated islands. Since 1972, the PRC has largely replaced the ROC in the international arena, and Taiwan has been left isolated from many international organizations and regimes (Simon 2009: 2). The ROC persists with the status of a de facto independent state, satisfying many, but not all, of the commonly recognized criteria for sovereign status (Clough 1993). Taiwan's unusual status has compelled it to engage in activities that mimicked sovereign states (deLisle 2011, 2019; Friedman 2015). In its efforts to walk and talk like a state, Taiwan has strategically sought out opportunities to engage with the international community by pledging to live up to international standards, participating in international bodies, engaging with international norms, and maintaining diplomatic relations. It has also protected claims to sovereignty through everyday governing practices, such as border evaluations at Taiwan ports of entry.

There are notable similarities between indigenous and Taiwan state performances of sovereignty. Both have been forced to engage in activities enacting "as-if" sovereignty, maneuvering—intermittently and strategically—in the spaces available to them, taking and making opportunities to perform self-rule and governance. Yet, differences in temporality are also apparent. ROC sovereignty does not lie latent in waiting in the same way as indigenous sovereignty because it is impossible for the ROC to claim a direct line between "past" ROC sovereignty and Taiwan's current de facto sovereignty. As such, ROC sovereignty appears to be

subject to proof in ways that indigenous sovereignty is not. The ROC government might reflect for a moment on this. As Taiwan has struggled for international recognition as a sovereign state, navigating the persistent obstacles imposed by the PRC, so have Taiwan's indigenous peoples struggled against imperial, colonial, and state regimes for sovereign recognition. Beyond developing empathy for indigenous peoples, Taiwan might also consider indigenous sovereignty as a resource for its own de facto sovereignty, drawing on indigenous sovereignty's deep historical connections to the island and its connections to international legal order as a way of concretizing Taiwan's de facto status. Taiwan is in a unique position to think reflexively about how both it and indigenous peoples have had to engage in sovereignty via opportunistic bricolage efforts and the practical and symbolic value of expanding room for indigenous expressions of sovereignty. This may ultimately mean decoupling indigenous cultural, legal, linguistic, and political rights from the nationalist goals of the Han Chinese-dominated government (Simon 2009: 29).

Sovereignty is an unfolding narrative. It is a story told about power and rule performed through institutions, mechanisms, organizations, and systems—sometimes standing alone, sometimes interdependent—oriented towards self-rule. These performances need not be totalistic to be meaningful and powerful, although they depend upon audiences that recognize them as such (Rutherford 2012). Recognition by the local community is one thing; recognition by the state is another; recognition by international bodies is yet another still. Neither need these performances be continuous or consistent. Rather, they can be intermittent, nomadic, even consciously false, as states and communities act "as-if" they have sovereign control in an effort to control their own futures. These "as-if" enactments are performances of narratives about history and relationships to land, laws, and other peoples.

An important lesson comes from Taiwan's indigenous communities about sovereignty. This lesson—this moral tale—is that power and rule are not about exclusion but rather about collaboration. It is a form of sovereignty grounded in engagement. Seen in this light, sovereignty depends upon occasions and venues for coming together to work through differences. The special indigenous courts, in their moments as exceptional spaces for debate and experimentation, can contribute to these conversations by serving as fora for negotiating state and indigenous understandings of belonging, custom, and law. Yet, in their constitution as state bodies dominated by non-indigenous understandings of law and justice, the special units' capacity to effect substantive change and secure indigenous rights is likely limited. Tackling and transforming the power structures that underlie indigenous marginalization will be important work. In this regard, it may be useful to stay tentatively with the special units, using them as resources for understanding how deeply mainstream logics penetrate into state initiatives designed to help indigenous peoples and for underscoring the need for empirical research on measures affecting indigenous peoples.

Closing Remarks

This dissertation is suggestive of how much can be learned about indigenous rights by examining them through court institutions. Law appears as something crafted: it is something made authoritative, intelligible, and relevant through encounters of individuals in particular moments. As such, indigenous rights must be viewed by reference to the legacies of colonial, imperial, and state categories and logics flowing through them, illuminating the relationship between path dependence and the law. It also requires interrogating the broader infrastructure supporting indigenous rights by considering the political rationalities embedded in the

institutions administering these rights and the aesthetics of personal encounters with these institutions. In this process, global norms can take new forms as local actors work to situate them in the local vernacular. The practices giving life to indigenous rights also at times require legal actors to improvise and draw upon extra-legal sources as they apply these rights to discrete disputes. These rights may also unsettle the stability courts of law as courts shift from their ordinary operations to working at, or even beyond, the limits of mainstream ideas about law, culture, and reality.

Despite significant structural imbalances of power, indigenous peoples themselves emerge as critical actors influencing the framework of indigenous rights. Attention to indigenous peoples' postures towards governance in daily life; the efforts of activists, politicians, and institutions; the narratives indigenous peoples introduce that challenge prevailing ideas about land and law; the performances of indigenous identities to and within state organs; and the strategic enactments of self-governance reveal how indigenous peoples are not only passive subjects of rights but also important agents of formation and change. The concept of justice itself may require rethinking once we recognize that laws are entangled with other social fields and normative orders in a broader lawscape. Under this view, measures designed to ensure bare access to courts and lawyers present a thin understanding justice as they ignore the cultural, economic, political, and social obstacles peoples in precarious living conditions face. Ultimately, the state law framework as a whole appears to be a problematical system for accomplishing indigenous justice as it exhibits a strong tendency to control and coopt indigenous cultural rights.

I close this study of Taiwan's special indigenous court units with an invitation to consider state-indigenous relations anew. In Taiwan, state and indigenous laws and sovereignty share in a character of "if" conditionals. One "if" is propositional. Taiwan state statutes and indigenous

customs form “if-then” stories, or parables, about what can and should happen given a set of events, characters, and plots. If state law and indigenous custom share a fundamental core of narrative, arguments maintaining that indigenous oral traditions are unfit for use as normative sources appear arbitrary and weak. The second “if” is performative. Both the Taiwan state and indigenous communities intermittently and strategically act “as-if” they have sovereign power. Taiwan is thus in a position to think reflexively about the nature of sovereignty and the possibilities for seeing indigenous sovereignty not as a threat to state sovereignty but as a resource for securing it.

In summation, much work remains to be done to secure justice for indigenous peoples in Taiwan. Taiwan’s special indigenous court units were a recent institutional innovation to accomplish this, but as they were set firmly within the state apparatus and dominated by non-indigenous law and justice practices, the special units’ ability to accomplish this goal was limited and uncertain. The special units found their most robust moments when they opened themselves up as agonistic spaces, as fora for debating culture, law, and power. Their emergence in this exceptional form, however, was never assured as they more commonly operated invisibly as ordinary state courts. In their present form, the special units are unlikely to accomplish, in any substantial sense, their goal of respecting indigenous cultural differences as they remain coupled to the aims, logics, and preferences of the Han Chinese-dominated ROC government.

Ultimately, the special units’ greatest strength may be that they so deeply reveal law as social practice. Bearing this mind, securing indigenous protections may require the creation of another approach—another vocabulary—based on land and self-determination, one focusing on decolonization over categories of race or ethnicity. This may involve, for example, a freestanding judicial system under the control of indigenous peoples. Such a system would not only be

consistent with Taiwan's aspiration of being a state of "cultural pluralism," it would also be in line with aspirational goals of the Taiwan judiciary and ongoing justice practices in many indigenous communities around the island. If law and sovereignty are stories all the way down, Taiwan has a unique opportunity to intervene and write a new story about indigenous futures and the possibilities of genuine justice and reconciliation for indigenous peoples.

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Taiwan

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Constitution of the Republic of China (Taiwan) (中華民國憲法) (1947).

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Convention on the Elimination of All Forms of Discrimination against Women, December 18, 1979, 1249 U.N.T.S. 13.

Convention on the Rights of the Child, September 2, 1990, 1577 U.N.T.S. 3.

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International Covenant on Economic, Social and Cultural Rights, January 3, 1976, 993 U.N.T.S. 3.

International Convention on the Elimination of All Forms of Racial Discrimination, January 4, 1969, 660 U.N.T.S. 195 .

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Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (December 10, 1948).

APPENDIX A

Interviews

001 Law professor, non-indigenous. Taipei City. Interview on June 15, 2015. [Written notes]

002 Law professor, indigenous. Taipei City. Interview on June 18, 2015. [Written notes]

003 Law professor, indigenous. Taipei City. Interview on June 22, 2015. [Written notes]

004 Anthropologist, non-indigenous. Taipei City. Interview on June 25, 2015. [Written notes]

005 Anthropologist, non-indigenous. Taipei City. Interview on June 25, 2015. [Written notes]

006 Anthropologist, non-indigenous. Taipei City. Interview on June 29, 2015. [Written notes]

007 Law professor, non-indigenous. Taipei City. Interview on July 7, 2015. [Written notes]

008 Atayal Nation member. Taichung City. Interview on July 7, 2015. [Written notes]

009 Judge, non-indigenous. Taichung City. Interview on July 8, 2015. [Written notes]

010 Judge, non-indigenous. Taichung City. Interview on July 8, 2015. [Written notes]

011 Lawyer, non-indigenous. Taipei City. Interview on July 10, 2015. [Written notes]

012 Anthropologist, non-indigenous. Taitung County. Interview on July 21, 2105. [Written notes]

013 Anthropologist, non-indigenous. Taitung County. Interview on July 21, 2105. [Written notes]

014 Anthropologist, non-indigenous. Taitung County. Interview on July 21, 2105. [Written notes]

015 Paiwan Nation member. Taitung County. Interview on July 21, 2105. [Written notes]

016 Anthropologist, non-indigenous. Taitung County. Interview on July 23, 2105. [Written notes]

017 Bunun Nation member. Taitung County. Interview on July 24, 2105. [Written notes]

018 Bunun Nation member. Taitung County. Interview on July 24, 2105. [Written notes]

019 Lawyer, non-indigenous. Taitung County. Interview on July 24, 2015. [Written notes]

020 Truku Nation member. Taitung County. Interview on July 24, 2015. [Written notes]

021 Tao Nation member. Taitung County. Interview on July 26, 2015. [Written notes]

022 Pinuyumayan member. Taitung County. Interview on July 30, 2015. [Written notes]

023 Judge, non-indigenous. Taipei City. Interview on August 4, 2015. [Written notes]

024 Law professor, non-indigenous. Taipei City. Interview on August 5, 2015. [Written notes]

025 Law professor, non-indigenous. Taipei City. Interview on May 18, 2016. [Written notes]

026 Medical researcher, non-indigenous. Taipei City. Interview on May 22, 2016. [Written notes]

027 Law professor, non-indigenous. Taipei City. Interview on May 24, 2016. [Written notes]

028 Lawyer, non-indigenous. Taipei City. Interview on May 25, 2016. [Written notes]

029 Panel of two lawyers, Amis Nation and non-indigenous. Taitung City. Interview on June 1, 2016. [Written notes]

030 Anthropologist, non-indigenous. Taitung County. Interview on June 1, 2016. [Written notes]

031 Bunun Nation member. Taitung County. Interview on June 17, 2016. [Written notes]

032 Bunun Nation member. Taitung County. Interview on June 17, 2016. [Written notes]

033 Bunun Nation member. Taitung County. Interview on June 17, 2016. [Written notes]

034 Anthropologist, non-indigenous. Taipei City. Interview on June 24, 2016. [Written notes]

035 Law professor, indigenous. Taipei City. Interview on June 25, 2016. [Written notes]

036 Lawyer, non-indigenous. Taipei City. Interview on June 25, 2016. [Written notes]

037 Anthropologist, non-indigenous. Taipei City. Interview on June 28, 2016. [Written notes]

038 Bunun Nation member. Taitung County. Interview on July 2, 2016. [Written notes]

039 Judge, non-indigenous. Taitung City. Interview on July 13, 2016. [Written notes and audio recording]

040 Lawyer, non-indigenous. Taitung County. Interview on July 21, 2016. [Written notes]

041 Paiwan Nation member. Taitung County. Interview on July 21, 2016. [Written notes]

042 Forestry Bureau official. Taitung County. Interview on July 22, 2016. [Written notes]

043 Bunun Nation member. Taitung County. Interview on July 22, 2016. [Written notes and audio recording]

044 Bunun Nation member. Taitung County. Interview on July 27, 2016. [Written notes]

045 Panel of 2 judges, non-indigenous. Taichung City. Interview on July 29, 2016. [Written notes]

046 Panel of 4 judges, non-indigenous. Hualien City. Interview on August 5, 2016 [Written notes]

047 Judicial Yuan representative, non-indigenous. Taipei City. Interview on August 11, 2016. [Written notes]

048 Judge, non-indigenous. Taipei City. Interview on August 11, 2016. [Written notes]

049 Law professor, non-indigenous. Taipei City. Interview on August 11, 2016. [Written notes]

050 Law professor, indigenous. Taipei City. Interview on August 12, 2016. [Written notes]

051 Paiwan Nation member. Taipei City. Interview on June 7, 2017. [Written notes]

052 Amis Nation member. Taipei City. Interview on June 28, 2017. [Written notes]

053 Panel of three lawyers, non-indigenous. Taipei City. Interview on July 19, 2017. [Written notes]

054 Atayal Nation member. Taipei City. Interview on August 13, 2017. [Written notes]

055 Law professor, non-indigenous. Taipei City. Interview on August 24, 2017. [Written notes]

056 Law professor, indigenous. Hualien County. Interview on September 13, 2017. [Written notes]

057 Anthropologist, non-indigenous. Hualien County. Interview on September 20, 2017. [Written notes]

058 Judge, non-indigenous. Hualien City. Interview on September 22, 2017. [Written notes and audio recording]

059 Panel of two Truku Nation members. Hualien County. Interview on September 25, 2017. [Written notes and audio recording]

060 Bunun Nation member. Taitung County. Interview on September 29, 2017. [Written notes and audio recording]

061 Law professor, indigenous. Hualien County. Interview on October 4, 2017. [Written notes]

062 Lawyer, non-indigenous. Hualien City. Interview on October 6, 2017. [Written notes]

063 Expert witness, non-indigenous. Taipei City. Interview on October 11, 2017. [Written notes]

064 Lawyer, non-indigenous. Taipei City. Interview on October 11, 2017. [Written notes]

065 Lawyer, non-indigenous. Hualien City. Interview on October 12, 2017. [Written notes]

066 Panel of two lawyers, non-indigenous. Hualien City. Interview on October 13, 2017. [Written notes]

067 Judge, non-indigenous. Hualien City. Interview on October 20, 2017. [Written notes and audio recording]

068 Panel of four judges, non-indigenous. Hualien City. Interview on October 23, 2017. [Written notes]

069 Judge, non-indigenous. Hualien City. Interview on October 24, 2017. [Written notes and audio recording]

070 Tao Nation member. Taitung City. Interview on November 16, 2017. [Written notes]

071 Judge, non-indigenous. Taichung City. Interview on November 21, 2017. [Written notes and audio recording]

072 Lawyer, non-indigenous. Hualien City. Interview on December 8, 2017. [Written notes]

073 Lawyer, non-indigenous. Taipei City. Interview on December 15, 2017. [Written notes]

074 Panel of two Truku Nation members. Hualien County. Interview on January 10, 2018. [Written notes]

075 Lawyer, non-indigenous. Hualien City. Interview on February 1, 2018. [Written notes]

076 Judge, non-indigenous. Hualien County. Interview on February 2, 2018. [Written notes]

077 Lawyer, Tsou Nation. Hualien County. Interview on February 2, 2018. [Written notes]

078 Lawyer, non-indigenous. Hualien County. Interview on February 2, 2018. [Written notes]

079 Lawyer, non-indigenous. Hualien County. Interview on March 8, 2018. [Written notes]

080 Amis Nation member. Hualien City. Interview on March 22, 2018. [Written notes]

081 Bailiff, non-indigenous. Hualien City. Interview on March 26, 2018. [Written notes]

082 Truku Nation member. Hualien County. Interview on March 27, 2018. [Written notes]

083 Lawyer, non-indigenous. Hualien City. Interview on March 30, 2018. [Written notes]

084 Anthropologist, non-indigenous. Taipei City. Interview on April 3, 2018. [Written notes]

085 Lawyer, non-indigenous. Taipei City. Interview on April 3, 2018. [Written notes]

086 Biologist, non-indigenous. Hualien County. Interview on April 12, 2018. [Written notes]

087 Judge, non-indigenous. Tainan City. Interview on April 13, 2018. [Written notes and audio recording]

088 Bunun Nation member. Taitung County. Interview on April 19, 2018. [Written notes]

089 Pinuyumayan Nation member. Taitung County. Interview on April 19, 2018. [Written notes and audio recording]

090 Judicial Yuan representative, non-indigenous. Taipei City. Interview on April 24, 2018. [Written notes]

091 Lawyer, non-indigenous. Taipei City. Interview on April 24, 2018. [Written notes]

092 Lawyer, non-indigenous. Hualien City. Interview on April 30, 2018 [Written notes]

093 Judge, non-indigenous. Chiayi County. Interview on May 11, 2018. [Written notes]

094 Judicial Yuan representative, non-indigenous. Taipei City. Interview on May 14, 2018. [Written notes]

095 Lawyer, non-indigenous. Pingtung County. Interview on May 18, 2018. [Written notes]

096 Law professor, indigenous. Hualien County. Interview on May 24, 2018. [Written notes]

097 Judge, non-indigenous. Taipei City. Interview on May 25, 2018. [Written notes]

098 Lawyer, non-indigenous. Hualien City. Interview on June 12, 2018. [Written notes]

099 Law professor, indigenous. Hualien County. Interview on June 24, 2018. [Written notes]

100 Law professor, non-indigenous. Taipei City. Interview on July 5, 2018. [Written notes]

101 Judge, non-indigenous. Taipei City. Interview on July 9, 2018. [Written notes]

102 Expert witness, non-indigenous. Taipei City. Interview on July 12, 2018. [Written notes]

103 Lawyer, non-indigenous. Hualien City. Interview on July 13, 2018. [Written notes]

104 Lawyer, non-indigenous. Hualien City. Interview on July 17, 2018. [Written notes]

105 Law professor, indigenous. Hualien County. Interview on July 28, 2018. [Written notes]

106 Bunun Nation member. Hualien City. Interview on August 4, 2018. [Written notes]

107 Paiwan Nation member. Hualien City. Interview on August 4, 2018. [Written notes]

108 Lawyer, non-indigenous. Hualien City. Interview on August 5, 2018. [Written notes]

109 Judge, non-indigenous. Hualien City. Interview on August 7, 2018. [Written notes]

110 Lawyer, non-indigenous. Taipei City. Interview on August 8, 2018. [Written notes]

111 Paiwan Nation member. Hualien City. Interview on August 16, 2018. [Written notes]

112 Law professor, indigenous. Hualien County. Interview on August 30, 2018. [Written notes]

113 Lawyer, non-indigenous. Taipei City. Interview on August 31, 2018. [Written notes]

114 Lawyer, non-indigenous. Hualien City. Interview on September 2, 2018. [Written notes]

115 Lawyer, non-indigenous. Hualien City. Interview on September 12, 2018. [Written notes]

116 Atayal Nation member. Hualien County. Interview on September 16, 2018. [Written notes]

117 Lawyer, non-indigenous. Hualien City. Interview on September 16, 2018. [Written notes]

118 Judge, non-indigenous. Taipei City. Interview on September 18, 2018. [Written notes and audio recording]

119 Judge, non-indigenous. Hualien City. Interview on September 19, 2018. [Written notes and audio recording]

120 Judge, non-indigenous. Tainan City. Interview on September 21, 2018. [Written notes and audio recording]

121 Paiwan Nation member. Hualien City. Interview on September 27, 2018. [Written notes]

122 Bunun Nation member. Taitung County. Interview on October 1, 2018. [Written notes]

123 Lawyer, non-indigenous. Taitung City. Interview on October 2, 2018. [Written notes]

124 Panel of four Bunun Nation members. Taitung County. Interview on October 3, 2018. [Written notes]

125 Bunun Nation member. Taitung County. Interview on October 3, 2018. [Written notes]

126 Lawyer, non-indigenous. Hualien City. Interview on October 9, 2018. [Written notes]

127 Law professor, indigenous. Hualien County. Interview on October 10, 2018. [Written notes]

128 Judge, non-indigenous. Hualien City. Interview on October 11, 2018. [Written notes]

129 Lawyer, non-indigenous. Pingtung County. Interview on October 17, 2018. [Written notes]

130 Panel of two Truku Nation members. Hualien City. Interview on October 22, 2018. [Written notes]

131 Lawyer, non-indigenous. Hualien City. Interview on October 24, 2018. [Written notes]

132 Lawyer, non-indigenous. Taipei City. Interview on October 26, 2018. [Written notes]

133 Expert witness, non-indigenous. Taipei City. Interview on October 26, 2018. [Written notes]

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ACADEMIC APPOINTMENTS

University of Richmond, Richmond, Virginia — 2020
Visiting Lecturer, Department of Anthropology

University of Virginia, Charlottesville, Virginia — 2019-2020
Visiting Scholar, Department of Anthropology

EDUCATION

Doctor of Philosophy (Ph.D.) in Anthropology — March 2020
Indiana University, Bloomington, IN
Dissertation: "Culture on Trial: Law, Custom, and Justice in a Taiwan Indigenous Court"
Advisor: Sara Friedman, Ph.D.

Juris Doctor (J.D.) in Law — May 2007
Notre Dame Law School, Notre Dame, IN
Magna cum laude

Masters of Arts (M.A.) in Philosophy — May 2004
Virginia Polytechnic Institute and State University, Blacksburg, VA
Thesis: "Pragmatic Epistemology, Community, and the Problem of Solipsism"

Bachelors of Arts (B.A.) in Philosophy and Archaeology — May 1999
Baylor University, Waco, TX

RESEARCH INTERESTS

Human Rights, Legal Anthropology, Postcolonial Studies, Indigenous Peoples Studies, Power and the State, Anthropology of Infrastructure, Research Ethics, East Asia (China and Taiwan).

GRANTS, FELLOWSHIPS, & AWARDS

WRITING

Max Planck Institute Dissertation Fellowship, Germany 2019

RESEARCH

National Science Foundation (Grant #: 1728451) 2017-2018
Fulbright Foundation 2017-2018; 2018-2019 (declined)
Native American and Indigenous Studies Fellowship, Indiana University 2017-2018
Taiwan Fellowship, Ministry of Foreign Affairs, Taiwan 2017; 2019 (declined)
Henry Luce Foundation / ACLS Program in China Studies 2016
SKOMP Research Grant, Indiana University Dept. of Anthropology 2015
Indiana University Office of the Vice-President for International Affairs 2015
Indiana University College of Arts and Sciences Travel Grant 2014
SKOMP Travel Grant, Indiana University Dept. of Anthropology 2014

STUDY

Huayu Language Enrichment Scholarship 2017
Vincent and Elinor Ostrom Workshop Fellowship 2016-2017
Foreign Language and Area Studies Fellowship 2014; 2015 (declined)
Indiana University Graduate Teaching Fellowship 2013-2016
Virginia Tech Graduate Teaching Fellowship 2002-2004

HONORS

Brantlinger-Naremore Essay Prize (2nd prize), Indiana University 2017
AAA Guerrero-Friedlander Human Rights Graduate Paper Prize (1st prize) 2016
Associate Instructor of the Year, Dept. of Anthropology, Indiana University 2016
David Bidney Paper Prize (1st prize), Dept. of Anthropology, Indiana University 2015
Finalist, AAA Association for Political and Legal Anthropology Paper Prize 2014
E. Randolph Williams Award for Outstanding Pro Bono Legal Service 2008-2011
African Telecoms Deal of the Year (legal team award) 2008
Philosophy National Honor Society, Phi Sigma Tau 1999

PUBLICATIONS

PEER-REVIEWED JOURNAL ARTICLES

"The Hallowed Halls of Justice: Towards an Ethnography of Court Infrastructure in Taiwan."
Max Planck Institute for Social Anthropology Working Paper Series. Accepted.

"CAFTA's Symbolic Nod to Environmental Protection: Legal Perspectives on CAFTA's Citizen Submission Process" (with C. Tucker and S. Sanchez). *Society & Natural Resources* 30:10, 1277-1287, 2017.

PEER-REVIEWED BOOK CHAPTERS

"Courts and Indigenous Reconciliation: Positivism, the *A Priori*, and Justice in Taiwan." In *From Stigma to Hope: Indigenous Reconciliation in Contemporary Taiwan*, Hsieh, J., Simon, S., and P. Kang (eds.). Routledge. Forthcoming 2020.

"Of Rich Points and Reflexive Teaching: Minding My Own Social Business as an Anthropology Instructor." In *Teaching as if Learning Matters: Next Generation Faculty Learn to Teach in Higher Education*, Robinson, J. M., V. D. O'Loughlin, K. Kearns, and L. Plummer (eds.). Indiana University Press. Forthcoming 2020.

OTHER PUBLICATIONS (NOT PEER-REVIEWED)

"Reflections, Refractions, and Reorientations: Conducting Ethnographic Research in Indigenous Taiwan." In *Research & Reflections: An online journal of Fulbright Taiwan experiences*. Fulbright Taiwan, Foundation for Scholarly Exchange. June 2018.

"Global Issue: Indigenous Hunting." In *Native American & Indigenous Studies Newsletter*. Indiana University. December 2017.

"Global Issue: Indigenous Land, Territory, and Natural Resources." In *Native American & Indigenous Studies Newsletter*. Indiana University. August 2018.

CONFERENCE PRESENTATIONS

"Tensions and Intentions Shaping the Social Imaginary of Taiwan's Indigenous Rights Framework." Paper presentation. 3rd World Congress of Taiwan Studies Conference, Taipei, Taiwan. September 2018.

"Rights and Rule-Crafting Processes in Taiwan's Special Indigenous Courts." Paper presentation. Fulbright Taiwan / Foundation for Scholarly Exchange Conference, Taipei, Taiwan. January 2018.

"Ordinary Courts with Extra-Ordinary Moments: Securing Indigenous Rights Through Ad Hoc Judicial Institutions in Taiwan." Paper presentation. Ostrom Workshop Conference. Bloomington, Indiana. December 2016.

"Rights and Rule-Crafting Processes in Taiwan's Special Indigenous Courts." Panel presentation. For conference at the IU Center for the Study of Global Change: "Ambiguous Geographies: Rethinking Global and Area Studies." Bloomington, Indiana. May 2016.

"Imagining Indigeneity: Convergence, Discovery, and Imagination in Taiwan's Indigenous Rights Framework." Crossing Boundaries: Interdisciplinarity and Anthropology Symposium, Indiana University, Bloomington, Indiana. February 2016.

"Guantanamo Bay, Anthropologists, and the State of Exception." Annual Meeting of the Law & Society Association, Seattle, WA. May 2015.
"Human Rights and Indigenous Autonomy: Taiwan as a Case Study." Digital Communication, Collaboration, and Preservation Symposium, Indiana University, Bloomington, Indiana. February 2015.
"Guantanamo Bay as a 'Graduated' State of Exception." Breaking Down Barriers Symposium, Indiana University, Bloomington, Indiana. February 2014.

INVITED TALKS

"Guantanamo Bay, Habeas Corpus, and Law: Anthropological Observations on Representing Suspected Terrorists." Department of Anthropology, University of Richmond. November 2019.
"Indigenous Rights and Special Indigenous Courts in Taiwan." Environmental Justice Center, Taipei, Taiwan. October 2018.
"Indigenous Rights and Special Indigenous Courts in Taiwan." Taiwan Judicial Yuan, Division of Special Indigenous Courts, Taipei, Taiwan. July 2018.
"Culture on Trial: Human Rights, Indigenous Rights, and Special Indigenous Courts in Taiwan." Taiwan National Museum of Prehistory, Taitung, Taiwan. June 2018.
"An Event for Ms. Marie Royce, United States Assistant Secretary of State for Educational and Cultural Affairs." Organized by Fulbright Taiwan / Foundation for Scholarly Exchange Taiwan, Taipei, Taiwan. June 2018.
"Culture on Trial: Human Rights, Indigenous Rights, and Special Indigenous Courts in Taiwan." Academia Sinica, Institute of Ethnology, Taipei, Taiwan. May 2018.
"Rights and Rule-Crafting Processes in Taiwan's Special Indigenous Courts." Thought Leaders Talk, Fulbright Taiwan / Foundation for Scholarly Exchange Taiwan, Taipei, Taiwan. May 2018.
"Human Rights: Cultural Heritage, Cultural Rights, and Indigenous Courts [國際人權: 文化遺□， 文化權利與原住民法庭]." Graduate Institute of Financial and Economic Law, National Dong Hwa University, Hualien, Taiwan. April 2018.
"Tensions and Intentions Shaping the Social Imaginary of Taiwan's Indigenous Rights Framework." Ostrom Workshop Research Series, Bloomington, Indiana. May 2017.
"Indigenous Rights in Taiwan." Workshop on Indigenous and Ethnic Minority Rights: Policy Making for Survival, Department of Political Science, Indiana University, Bloomington, Indiana. November 2016.
"Minding My Own Social Business as an Anthropology Instructor." Department of Anthropology Pedagogy Workshop, Indiana University, Bloomington, Indiana. October 2016.
"U.S. Healthcare and Antitrust Law: An Introduction." School of Public and Environmental Affairs, Indiana University, Bloomington, Indiana. March 2016.

"Taiwan's Indigenous Peoples as 'Legal Persons': Three Recent Cases." NAGSA Luncheon Speaker Series, Native Studies at Indiana University, Bloomington, Indiana. October 2015.

"U.S. Antitrust Law and the Healthcare System." School of Public and Environmental Affairs, Indiana University, Bloomington, Indiana. April 2014.

TEACHING

ANTH 279: "China, Orientalism, and Globalization," University of Richmond, Spring 2020. Instructor of record.

ANTH 101: "Introduction to Anthropology," University of Richmond, Spring 2020. Instructor of record.

ANTH A122: "Interpersonal Communication: A Cultural Approach," Indiana University, Fall 2014-Spring 2016. Instructor of record.

COLL L220: "The Root of All Evil? The Culture and Ethics of Money," Indiana University, Spring 2015. Instructor of record.

CMCL P155: "Public Oral Communication," Indiana University, Spring 2014. Section leader.

CJUS P100: "Introduction to Criminal Justice," Indiana University, Fall 2013. Section leader.

PHIL 364: "Epistemology and Film," Virginia Tech, Spring 2004. Section leader.

PHIL 261: "Knowledge and Reality," Virginia Tech, Fall 2003. Section leader.

PHIL 200: "Introduction to Ethics," Virginia Tech, Fall 2002-Spring 2003. Section leader.

PROFESSIONAL EXPERIENCE

Attorney, District 10 Pro Bono Project 2014-2017

Practice Areas: Domestic violence, marriage dissolutions, child custody

Attorney, Setliff & Holland, P.C. 2011-2013

Practice Areas: Contract, tort, premises liability, eminent domain, product liability, FELA

Attorney, Hunton & Williams LLP 2007-2011

Practice Areas: Constitutional law, antitrust, project finance, energy regulation, international trade, corporate governance, human rights

MEMBERSHIPS

American Anthropological Association

American Bar Association

Virginia State Bar

Languages

English (native), Mandarin Chinese (advanced)

Academic & Public Service

Committee Member for Native American & Indigenous Studies Fellowship, 2018-2019
Legal Advisor for Law Center for Indigenous Peoples, 2017-2018
Pro Bono Legal Counsel for Monroe County District 10 Pro Bono Project, 2014-2017
Pro Bono Legal Counsel for Monroe County Counsel in the Court, 2014-2017
Board Member for Christchurch School Foundation Board, 2012-2017
Pro Bono Legal Counsel for Sexual & Domestic Violence Immigration Clinic, Virginia Poverty Law Center, 2011-2013
Pro Bono Legal Counsel for group of detainees challenging detention at Camp Delta, Guantanamo Bay, Cuba, 2008-2013
Legal Advisor for International Justice Network, 2008-2011
Legal Advisor for Notre Dame Center for Civil and Human Rights, 2008-2010