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Making Laws for Indigenous Traditional Territory and Land Rights: Controversy in a Taiwanese Context

5.1 The Indigenous Peoples Basic Law (Basic Law 2005): A breakthrough?

The passing and enactment of the Basic Law (2005) was good news that came as a surprise to many lawmakers, scholars, and indigenous activists. Its articles contained many international standards of indigenous human rights and, unexpectedly, it passed with relative ease through the Legislative Yuan, in which indigenous members occupy less than two per cent of the seats. (Simon 2011: 731-732; Ku 2008: 401). There has been very little study of the law-making processes. Thus, I will begin this chapter by presenting some theories and statements from indigenous people in order to trace a line of logic that demonstrates the major reasoning and considerations that culminated in the Basic Law incorporating a number of human rights and, in particular, much needed land rights. Out of a total of 35 articles contained in the Basic Law, eleven articles explicitly and implicitly concern the definitions and boundaries of land territories, as well as rights and substantial benefits for indigenous people. Furthermore, the law implies that lands are a basis for self-determination and autonomy. The ambitious Basic Law puts indigenous developments at the base of a system to manage lands that have been out of indigenous control for a long time. I will illustrate this by interpreting some of the articles in the law that relate to indigenous land rights and their future implementation. First, however, I will examine some of the discourses and actions of indigenous people and activists before the Basic Law was passed.

5.2 Natural sovereignty and various claims for self-determination

Over many decades, beginning in the 1980s, Taiwan’s indigenous peoples have been asserting their rights and reclaiming their territories. One of the implicit theories that is practiced by indigenous land rights movements is the idea of ‘natural sovereignty’ (Poiconu 2005). The indigenous law scholar, Pu (2005), argues that natural sovereignty is the direct result of the following process:

First occupation or long term residence $\rightarrow$ natural sovereignty $\rightarrow$ current rights

He acknowledges that it is hard to explain why first occupation and long term residence could support a natural sovereignty that would prevent any encroachment by the state. What is the status of natural sovereignty in a modern state? Who is able to claim natural sovereignty? Could natural sovereignty possibly be governed by state laws? All these questions are hard to answer. That said, Western or Roman laws, and indeed many civil laws, respect the notion of first occupation and long term residence as legal facts to support the rights of the people on the land. Why does natural sovereignty only concern land issues, and how does natural sovereignty stand in relation to the state? Poiconu believes that it should be explained using the histories and processes relating to the situation before and after the indigenous people encountered outsiders and the state (Pu 2005).

He believes that ‘natural sovereignty’, based on natural rights, refers to a highly autonomous history in which indigenous people have used and protected their home areas and the natural resources over a long period. Consequently, indigenous people have a political structure based on an unofficial semi-state and sovereignty over their living areas. As a semi-state is not equal to a state under standards of international law, indigenous people refer to the notion of owning the ‘natural sovereignty’. Certainly, the fact that indigenous people have lived in an area for a long time according to natural laws that existed before the emergence of nation state would suggest that they deserve ‘natural sovereignty’. ‘Natural sovereignty’ is a human right that does not need approval from the state. Under this concept, we must adjust the idea of state sovereignty taking precedence over all other rights. Based on the idea that different sovereignties are equal and independent, the state cannot take any indigenous traditional territory into the realm of state territory. Thus, rights connected to indigenous traditional territory, such as the right to autonomy, rights of access to natural resources and the management of natural resources, cannot be disrupted by the state and should be kept intact. The state cannot insist on the ‘theory that state has the absolute sovereignty’ to rule over indigenous traditional territories. The state has no right to ask indigenous people to give up their natural rights to their traditional territories.

This concept of ‘natural sovereignty’ is an important idea among indigenous peoples (see Shi-lin 2002). By this, I do not mean necessarily that the theory is consciously used by indigenous people as a call to action; rather, I would say that this theory is the convergence of a number of ideas by different indigenous
people about first occupations and long term residence. For example, the people in the Taroko area use the spirit of gaya (a general term for Taroko people's traditional laws) to respect the first comers or cultivators, at least in political and religious terms. Many indigenous peoples have similar ideas and experiences of being colonized, which bring about a theory of natural sovereignty and lead to actions and movements. These histories have led to the fight for indigenous land rights. Based on this local theory, indigenous people have created movements at many different levels in order to appeal for their rights. Thus, we see a wide spectrum of claims concerning collective or individual rights, based on varying degrees of collectivity or individuality. There have been some responses and feedback from the authorities providing some solutions to claims from indigenous people, such as the granting of some reservation lands to individuals. But this did not satisfy many indigenous people who insist on various claims of self-determination. While the majority of indigenous activists are eager for autonomy and outright sovereignty, other ideas on ‘independence’ have been mooted, including shared or co-ownership with the Republic of China (R.O.C) in Taiwan (Wu, Rwei-ren 2009). The Basic Law reflects this continuum of independence. However, if any kind of sovereignty for indigenous people is to be achieved, more procedures and further legislation relating to implementation and resolving conflicts between different laws are needed.

Another study is required in order to explore the continuum that ranges between the different poles of individuality/collectivity, sovereignty/property and self/collective determination. For now, I will focus on the processes involved in indigenous people incorporating and implementing these issues in the legislation relating to the Basic Law.

### 5.3 Legalizing ‘traditional territories and lands’

Legislation alone is rarely enough to resolve land issues. Besides problems of definition, the implementation of rights is complicated, as is evident in many other countries. That said, law-making is a necessary first step. There are many critical considerations to be taken into account when legislating for land rights in Taiwan, not least the diversity among indigenous peoples. Despite many decades of effort, the Basic Law remains problematic and needs additional legislation. Before discussing some of the pitfalls implied in the Basic Law, I would like to describe a formal meeting that took place in the Legislative Yuan in 2006, in order to illustrate the process involved in indigenous activists brainstorming on the definitions and implementation of indigenous rights.
5.3.1 Debates on the definitions of ‘lands’ or ‘traditional territories’

On the 7th December 2006, a meeting was held in the Legislative Yuan. This meeting had the grand title of ‘The 6th Term of the Legislative Yuan, the 4th Congress Conference, the 8th meeting of the Commission on Interior Affairs and Ethnic Relations’. I did not attend this meeting personally, but having read many legislative records, and following a series of interviews and exchange of ideas with indigenous activists over a number of years; I have chosen it as a typical example of a meeting convened to debate indigenous rights.

This meeting was held to discuss the draft of a new law initiated primarily by the Legislator Yan, Zen-fu (2006), who belongs to the Amis tribe. The draft law was titled the Indigenous Traditional Land Restitution Act (draft). Legislator Yan had already served four terms in the Yuan, so he was experienced in terms of introducing draft laws to promote indigenous claims. At the same time, he was cautious about introducing a draft concerning the restitution of indigenous lands, in particular relating to his electoral area. The Amis tribe had been deprived of land rights and their territories were designated as free market lands, which are quite different from reservation lands. Because the Amis live mainly on the east coast and plains, their early encounters were with the Han or non-indigenous peoples, rather than with mountain indigenous peoples like those in the Taroko area. Consequently, the Amis people were considered to be more civilized than other savages deep in the mountains. Indeed, since the Japanese times, the Amis have been considered as rational or sinicized enough to be treated as citizens deserving of full land rights, i.e. private land ownership. This meant that they could sell lands to non-indigenous people at will. As a result of this, and a series of Japanese laws that legislated for the state ownership of terra nullius, the Amis sold out and lost most of their lands. As a matter of fact, many of the Amis believe that they have suffered more than other indigenous peoples who at least had reservation lands. Legislator Yang emphasized the notion of ‘traditional lands’ when asking for the restitution of lands lost by his people. In his draft of the Indigenous Traditional Land Restitution Act, he included a definition of traditional lands as:

Those taken, confiscated, registered or taken over by forceful means to occupy or deprive lands originally owned by indigenous peoples. The lands not yet returned to indigenous people include the following:

1. Lands in indigenous villages or tribes and the adjunct areas where indigenous people used to cultivate, herd or hunt.
2. Lands where indigenous ancestors cultivated, settled their houses, rituals, ancestors sacred places, herding or hunting.
3. Lands like lakes, rivers, or islands in rivers.
4. Lands confiscated or taken or registered by the authorities or institutions like the Ministry of Defense, Council of Veterans, Bureau of Forestry, Bu-
From his definition, we can see that Yang was mainly focused on lands lost in the past, in particular those lands taken by state agencies. At first sight, the definition is clear; but look closer and the definition is vague because it indicates that the lands that should be part of the restitution process are, in fact, lands owned mainly by the state. This definition ignores those conflicts over land between indigenous peoples and the Han or other non-indigenous peoples. It is aimed only at state lands. However, this definition was supported by other indigenous legislators, such as Mr. Tseng, Hua-der, who responded in the meeting saying, ‘the draft is very important because it concerns a source of long term pain among indigenous peoples. This could be the most important law ever for indigenous peoples because for so many years, we have been trying for the return of those lands that were cultivated by our ancestors’ hoes’. Legislator Tseng was from a mountain tribe where, in his experience, the major losses of the land came as a result of Japanese colonial rule and the state taking territory. His people were granted limited reservation lands; however, they still lost a lot of traditional lands tenured by their ancestors. Consequently, Tseng agreed to the use of the term ‘traditional lands’. This term was also echoed by another indigenous legislator Mr Lin, Tsun-der, who extends the definition by saying, ‘even the area on which the Presidential Hall was built in our capital in Taipei is indigenous traditional land’. This is an exaggeration, but he apparently believes it to be the truth. Tseng said that when he uses the term ‘traditional lands’ he does not mean that the entire island of Taiwan should belong to indigenous peoples and that they should be granted independence. He stated that he would rather the term ‘indigenous traditional territory’ was used in place of ‘traditional lands’, for two reasons: firstly, indigenous ‘traditional territory’ could be defined by law with a narrower scope than the term ‘indigenous territory’, which indicates a historical process or reality. It means that traditional territory could be defined in law through a process of investigations. He seemed to say that it is irrational to expect that the whole island should be included in the process of restitution. Instead, he believed that legal processes should be the rationale for defining traditional territory. Tseng emphasized that, according to the General Land Act, lands redistributed and appropriated by due processes are not included in the process of restitution. Instead, he focused on forest lands as the objects of restitution. The second reason for Tseng insisting on the use of the term ‘indigenous traditional territory’ is that the term has already been adopted in a number of articles in the Basic Law (2005). Tseng’s ideas raised significant questions regarding the title and definition of the law, and specifically, whether to adopt the term ‘traditional territory’ or ‘traditional lands’. The chair of the meeting and the Commission of Interior affairs and Ethnicity, Legislator Wu, Tung-shen (a Han), suggested that it was better to adopt the terms in use in laws already. However, he did not agree with...
his colleague, Legislator Lin, who also called for the use of ‘indigenous traditional territories’, saying that it is clear in the Basic Law that the term, ‘indigenous traditional territory’ is a sub-category of the term ‘indigenous land’, which also includes reservation lands. Reservation lands are lands that are owned by indigenous peoples now, whereas the term traditional territory deals with lands lost in the past. Chair legislator Wu suggested adopting the general category of ‘indigenous land’ in the title of the draft ‘Indigenous Lands Restitution Act’. Legislator Wu provided another reason for supporting this strategy to promote the law. He thought that the term ‘traditional territory’ was sensitive as it could denote an extension of the scope of territory to a state territory, which could conflict with state sovereignty in constitutional terms. Chair legislator Wu strongly suggested that because in the Basic Law the term ‘indigenous lands’ includes both lands in terms of territory and lands now and in the past, it avoids conflict with state power. In the end, the majority of indigenous legislators insisted on keeping the word ‘traditional’ in the definition in order to maintain their links with the histories, causes and effects of the past. Both Lin and Tseng insisted on keeping the term ‘traditional territory’ in order to denote sovereignty. The problem of the definition of lands had not been resolved, and many participants in the meeting mentioned that in order to clarify which lands should be part of the restitution process, an investigation and institution should be established. There was an explicit recognition among these legislators that those lands taken by the state, and specifically those taken by the Bureau of Forestry, should be brought under the restitution process. The next step, then, was to establish a law that would support a state institution to deal with the investigations and decisions related to indigenous lands.

5.3.2 Debates on the definition of restitution: to return or recover?

The title of the draft law was still to be decided, but another debate was taking place regarding the ambiguity of the term ‘restitution’. The English word ‘restitution’ is a direct translation of the Chinese word ‘回復’ (huei-fu), which was used in the title of the draft. In English, ‘restitution’ can mean ‘the act of restoring anything to its rightful owner, or of making good, or of giving an equivalent for any loss, damage, or injury. Thus the term ‘回復’ (huei-fu) could be ambiguous in terms of future actions. There are a number of ways to manage restitutions. It can take the form of compensation, or it can be as little as paying lip service by offering apologies. There are also situations where it is not possible to restore things to an original state. Consequently, all the participants in the meeting in the Yuan acknowledged a sense of ambiguity in the term restitution. Legislator Tseng, who, as previously mentioned, said, ‘we want those lands cultivated by our ancestors’ hoes returned to us’, suggested using the term ‘return’. He even indicated that the KMT (Nationalist Party) should return indigenous lands occupied by the KMT regime in the past. He wanted to adopting this clear term in order to ensure that specific lands be included in the draft law. He suggested the title of the law should be the ‘Indigenous Peoples Traditional Territory Lands Re-
covering Act’, substituting the term ‘restitution’ with ‘recovering’ (恢復huei-fu). Once again, there was no resolution or agreement surrounding the best meaning or actions for the term restitution, and the debate subsequently switched to discussions about the purposes of restitution.

5.3.3 Debates about the purpose of restitution

Legislator Lin hoped that the original traditional lands could be returned directly to his people who were keen to receive autonomy, something that was strongly advocated by the then president Chen. Indeed, Chen signed and announced a ‘nations within a nation’ partnership with Taiwan’s indigenous peoples. In the context of this partnership, Lin interpreted autonomy as the ultimate form of restitution. Lin originated from a Tgdaya tribe in the mountains of north Taiwan, an area infamous for its fighting and resistance to Japanese rule in 1930, when Lin’s ancestors fought a war against the Japanese colonial government. This war was later considered to be shameful, not least because of the previously mentioned ‘Wushe Incident’ in which many Japanese were killed. The war also indicated the failure – after almost 35 years of colonial investment and implementation – of a policy to control the ‘savages’. The Tgdaya people, and neighboring tribes, have a long history of advocating autonomy stemming from their struggle against Japanese rule and their experience of being treated as rebels. Autonomy was both the theme and the major goal agreed by all participants at the meeting in December 2006. Certainly, this theme was a reminder that, as yet, no complementary laws for setting up indigenous autonomous areas had been designed or stipulated, despite the fact that article 4 of the Basic Law states that, ‘The government shall guarantee the equal status and development of self-governance of indigenous peoples and implement indigenous peoples’ autonomy in accordance with the will of indigenous peoples. The relevant issues shall be stipulated by laws’. Furthermore, article 5 states that:

The state shall provide sufficient resources and allocate sufficient annual budget to assist indigenous peoples in developing autonomy. Unless otherwise provided under this Law or other laws related to autonomy, the power of autonomy and finance in regions of autonomy shall be subject to the Local Institution Law, the Act Governing the Allocation of Government Revenues and Expenditures and other statutes governing county (city).

Article 6 also brings empowerment to indigenous peoples at a state level: ‘In the event that any dispute concerning the power of autonomy arises between the government and indigenous peoples, the Office of the President shall call a consultation meeting to resolve such a dispute.’ These three articles address the rights to be supported by the state and to have autonomy granted according to the ‘will’ of indigenous peoples. The meaning of ‘will’ in this context can be both explicit and vague and, as such, it merits further discussion later.
In the records of the 2006 meeting, we find confusion concerning terms such as territory or lands; restitution or recovering or returning; and traditional or status quo. Ultimately, there were no decisions and there was no consensus among the participants. If there had been consensus, then the draft would be brought by the commission to the congress for further negotiation. In fact, as had been the case with previous attempts to introduce this draft bill, four indigenous legislators belonging to parties other than the ruling Democratic Progressive Party (DPP) boycotted the promotion of the law. Moreover, the law encountered another 300 legislators who insisted on maintaining the land rights status quo.

A number of legislators explained that the reason for the boycott was purely party political. Party identity is not only a label, but also the source of support for elections and political power among these indigenous legislators. It can also deliver another arena of contingencies in the process of promoting indigenous rights.

It is clear that the effective implementation of the Basic Law in terms of rights for indigenous peoples requires further legislation. This is very complicated. In fact, the final article of the Basic Law states that any amendments must be made within a period of three years: ‘The relevant authority shall amend, make or repeal relevant regulations in accordance with the principles of this law within three years of its effectiveness (Article 34).’ The deadline for complementary legislation was originally set for February 2008; at the time of writing this paper (June 2011) no supplementary laws or amendments to the Basic Law have been passed. As a matter of fact, in the aforementioned meeting, the only agreement reached by the participants was to urge the Indigenous Council to bring a draft of an Indigenous Peoples Lands and Ocean Territory Act to add to the legislative negotiations taking place in Congress. This ‘mission impossible’ had to be completed within a few months. Not surprisingly, the Indigenous Council was unable to achieve this draft in such a short space of time, and it took a further year for the Council to present its draft Bill to Congress.

At the time of writing, a few years after this now infamous meeting, the timing and opportunities to promote any land rights for indigenous people are no longer favorable, as the ruling party is now the Nationalist Party (KMT), which has little concern for indigenous rights. Indeed, rumor has it that President Ma chose an Amis indigenous woman who speaks no Amis language to be the Minister of the Indigenous Council precisely to put a stop to the promotion of crucial indigenous rights. It certainly appears to be the case that the Minister has halted all the legal processes, though she did add the Indigenous Traditional Lands and Sea Territory Act (Draft) to the waiting list to be approved by the Executive Yuan and, subsequently, to enter the legislative procedure for first reading. However, the draft was swiftly rejected because the Minister believed that the law conflicted with the land rights of the non-indigenous or the Han people. Many indigenous activists believe it was a cynical move by the ruling KMT party to hire an indigenous person to fight against and disempower the indigenous people. It was certainly the most convenient way to postpone any indigenous agenda that would conflict with the majority interests. Many indigenous people feel that the
general environment for law-making is contingent on majority politics, and that local and national political arenas are not trustworthy. Consequently, many indigenous activists seek alternatives to promote indigenous rights. One method used by indigenous people is to move their struggle to small-scale arenas, in the hope of a ‘bottom-up’ movement being more successful in terms of putting forward ideas and practices such as river protection or promoting ethnic autonomy for the Truku people. Certainly, legal arenas have proved problematic. Almost no progress has been made through these channels, which, for the most part, focused major efforts and emphasis on matters such as recovery from natural disasters resulting from floods brought by typhoons or the large-scale damage caused by earthquakes that have hit Taiwan (and in particular indigenous areas) heavily in recent years. To summarize, the passing of complementary laws and amendments to the Basic Law is crucial to the claims of local indigenous people. Many efforts by indigenous officials, intellectuals and activists were aimed at trying to implement a more bottom-up approach in order to stimulate the promotion of relevant laws. However, because of the ambiguity of many terms used in the Basic Law, many activists are pessimistic about the promotion of the indigenous rights. Some of the issues concerning indigenous land rights that illustrate how difficult it is to achieve improvements using legal channels include: (1) the vague categories used to define indigenous land; (2) vague definitions of ‘tribes’ or autonomous units; and (3) the vagueness of the term ‘autonomy’, which is actually hard to define. Because of these shortcomings in the Basic Law, many indigenous people consider it to be an obsolete piece of legislation, despite the fact that it accords with the standards of the UN Declaration of Rights of Indigenous Peoples that was officially ratified in September 2007.

### 5.4 Vague categories used to define ‘indigenous land’

There is a land category that is seen as crucial to the quest of ‘Return my land’ social movements. That is the term ‘indigenous land’. Article 2 of the Basic Law refers both to the traditional territories and reservation land of indigenous peoples. Reservation land is relatively clearly defined and administered in Taiwan using the cadastre system; however, questions still remain regarding what traditional territories are and where they are located. It is interesting to note that the Basic Law adopts the term ‘indigenous land (yuan-tsu-min-tsu-tu-di 原住民族土地)’, which in Chinese denotes a collective right to land. More recently, the word ‘tsu’ (族) (tribe, race, ethnic group) in ‘Yuan-Zu-Min-Tsu-Tu-Di’ (indigenous peoples’ land) has been used to refer to both individual and collective rights. Taiwan’s reservation land has already gone through a process of privatization, though alienable and disposable rights are still limited among indigenous people. Rather, rights to reservation lands are usually granted to individuals. In the Basic Law, the definition of ‘indigenous land’ includes both ‘reservation land’, which indigenous people already have ownership of, together with another category of ‘traditional territories’, which so far has not been defined in the Basic
Law. In fact, the definition of ‘traditional territories’ will be decided by an institution that will be set up in the future if the Legislative Yuan issues a law to support article 20 of the Basic Law that states:

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

We may assume that this future indigenous peoples’ land investigation and management committee (IPLIMC) will be empowered to decide on the definition of ‘traditional territories’ and further decide on where, when and whose traditional territories are implied in article 20. Here, I assume that indigenous land and related natural resources are the objects to be investigated and ‘managed’ by the (IPLIMC) in the context of land rights. It is not clear, however, whether this will result in the granting of indigenous land rights as indigenous peoples have always imagined. Moreover, to what extent will the IPLIMC be empowered with the authority to make decisions on land rights while further legislation is pending?

As previously mentioned, in order to achieve more legislative progress, the Indigenous Council has produced a draft of an Indigenous Peoples Land and Ocean Act (IPLOA). Many people remain curious as to how the IPLIMC will decide on and deal with the land issues in the draft law. In an interview, Yabu-sonngu Poiconu, a sub-section chair in charge of the indigenous land policy in the Indigenous Council, said, ‘the committee shall be empowered with at least the function of a court, to judge on land issues; otherwise they won’t be able to decide such complicated things’. As for the investigations into land issues, I found many indigenous people have diaspora and hybrid relations with their territories, which makes it difficult in terms of determining clear boundaries among people and their relations with specific tracts of lands. This raises another problem in relation to the definition and recognition of the ‘owner’ of the land and any natural resources on it. Furthermore, as discussed below, the use of the term ‘tribe’ in the Basic Law is another example of the controversy surrounding definitions.

5.5 What is a ‘tribe’?

In the Basic Law, there are terms that refer to collective actions on lands and territories based on solid group foundations. Thus, the term ‘tribe’ appeared for the first time in Basic Law in reference to ‘a group of indigenous persons who form a community by living together in specific areas of the indigenous peoples’ regions
and follow the traditional norms with the approval of the central indigenous authority’ (article 2, definitions 2). The Basic Law provides for certain groups approved by the Indigenous Council to become action groups. The term ‘approval’ is also controversial due to its top-down connotations. According to article 2, ‘approved tribes’ are tribes recognized by the state. A memorandum signed by former President Chen stated the intention to form a ‘New Partnership’ with indigenous peoples and to recognize them as nations within a state. However, Chen did not explain what a ‘nation’ is in his new partnership declaration. Many indigenous activists, and thus indigenous people imagined that an approved tribe would equate to a nation. In fact, ‘tribe’ is a term that has been used in colonial constructions. Tribal activities at different levels have formed the second wave of indigenous movements. We see ideas or actions conducted on a small scale in order to revitalize the health or wealth of a small indigenous community. At the same time, it is possible to see a large-scale project by an ethnic group with a large area of land to form a ‘nation’, an autonomous area. Such ideas and actions have been incorporated in the concept of tribal self-determination during the last decade. Since 2005, these efforts have been supported by the Basic Law. The former Minister of the Indigenous Council, Walis Berlin had been leading indigenous movements for many decades and supported the tribal movement through his legislative endeavors and policy practices. The scale of subjectivity of the indigenous people will be a critical issue in terms of the future implementation of the Basic Law. Thus, tribes become basic units composed of groups of people and communities who have rights. It is interesting to know that ‘tribe’ (部落) in the Taiwanese context denotes different levels recognized by government; from a small-scale village community to a large ethnic group. Many activists contest the process to define a tribe in the Basic Law. They believe that there are natural processes for defining a tribe as a unit of natural sovereignty. Poiconu, an advocate of natural sovereignty says:

Basically speaking, sovereignty starts from a tribe with its habitat areas and then its cultivation lands, hunting and gathering areas and distant areas over which the tribe has no direct or strong control. But when any of these areas is intruded on, the people who own the territories must defend themselves in order to demonstrate the strength of their sovereignty (in Committee of Special Chapters for Indigenous People on Constitution, 2005).

A unit such as a ‘tribe’ actually develops naturally in a local context. Any ‘approval’ by the authorities will often conflict with local ideas. So far we do not have any cases to illustrate the above mentioned problems that many activists have predicted.

However, in order to resolve the definition problem hidden in the Basic Law, the Indigenous Council has been encouraging a bottom-up approach. In recent years, I have observed that the notion of ‘approval’ has been implemented with large amounts of funding, in a bid to support ‘tribes’ who are engaged in collective actions on tribal ‘revitalizations’. Thus, we can observe the phenomenon of
'making a tribe' taking place under the sponsorship of government. The Basic Law includes the terms and conditions, ‘with the approval of the central indigenous authority’. This means that, in future, the scale and scope of a tribal agent to act as a legal unit will be determined by the central indigenous authority. The land rights of an approved tribe will be recognized in accordance with its due tribal agent. A tribe afforded land rights is seen as the ideal status by many indigenous activists. Following the announcement of the Basic Law, achieving autonomy for a tribe-nation has been an advocacy priority among activists. Even though the Autonomy Act for indigenous peoples has yet to be passed, the Atayal, the Tsou, the Thao, the Troko, the Tao, the Saisiat and the Bunun are all engaged in autonomous movements and are demanding the establishment of an ethnic parliament in order to create a forum for the setting up of a preparatory ethnic congress and government. These actions to create ethnic autonomy are similar to nation-state building activities and movements; however, to what extent will the autonomy they achieve mirror that of a nation in a state? The current ambiguity in this area can be explained by examining those articles relating to autonomy in the Basic Law as well as by recalling a number of historical experiences.

5.6 Vague autonomy

As mentioned above, the Basic Law (2005) prescribes that the state must do its best to assist indigenous autonomy. The Basic Law states that autonomy should be decided in accordance with the ‘will’ of indigenous peoples. If indigenous people are thinking in terms of solid sovereignty to claim indigenous traditional territories, then, based on articles 4 and 5 of the Basic Law, the aforementioned IPLIMC is the first authority that can assist in achieving this goal. However, if the IPLIMC is not set up with the full support of legislation, then the will of the indigenous peoples will not be approved by the authority. The implication is that, according to the Basic Law, the right to autonomy is acknowledged. However, without the establishment of the IPLIMC it is not achievable. Put bluntly, the articles of the Basic Law only pay lip service to the idea of autonomy. Even if the IPLIMC is established, there will still be a direct conflict about the meaning of the term ‘will’. A will is a will free of any others’ will, and does not require approval from any authority. The Basic Law apparently predicts the possibility of future conflicts and embeds a device for managing such conflicts by prescribing that the Office of the President shall call a consultation meeting to resolve such disputes (article 6). This implies that the will of the President is important when it comes to issues of scale, power and authorities of autonomy and similar problems. As a result, any solutions are likely to depend heavily on the future political and economic environment and the willingness of the majority population.

Thus, we experience a gap between the idea of ‘natural sovereignty’ and ‘autonomy approved by governments’. As some advocates of natural sovereignty say:
If indigenous peoples own natural sovereignty, which is different from state sovereignty, there is no need to be recognized by any state. If the indigenous peoples can bring their own representatives as agents of natural sovereignty, then indigenous peoples could be independent from the state and an autonomous unit per se. So some activists are in favor of a law or constitutional reform to recognize the treaty rights of the indigenous peoples. If the indigenous peoples insist on natural sovereignty, it would be quite a paradox to achieve that status of natural sovereignty through the approval of the state. Thus, it would deem natural sovereignty less legitimate under state sovereignty, and then the theory of natural sovereignty loses its base to demonstrate that natural sovereignty takes precedence over the state (Committee of Special Chapters for Indigenous People on Constitution, 2005; Shih, Chen-fong 2006; Shih, Chung-shan 2006).

These theoretical debates are important for the future of indigenous autonomy since we still have no official implementation of any kind of autonomy for the indigenous peoples. How, then, can both sides involved – the indigenous people and the majority population – find a compromise in order to achieve a regime of indigenous autonomy? As we can see from the aforementioned meeting of legislators, there appeared to be little appetite for compromise and a strong desire to avoid conflicts with the state constitution, which insists on strong state sovereignty. Many observers worry about the strategy adopted by indigenous intellectuals, like the non-indigenous chief of the committee, who strongly advocated the use of more neutral terms like ‘lands’, in order to avoid conflict over the name of the law draft. By analyzing the debates, I have found that the indigenous legislators were aware of the conditions and limitations that would force them to compromise and to adopt clever strategies or skills to promote indigenous rights. It was also clear that if they failed to compromise to some extent, they would lose in the end. It is historical fact that many lands were lost because of state claims. Lands were not only lands but also territories that hold historical and cultural meaning. Autonomy stands on these foundations of sovereignty. Later, we see that, in fact, these legislators did not compromise and insisted on drafting the law with the basic elements of ‘traditional territories’. As a result of this strategy, legislators would be exposed to future confrontations and possible conflicts, at least on the terms of the law. However, they could keep their ideas and emphasis regarding the title of the draft. As an observer, I would say the emphasis on restitution for past injustice over land rights and an autonomy based on natural sovereignty were embedded or implied in the contents of the draft law. Thus, there seems no need to insist on a certain title for the draft. Despite this, the legislators refused to compromise at all on the title of the law, even if there was an agreement about the contents. In fact, the contents of the draft law, which in the end required three readings in the legislative process, were also a cause of confrontation. This kind of insistence reflects that indigenous activists, though constrained in terms of power, are determined to adopt a strategy that puts them in direct confrontation with the state. I would like to describe this model of pursuing autonomy for
indigenous peoples as ‘dependent but independent’. According to Wu’s analysis on the origins and practices of autonomy advocating activities among indigenous initiators during the transition of colonial regimes from the Japanese to the Nationalists, indigenous elites have developed ideas and practices of autonomy based on a model described as ‘Nation-sponsored Development of Autonomy’ (Wu, 2005). Wu found that indigenous elites developed a model of actions to ask for autonomy with the help of the state. He found that the indigenous advocates had to adopt this strategy in order to achieve some level of autonomy on the condition that indigenous peoples remain minorities. Following Wu’s hypothesis, we can understand that many articles in the Basic Law concerning the rights to autonomy reflect the ‘Nation-sponsored Development of Autonomy’ in so far as the state should assist indigenous people to achieve a degree of autonomy based on their own will. As Wu points out, this ‘autonomy but ruled by state’ is a paradox. Moreover, it seems to conflict with the term in the Basic Law that advocates ‘autonomy by will’. It is paradoxical to see indigenous will as being based on the notion of natural sovereignty. Theoretically speaking, state sovereignty would not be above indigenous autonomy. Thus, an autonomous area ruled by the state would be a real compromise on the part of the indigenous peoples in terms of theory and practices in the future.

‘Autonomy by will’: the case of the Truku People’s Autonomy Constitution Draft
Prior to the Truku presenting a Truku Autonomy Constitution Draft in 2006, most of the advocates had fought for recognition of an ethnic label for the Truku people that differentiated them from the Atayal. From the Japanese time, the people living in the Taroko area were considered as belonging to the Atayal people. The Japanese labeled these three peoples as a subgroup of the Atayal, something which all three ethnic groups felt to be a miscategorization. From the 1980s onwards, we see many ideas relating to these groups being recognized as different from the Atayal. The largest of these three groups is the Truku. Perhaps because the area is called Taroko, and because there had been a well-structured Presbyterian branch named Truku, independence from the Atayal in terms of ethnic names was established with the new label Truku (Tera 2003). The idea of an independent ethnic group such as the Truku people has taken many decades to be accepted. Certainly, an ethnic group recognized and re-recognized by its ethnic name by successive governments gives a strong position in the political economy. An ethnic group that has not yet been recognized by the people themselves, but is granted independence as a single tribe is confronted with many internal problems. Put simply, many individuals in the Taroko area fight for autonomy and to be recognized as a tribe independent of the Atayal. There are still many individuals who disagree with being labeled as Truku, the largest group, and would rather be categorized as Toda, Tgdaya or even by the general term sediq (used by the Truku, Tgdaya and Toda to indicate human beings) as an indicator of humans on the basis of their language. Thus, we find many internal confrontations regarding different ideas on ethnics. That said, these pan-Truku
activists want to see autonomy firmly on the agenda of ethnic movements. This issue also has an impact on the scoping of autonomy for indigenous territory where there are different people insisting on different ethnic names. Despite such confrontations, a Truku Ethnic Group Constitution on Autonomy was established and expresses the demand for autonomy.

The Constitution implies that the indigenous autonomous areas should be treated as a state, and be granted every kind of power afforded to a state, including diplomatic and military rights (see Box 5-1 from Siyat 2004). The Truku Constitution on Autonomy is in line with the theory of natural sovereignty. As Poiconu says:

The areas where there is natural sovereignty are traditional territories. Territory is the arena where ethnic power (natural sovereignty) rules. Territory is a spatial used term to differentiate ‘we’ groups from other groups. It means the ‘us’ group has exclusive rights to the territory and that other groups cannot interfere. This makes an indivisible unit of territory (Committee of Special Chapters For Indigenous People on Constitution, 2005).

In order to protect this natural sovereignty, indigenous people hope to be equipped with the rights to law, education, police, military, and foreign diplomacy; rights that usually go hand in hand with state sovereignty. Is it a state within a state or autonomy under a state? Either way, it is an autonomy that the ROC government should, in accordance with the will of the tribal people, provide with adequate resources and a budget to assist the development of Taroko autonomy (see article 3 in Box 5.1).

Here we have an example of ‘autonomy by will’ that would challenge scholars of politics and advocates of autonomy who have to face explicit theoretical confrontations and more implicit obstacles from inside. This constitution was drafted by Truku intellectuals who are usually criticized for being elites without public support. The pan-Truku movements initiated by these elites are helping to empower locals to express and act on the issue of autonomy. However, as I have observed, it is largely political elites or intellectuals who join these actions. In addition, there are many local villages that are bringing their ideas of autonomy via initiatives such as the co-management of river protection, with a view to collectively reviving and improving livelihoods, ecology, and culture. Clearly, local people have different ideas about autonomy than elites. This gap requires further observation to see how ideas and actions on autonomy will evolve.
Box 5-2 • Some themes in the Truku Ethnic Group Basic Law (Draft); also called the Truku Ethnic Group Constitution on Autonomy

Based on international trends, ‘the new partnership between indigenous peoples and the Taiwanese government’, and the Additional Article 10, Clause 12, of the ROC Constitution; in order to support the recognition of indigenous desire for autonomy, and in accordance with the principles of protecting the equal status of indigenous peoples and autonomous development; the ten articles of the ‘Taroko Nation Autonomy Constitutional Charter’ are explained below.

1 In order to respect the natural rights of the Taroko Nation and the Spirit of Gaya; and to protect its autonomous development; in accordance with the UN Draft Declaration of the Rights of Indigenous Peoples, the ROC Constitution, and the Basic Law on Indigenous Peoples, the Taroko Nation Autonomy Constitutional Charter shall be established.

2 The Taroko Nation shall implement tribal autonomy in accordance with its traditional territory; establish an autonomous government, tribal council, and regional government.

3 The ROC Government shall protect the right of the Taroko Autonomous Government to exercise autonomy; and the autonomous political, economic, social, educational and cultural development of the Taroko Autonomous Government in accordance with the principle of self-determination. The ROC Government shall, in accordance with the will of the tribal people, provide adequate resources and a budget to assist the development of Taroko autonomy.

4 The sovereignty of the Taroko Nation belongs to all Taroko People.

5 The land and resources within the autonomous territory belong to all Tribal People.

6 The Tribal Council shall be the highest legislative body of Taroko Autonomy.

7 The Taroko Autonomous Government shall be the highest executive body of the Taroko Nation.

8 The Council of Elders shall be the highest judicial body of the Autonomous Government. It shall be charged with civil affairs, criminal law, the trial of executive lawsuits, the disciplinary punishment of public officials, and the exercise of rights of impeachment and censure.

9 Tribal foreign relations shall, based on the spirit of independence and autonomy as well as the principle of equal reciprocal benefit, respect treaties and the UN Charter. In order to protect the rights of the tribal people, it shall advance international cooperation and promote international justice and world peace.

10 The Taroko Autonomous Government shall actively promote tribal education, promote tribal language, develop tribal history and culture, develop its pluralistic potential, and elevate its international perspectives.
5.7 Conclusion

It appears that Taiwan’s indigenous peoples have benefited little from the Basic Law (2005), which still awaits future legislation. A clear response to land issues is cleverly avoided in the articles of the Basic Law. The same can also be said of the memorandum on ‘A New Partnership Between the Indigenous Peoples and the Government of Taiwan’ signed by the then President Chen, which stated an intention:

To **restore** or **recover** tribal and ethnic traditional territories for Taiwan indigenous peoples, who were originally tribal societies where institutions of communal or individual uses are based on communal ownership of land. In order to rebuild an ethno-cultural development subjectivity to process a foundation for autonomy, the government of Taiwan should **admit** or **recognize**, regardless of the private ownership regimes on land, on the tribal and ethnic subjectivities and their ownerships over the traditional territories.

The first two Chinese words ‘**Huei Fu** (恢復)’ in the abovementioned memorandum denote a common meaning of recovery. But exactly what is to be recovered is not clear as words like ‘return’ and ‘giving back’ remain vague. This memorandum uses the words ‘recognize or admit’ in terms of indigenous sovereignty over their traditional territories but it does not appear to go any further and actually grant these rights. This declaration leaves us no clearer about the extent to which land rights will be assumed, not to mention that many people still think this law is unconstitutional (Huang, Ju-zheng 2009). To quote Pasuya Poiconu, the former deputy minister of Council of Indigenous Peoples (CIP) once more, ‘we (indigenous people) first have to persuade mainstream society and to produce consensus in each indigenous group.’ The implementation of the Basic Law will be part of the political and economic realities in times to come.