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PART III

Individualization of Land Rights
Photo 6.1
Protest for the land that is occupied by Taiwan Power Co. in Fushih village, Taroko, May, 2009. The label in the photo says, ‘Return My Indigenous Lands; otherwise I will fight to Death! Shame on the township office! You never listen to what the elders say!’
6

Reservation Land Property Disputes: From a Law-Individualism Perspective

6.1 A preliminary review of the study of indigenous land property conflicts within the Reservation Land Procedure regime

In 1945, soon after the end of World War Two, the Chinese Nationalist government took over Taiwan and adopted the Japanese regime, which had also stopped non-indigenous people from taking indigenous lands. Even today, indigenous lands are still state owned. In order to maintain the existing regulations and to develop methods of management, the government introduced the 'Indigenous Reservation Land Management Procedure (IRLMP, 原住民保留地管理辦法) (Hereafter referred to as the Reservation Land Procedure) in 1948 (Yen and Yang 2004; Wu, Shuh-tsrong 2000).

The Procedure followed Japanese doctrines and the notion that, basically, indigenous lands were *terra nullius*. As a result, if indigenous people could not provide any official Japanese deeds to prove ownership of a piece of land, the Nationalist government confiscated the property. The strict implementation of the Procedure triggered many conflicts about the principles that make up the law and, subsequently, there have been a series of indigenous claims to the disputed land. In this chapter, I will focus on those claims arising from the doctrine of reservation land in order to illustrate how indigenous people provide reasons to suggest where laws are compatible – or incompatible – with their ideas and practices relating to land issues.

There has been little research on the legal conflicts concerning reservation land by law scholars in Taiwan. Equally, anthropologists in Taiwan tend not to be immersed in land tenure problems from a legal anthropological point of view, i.e. the relationships between state laws and local lives. Most of the attention for indigenous reservation land problems has originated from scholars of land administration and politics. However, in my view, these studies lack ethnographic immersion on the implementation of processes taking place inside indigenous communities. Indeed, much of the research has focused on the process of establishing the laws concerned (Chen, 2002, 2003; Yang, Chih-Wei, 2005; Wu, Shuh-Tsong, 2000; Simon, 2002; Mao, 1998). Actual and detailed discussions of the en-
counters between state laws and local ideas have, thus far, not been highlighted. Fu (2001) has written (but not yet published) a short article that discusses how certain indigenous peoples have lost their reservation lands. He uses an ethno-graphic methodology in order to uncover the social and political proceeds of the lost land, which was occupied by local indigenous governments or non-indigenous people (Fu 1997). A good starting point is an analysis of the legal concerns raised by Judge Tang, Wen Chang (2005) in the Hualien District Court, based on the land claims cases he dealt with. This will also provide us with some general characteristics of indigenous reservation land conflicts. Judge Tang believes there are some typical types of conflicts arising from the implementation of the doctrine of Reservation Land Procedure. Firstly, the Procedure was not issued as a normal law, but rather as an administrative procedure that conflicts with other laws issued by the Legislative Yuan. Thus, the Procedure conflicts with, among others, the Forestry Law (2004) and the Animal Law (1989). This makes it hard to support indigenous rights in court decisions. Secondly, the restrictions on land transactions between non-indigenous peoples have reduced the value of reservation land. Consequently, reservation land is less attractive and it is harder for indigenous people to get bank loans or raise the capital necessary to buy and invest in reservation lands. Thus, the Reservation Land Procedure policy limits the chances of indigenous people surviving in normal conditions. This certainly accounts for why illegal land transactions of land have become such a big issue between indigenous and non-indigenous people (ROC Control Yuan 2004). Thirdly, the land transactions of land between indigenous and non-indigenous people are illegal, and the punishment is confiscation of the lands in question. This can be a source of ethnic and economic conflicts. The fourth characteristic of land claims conflicts mentioned by Judge Tang is the misunderstandings caused by the gap between indigenous tenure ideas and the land registration process implied in the Reservation Land Procedure. These observations are similar to those noted by the Legal Aid Foundation Hualien Branch, who found that indigenous people asked for more legal aid than non-indigenous people. In addition, they found that in 2004, the top three per cent of all cases brought by indigenous people were about land issues (Tsai, Yun-qing). A lawyer for the Foundation, Tsai, found that the majority of 25 reservation land cases he examined were conflicts between indigenous and non-indigenous peoples (Han people), or between indigenous citizens and township governments. In all these cases, the conflicts centered on the land registration procedures. I believe it is in everybody’s interest to examine these conflicts with Taiwan’s state laws.

Based on the above-mentioned observations, and with a view to expanding the field of observing land conflicts beyond court cases, I carried out a review of the archives of Shoulin Township’s Council of Mediation (秀林鄉調解委員會檔案). Here I examined 174 cases. In addition, I reviewed 30 cases found in the documents of the Shoulin Township Representatives Council (秀林鄉代表會議事錄); 45 claims documented by the Hualien County Representatives Council (花蓮縣議會議事錄); and I examined papers of the Formal Taiwan Province Representatives Council of Senates (台灣省議會議事錄及省政公報); docu-
ments from the Legislative Yuan Documents (立法院議事錄) and many other official land claims documents relating to the period 1945 to 2010. I read these with the aim of getting to know the people behind the names in these official documents and legal archives relating to a number of adjunct villages in the Taroko area. This is how I selected my cases studies. This is quite different from history, which mainly studies affairs from the past. Instead, I try to find people in the documents and archives who are alive today and have ongoing land claims or experiences of the aftermath of land confiscation. This provides me with the opportunity to follow conflict cases from an ethnographical perspective and to examine how land issues are related to people and societies.

I will detail some of the cases I have collected in order to demonstrate the ethnographical methods used. These methods start from a holistic ambition to study each case and illustrate the impact modern state land laws have had on indigenous people. In principle, I will arrange my cases in line with the legal procedures of land property titling, beginning from the land survey and measuring, the registering of cultivation rights or land surface rights for construction or forestation land, and then wait for five years to promote the usufruct right that is non-alienable to non-indigenous people according to the Reservation Land Procedure (appendix 2). In order to provide a preliminary typology of conflict types, I will illustrate cases that are, in accordance with my findings so far, typical of each phase of the procedure.

### 6.2 Conflicts concerning the Land Survey and Measurement Procedures from the 1950s to the 1970s

#### 6.2.1 No measurements, no land rights: Case of Taiwan-Power vs. original indigenous cultivators

In May 2009, a ‘Fushih Tribe Land Claiming Self-Rescue Association’ along with some 50 or more local villagers assembled outside the offices of the Shoulin Township government to demonstrate for the return of their indigenous lands. Some elders belonging to the association said that prior to 1920 they used to cultivate the land that was now the backyard of the Taiwan Power dormitory. ‘We have lost our land for a long time and that was because there were no ‘white paper and black ink’ [contracts or documents] to prove our land rights at that time.’ The spokesman for the association, Mr Tsing, urged the Township Office to

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10 The land survey and measurement began in 1958 and finished in 1966. The measurements were processed with the following purposes: (1) to define land types in order to assess whether they are suitable for forest, herding or agriculture and to help indigenous people to use the land efficiently; (2) to allocate and appropriate reservation lands in more reasonable ways; (3) to define boundaries between reservation land and public land; and (4) to provide legitimacy for the granting of reservation land to the indigenous people (see Li, Yi-yuan 1983: 113-114). After the measurement phase, reservation lands were assigned with a land number, type indications, cadastre for the legitimacy of reservation being granted to the indigenous people. Later, the ‘over all registration of lands (土地總登記)’ procedure went on to clarify all land tenures.
return the land as soon as possible; otherwise, ‘they would use all kinds of fierce measures and protest against the injustice’.

Actually, this group of indigenous people had been trying for almost a decade, using all kinds of possible methods, to get the lands in question returned. They visited the local Township and also County Government offices to ask them to investigate possible wrongdoing during the procedures that cancelled their land rights. However, the only answers they received stated that according to the relevant laws, they have no rights at all to claim the land in question. Having failed to find justice at the local level, the group then approached the ‘Big men’ in the Control Yuan and a number of indigenous legislators in the Legislative Yuan, only to be told they should ask the local township to investigate the process. The spokesman for the association is a highly educated man, whose wife has a law degree, and who had spent years carrying out ethnographical research on the history of the land using documents and oral histories. He provided oral histories, old aerial photos and official documents to prove the ‘simple and obvious’ fact that the land was indeed cultivated by his elders and ancestors. After more than seven years of efforts to have the land returned, there was no sign of a response from the local indigenous township government. The next step was to form an association and raise funds in order to bring an appeal to the court, despite the possibility of winning justice being slim. Initially, the association was unsure about whether to go to a general court or an administrative court. In fact, deciding whether reservation land issues should be dealt with in the general courts or an administrative court is a source of controversy among legal experts, because the procedures concerning the titling of indigenous reservation land are the responsibility of the official agents of the Township Indigenous Reservation Land Committee (TIRLC). The actions taken to give a title to indigenous people are administrative actions and therefore belong to the realm of public or administrative law. Others argue that these claims are private matters to be resolved between property owners (Tang 2002). Judge Tang confirms that many cases suffer from this confusion and this was one of the reasons why the members of the association decided to recruit a high profile lawyer to fight their cause and win the case to return the lands that were ‘obviously and clearly’ theirs. One high profile lawyer they approached responded with the same confusion about which court was suitable for their case. In the end, they chose to go to the administrative court in Taipei to accuse the township government of not returning their lands. The judge in the Taipei Higher Administrative Court accepted this case (#1668(2008)) as an administrative suit. However, he expressed concern about exactly what it was that the elders were asking for. Was it ‘returning the land’ (申請返還土地) or ‘asking for a redistribution of land’ (請求分配土地), both of which require a different type of hearing and evidence? A case asking for the return of land demands that only a legal owner, with title and rights, can claim his property back. A request for the redistribution of land requires a claimant to ask the township government for the registration of surface rights or cultivation rights according to the Reservation Land Procedure (see the decision on case#1668(2009)). In the end, the Judge ruled that the primary purpose of the case was to ask for the land back. Consequently, he made a decision on the case stating that because it did
not conform with the requirements of either of the scenarios mentioned above and that he could find no evidence that the elders or claimants had completed any of the legal procedures required by the Reservation Land Procedure when applying for either the return or the redistribution of the lands. The judge said that he could only take cases where there is a dispute over prior administrative decisions. He acknowledged that the plaintiffs had made many and varied attempts to get the land back, but said that they had not provided sufficient legal evidence or followed the necessary procedures at the township government level. The township representative explained in court that, ‘these elders lack proof of registration’ (權源證明文件), which is recorded in the Land Survey Registration Book and details the type of land use and a list of land users at different times: the Total Land Survey of the 1950s; the 1973 Illegal Land Use Survey (濫墾地調查山地保留地使用清冊); the Reservation land Use Survey (山地保留地現況調查表) of 1983; and the 1987 Illegal Land Use Survey (花蓮縣秀林鄉山胞非法濫墾使用山地保留地宜林地審查清冊). In other words, during these four surveys by the government, there was no record of any of the plaintiffs. They do not qualify, therefore, as candidates for land titles, even though there is now plenty of evidence in the form of oral histories and communal relations to support their claims of land use. The judge ruled that these plaintiffs did not hold any registration records and, therefore, they have been unable to make progress in terms of redistributing land titles. The Judge accepted the township’s argument and refused to accept the appeal on the grounds of a lack of evidence that the lands were lost ‘legally’ before the township leased the land to the Taiwan Power Company. The plaintiffs argued that since the indigenous people were unable to provide proof of registration, then the township government should be able to demonstrate how the lands in question were legally taken by the government and the government should have first compensated the original land users before then leasing the land to others for ‘national economic’ purposes. In fact, the township office did not have to pay any compensation to anybody at all, because the township office viewed the land as terra nullius and thus believed it owned the territory and could appropriate it at will. The judge also denied this case on the grounds that, according to section 7 of the Reservation Land Procedure, the ‘Council of Indigenous Peoples, together with the relevant authorities concerned should assist the aborigines in establishing the indigenous peoples reservation land cultivation rights, land surface rights, as well as lease rights and ownership rights’. However, there was no ruling that the indigenous people have the right to ask for the government to reveal its decision-making process. It is no surprise that the elders and claimants could not understand or accept why the Judge failed to see that they had actually cultivated the land in question. In fact, they were so outraged by the ruling that even the mildest of old ladies and pastors, who were seldom involved in conflict, gathered for the ensuing protests.

I asked the claimants why their names had not shown up in any of the previous land use surveys. A number of them told me that they had no idea about the land survey at all:
For God’s sake, who knew to accompany the surveyors in order to prove our land rights? ‘We neighbors knew very clearly which line and which inch of land to use (pyusi). It’s our gaya (customary law) to obey the lines and borders (ayus). We knew this from our ancestors. The government did not inform us about joining the survey and we didn’t think it was such a big deal because between the mutual recognition among neighbors and the gaya of ancestors our lands were safe enough.

During the early period of the implementation of the Reservation Land Procedure, we find that many indigenous people still supported their land use rights with collective norms or rules they call gaya. Perhaps the various surveys were designed to create a direct one-to-one relationship between the land and its owners or users. In any case, the notion of land used as common or communal property was not permitted under this type of state simplification.

Local neighbors have always adopted a policy of mutual recognition of land tenure and thus the new laws were seen only as additional support for their land rights. The procedure to parcel land for individual registration based on the Land Survey was not started until 1958. That is to say, indigenous people were still using land in collective methods prior to 1958. The Reservation Land Procedure even suggested indigenous people should plant trees collectively and share the mutual benefits of tree trading. Land tenure was constructed using local customary norms and gaya, so the government surveys were somewhat alien to the indigenous peoples. They did not understand that the only way to have your legal title to land recognized was for it to be recorded in the Township Survey Book.

6.2.2 The wrong registration of the wrong people

Case study: Grandma Sakura’s complaint: dreams and gaya

Many of the elders involved in the protest were also involved in their own land conflicts. Grandma Sakura’s claim – to ask her sister to return her land – was a typical example of the wrong registration of land titles that occurred frequently under the land survey procedure. About 40 years ago, around the time of the land survey in the 1950s, Grandma Sakura’s husband lent a big piece of land to her sister’s husband, who had just moved into the village without any land to plant. According to Grandma Sakura’s memory and discourse, she believed there had been an oral contract between her husband and her sister’s husband (Anay) to lend him the land so that the family could survive until their children had grown up enough to become independent. The promise was a free loan on the condition that one day the land would be returned. However, almost 40 years after her sister’s husband’s funeral, Grandma Sakura found that the loaned land had already been registered in the name of her sister’s husband by the township government. Grandma Sakura did not understand why her sister’s husband would register the land in his name. This would mean that his sons would inherit the land. It seems there was no intention of returning the land. Grandma Sakura felt upset for many years and did not know what to do. One day, her grandson decided to act on her
behalf and approached the Township Mediation Committee with the request that the sister return the land. However, the sister’s son said that:

the land belongs to my father who spent more than 40 years of labor and sweat cultivating the waste land and making it fertile. It is legally registered in the Township Land Book. I don’t feel worried at all; the law is with us. The law will prove that we own the land forever’.

The son said his piece and left the Township Mediation Committee in a temper. This resulted in the mediation process being stopped and Grandma Sakura was told that she could bring the case to court. But she did not want to do this and hoped to find other ways to bring her prick her sister’s conscience and get her land back. She expressed the belief that the oral contract or promise had been supported by gaya: ‘If you break the gaya, you will be punished badly, even worse than what the law can deal out’. During these few days, one of Grandma Sakura’s daughters kept dreaming about the land issue. In the first dream, she found her aunt’s husband (the man who had borrowed the land) had fallen down into a deep gorge and was tangled in heavy wires, too badly hurt to walk. She was shocked by the dream because she had just returned from her father’s grave to ask for advice about the land. She shared the dream with her family who told her that, in fact, her aunt’s husband had indeed died when he fell into a deep gorge. The second night she dreamed that she was searching for her father’s money, all over the house, but she could not find it anywhere. In her dream, her father told her that the money was hidden in a new place. The next day, one of their neighbors said that the dream was actually telling her that the land was registered in another’s name. It was during the 1970s that the government sent surveyors up to the mountains. They called on land users and land owners to witness the land survey and they carried out measurements according to the procedures laid down in law. At that time, Grandma Sakura’s family had moved down to the plains, and perhaps this is the reason why they were not informed of the survey. Consequently, the borrower and user of the land participated in the survey and were registered as the land user who was entitled to the right to cultivate (so-called surface rights). It was argued that her sister’s husband did not mean to cheat her family out of the land and that it was outside of their ‘legal awareness’ to find out the real meaning of the land survey. However, others argued that her sister’s husband had every intention of taking the land thus did not inform the real owners about the survey. They believed that this could be proved by the dream that he had fallen to his death. Slipping on stones or wood is taken as a sign or skribut (a Truku term) for being symbolically stopped by a utux (ghost), and that is always seen as a judgment for breaking a gaya (Xen 1998; 1999):

Gaya is so powerful that you can see another relative, who also borrowed land from us, has just returned the land to us after 40 years. He had no gaya to steal the land and register it in his name. People believe that gaya always remembers to execute fierce vengeance on its violators or on a corporate group (personal contact).
The villagers became reluctant to talk too much about this gaya, which had already been responsible for something bad. People did not dare to talk too much about it in public for fear that someday there would be vengeance. During my time in the field, I could sense that most of the villagers had an opinion on this matter and there was plenty of gossip about the case. Most villagers suggested that the land should be returned in order to keep the gaya intact and then a pig should be sacrificed and the meat shared among relatives as compensation for any damage. What people worried about most was that the son, who had inherited the land and insisted that he had a legal right to the land, would suffer bad fortune like so many others who had stolen land or violated the gaya. Indeed, one day, the son who had inherited the land was going up the mountain to fix a house that he wanted to run as a homestay; his mother warned him to be alert and to guard against accidents or falling down. But he ignored her and when he was coming back down the steep trail he slipped and could not walk for many days. The people’s daily lives seemed to become full of warnings.

In this case we found the emergence of a special category of people who are seen as controversial by villagers. I would call this category of people ‘law-individualistic’. In local people’s terms, they are people who take advantage of their knowledge of certain laws and procedures in order to benefit from the support of the law. They are usually people who local people believe are violating the gaya. One villager commented that the Land Survey was designed to ‘call for people concerned to record the ‘facts’ of land tenure in the government book, but unfortunately it was ruined by some people who disregard the gaya. They could have registered the original facts, i.e. who may actually own, or deserve to own, the lands. They are selfish and destroy the collective gaya.’ According to this thinking, there is no reason why the land survey could not have maintained the original indigenous structure of land tenure. The Reservation Land Procedure did not force people to be selfish, but it allowed it to happen. People usually call these law-individualistic people thieves. Very often, the processes implemented by the agents of government were full of administrative mistakes or inconveniences. Land thieves are land thieves no matter whether they take advantage of the law or not. People often complained that the notification about the survey was announced on a bulletin board that few people accessed. In addition, at that time, just after the Japanese had left, not many people were able to read Chinese. The new procedures were supposed to be publicly announced, but this clearly failed. The following case from a nearby village (law suit #6444 (2001)) exemplifies a land dispute.

6.2.3 No land rights without registration

An Indigenous teacher vs. the township office

Four cases\(^\text{11}\) were brought by an indigenous teacher who believed that the land she inherited from her parents had been stolen or registered ‘illegally’ in other

\(^{11}\) Cases 90, 6444 and 89, 155確認土地所有權存在.
people's names. She accused the township government of granting the title of land 'owner' 'illegally' to others. She stated in the court that the rights to the land in question should be granted to her parents who had first cultivated the land and still used it to this day. She had discovered by chance that the land had been registered by someone else. She believed that this was, at worst, an illegal action and, at best, a mistake made by the township government and the wrong land title holder. The judge who heard the case was confused the teacher wanted and decided that, first and foremost, she was looking for a 'correction of the title to cultivate' (更正耕作權) and not ownership of the land. If she wanted to present a case for ownership, then, she would have to challenge another governmental institution in charge of land registration, the Hualien Branch of the Land Office and not the township government. Listening to the testimony from the Township Office, the judge heard that the teacher's parents did not present themselves at the office between 1961 and 1962, the years when the land survey was conducted in the village. Consequently, the Original Land List did not list her father as the land user. In 1980, the new Land User List recorded that the right to cultivate (surface rights) was registered by the township government and also, strangely, a note was attached to the record stating that the teacher's father was the land user. In 1982, the township government carried out a third land survey which apparently recorded double ownership and informed the teacher. At that time, the teacher did not bring a claim to correct the title. Before long, the 15 year period within which a land claim was possible (negative prescription) had elapsed. The note attached to the entry in the Reservation Land Use Survey Book stated, 'the registration of the surface right is wrong and needs to be corrected to the original user'. However, because land surface rights are different – have less status in law – to land use rights, the township government did not feel any urgency to correct the mistake. What is not clear is how another person was able to register the right to cultivate (surface rights) the land. The Reservation Land Procedure declares that the right to cultivate is reserved for someone who 'has opened and cultivated prior to the enactment of said procedure' – in this case, the teacher's parents. The Reservation Land Use Survey Book also acknowledged that her father qualified for surface rights. Crucially, in 1982, the government noted that it had been a mistake to register the land to a third party. The mystery of the third party continued, but rumor had it that the registration had been done intentionally and illegally by township government officers and the land title holders. Thus, we see the emergence of a law-individualistic man who may have registered illegally, but later had this decision upheld by law. It seemed that no one could correct the obvious mistake:

There is no justice at all in the ROC laws and courts! It is obvious that the teacher's father was most deserving of the land, not a stranger.

If you didn't show up in the first land survey, then you were not registered as the land owner, even though you had cultivated the land for generations.'
If you showed up for the survey, your name will at least be listed in the Survey Book and you will automatically have rights, even though you haven’t shed a drop of sweat on that land at all.

These are some commonly-held views about the National Land Law.

In order to compensate for the numerous omissions from the first land survey, the government carried out more editions, listing land users with a view to assisting the registration of land rights. However, the above case illustrates that the justice or truth in people’s mind was not reflected in the Land Survey Books. The teacher did not claim her rights before negative prescription came into effect. She said she did not know what the procedures were at that time and had assumed her parents had rights because they were still working on the land in question. Neighbors were quite clear about the local tenure structure. If consensus on land property issues was achieved at the local level, then why bother to care about whether the land had been officially registered or not?. Registration was an idea alien to these peoples’ culture. Tenure had already been structured by a clear collective consensus. The registration system, on the other hand, creates a fictive tenure structure based on words and paper, something that was new to indigenous people. Inevitably, there were problems resulting from the transformation of the tenure system from a local equilibrium to a national registration system. Local customary equilibrium was balanced between related neighbors and, thus, was supported by different but related levels of collectiveness, such as families, relatives or local adjunct land users. By contrast, the surveyors involved in the registration procedures were not familiar with local contexts, and it was highly possible for distorted information to be registered in the land book. Law-individualistic people emerge as individuals who deal with their property without participation in a wider context. That is to say, with the backing of new national laws these individuals could ignore traditional or customary ways of land tenure that are more relationally embedded in a local context. The new national laws replace these traditional relations and serve as a kind of objective means by which land ownership gradually requires a new form of interdependence, where one’s own wider recognitions do not function as a primary means of obtaining the land.

From the above examples emerge a new type of person that adopts individualism and leaves collectiveness behind. At this juncture, however, we see that this tendency to individualism has not yet ‘atomized’ as would happen later. Basically, this was because the land survey was carried out in a collective atmosphere that provides less opportunity for selfish individuals to take advantage. Later, I will discuss the procedures that were introduced after the land survey, which resulted in a structure that fostered increased law-individualism and allowed individuals to make decisions in more atomized ways. The procedures that encourage increased law-individualism can be illustrated by the following cases that took place during a time when progress was being made towards land ownership on the basis of surface rights, also known as superficies.
6.3 Conflicts during the period of limited cultivation and land surface rights (Superficies)

Cultivation rights or land surface rights are like superficies; that is to say, a real right consisting of a grant by a landed proprietor of a piece of ground, bearing a strong resemblance to the long building leases granted by landholders. The right of superficies is adopted in the reservation land procedures because the indigenous land is legally state-owned. Thus, for indigenous people to have legal permission to use or to own land, they must first go through the procedure of registering superficies that resemble a permanent rent. Before you could obtain ownership of a piece of land for agriculture or housing or forestry, you first had to be listed in the survey book and then begin to obtain the surface rights to the property. According to section 17 of the Reservation Land Procedure, you have to inherit the land, cultivate it, or live on it for private use for a period of (at least) five years after registration. However, the promotion to ownership after five or ten years is not automatic. Rather, it must be on the ‘condition that the personal use has been verified factually’. Only then can the land ‘be converted to land ownership registration upon the personal application of the cultivation or land surface rights holder in the presence of the authorized clerk of the Council of Indigenous Peoples’.

Thus, the application should be filed at the local land registry office. In my fieldwork I found conflicts and mistakes consistently occurred during the process of verification and promotion. Below, is such an example, in the form of the nationally famous and internationally reported case between the Shoulin township government, the Asia Cement Company and some 90 indigenous people.

6.3.1 Indigenous Land rights appropriated by the state for use by industry

Indigenous people vs. Asia Cement Co.

At a time when Taiwan had just released itself from the constraints of martial law, a group of indigenous land owners took advantage of the freedom to demonstrate and lobby for their rights. In fact, since 1995, they had adopted many different measures to ask the Asia Cement Company to return their lands. This particular group was among the very first from the indigenous community to exercise their right to protest. In fact, they attracted so much publicity that many activists and legal experts agreed to help them. For example, a human rights NGO, largely comprising lawyers, volunteered their services to help them bring a series of cases in different courts. In these cases, the indigenous plaintiffs stated that in the year of 1973 the township government had faked their signatures in order to cancel their rights to cultivation, which had already

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12 I discuss this case based on the records of the court’s decisions re: case #1(1999) and # 2055(2006).
13 Since martial law was lifted in 1987, indigenous peoples have been able to start lobbying for better enforcement of their land and labor rights. (Allio 1998).
been registered after the land survey during the 1960s. They believed that later the township government leased the land illegally to the Asia Cement Company, according to section 15 of the Reservation Land Procedure:

Indigenous peoples land grants for cultivation rights, land surface rights, lease rights, or gratis land use rights is non-transferable or non-leasable, except to the indigenous heir or chosen successor, another indigenous member of the original beneficiary household, or indigenous peoples within a three-degree kinship.

The indigenous claimants believed that they still had the rights to cultivate and, because a decade had passed since registering their cultivation and surface rights, they should be promoted to ownership rights. Their accusations raised a lot controversy, even among indigenous communities and among some of the previous owners of the land related to Asia Cement. Subject of the most debate was the money these previous owners had taken from Asia Cement; money that was intended to compensate for the cancellation of the cultivation rights. According to the Reservation Land Procedure, cultivation rights cannot be sold or transferred to non-indigenous people. So it seemed that in order for Asia Cement to establish itself in the indigenous area, they first needed indigenous land owners to give up their cultivation rights. Then, the Township Office, as the representative of the ‘real’ land owner – the State – could take back the lands and then lease them to corporations for national economic and industrial plans. The money that changed hands was meant as private compensation and not as ‘rent’ or as a ‘price for buying or trading’ between Asia Cement and indigenous land owners. This tricky process appears to be an implicit – and perhaps complicit – attempt by Asia Cement and the township to avoid breaking Section 15 of the Reservation Land Procedure. However, there are many conflicting interpretations among indigenous land owners about this money. This is exacerbated by the fact that the process happened almost 30 years ago when these plaintiffs were young and the business was conducted by their parents who were illiterate or ignorant of legal processes. Many second generation owners believed that the money actually meant rent, so the papers they signed, which were sometimes fake, were seen by them as proof of a rental contract. As a result, they filed cases asking for the return of their land. Here we find that they still adopt natural law thinking, and believe that they were in a position to rent out the land with cultivation rights, even though the Reservation Land Procedure did not allow this. Other indigenous people accept that the transaction that took place amounted to a purchase and consequently, they no longer had any rights to the land. Yet others understood that, according to section 15, they could not lease lands that they had cultivation rights for but did not actually own. There were some indigenous people who accused those who believed they had the right to rent out the land of being ignorant of the law and refused to join the land claim case. On the other side, there were a number of people who saw an opportunity to piggy back on the case and perhaps benefit from a positive result. They certainly saw the
involvement of Han intellectuals and lawyers in the case as an advantage. Thus, a case was filed, accusing the township government and the cement company of faking the paperwork that cancelled their cultivation rights. For its part, the township government stated that the money paid was private compensation for giving up cultivation rights. This meant that once you took the money you gave up any further rights to the land. The township representative admitted, however, that the problem with this procedure was that when the township received the signed permissions, giving up the cultivation rights, the clerk did not take the next step and go to the Land Registry Office to officially cancel the cultivation rights. This oversight on the part of the township government is the major reason a number of indigenous land title owners, who had taken the compensation money and signed to handover their cultivation rights, were able to regain ownership of this land ten years later. A second mistake also occurred that encouraged a number of indigenous people to file land claims. Rumor had it that some of those who had sold out their rights managed to get ownership back as a result of bribing the township government or by using underhand methods. It was certainly the case that a number of those who were granted land titles were employed as clerks in the township governments. These clerks and others who had taken compensation but then claimed land back attracted a great deal of criticism, from within the indigenous community, but also from township representatives. Local people complained that, ‘they are tricky to use legal methods to get what they don’t deserve’. The judge in this trial made a decision that did not resolve the problems at all and, in fact, created more confusion among stakeholders. The decision stated that what these indigenous people wanted was to ask for their rights to be promoted to ownership from cultivation rights to ownership rights. It also said that the decision about whether or not to agree promotion should be made by the county government, in accordance with section 5 of the Reservation Land Procedure (see appendix 2). This decision caused a great deal of confusion.

In short, we found that vindication by the court does not always equate with justice in the peoples’ minds. I would go so far as to say that justice cannot come from national laws that are designed with such limitations. We have found that many of the people asking for their rights through the courts are not always expecting real justice for their community, but rather are looking for profit for themselves. Justice or injustice from the courts is not compatible with ideal moral sensibility among people. When there are no other alternatives than to proceed through the courts, the result is that an individual moves outside of the moral circle of the community and, instead, turns to the law for support. At the point someone chooses to find support or fortune from the law, he becomes individualized.

Many of the court decisions I have heard or read about share similarities with the Asia Cement case. For example, research showed that the township government and private companies or national corporations such as Taiwan Power or Taiwan Water even took land without providing compensation, either because, once again, the township office failed to cancel the cultivation rights at the Land
Registry Office, or the township turned a blind eye to the fact that the lands these corporations wanted were already registered or used by someone else, only to face claims by subsequent generations later. In my observation of land claims, truth and justice are hard to find, although some individuals have been lucky enough to get their land back. For example, the court decision listed as the case of Hua-simple-#508(2007), which related to land in my fieldwork villages. In this case, the plaintiffs asked for the return of land that was being used as a water station by Taiwan Water, who obtained the land for public use from the township government. However, prior to Taiwan Water obtaining this land for free, cultivation rights had been registered in the name of the plaintiff’s father. The township admitted that it failed to cancel these cultivation rights and, consequently, the plaintiffs were awarded ownership.

The plaintiff refused to acknowledge that his family had previously received any compensation for the land, and challenged testimony by an elder in court who said that her father had actually donated the land for public use. The representative from the township government also defended their actions, saying that it was obvious that the lands had been a public water station for decades and that the plaintiff had not personally cultivated the land for more than ten years. According to section 15 of the Reservation Land Procedure, this meant that the plaintiff was not entitled to ownership rights. However, the judge decided to award ownership to the plaintiff because, according to article 43 of the Land Act, ‘Registration duly made according to this Act shall have conclusive validity.’ That is to say, even though the registration had not followed procedure, it was still valid. Thus, the decision was made that the water station should be torn down and clear land returned to the plaintiff. I do not intend to examine this decision further, but I can imagine that the decision divided opinion. In fact, article 43 of the Land Act has become something of a standard among indigenous people, who are bringing similar cases in the hope of a similar outcome.
6.3.2 Indigenous land appropriated for Han shelters

Mr Cilu vs. nine Han families: 18 trials in more than 12 years

Mr Cilu is an employee of the controversial Asia Cement Company and earns a salary good enough to give his family an above average standard of living. His wife has a successful fishing tool shop that provides them with an extra source of income. It is quite unusual to find a double income indigenous family. It is fair to say that Mr Cilu felt financially secure. Consequently, about 15 years ago, he decided to think about asking for his father’s land back. This land been occupied and nine Han families had built apartments on the property. These Han families believed that they had paid compensation money to Cilu’s father and, therefore, had the right to build houses on it. Indeed, they had lived there for over 30 years, from 1977 and the moment a fierce typhoon called Wenny struck their village and swept away their houses. The houses the Han people are now living in were planned by the township government, the Nationalist Party (Kuo-mintang) and the provincial government, who arranged for Cilu’s parents and other indigenous cultivation rights owners to receive 10,000 NTD (a good rate at that time) as compensation for the loss of their cultivation rights. However, as with the previous case, the township did not proceed to cancel the cultivation rights at the Land Office. As a result, in 1989, Cilu’s mother received a deed of ownership from the township government. He could not understand why they had the deed of ownership when the land was being used by Han families. His mother said that she had no idea about the 10,000 NTD. He concluded that when his father had been alive, the family had been cheated by a powerful triumvirate of local Han politicians, the KMT and the township government. Cilu believed it was his duty to ask for the land back. He asked other indigenous people who had suffered the same problems to join him, but many were hesitant because of financial problems and a mistrust of the courts, the laws and lawyers. A number of those who hesitated believed their parents had received compensation money, so they did not have a right to make any claims. It appears to have been a mistake that promoted Cilu’s cultivation rights. And, in fact, many people in the village told him that the transfer of the land had been organized by the government in order to help the Han people to survive in the aftermath of the typhoon; so they suggested that he should not to proceed with legal action, even though he possessed the ownership deeds. The township suggested that a solution was for him to lease the land to the Han people who had lived there for so many years. They warned him that the law may not offer him the solution that he was looking for and also asked him to think about what would happen to the Han families without anywhere to live. The Han people in question were very angry that their housing rights were being threatened by a mistake by the township many years ago. Despite this, Cilu still believed that there had been many injustices during the time of the land arrangements and he insisted that his family had not received any money, so they had the right to take back a clean property. In fact, Cilu started legal action in the civil courts without hiring a lawyer. The case was
heard in the court eighteen times\(^\text{14}\) in thirteen years, but the result he was looking for remained elusive.

In the first two appeals, Cilu's claim was denied because the judges believed that his parents would have received the money like others had, which demonstrated an intention to give up the cultivating rights. But Cilu refused to accept these court decisions and so he hired a lawyer to fight a third appeal in the highest court in Taiwan. Dramatically, the court overturned previous decisions on the grounds of article 43 of the Land Act, 'Registration duly made according to this Act shall have conclusive validity'. Thus, Cilu won the case and now waited for the land to be cleared and the houses torn down by compulsory enforcement (強制執行). Meanwhile, the Han families mustered all their resources and hire lawyers to appeal the decision. A staggering fourteen more trials took place in a bid to get the Indigenous Council to influence and stop Cilu. They put forward the argument that his ownership had been based on 'incomplete' cultivation rights and that Cilu's family had not personally cultivated the land for ten years without disruption because the land had obviously been used for housing and not farming. Most of the Han families involved believed that it was a cynical move on the part of Cilu and his mother who waited for fifteen years to pass and with that the deadline for bringing any action (negative prescription 時效消滅) to claim their surface and housing rights (superficies).

To summarize the events surrounding these eighteen trials, I would say that only article 43 of the Land Act promotes indigenous rights. As a result of these trials, Cilu's family was thought of as selfish by the Han people, while some indigenous people thought he was courageous for challenging an unfair system. Later, we found another group of Han who were worried that the original indigenous owners of the land that they were living on would file a case as Cilu had done. To avoid this, they put forward a plea to the Hualien County Parliament to protect their housing rights. We also found a number of indigenous people joining with Cilu to form a local association to promote their village development and to fight against the dominance of Han people who had obtained land from indigenous people and then promoted the land as a valuable commodity. Cilu's victory certainly encouraged many indigenous people to fight for land rights. Therefore, we can see that in contrast to previous cases, this law-individualistic character had enough charisma to raise support from indigenous people who would not have got involved in such a fight a decade or more ago. Cilu's case became famous in local villages and many people who had suffered because of land

conflicts sought him out in order to exchange experiences and ideas. It did not take long for a theory to develop; that is to say, if you possessed the land right deeds, no matter whether they have been obtained legally, in error or illegally, you had a strong claim to ownership rights.

Mother Leaf’s case clearly illustrates the theory of 'registration above all.' This case demonstrates the failure of an oral contract, which was less powerful than the registration of ownership. In this case, Mother Leaf had found many elders in her neighbourhood who were prepared to testify that she had bought land from the accused, a second-generation descendant who insisted that his parents had forgotten to cancel their right to the land with the township authorities and failed to transfer the rights to Mother Leaf. Mother Leaf did not hire a lawyer to fight her case, but rather asked an indigenous cousin who had experience of the Asian Cement case to assist her. The judge hesitated to believe the neighbors' testimony and the notion that there had been a transaction, even if it had only been an oral contract between Mother Leaf and the buyers. The decision was very controversial among the indigenous community, not least because there are so many similar cases where oral contracts had taken place. This judgment basically meant they were all invalid, or at least useless in terms of land claims. The problem with these oral contracts is that they took place more than a generation ago and the memories of and witnesses to the events were gone. At the same time, modern law demanded that property trading be dealt with formally, with paper deeds. Local gossip suggested that there had indeed been a purchase – otherwise the land could not have been used by the plaintiff for so many years. The defendant’s cousin, however, possessed the paper deeds to the land, which had more legal weight than an oral contract. Here, then, we find another case where one of the parties is supported by law, while the other is relying on local customs and hearsay. Ultimately, Mother Leaf lost her case.

During my fieldwork I found another important example of a case (Hua simple 63, 2002 (九十一年度花簡字第六三號) in which the land had been sold and the buyer had built a house and lived on the land for more than 40 years. Later, however, he was threatened with the house being torn down because the land was still registered in the seller’s name. I also found case 109, 2003 (拆屋還地92,訴,109) where an old man who had migrated from mainland China was urged to return the land he was living on because it was still registered in the name of the seller’s descendant. A similar case can be found in Up Yi 74, 2003 (九十二年度上易字第七四號), where the judge ruled that ownership should belong to the seller, but that the buyer was eligible to occupy the land that they were living on because the trade of the land had happened before 1972 when the Reservation Land Procedure decided that land can only be transferred among indigenous people. To everybody’s astonishment, the buyer’s oral contract meant that his descendants could occupy the land but had no land title. We can see that land rights are supported by law and that local recognition does not count. One example worth noting here is the devastating case of Up YI 33, 2005 (九十四年度上易字第三三號). In this case, the seller’s daughter sold the land with an oral contract and forgot to transfer the title. The land was then sold on again
to a third party. The daughter’s claim to the land was given no credence by the indigenous community, but she believed that the legal process would uphold her claim. This is yet another example of indigenous people learning legal techniques in order to gain personal profits. But the consequence is the sacrifice of local balance. Below, the Brighten case provides a typical illustration.

### 6.3.3 Registration is paramount

**Brighten vs. his indigenous neighbor**

Based on the theory of ‘registration above all’, one of Cilu’s colleagues at Asia Cement, nicknamed Brighten, had registered a piece of land that was already occupied and used for many years by one of his neighbors, an old lady who had filed a law suit demanding that Brighten return the land she had used and cultivated. The case came in front of the judge twice, and twice the judge ruled that the land had been legally redistributed to Brighten. Following this decision, the old lady still occupied the land, so Brighten countersued in the Hualien civil court and demanded that the houses on the land be torn down and the land returned to him. Brighten assumed that he had already registered the cultivation rights so he would be in a strong position in terms of claiming the full land rights. However, on this occasion the civil court judge ruled that, on the one hand, Brighten could not prove that he had occupied the land earlier than the old lady and, on the other hand, the period in which Brighten could enjoy cultivation rights had come to an end after five years. This meant he had no right to claim the land, which according to procedures should now be returned to the state (in this case the township). This decision was quite a shock. Indeed, the majority of people expected that ownership would be automatically granted after the five year term. The judge ruled that no further appeals would be heard because the total value of the land in question was now below the parameters of the law. In fact, many people in the community thought that the ruling that nobody was given the land title was a good decision in terms of maintaining community relations.

Brighten was clearly astonished to find that registration is not actually paramount. He could not understand why he had not been able to earn the land back. If we examine all nine appeals on the Brighten case, there appears to be an inconsistency between the decisions of the administrative court and those made by the civil court. From the cases highlighted here, we can see that the Reservation Land Procedure has been designed to decide the power attributed to various rights through a collective process such as a collective land survey and the conditions of using land for cultivation or housing. Among the techniques and procedures employed in land claims, there is a tendency to reduce the public or collective aspects in order to prove the power afforded to a specific type of land right. It is certainly possible to gather the signatures of four neighbors who

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15 A list of the nine appeals on the Brighten case in the years 2004 to 2008: (1) 花蓮縣政府訴願決定書93訴字第8號，(2) 訴93,訴, 3948行政訴訟，(3) 93,訴, 3948行政訴訟，(4) 花蓮縣政府訴願決定書94訴字第024號，(5) 94,訴, 4078，(6) 拆屋還地94,訴, 296，(7) 96, 詐, 3779 最高法院，(8) 拆屋還地94,訴, 296，(9) 拆屋還地97,上易, 39.
are willing to testify to your ownership of land you have actually never used. You may register your name instead of that of the real cultivators. But there are still public processes that need to be completed, even with fake documents. And herein lies the problem; it appears that the public processes are so focused on the need for registration or the holding of deeds that they miss cases where land is being claimed dishonestly. This can cause controversy between individuals and in communities. The precedents set by previous rulings and increased knowledge of how to exploit the loopholes in the law have resulted in more indigenous land claims cases.

Later, I will provide examples of other cases concerning the granting of ownership rights that occur outside the collective domain and public monitoring. These examples show that indigenous people bringing land claims cases tend to be those with autonomy and the private means to do so. Moreover, they appear to take individual decisions without worrying about how others in their community may react. All the examples highlighted here suggest an increasing trend towards law-individualism among indigenous people. This, in turn, appears to reflect the original design principle of the colonial Japanese government and to prove that the implementation and practice of the Reservation Land Policy of the ROC government seems to correspond with the status of a colonial state.

### 6.4 Disputes arising subsequent to obtaining ownership

There are many checks in the system of public monitoring and administrative governance designed to establish whether reservation land is being used by individuals as intended, i.e. for cultivation, forestry or housing. These processes are designed to help protect the basic needs of indigenous people. There is an implicit recognition between policy designers that land can be used collectively by indigenous communities for agricultural and housing needs. The collective processes that take place before ownership rights to a piece of reservation land are granted include agreement to the condition that the property is not to be sold on to non-indigenous people. As we have seen, this process is still vulnerable to mistakes or deliberate rule breaking due to the emergence of law-individualism, as previously discussed. Below, I will illustrate how a legal environment encourages an atmosphere of increasing individualism that falls outside of collective monitoring or controls. I have found two tendencies in particular that are illustrative of this trend towards individualistic decisions regarding land use. One is changes in the law that have increased the opportunities for non-indigenous people to use indigenous land, despite the government maintaining a policy of not transferring ownership to non-indigenous people. This raises the spectre of collaboration between indigenous and non-indigenous people in order to circumvent these laws. Consequently, there is an atmosphere in which indigenous people are forced to deal with their ownership rights in secret, away from monitoring by the authorities. The second tendency my research demonstrates is the legal idea of private autonomy that goes hand in hand with the registration sys-
tem. The logic is that once a land title is granted and the paper deeds are in your possession, you may use it as an asset to borrow money, and you may sell it to others without notifying others, even those who may claim connections to the land. Here we see that the law tends to grant land titles to individuals and favors private ownership of land. Private autonomy tends to exclude relations, other than legal relations, that may be employed in land claims and results in land becoming a commodity. Here, I would warn that the extent of privatization needs to be differentiated. For example, land can be titled to co-owners of a shared property. There are certainly records of the registration of co-owners in indigenous areas. These co-owners still tend to deal with the land collectively when collective actions favour their survival. Even individual owners, with specific individual land, may cooperate with local ideas of land use. Therefore, the privatization of land titles is not an issue resulting from indigenous land conflicts. Rather, and more critically, is the way people deal with land issues from the perspective of private autonomy. We see that the Reservation Land Procedure is trying hard to help indigenous people deal with land at a local level with public monitoring, in order to avoid land rights to being taken out of local contexts and thus rendering indigenous land subject to the total control of private autonomy. The legal ideal of private autonomy is not totally unsuitable for indigenous people, but it does foster an environment in which indigenous people can disregard their collective relations. In particular, with regards to the transactions of land, private autonomy encourages people to opt out of the collective process. For this reason, private autonomy encourages people to become increasingly individualistic, even selfish, in terms of winning land rights.

Examining the cases relating to the Taroko indigenous area, I have found, generally, that Taroko society is facing a transformation; one that encourages less collectiveness and more possessive individualism in the form of law-individualism. If we follow Macpherson’s idea and view possessive individualism as a person who is ‘the sole proprietor of his or her skills and owes nothing to society for them’ (Macpherson, 1962), then we can say that possessive individualism in the Taroko area is not strong in most of the aspects of daily life. This is because we find many indigenous people who still share their resources and production, at least among families and relatives or adjunctive neighbors.

However, we can argue that possessive individualism has been observed in the domain of land conflicts, in cases where there is an individual who is keen to occupy land. In this scenario, possessive individualism and law individualism work together to bring a sense of selfishness and a disregard for the collective atmosphere. My research also suggests that we cannot use Dumont’s argument to describe Taroko society; that is to say, that ‘egalitarian individualism is exceptional, a recent and specialized growth’ (Macfarlane 1978). In fact, I would argue that egalitarian individualism and possessive individualism is not new in indigenous society; that individualism has not just emerged since ‘land became a commodity and markets played an important part in the economic system’ as expressed by Polanyi (Ibid). I would argue that possessive individualism is, indeed, becoming stronger in indigenous society and that we see indigenous communi-
ties experiencing a ‘great transformation’. It is certainly moving away from a non-market, peasant society where economics is ‘embedded’ in social relations, but it has not yet completed the shift ‘to a modern market, capitalist, system where economy and society have been split apart’ (Ibid). It is important to note that, up to this point, there was no free market system for Indigenous Reservation Land. Law-individualism has become an important medium in terms of progressing the great transformation described by Polanyi. The situation in Taroko, however, is not shaped by the emergence of individualism; but rather by stronger possessive individualism that is focused on the economic domain. In the Taroko area, possessive individualism is progressed by law-individualism, particularly with respect to issues of land use, the disposal of land and land transactions. However, there is no evidence that the sharing of land and embeddedness of land use in the social context have disappeared entirely.

Private autonomy is a basis for law individualism. Below, I will illustrate a number of cases that demonstrate conflicts among family members. Incidents where individuals have opted for private autonomy or law supported individualism and disregarded their family relations in pursuit of land claims. These examples will illustrate how collective decisions are disrupted by law-individualism.

6.4.1 Typical examples of private autonomy supported by state laws

Cases of conflict within a family

The case most typical of private autonomy that rejects collectiveness and public recognition is case 91, sue, 142 (花蓮91年訴142號). In this case, siblings accused their eldest brother of selling the land they should have inherited from their father to a third party. Previously, they had taken their problem to the mediation committee at the township office, and during this process all the siblings promised to share the land. Later, however, the eldest brother rescinded and sold the land to a third party. The family went to court and the judge found that the land had been registered in the eldest brother’s name right from the start and officially he had the cultivation rights. Consequently, the judge ruled that he should be promoted to land owner, rather than his father who had actually started to cultivate the land. From the judge’s point of view, there was no legal proof that the land belonged to the family’s father. The upshot was that the siblings had no right to claim the land as inheritors. Inevitably, this decision broke up the family, who saw their eldest brother as a law-individualistic man that was only interested in profit. The judge ruled that the eldest brother had been free to register the land because his brothers and sisters had not. Even though it was their father who had begun to cultivate the land, the law could only recognise the eldest brother’s rights to the land.

Another case Hua sue 306, 2000 (花89年訴306號) also deals with brothers and sisters competing for the right to share the house their father left them. One particular son demonstrated that he had made much more of an effort than his siblings in terms of maintaining the house and insisted on having the full rights
to the house. His claim was upheld by the judge. The ruling did not compensate the plaintiffs, his siblings, in any way.

In another case – Hua Simple 231, 2003 (花簡字92年231號), a family registered the land they had inherited from their father in the names of some of the brothers and sisters. Later, however, they each refused to return the share that they had. Indeed, some of them were claiming more than the share they deserved. Thus, we find a situation where many indigenous people worry that if their parents do not make proper arrangements for their land before they die, there will be problems regarding the division of the heritage. This is supported by the findings of the fieldwork by Xia (2003:48).

6.4.2 Methods used to circumvent the Reservation Land Procedure

Cooperation or corruption between indigenous people and the Han

Many policymakers from the Japanese period believed that if there were no borders between indigenous and Han peoples, and if the government adopted a laissez-faire policy regarding land economy, then eventually the indigenous people would lose their land. The Reservation Land Procedure was designed to protect against this loss of land. The Reservation Land Procedure was developed and accompanied by other policies to help transform indigenous ideas and lifestyles so that they would be more aligned to the situation in Taiwan as a whole, and in particular with the lives of the Han people. We have seen that, since its introduction, the Reservation Land Procedure has been changed, in particular a number of the sections relating to the transfer of land rights between the indigenous people and the Han. It appears that the reservation land procedure was originally designed to help indigenous people to survive through farming and forestry. Equally, the sections relating to land tenure were designed to create units of families or individuals with basic life resources. There is provision for indigenous people to use land collectively (see appendix 2), although the reality is that this seldom occurs because indigenous reservation lands tend to be in areas that are steep and scattered and are not suitable for collective investments and developments, especially in the national parks area with so many limitations and restrictions. The method of land registration encourages people to use land in pieces but not in blocks. This makes titled land unsuitable for collective agriculture. In addition, there was a need to ensure that indigenous people do not profit more than Han farmers (see Chart 6.1: A survey of the annual income of indigenous and non-indigenous people).

16 Many scholars and officers are devoted to providing incentives for indigenous people to plan land collectively. To this end, a law, the ‘Statute of Development and Management on Indigenous Reserved Land’ was drafted but later rejected by the Legislative Yuan. The draft law intended to set up a Reserved Area for indigenous people to ‘preserve the traditional culture, improve the living environment, and promote the economic development collectively’. Scholars believed that such a law would ‘correct the market failure and government failure caused by ongoing regulation when the new design becomes a formal law’ (Yen, A-C; Chen, C-C; Wu S-T et al. 2006).
Indigenous agriculture tends to be just for daily consumption and survival, and it is vulnerable to market fluctuations. From the beginning of industrialization in Taiwan, in the 1970s, agriculture has been insufficient for indigenous people to make a living. The costs involved outweigh any profit to be gained from agriculture. As a result, there was a significant trend towards indigenous people embracing urbanization and industrialization and leaving their indigenous homelands. In order to improve the situation, the government has changed the laws and invited corporations or Han people with capital to invest in the indigenous areas. The Asia Cement Company was a case in point. While the government’s intention had been to invite outside capital into the area in order to help indigenous people develop careers, research show that indigenous people remain poor and unable to make good use of their lands in terms of agriculture. Following a change in the law that allowed non-indigenous people to rent indigenous land, those territories that are good for commerce are generally leased or occupied by non-indigenous people. Even in cases where indigenous people have land that has the potential to be good for economic or tourism development, the issue of a lack of capital remains a huge obstacle. As a geographer observed, ‘For a few decades, many indigenous people left their homes and went to urban areas to find jobs, thus reducing the value of indigenous lands and leaving them vulnerable to take over’ (Chen, Yi-Fong 2008). Thus, we see in Chamin Village that 60 per cent of the land was sold to Han people who now use it to run bed-and-breakfast hotels or profit from tourism, something that in fact indigenous people more than capable of doing (Chen, Yi-Fong 2008; Shoulin Township Historiography, 2008).

17 A survey supported by the Indigenous Council found that more than half of the indigenous population are now living in urban areas.
18 However as the 1974 amendment to the reservation procedure shows, the government did not give up on the idea of considering ‘reservation land’ as national land. But in amendments introduced in 1990 and 1998, there is no longer any use of the term ‘national land’. Thus, as Fuji has argued regarding the granting of lands to indigenous people, the title documents do not carry the meaning of reservation land. Section 27 of the original 1948 version of the Reservation Land Procedure indicates that reservation land limitations and restrictions will be only cancelled when indigenous people have improved their standard of living and are able to live financially independently. However, as Fuji has argued, when indigenous young people head off to urban areas to earn a living, their financial situation is not based on farming on reservation land, but rather on the urban economy. Indeed, the reservation land in the homeland now becomes a real ‘reservation land’, one that is beyond the role it was originally designed to play, i.e. it now has a transition role and can be used to introduce capital into indigenous communities. This is because the majority of indigenous...
In a bid to circumvent the problems of a lack of capital, we can see a great deal of corruption between indigenous individuals and Han capitalists. In the Taroko area where I conducted my fieldwork, for example, the most famous illegal dealing was between indigenous people and a high profile Han who was a chief in the Shoulin Township Parliament of Representatives, known as ‘Mr Big’. The case was publicised in the local media who reported that Mr Big had occupied indigenous land. The prosecutors of the local court had tried to find evidence to charge him with dealing with local ‘mafia’, but nothing came of it and he was free to go about his business, albeit surrounded by controversy (Kensheng Diary 2007). He also managed to stay out of the local criminal courts because he understood how to avoid breaking the law. Mr Big was also involved in the corruption case 1999 (貪污88,上更(二)) but this time it was a clerk in the civil engineering department of the Hualien County Government who was accused of accepting bribes from him in return for faking a compensation report to the National Railways, which was going to take land for railway construction. The clerk was accused of faking records that stated that Mr Big had built a KTV (Karaoke and MTV) shop worth 20,050,020 NTD (almost 435,870 Euros) and was entitled to compensation. The prosecutor carried out an investigation and found that the land was indigenous reservation land and did not belong to Mr Big who was not indigenous. The prosecutor also discovered that Mr Big seemed to have had prior knowledge of the railway construction because he had many sources in government providing him with policy information. In this way, he had tried to obtain indigenous land to build the KTV shop. In fact, the prosecutor found that the KTV shop was an illegal building without the relevant construction permits. Furthermore, the clerk had faked documents to legalize the building in order to ensure the payment of compensation. The clerk was found guilty of accepting bribes. However, he appealed the verdict (Tai Up, 1434, 2001 (90,台上,1434)) in the high criminal court and the ruling was overturned because the judge thought the prosecutor could not support his findings with laws or articles proving that the building was illegal. The prosecutor had fully intended to take the matter back to court, but the clerk died suddenly and all further hearings were stopped. Local people were very unhappy with the outcome as they felt that Mr Big had been clever at finding ways to obtain a piece of indigenous land and then claiming compensation following its sale. They believed he had become rich by employing exactly these kinds methods: ‘These kinds of gangster’s deeds should be punished; otherwise there is no justice at all in this world’. At the same time, there was a reluctance to be open about these kinds of practices, because that would mean admitting that someone from the indigenous community had cooperated with him. There was a feeling that these kinds of issues should be dealt with in secret; that even family members should not know. Case 50, 2001 (90,訴,50) is evidence of just this. In this case, Mr Big loaned money to indigenous people who needed funding to stand as candidates in an election for the Township Parliament Representatives. He did this by taking out a mortgage on the valuable plants on the reservation lands became a ‘commodity’ that was used for mortgage, leasing or renting. Seen from this perspective, reservation lands can be viewed as ‘private lands’ (see Fu 2001).
land. The case was brought by the losing candidate’s mother who said that her son had no right to mortgage her plants or take what belonged to her.

Mr Big regularly used this strategy to control candidates who were running for the local Parliament; especially those were in need of a lot of money to run in the elections. One indigenous representative in the Parliament told me that, ‘Mr Big used a lot of money to obtain the position of Parliament chief and most of the members were in debt to him. So, the Indigenous Township Parliament and also the Government were virtually controlled by this non-indigenous individual and he grew stronger and stronger, winning successive terms as Parliament Chief for two decades’. In fact, these actions were no secret at all. The local prosecutors in the criminal court were always trying to convict him on corruption charges (Kenseng Diary, 2000). But these prosecutions always failed.

Returning to the abovementioned bribery case, we can see that the prosecutors were frustrated by the accused clerk’s sudden death, not least because they had failed in previous attempts to convict this high profile Han individual for corruption. The prosecutors were also frustrated by the judge, who later ruled that the transfer of land that took place had not been a matter of land purchase, but rather of a land trust, which is legal under the Reservation Land Procedure. People were also astonished by the judge’s opinion that despite the transaction being deemed a sale, whether or not it should be ruled guilty or not depended on the administrative procedure between the township and the accused. Basically, this meant the possibility of another trial, this time in the administrative court. Given the precedents, the chances of the sale being ruled illegal there were slim 19 (see 89, 上易, 895 and 90, 上易, 90). The above case received a great deal of attention and became the subject of local murmurings and gossips. The case illustrates how profits were constructed by local indigenous and non-indigenous people. Cooperation and corruption went hand in hand. We can find examples of a number of non-indigenous investors in indigenous areas seeking profit from public infrastructure construction or tourism and cooperating with and even corrupting local ethnic people in the process. Establishing a trusteeship is a brand new way for non-indigenous people to deal in indigenous land property within the law. Other ways, which are perhaps less clear cut in legal terms, include lease of ownership, mortgage or the registering of supercificities. In recent decades there have been discussions among law scholars like Wang, Tay-Sheng (2003) and Lin, Jia-ling (2000) on the process of passing indigenous lands to non-indigenous people more openly. It has been observed that there are conflicting opinions among judges in decisions related to the protection of indigenous land and the extent to which use of indigenous land should be open to non-indigenous people. After much debate, in 2001, an administrative document

19 Mr. Big is indeed not a buyer. But the fact he used the name of the accused to register the land in question is actually against the reservation land procedure and thus is outlawed. But whether it is outlawed needs another administrative court to decide on. Thus, it’s hard here to decide whether he is guilty or not. Thus I (the judge) reject what the prosecutor has brought as guilty.’ (see case 89花易895)
was published by the Indigenous Administration Bureau in Huanlien County announcing that the central government had decided to allow non-indigenous people to register superficies of indigenous land:

The reasons why the land is marked as ‘Indigenous Reservation Land’ should be explained from the background of histories. Indigenous peoples are ruled by the Han and are peripheral in remote areas with low population. They are not inspired by civilizations and have fewer abilities to compete with the Han plains people. It is usually the indigenous people who are inferior to the Han when they are dealing with commerce. The marking of indigenous lands could prevent indigenous people from making bad decisions lest that the land won’t transfer to non-indigenous people easily. It is intended that the Reservation Land Procedure, especially article 18, will limit the use and users to indigenous people. Despite the Procedure, we still hear of a lot of illegal acts of transferring illegal usufruct to non-indigenous people. Now the central government has decided allow the transfer of the superficies, since the superficies are usually almost as powerful as property rights, and let some profit seekers make use of indigenous lands. While this could see indigenous peoples’ rights invaded step by step. However, if we look at it from another perspective, if land can be used efficiently and developed by economically strong men, then landlords can profit from rent. It is a principle of market economy and the government and the indigenous people are all members of the wider environment. Thus, we could not disobey the principle. It is not easy finding a balance between the right to survive and the operation of the market.

(An official document to announce the new rules of the reservation land circulated among indigenous officers check the source)

6.5 Conclusion

The above opinion expressed by an indigenous official, puts forward a strong theory for allowing the market economy to lead the way in mediating the use of reservation land among indigenous and non-indigenous (mainly Han) people. In the 50 years since the implementation of the Land Reservation Procedure, we have seen many original principles changed in a way that benefits the state but does not benefit indigenous peoples. For example, section 3 of the Reservation Land Procedures says, ‘The indigenous reservation lands herein refers to the mountain land originally reserved for the indigenous people for administration purposes, and reservation land should be legally delineated and annexed for indigenous people to safeguard their livelihood (appendix 2)’. Reservation land actually belongs to the state, so in legal terms, the state has the ultimate rights to use reservation land.

20 内政部以九十年五月七日台（九十）內地字第九○六四八六四號「九十年版地政法令彙編 | 地權類」原住民保留地審查會議紀錄，作成「法無明文禁止私有原住民保留地不得設定地上權予非原住民」之決議，並行文各縣市政府遵照辦理，以解決各單位承辦相關案件之困難。
This is demonstrated in the many court cases and in local and national policies. Through the court cases studied in this chapter, we see that there are always ways for a profit seeker to avoid the law. One method, known as ‘hanging indigenous names to buy reservation land for non-indigenous people’ (掛人頭) is so popular that you can see the results all over Taiwan’s indigenous areas, especially those that are good for tourism. This method is well-known, even among government officers, and there are many surveys to indicate that many indigenous reservation lands are actually used or occupied by non-indigenous people.

From these surveys (see Chart 6.2), we can see that the county of Hualien has a lower percentage (23.95%) of illegal non-indigenous reservation land use than other counties. Some scholars think this percentage is low because of poor monitoring, and that, in fact, many indigenous areas, especially those with connections to tourism, would score as much as 60 per cent illegal land use (Chen, Yi-Fong 2008). Illegal methods remain popular, but increasingly we see more legal ways to use and occupy indigenous reservation lands. The use of trusteeship, as we see in the case of Mr. Big, or the permission to lease superficies granted by the government provide non-indigenous people with more rights to use reservation lands. This is seen as a way of bringing together the indigenous people who have land and, in particular, Han people who have capital to invest. We would like to see this trend of neo-liberal thinking open up the boundaries between indigenous reservation lands and capital. As the cases above illustrate, there are many scenarios in which indigenous people have felt the loss of their lands and have also been exploited by the cooperation or corruption surrounding dealings on reservation lands. Indigenous landlords earned little rent when the reservation land is valued well below the market rate. The mainly Han tenants are able to use and occupy the land for long periods precisely because the rents are so cheap. The reality of renting out reservation lands has always been the loss of the land. These scenarios have historical origins in the colonial period; a time when the Japanese authorities believed that indigenous people were barbarians, incapable of rational thinking and unable to manage what they had. This social Darwinism theory was implemented for the colonial policy and resulted in the confiscation of indigenous lands and territories. Indigenous people were seen as lazy and foolish, incapable of learning the ways of civilized people who work hard and understand economics. This evolutionary theory was also designed to simplify indigenous land use and categorize their territories as waste land, leaving only a few lands for sedentary farming by the indigenous people. What we have seen, however, is that clearly the Japanese authorities were cheating themselves by thinking that indigenous people were too stupid and lazy to have land tenure or be capable of land management. My research in the Taroko plains area found that indigenous people were smart landlords and even able to exploit non-indigenous labor. The theory of terra nullius and the taking of lands as state-owned were colonial acts that rendered indigenous people ‘stupid’ and with no land. Unfortunately, this kind of thinking still prevails among many people, even among indigenous ones.

There are so many restrictions on non-indigenous land use that reservation lands can only really be used for agriculture. And because indigenous people
have no capital to invest in their land, their farming remains at a subsistence level. They are forced to go to urban areas to find low paid work. Under these kinds of restrictions, reservation lands are rendered useless and worthless and are vulnerable to profit seekers. The emergence of legal individualism has seen the rejection of original or communal ways of dealing with reservation lands. Legal individualism cuts out communal relations or reciprocal responsibility. As Herskovits (1965:326) mentioned, if the national land laws are to be implemented in such a way that creates a better local equilibrium, ‘Whatever absolute criteria of property may be set up, the ultimate determinant of what is property and what is not is to be sought in the attitude of the group from whose culture a given instance of ownership is taken, mistakes or distortions should have chances to be corrected’ (see Hann 1998). The cases examined in this chapter show that very often court decisions do not offer the justice people want and instead judgments are processed with the logic of legal formalism. We find that laws support a legal individualism and equip the more controversial elements within communities with the skills to violate local customs and moral norms and to ignore alternative solutions to property disputes.

### Chart 6.2

**Indigenous Reservation Lands used by Non-Indigenous People (hectares)**

<table>
<thead>
<tr>
<th>County</th>
<th>(1) total area of Reservation area</th>
<th>(2) area of reservation used by non-IP</th>
<th>(3) area of reservation used illegally by non-IP</th>
<th>(4) % of area of reservation used by non-IP (2)/(1)</th>
<th>(5) % of area of reservation used by non-IP illegally (3)/(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Taiwan</td>
<td>251,080.8427</td>
<td>16,778,410</td>
<td>11,195.1098</td>
<td>6.68%</td>
<td>66.72%</td>
</tr>
<tr>
<td>Taipei</td>
<td>2,080.8138</td>
<td>25.0601</td>
<td>21.3021</td>
<td>1.30%</td>
<td>85.00%</td>
</tr>
<tr>
<td>Yilang</td>
<td>14,930.3223</td>
<td>663.2927</td>
<td>494.3447</td>
<td>4.44%</td>
<td>74.53%</td>
</tr>
<tr>
<td>Taoyuan</td>
<td>12,195.7230</td>
<td>1,053.1682</td>
<td>976.4175</td>
<td>8.64%</td>
<td>92.71%</td>
</tr>
<tr>
<td>Hsinchu</td>
<td>18,653.5395</td>
<td>77.0279</td>
<td>56.2185</td>
<td>0.41%</td>
<td>72.98%</td>
</tr>
<tr>
<td>Miaoli</td>
<td>7,614.4480</td>
<td>804.1194</td>
<td>479.8616</td>
<td>10.56%</td>
<td>59.68%</td>
</tr>
<tr>
<td>Taichuan</td>
<td>6,680.0149</td>
<td>2,995.5143</td>
<td>2,348.6438</td>
<td>44.84%</td>
<td>78.41%</td>
</tr>
<tr>
<td>Nantou</td>
<td>31,589.1758</td>
<td>4,493.5943</td>
<td>3,081.3766</td>
<td>14.23%</td>
<td>68.57%</td>
</tr>
<tr>
<td>Chaiyi</td>
<td>6,606.1261</td>
<td>149.9028</td>
<td>82.8311</td>
<td>2.27%</td>
<td>55.26%</td>
</tr>
<tr>
<td>Kaoushiung</td>
<td>16,458.0977</td>
<td>255.1802</td>
<td>150.5387</td>
<td>1.55%</td>
<td>58.99%</td>
</tr>
<tr>
<td>Pintung</td>
<td>64,590.7097</td>
<td>1,931.8809</td>
<td>1,063.5890</td>
<td>3.00%</td>
<td>55.05%</td>
</tr>
<tr>
<td>Taitung</td>
<td>43,720.7550</td>
<td>3,405.9534</td>
<td>2,218.7205</td>
<td>7.79%</td>
<td>65.14%</td>
</tr>
<tr>
<td>Hualien</td>
<td>25,961.1169</td>
<td>923.7360</td>
<td>221.2657</td>
<td>3.56%</td>
<td>23.95%</td>
</tr>
</tbody>
</table>
Cement Industry comes to the east! “That is the way the eastern politicians welcome Them!” (Eastern Coast Critics)