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# Between Legal Indigeneity and Indigenous Sovereignty in Taiwan: Insights From Critical Race Theory

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## Abstract

Taiwan, home to over 580,000 Indigenous people in 16 state-recognized groups, is one of three Asian countries to recognize the existence of Indigenous peoples in its jurisdiction. Taiwan's Indigenous peoples remember their pre-colonial lives as autonomous nations living according to their own laws and political institutions, asserting that they have never ceded territory or sovereignty to any state. As Taiwan democratized, the state dealt with resurgent Indigenous demands for political autonomy through legal indigeneity, including inclusion in the Constitution since 1997 and subsequent legislation. Yet, in an examination of two court rulings, we find that liberal indigeneity protects individuals, while consistently undermining Indigenous sovereignty. In 2021, the Constitutional Court upheld restrictive laws against hunting, seeking to balance wildlife conservation and cultural rights for Indigenous hunters, but ignoring Indigenous demands to create autonomous hunting regimes. In 2022, the Constitutional Court struck down part of the Indigenous Status Act, which stipulated that any child with one Indigenous parent and one Han Taiwanese parent must use an Indigenous name to obtain Indigenous status and benefit from anti-discrimination measures. Both rulings deepen state control over Indigenous lives while denying Indigenous peoples the sovereign power to regulate these issues according to their own laws. Critical race theory (CRT) is useful in understanding how legislation designed with good intentions to promote anti-discrimination can undermine Indigenous sovereignty. Simultaneously, studies of Indigenous resurgence highlight an often-neglected dimension of CRT—the importance of affirming the nation in the face of systemic racism.

## Keywords

critical race theory; Indigenous sovereignty; legal indigeneity; Taiwan

## Issue

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## 1. Introduction

After some twenty-five years of lobbying and deliberation between UN member states and Indigenous peoples, the General Assembly of the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on September 13, 2007. Although the UNDRIP is rightly heralded as a historical milestone in international Indigenous human rights, it also has limitations. One limitation is that Indigenous

peoples are promised self-determination, but only a very limited form of internal self-determination. Article 46, added in the final stage of negotiations because of concerns of the “African group” of states (Gover, 2015, p. 354), explicitly states that the UNDRIP does not encourage “any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States” (United Nations, 2007). Indigenous nations are thus constrained to assert their sovereignty within the borders of the states that

encapsulate them. Liberal democracies that attempt to integrate UNDRIP into national legislation end up balancing a liberal commitment to non-discrimination against individuals with Indigenous demands for sovereignty. Legal recognition of Indigenous peoples in multicultural states, as noted, for example, by Povinelli (2002) in Australia and Coulthard (2014) in Canada, can undermine Indigenous sovereignty. Demands for Indigenous rights address two variants of social exclusion. Not only are Indigenous individuals often racialized and discriminated against, but the Indigenous nations they belong to are restrained in their ability to exercise sovereignty and self-determination. When there is tension between the goals of anti-discrimination and recognition of sovereignty, liberal states tend to prefer the former. Canada, for example, has given priority to “dis-embodied liberalism” that optimizes income security rather than to the sovereignty demands of Indigenous political movements (Wotherspoon & Hansen, 2013).

Our reflection on legal indigeneity in the lives of Indigenous people emerges from the confluence of legal socio-anthropology and law. We focus on Taiwan, to which both authors have strong personal ties, and believe that Taiwan’s experience makes a valuable contribution to this scholarship as a non-Western example. Taiwan, despite its exclusion from the UN system (Simon, 2020), makes great efforts to conform to UNDRIP standards. By liberal standards, such as poverty rates, employment, and education, Taiwan does better in Indigenous social inclusion than most countries, including Canada (Simon, 2023, p. 53). In many countries, Indigenous activists are even targets of violence (IWGIA, 2019, p. 8), a phenomenon unknown in Taiwan. But, even in one of the best national situations for Indigenous rights, indigeneity deepens the social integration of individuals while excluding Indigenous sovereignty claims (Awi Mona, 2019, p. 671).

We explore how critical race theory (CRT), although it emerged from the Black experience in the United States, can be used to better understand social inclusion and social exclusion anywhere, just as Marxism, which originated in Europe, is useful in analyzing economic change and class struggle. Our goal is not to compare Taiwan and the United States. Rather, we use insights from an influential theory about social exclusion to better understand Taiwan as a non-western example of a liberal multicultural democracy. Moreover, CRT has always been informed by the experiences of other dominated groups in the United States, such as Nisei (Japanese-Americans) and Indigenous peoples (Williams, 2005). The experiences of Taiwan’s Indigenous peoples can enrich and internationalize CRT while contributing to international research on how Indigenous peoples view race relations and governance, as has been done in Australia (Habibis et al., 2016). It is important to look at the dynamics of settler colonialism and indigeneity beyond the paradigmatic Anglo-Saxon settler states.

We use CRT to understand two legal interpretations in Taiwan that weighed in on Indigenous rights,

yet disappointed Indigenous rights activists because they undermined Indigenous sovereignty. The first was the Judicial Yuan Interpretation No. 803 that, in 2021, upheld existing regulatory laws that restricted hunting. Those laws, in a context where hunting is otherwise illegal, provide exceptions to Indigenous people for subsistence and cultural reasons. Indigenous people alone may hunt, but on the conditions that they use hand-made rifles, apply for state permission in advance, and abstain from taking protected or endangered wild animals. Although the decision was represented as a fair balance between Indigenous and environmentalist demands, Indigenous hunters still seek to live in the forests as they have for generations and according to their own socio-political systems. The second judgement was in 2022. The Constitutional Court struck down part of the Indigenous Status Act, which stipulated children of intermarriage between Indigenous and non-Indigenous persons must take the surname of the Indigenous parent or use an Indigenous traditional name in order to obtain Indigenous status and benefit from anti-discrimination measures. Indigenous activists argue that using Han Chinese names weakens Indigenous identity and encourages assimilation into the dominant Han society. This also undermines Indigenous sovereignty as it grants the state, rather than Indigenous nations, the power to determine the Indigenous legal status of individuals.

Our main question is: How does liberal law, even with the best of intentions, contribute to structural forms of exclusion? We use CRT as our theoretical lens to understand what is happening. In the second section of this article, we explain how we came to this topic and how Taiwan fits into the racialized world system. In the third section, we distill the lessons we learned from a reading of CRT texts. In the fourth and fifth sections, we explore how two legal decisions exclude Indigenous sovereignty claims. Finally, returning to CRT in a coda, we suggest that underexplored aspects of this theory are relevant to understanding social exclusion everywhere.

## 2. Black Lives Matter Meets Indigenous Taiwan

On June 13, 2020, Black people (especially from the United States), sympathetic allies, and Indigenous activists joined forces at a rally in Taipei in support of the American social movement Black Lives Matter after the death of George Floyd to police violence in Minneapolis. Savungaz Valincinan, a Bunun youth activist from the Indigenous Youth Front, took the microphone to describe the discrimination that Indigenous people face in Taiwan regarding rental accommodations and other issues. She said: “We are coming out today to support this movement, not because of sympathy. It is because we have also gone through the hurt of being discriminated against” (Taiwan Black Lives, 2020). Black Lives Matter takes intellectual inspiration from CRT to examine the legal structures of societies that, even if they are intended to end discrimination, end up

contributing to systemic racism. It intentionally blurs the lines between scholarship and activism, with the hope that scholarship can radically challenge and transform society (Cabrera, 2018).

### 2.1. *Taiwan in the Racialized World System*

We use CRT and related theory to illustrate the dynamics of oppression in Indigenous Taiwan because we find it limiting to understand Taiwan and North America as if they represent essentially distinct social and cultural worlds. Rather, they are different linked points in the commodity chains that Cedric Robinson saw as making up a racialized world system. Within each node in the system, socially and economically subordinated groups experience oppression within particular sociological contexts shaped by their own unique histories of incorporation into the racialized world system. The dominant groups in the different parts of commodity chains now rule in nation-states which are the normal framework of the bourgeoisie and require a proletariat. Robinson (1983/2020, pp. 225–226) argued that it is necessary to historicize this process, while including consideration of nationality, language and culture, race, and class. CRT draws attention to how these processes become embodied in individual lifeworlds.

Understanding Taiwan's place in a racialized world system requires a study of the formation of its bourgeoisie under colonialism, its economic development, and the racial nature of sources of labour and land. Japan, when it ruled Taiwan from 1895 to 1945, pacified the island's Indigenous peoples, nationalized their traditional territories, and began incorporating them (sometimes as forced labour) in an industrializing economy. After Japan lost World War II, the victorious Allies placed Taiwan under the Republic of China (ROC) tutelage, without consulting either the island's Indigenous or non-Indigenous peoples. During the Cold War, the United States supported the ROC, which ruled under strict martial law for 40 years, as a bulwark against Chinese Communism. With US support and market access, Taiwan experienced a widely touted "economic miracle" (Gereffi & Wyman, 1990; Gold, 1986) and then democratization based on constitutional law reforms (Ye, 2016). In the early years of economic growth, Hill Gates examined the apparent paradox of a dependent country that managed rapid development, looking at its particular historical constellation of ethnicity and class formation (Gates, 1979). In the racialized world system, the Cold War project of promoting economic growth in Taiwan, in competition with Communist China, rested on the continued appropriation of Indigenous lands and integration of Indigenous people into the labour market (Simon, 2002).

### 2.2. *Indigenous Peoples on Formosa*

Taiwan is home to over 580,000 Indigenous people and 16 state-recognized peoples that the government calls

"tribes" in English-language publications (ROC, 2021). These speakers of Austronesian languages, related to maritime peoples across Oceania (Bellwood et al., 2006), live mostly in the central mountains and east coast. The 16 state-recognized peoples, defined by linguistic and cultural characteristics, are composed of hundreds of smaller communities that are also called "tribes" in English (ROC, 2018). This translation itself implies a denial of Indigenous sovereignty and a downgrade from "peoples" in the vocabulary of the UNDRIP (Hipwell, 2019). As the ROC in Taiwan evolved as a liberal democracy, an Indigenous movement with goals of affirming sovereignty and obtaining political autonomy lobbied for and obtained a new framework of law that recognizes the existence of Indigenous peoples and promotes their legal rights.

As in other liberal democracies, Taiwan's policy-makers consider the demands of a radical Indigenous movement seeking full recognition of sovereignty and a reformist movement seeking rights for individuals as citizens. Each of the 16 state-recognized Indigenous peoples has a representative at the Council of Indigenous Peoples and gains, for example, access to state funding for language instruction. Non-recognized Plains Indigenous peoples have long sought legal recognition (Hsieh, 2006) and are beginning to attain it. Indigenous peoples are working in rural communities to create institutions for internal political self-determination, as promised in the Basic Law on Indigenous Peoples, by creating such groups as the Seediq National Council. In addition, at least half of Indigenous people live in urban areas and, no matter where they live, struggle to make a living amidst the daily realities of racial discrimination and prejudice. Indigenous rights in Taiwan are thus also a balancing act between principles of anti-discrimination against individuals and affirmation of collective political sovereignty. Even the best-intentioned laws and legal decisions risk further entrenching the marginalized and oppressed status of Taiwan's Indigenous peoples if they are not rooted in the concept of Indigenous inherent sovereignty. The loss of Indigenous sovereignty is part of larger global patterns of Indigenous displacement and genocide. As CRT reminds us, this history formed the intergenerational lifeworlds of today's oppressed peoples.

### 2.3. *The Doctrine of Discovery as Foundation of Indigeneity*

The papal Doctrine of Discovery, which Sioux legal scholar Vine Deloria Jr. demonstrated is the conceptual basis of the oppression of North American Indigenous peoples (Deloria, 2006), also laid the foundation for the denial of Indigenous sovereignty in Taiwan (see also Awi Mona, 2019, p. 658) and their eventual incorporation in the racialized world system. After Spain started seizing territory on the justification that Christians could dominate lands they "discovered," they incorporated Northern Formosa (the old name of the island) into

the colonies of the Manila-based Spanish East Indies from 1626 to 1642 (Borao Mateo, 2009). The Dutch East India Company, under the same legal pretexts, made Southern Formosa into a trading colony from 1624 to 1662 (Andrade, 2008). The subsequent history of Formosa differed from the Philippines, other Pacific Islands, and the Americas primarily because Chinese settlers took over the project of violent territorial expansion. By 1895, when the Qing ceded Formosa to Japan, the Indigenous peoples in the mountains, nearly half the island, still lived autonomously from any state control. The Japanese were the first to subdue those communities, placing them in institutions of frontier control of chiefs and tribal councils that were inspired by American models. Historian Paul Barclay characterized Japanese colonial rule on Taiwan as a system of “bifurcated sovereignty” precisely because Chinese settlers and Indigenous peoples were given different sets of rights (Barclay, 2018).

After so many waves of colonialism, Taiwan’s Indigenous peoples demonstrate great resilience and great will to protect their territories, political systems, and identities. As Indigenous activists demand greater recognition of their inherent sovereignty, including calls to return land and create self-governing autonomous zones, the state has responded with increased but imperfect incorporation of Indigenous peoples into official Taiwanese multiculturalism (Simon, 2011). The main issue is that the sovereignty of Indigenous peoples, as in North America (Matsuda, 1987, p. 358), was never legitimately extinguished, but is also not sufficiently recognized by the state. All of Taiwan’s Indigenous peoples retain knowledge of their sovereignty and state encroachment upon it, which they transmit to future generations through oral narrative and history.

#### 2.4. *The Cunning of Recognition*

Taiwan’s liberal legislation, especially since democratization in the 1980s and 1990s expanded the room for Indigenous social movements to influence law-making, gives special recognition to Indigenous peoples. The Indigenous social movement, in 1994, was launched with the goals of “name rectification,” return of land, and inclusion in the Constitution (Allio, 1998, pp. 59–60). The special legal status of Indigenous peoples, the Chinese translation of Indigenous (*yuanzhumin*) having been chosen by Indigenous activists themselves, is recognized in law through the Additional Articles of the Constitution (ROC, 2005), the Basic Law of Indigenous Peoples, and subsequent legislation. The Basic Law has been amended four times since its promulgation in 2005. Article 1 of the Basic Law states: “This Law is enacted for the purposes of protecting the fundamental rights of Indigenous peoples, promoting their subsistence and development and building inter-ethnic relations based on co-existence and prosperity” (ROC, 2018). Like the UNDRIP, the Basic Law says nothing explicit

about Indigenous sovereignty but does promise the effective exercise of sovereignty through institutions of self-government and consent, land and natural resources governance, as well as cultural protections. Taiwan’s legal framework for Indigenous rights is derived from the ROC Constitution which, in Article 5, proclaims equality between “the various racial groups in the Republic of China” (ROC, 1947). Indigenous rights were constitutionally entrenched in 1997 reforms which, in Article 10, paragraphs 9 and 10, recognized cultural pluralism and political participation of Indigenous peoples (ROC, 1997).

Despite legal equality between racial and ethnic groups, stark disparities remain. Indigenous peoples, compared to the general population, have lower rates of college education, lower household income, and higher unemployment. In terms of health disparities, the average life expectancy of Indigenous people in 2017 was 72.2 years, 8.2 years lower than the national average of 80.4 years (Ciwang & Hsieh, 2023, p. 123). Focusing on health disparities, which are often linked to alcohol use, Ciwang and Hsieh (2023, p. 136) attribute these inequalities to the impact of historical trauma. Historical trauma is rooted in colonialism, but reinforced through contemporary interpersonal discrimination, microaggressions, and violence, as well as exclusion from traditional territories and criminalization of many hunting practices. As in the United States, legal equality is a belief that can render invisible or even rationalize racial economic and health disparities. There is thus a need to understand oppression through racial realism, or begin analysis and action from those stark realities (Bell, 1992).

### 3. Critical Race Theory

CRT is relevant in Taiwan because, despite legal and formal equality between all citizens of the ROC, race consciousness underpins Taiwanese society. As Savungaz Valincinan testified at the Black Lives Matter rally, Indigenous people face discrimination in the job market, in the search for accommodations, and elsewhere. Sometimes Indigenous people have different phenotypes from the majority Han population. It is not uncommon for police officers to demand identification papers from Indigenous people on the suspicion that they are “runaway” migrant workers. All Indigenous people have heard pejorative epithets used to denigrate them, like the infamous “n-word” in English. In a process of “Othering,” the dominant groups perpetuate negative stereotypes of the subaltern group, such as notions that Indigenous people are lazy, drink too much, and do not understand money (Simon, 2004). The customs and lifestyles of the majority group are elevated to the norm of “mainstream” society, which means that “Han norms” can be as oppressive as what Crenshaw calls “white norms” (Crenshaw, 1988, p. 1384). Hunting, an intrinsic element of Indigenous lifeworlds, is reduced to a symbol of savagery. So, just as white supremacy remains a lived reality to Black and other visible minorities in North

America, Han supremacy is a fact of life in Taiwan. Within different nodes of the racialized world system, the Han and Indigenous Taiwanese take structural positions of dominance and oppression that parallel those of whites and visible minorities in North America. CRT maintains that, even if some individuals succeed, and even if the law provides a rhetoric of equal opportunity, people of oppressed groups still experience racism and this racism is systemic.

CRT differs from liberal social theory not because it is rooted in abstract philosophical concepts of justice but because it is radically embodied in lived experiences of oppressed people. It affirms that the painful history of slavery or genocide on Indigenous lands is not historical “background,” but rather an intergenerational trauma that lives into the present and creates limits on what individuals can do with their lives. People are not autonomous individuals, as assumed in liberal thought, who create social relations based on free will. Rather, they are “thrown into history” (Peller, 1990, p. 794). CRT shows how liberal and universalist notions of objectivity, rationality, and neutrality emerged from a particular history, and how such language can justify racial domination when employed in contexts where judgements are passed about what is worthy or unworthy (Peller, 1990, p. 778). Liberal social ideas about the civic public exclude those that are associated with nature and the body, rather than with culture (Young, 2011, p. 108). Such judgements happen in everyday social life, in the media, and, as we show below, in court decisions.

CRT also offers methods. Mari Matsuda proposed “looking to the bottom” (Matsuda, 1987). She proposed a phenomenology of law in which scholars seek to learn from the people who have been failed by liberalism. This approach assumes that the oppressed and the marginalized in any society are precisely the individuals who perceive most clearly the contours of power because they need that knowledge to survive. The privileged find it much easier to turn a blind eye to brute facts of social power and racial domination that bring them social status and economic wealth. Qualitative sociologists have been doing this for decades, but CRT brought those insights to law. There is also the method of listening to stories, acknowledging that telling stories is power and that some storytelling can foreclose one version of events over another (Torres & Milun, 1990). Ideally, this means documenting the oral literature and everyday stories of Indigenous people, contextualizing them in webs of power, and then sharing them as widely as possible.

Perhaps the most important contribution of CRT for Indigenous peoples is how it highly values the nation. In the United States, CRT drew forces from the Black nationalist ideas of Malcolm X, and this is precisely what draws the ire or rejection toward the theory among white liberals (Peller, 1990). Kimberlé Crenshaw, who defined the challenge of Blacks as maintaining a special worldview, saw oppression as “being between a rock

and a hard place” because there are risks and dangers involved in both engaging with dominant (liberal) discourse and failing to do so (Crenshaw, 1988, p. 1369). The goal for Black people is thus to “create conditions for the maintenance of a distinct political thought that is informed by the actual conditions of Black people” (Crenshaw, 1988, p. 1387). The expression of distinct political thought informed by actual conditions is precisely the goal of 21st-century Indigenous resurgence (Coulthard, 2014) and is just as urgent in Taiwan as it is in North America. This is why we need to use CRT to examine carefully recent liberal court interpretations on issues that affect Indigenous rights and livelihoods.

#### 4. A Legal Ruling on Indigenous Hunting

##### 4.1. Liberalism and Anti-Discrimination in Law

On August 1, 2016, President Tsai Ing-wen apologized on behalf of the government to Taiwan’s Indigenous peoples for four centuries of colonialism. She recognized that:

Taiwan is known as a culturally diverse society. But even today, indicators on health, education, economic livelihood, political participation, and more still show gaps between Indigenous and non-Indigenous peoples. Meanwhile, stereotypes and even discrimination against Indigenous peoples have not gone away. (ROC, 2016)

This well-intentioned discourse illustrates the ontological underpinnings of liberal democratic thought. Taiwan is described as a multicultural society. Within that society, the challenges are defined as differences between Indigenous and non-Indigenous people, in ways that are measured in the lives of individuals, such as life expectancy, education levels, incomes, etc. New policies should thus reduce social stereotypes and discrimination. The limitation is that liberal multiculturalism says nothing about Indigenous sovereignty and self-determination, or collective desires to live differently than mainstream society. Placing everyone in a situation of formal legal equality as citizens also neglects the rights of Indigenous nations to determine their own criteria for membership. Liberal social theory suggests that laws are not discriminatory if they are applied equally to all citizens, but Indigenous people demand self-determination. That goal was thwarted in legal decisions about hunting and Indigenous identity.

##### 4.2. Indigenous Hunting and the Law: Tama Talum’s Hunting Case

Legal disputes over Indigenous hunting involve conflicts between Indigenous cultural practices and the state when those practices are criminalized and penalties imposed. Most commonly seen are conflicts related to the Wildlife Conservation Act, the Controlling Guns,

Ammunition, and Knives Act, and the Forestry Act. These laws not only stipulate penalties to control hunting but also establish exception clauses as a way to decriminalize Indigenous cultural practices in a circumscribed way. Although the decriminalizing clauses are intended to protect the cultural rights of individuals, they fail to meet Indigenous demands for collective rights and sovereignty. State law ignores the fact that Indigenous nations already have their own laws for regulating hunting and protecting animal populations. This conflict between state and Indigenous legal orders is of an ontological nature because the state ignores and erases Indigenous lifeworlds. Furthermore, due to different understandings about culture held by law enforcement agents, gaps between the interpretation and application of relevant legal elements may hinder the implementation of Indigenous rights. There are also conflicts between different administrative and judicial levels.

“Tama Talum’s hunting case” was first decided on October 15, 2014, by the Taitung District Court. Fifty-four-year-old Talum Suqluman (Tama means “father”) of the Bunun Nation had in July 2013 gone hunting at the request of his elderly mother, bringing her back a Formosan serow and a Reeve’s muntjac. He was arrested and charged with violating the Controlling Guns, Ammunition, and Knives Act for using a modern firearm instead of a permitted handmade rifle. He was charged with violating the Wildlife Conservation Act on two other charges: taking two protected species and failing to apply for local government permission to hunt for cultural reasons. The Taitung District Court ruled him guilty and sentenced him to a steep fine and imprisonment for three and a half years. His appeal in 2015 was denied, but the sentence was suspended following domestic and international outcry (Simon, 2021). Nonetheless, the court’s decision was at odds with other judicial opinions about Indigenous inherent sovereignty. Indigenous and human rights organizations criticized the court’s cultural bias and discrimination against Indigenous peoples.

After more than six years, the Constitutional Court of the ROC finally accepted a constitutional interpretation request. The court held an oral hearing with live-streaming to the public on March 9, 2021, and after deliberation, released Judicial Yuan Interpretation No. 803 on May 7. The court concluded that Articles 20, paragraph 1, of the Controlling Guns, Ammunition, and Knives Act (requiring homemade guns), and 21–1, paragraph 2, of the Wildlife Conservation Act (requiring state approval for hunting), as well as prohibitions on hunting protected or endangered species, are consistent with constitutional understandings of Indigenous cultural rights. Nevertheless, some implementing regulations lack the clarity and proportionality needed to ensure that the Constitution can effectively protect Indigenous cultural rights. The court ordered the revision of regulations on hunting rifles and on the applications for permission to hunt, to make the laws clearer and easier for individuals to follow. The court based its decision on the principles

of personal dignity, cultural identification, individual cultural autonomy, and the integrity of free development of persons for the purpose of preserving, practicing, and passing down their unique traditional cultures in order to ensure the sustainable development of Indigenous culture. Those rights are nonetheless preserved by the state rather than by the Indigenous peoples themselves.

Interpretation No. 803 recognized that the Indigenous right to hunt is protected by the Constitution as a fundamental individual right to enjoy culture, but continued to obscure the issues of Indigenous sovereignty and the existence of Indigenous legal orders. Povinelli’s argument that liberal states only recognize Indigenous customary law to the extent that Indigenous practices are not considered repugnant or shameful (Povinelli, 2002, p. 176) holds here. There are still popular notions in Taiwan that hunting is primitive and a trait of “backwards people” close to nature.

#### 4.3. *The Court Decision as a Denial of Indigenous Sovereignty*

Interpretation No. 803 is problematic for two other reasons. First is the argument made by the court that the decriminalization of hunting should apply only to self-made rifles used for subsistence. Second, the court argued that hunting endangers wildlife, especially protected species and, therefore, protected species must be excluded from hunting activities unless otherwise approved. The interpretation is based on a balance of interests between Indigenous cultural rights and wildlife conservation. Although the decision was framed in terms of constitutional proportionality, it was made in a broader context of racial discrimination, accompanied by attitudes of superiority and by a projection of Indigenous lifeways as “primitive” and “inferior.” Majority views are the continuation of colonial attitudes that regarded Indigenous peoples as inferior, rooted in calling Indigenous peoples *shengfan* and *shoufan* (literally “raw savages” and “cooked savages”; Barclay, 2018, p. 183). In Taiwan, the majority considers that hunting is a practice of pre-agricultural primitive peoples, and is best relegated to the past. This results in discrimination of a dual nature: On the one hand, there is direct destruction of the material and spiritual conditions needed for the maintenance of Indigenous ways of life as many Indigenous peoples have been excluded from their forests. On the other hand, even after President Tsai’s apology, majority attitudes that lead to exclusion or negative discrimination persist. The principle that Indigenous peoples have the right even to modest internal self-determination, by controlling their own hunting institutions on their own traditional territories, as promised in the Basic Law, is entirely sidestepped.

The court upholds the notion that the only way to demonstrate “traditional” culture is through the use of outdated technology. Modern hunting rifles, even though they would be safer for hunters, are

strictly prohibited. This is a purely colonial gaze. In fact, Indigenous peoples have been appropriating the most modern arms available and incorporating them into their cultural practices since the first years of colonial contact, and as a means to protect their territorial sovereignty (Lin, 2016). The discourse of putting Indigenous rights and conservation in opposition frames the hunters as destructive of nature because it is based on the assumption that human society or culture rests outside of nature. This ontology, which Philippe Descola calls “naturalism,” was transported to all corners of the world during the colonial period (Descola, 2011, p. 91). It is part and parcel of the racialized world system.

Regulations designed to implement cultural rights require hunters to demonstrate that a planned hunt is cultural by submitting a written declaration that it is a practice included on a pre-determined list of rituals furnished by the state. The court overlooked the fact that subsistence hunting is itself a cultural practice and simply denied the possibility of hunting any protected species. It does not take seriously the perspectives of hunters who testify that they must take animals as presented to them, regardless of the species, as gifts from their ancestors. The court does not even recognize that Indigenous communities already have their own rules and institutions to sustainably manage hunting and protect animal populations. In our analysis based on CRT, the decision was consistent with liberal social theory because it was concerned entirely with the individual rights of Tama Talum. It said nothing about Indigenous self-determination, or the rights of Indigenous peoples as sovereign nations to live by their own legal and political norms. The decision even failed to cite the Basic Law on Indigenous Peoples. The decision thus perpetuates systemic racism against Indigenous peoples.

## 5. The Danger of Assimilation

### 5.1. The Civilizing Colonial Project

Beginning in the 17th century, successive colonial regimes treated Indigenous peoples as savages, emphasizing a belief in the Manifest Destiny of Han settlers destined to take over the island in the name of a supposedly greater civilization. The Manchurian Qing Dynasty seemed content to leave the Indigenous peoples of the mountainous interior in effective autonomy. They even described them as “beasts” unworthy of governance (Barclay, 2018, p. 76). But, when the camphor trees in those forests became of interest to world markets, everything changed. Japan took Taiwan in 1895. The Japanese military pacified the Indigenous people over the next twenty years and began implementing policies of assimilation and integration. From the state’s point of view, integrating Indigenous peoples into the dominant society, even by erasing languages and cultures, was a benevolent way of incorporating Indigenous lands and peoples into the world economy.

In the early postwar period, Taiwan’s policy on Indigenous issues began with the mountainous region administration aiming at assimilation and integration. Until the lifting of martial law in the late 1980s, the state enacted a policy of “making the mountains like the plains” (*shandi pingdihua*), which was basically forced assimilation to Chinese norms and the Mandarin language. But the Indigenous peoples were resilient and would start asserting their own rights after democratization.

### 5.2. Post-Colonial Affirmations of Peoplehood

In the 1990s, following demands of the Indigenous social movement for land return, name rectification, and inclusion in the Constitution, Taiwan began adapting the ROC constitution to local conditions. Article 10 of the Additional Articles of the Constitution incorporated an international vocabulary of indigeneity. In 1994, the amendment stated that Indigenous people (*yuanzhumin*) have political, economic, cultural, and other rights; in 1997, this was further amended to Indigenous peoples (*yuanzhu minzu*). Like adding the final “s” in English, the addition of the suffix “zu” promises rights not only to individuals but to groups.

The Additional Articles frame the Indigenous people as vulnerable, equal to people of remote offshore islands, emphasizing that the state should actively support and promote their development, so as to guarantee the constitutional principle of equality. Historically, these provisions were originally intended for Tibetans, Mongolians, and other frontier groups in China, and only later applied to the situation in Taiwan. It is important to recognize that adding “Indigenous peoples” to the Constitution was intended by legislators and activists to address racism and discrimination. But that is precisely the point where CRT makes its most important contribution to Indigenous Studies. Liberal measures to address discrimination risk undermining the sovereignty of oppressed groups.

In February 2005, the Legislative Yuan enacted the Basic Law of Indigenous Peoples, affirming that Indigenous peoples refer to traditional ethnic groups who originally inhabited Taiwan and are subject to the state’s jurisdiction, identifying as an Indigenous person any individual who is a member of an Indigenous people (ROC, 2018). The Basic Law adopts UNDRIP norms by acknowledging that Indigenous individual legal status and identity are based on a relationship with an Indigenous people. According to the UNDRIP, Article 9, all Indigenous people have the right to belong to an Indigenous nation or group. Articles 33 and 35 recognize that Indigenous peoples have the right to determine membership criteria and determine the responsibilities of their members (United Nations, 2007). The challenge is the contradiction between the UNDRIP, which assumes Indigenous peoples are legal persons able to make and enforce decisions about membership, and the reluctance

of Taiwan to recognize the status of Indigenous peoples as legal persons.

In the politics of name rectification, the number of state-recognized Indigenous groups expanded from nine to sixteen, as groups defined their own boundaries and demanded recognition separate from ethnic classifications created during the Japanese colonial era. For example, the Truku became recognized as distinct from the Atayal in 2004 and the Seediq in 2008. Name rectification also included the goal that individuals would again use Indigenous names, instead of the Mandarin names that had been imposed on them since the 1950s. Activists hoped that the use of Indigenous names by individuals would strengthen their sense of belonging to specific Indigenous nations, and part of the goal was that each Indigenous nation would have control over its own membership. Name rectification was legislated in the Indigenous Status Act, as Article 4, paragraph 2, stipulated that individuals of marriages with one Indigenous and one non-Indigenous parent are considered Indigenous only on the condition that they take the surname of the Indigenous parent or use an Indigenous traditional name. The goal was to strengthen individual identity with Indigenous peoples, which would eventually establish their own self-government institutions and membership rolls. This approach proved unsatisfactory to some, especially urban individuals born from one Indigenous and one non-Indigenous parent, and who may have very little attachment to political projects affirming Indigenous sovereignty. Since there are advantages to Indigenous status, including preference in school admissions and employment, some people in this situation began claiming that the obligation to take an Indigenous name is also a form of discrimination.

### 5.3. Indigenous Status

On April 1, 2022, the Constitutional Court released its first decision on the constitutionality of the Status Act. Judgment 111-Hsien-Pan-4 reinforced norms of Chinese patrilineality by asserting that lineage is prior to the Constitution and the Law, meaning that a Chinese surname passed on from father to children should not disqualify those same children, if the mother is Indigenous, from assuming an Indigenous identity. This decision affirmed individual Indigenous status as a special personality right, closely connected to group belonging. By virtue of the reasoning of human dignity, the legislation was found to violate the Constitution on the ground of rights to personal identity and equal protection. Thus, individual Indigenous status should not be limited by additional legal requirements. Individuals are free to register Indigenous identity with state authorities and receive all of the benefits that come with that status, even if they use a Chinese personal name. This frustrated Indigenous activists, who interpreted the ruling as a weakening of Indigenous identity and a new

form of assimilation. The ruling made Indigenous identity a matter of individual choice, under state administration, rather than an affair of membership to be regulated by Indigenous governments. Although the Court couched the decision in a vocabulary of protecting Indigenous culture and Indigenous peoples' authority to their own membership criteria, the ruling creates two types of Indigenous status. One is state-recognized status, as individuals claim identity with local household registration authorities, but with no legal relations to an Indigenous nation. This is independent of the 16 recognized groups that are working on projects to create local self-government. Consequently, it makes Indigenous identity subject more to individual choice than to recognition by a sovereign Indigenous nation. Finally, it weakens Indigenous autonomy, because people without close ties to Indigenous communities may adopt Indigenous identity just to get the economic and social benefits that come with it.

Judicial intervention on these issues undermines projects of Indigenous self-determination and self-government. The fundamental elements of Indigenous peoples' occupation of land and territories prior to the state and the significance of colonial history define the state's legal relationship with Indigenous peoples. That is why the UN Cobo Report (Martinez Cobo, 1972, p. 10) emphasized the definition of Indigenous peoples on their determination to preserve, develop, and transmit Indigenous identity to future generations. Both the UNDRIP and the Basic Law affirm that Indigenous peoples existed prior to the state and that Indigenous status as legal collectivity was unjustly dispossessed by the state. To avoid inappropriate and excessive interference by the state, UNDRIP upholds the rights and principles of self-identification. The Basic Law takes the same approach.

In the above judicial decisions, judges asserted that the core value of a free and constitutional democracy is to protect human dignity and respect the free development of persons. This makes the right to culture a foundational element of individual personhood, which includes the right to recognition of one's cultural practices and one's Indigenous identity. In supporting the right to hunt, the court situates this right in an essentialized notion of culture, framing it as an individual right, but cultural practices are defined by the state and restricted by state law. The same is true of Indigenous identity, which becomes a relationship between a citizen and the state. Both judgements thus ignore the existence of Indigenous legal orders and undermine sovereignty claims.

The policy measures implemented as Taiwan became incorporated into the racialized world system functioned to sever and destroy Indigenous connections with traditional lands, and to subjugate Indigenous peoples in exploitative economies of labour. The forces of assimilation were found in education programs, land redistribution policies, and efforts to incorporate Indigenous peoples into the economy. Education systems were designed



to teach mainstream values and lifestyles, and encouraged the abandonment of Indigenous cultures, values, and ways of life. Eventually, the state adopted multicultural models of national culture and community, but the emphasis remained on the acceptance of and participation of Indigenous peoples as citizens of a state that was imposed upon them in history. Little room remains for Indigenous sovereignty, self-government, and living, emergent culture.

The practices of modern statehood have direct consequences for Indigenous peoples. The modern state logic, especially in a republican democracy, is to universalize its norms through assimilationist policies. The modern state attempts to assimilate Indigenous peoples through education programs and other forms of socialization. The state's goal is to incorporate Indigenous peoples and their lands into the racialized world system, opening up their territories and resources to extraction for the benefit of local and international elites. By reviewing the aforesaid judgements, many so-called "existing cultural characteristics" of Indigenous peoples have long been eliminated by the State. Most hunting practices and even the use of Indigenous personal names have been marginalized and receive no protection in the law. The civilizational project continues, as even the most well-intentioned laws and court decisions uphold the role of the state while postponing meaningful Indigenous sovereignty. There is still a long struggle before ROC law treats Indigenous peoples as subjects rather than objects of law, stops perceiving Indigenous culture as uncivilized and backward, and fully recognizes collective rights, even political sovereignty, for Indigenous peoples.

## 6. Coda

These legal decisions demonstrate the relevance of CRT to understanding the Indigenous–state relationship in Taiwan. Even the most well-intentioned laws and court decisions in a liberal democratic state have the potential to strengthen racist biases and the hegemony that oppresses racialized minorities. Interpretation No. 803, despite all appearances of court neutrality and constitutional order, ended up othering Indigenous people by portraying them as savages who hunt and endanger protected species. Indigenous activists were very disappointed that the court did not examine the applicability of the UNDRIP or even Taiwan's own Basic Law on Indigenous Peoples in coming to a decision; nor did they consider the laws of Indigenous peoples and Indigenous practices of managing forests in ways that protect animal populations. The court decisions on the Indigenous Status Act further strengthened the ability of the state to determine questions of legal status. None of these decisions questioned how state law blocks the ability to enact full, legal Indigenous sovereignty. By adopting an apparently impartial vocabulary of Indigenous rights and equality, moreover, they successfully eliminate the symbolic manifestations of racial oppression while allow-

ing the perpetuation of material subordination and even incarceration of Indigenous hunters who are merely living their own culture.

None of this should be a reason for Indigenous activists and their communities to give up hope. Rather, it underscores the importance of cultural revitalization, intellectual work, and linguistic survival. In one of the most important essays of CRT, Kimberlé Crenshaw concluded that Blacks can only continue to exist, rather than choose between oppression and co-option, if they maintain "a distinct political thought that is informed by the actual conditions of Black people" (Crenshaw, 1988, p. 1387). The Indigenous peoples of Taiwan do indeed have a rich tradition of political philosophy and institutions that are based on their own ontologies. As scholars, we can keep these realities alive by listening to and sharing the stories that the Indigenous people share with us. A resurgence of Indigenous legal and political thought is precisely the pre-condition that is needed if Indigenous and oppressed peoples in Taiwan and elsewhere are to affirm sovereignty and assert a relationship with encapsulating states that is an equal one between sovereign nations.

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## Conflict of Interests

The authors declare no conflict of interests.

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