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共同所有權與原住民財產權作為台灣土地產權系統的挑戰：來自澳洲經驗的見解

Communal Title and Indigenous Property Rights as a Challenge for Taiwan's Land Title Systems: insights from the Australian experience*

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摘 要

國家對於當代原住民土地權利的未充分回應和無解反映出了台灣現行土地登記制度的疏漏之處。該土地登記系統為中國國民黨政府在西元 1945 年後引入台灣。在此系統中僅允許土地被登記為個人所有權，而非共同所有權、習慣所有權或集體所有權，並將所有未由個人登記持有的土地轉為公有地或國有地。台灣現行土地登記系統主要襲自澳洲托崙斯制度，而其核心為經由登記程序所取得的不容質疑的土地所有權。在台灣採行托崙斯制度形成只允許原住民族的土地權利訴求被登記為個人的土地所有權的情勢，這個結果導致原住民族對於祖居地或傳統領域的共同所有權未獲承認。反觀澳洲，在持續採用托崙斯制度的同時，業已發展出許多重要的法律和司法經驗來肯認原住民族對土地的共同所有權。本研究旨在探討澳洲經驗對於台灣原住民族土地權利訴求與共享公共財產利益的啟發。

關鍵詞：共同所有權、托崙斯制度、原住民土地權、土地登記

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Abstract

Inadequate and unresolved state responses to contemporary Indigenous land right claims in Taiwan reflect a deep flaw in the country's current land registry. The land titling system, which was introduced by the KMT government after 1945, allows the registration of individual titles, but not communal, customary or collective titles, and effectively classifies all unregistered and untitled land as belonging to the state. The system is principally derived from Australia's Torrens title system, for which the core element is an indefeasible title by registration. The adoption of the Torrens title system in Taiwan has allowed Indigenous claims only to be registered as individual titles. Therefore, tensions over the non-recognition of communal titles that are derived from Indigenous peoples' ancestral domains or traditional territories are ongoing. In contrast, Australia has developed significant statutory and juridical experience that has resulted in the formal recognition of Indigenous peoples' communal titles alongside continued operation of the Torrens title system. This paper discusses how this experience might inform and support future recognition of Indigenous land right claims and shared communal property interests in Taiwan.

Keywords: Communal title, Torrens title, Native title, land registry, Indigenous property right

The subjects of Indigenous property rights are Indigenous subjects. In colonial contexts, however, Indigenous peoples were/are seldom qualified as subjects in formal legal frameworks, which reinforced Indigenous dispossession. Redressing colonial dispossession has been a central theme of Indigenous rights movements internationally, and Taiwan is no exception. In Taiwan's post-colonial (or what some may refer to as continuing colonial) setting, recognition of Indigenous land rights is central to Indigenous Peoples' well-being. But under the current land registry system[1], land rights of even officially recognized Indigenous groups are either un-recognized or constrained as individual ownership. The existence of land titles and Indigenous land rights seems conflicted in the current land registry system. But in this paper, drawing on Australian experience in accommodating recognition of Indigenous land titles alongside Torrens title systems, we aim to offer an insightful review that might better support of co-existence of registered land titles and Indigenous land rights in present and future Taiwan.

Why Examine Australian Experience?

Taiwanese academia often reviewed Indigenous policies from America, Australia, Canada and New Zealand. One of the particular reasons that we focus on Australia is because the Indigenous Peoples in

[1] The current land registry system in Taiwan was established by the colonial government after 1945, and it's derived from both German right registration system and Australian Torrens title system (Hsu, 2009).

both countries face similar political situations. Firstly, when the settlers arrived Australia and Taiwan, no treaty was signed that might be construed as ceding sovereignty, and only personal or organizational land deeds were signed to access Indigenous land[2]. Furthermore, till now, the constitutions in both Australia and Taiwan do not recognize Indigenous People's inherent sovereignty in either constitutional or more broadly political terms.

1. No sovereignty ceding treaty

1.1 Batman Treaty in Australia

Since the First Fleet[3] arrived the Port Jackson in 1788 and became the first European colonial settlement on the Australian continent. The only documented treaty in Australian colonial history is the Batman Treaty, which was made between a settler John Batman, representing the Port Phillip Association, and a group of Aboriginal headmen of the *Kulin* nation. The treaty supposedly allowed for the purchase or rental of land around Port Phillip Bay, near the present site of Melbourne. The significance of this treaty is it renders the first time of colonists formally negotiated their occupation of Indigenous land. However, the treaty was voided in 1835 by the Governor of New South Wales, who issued a proclamation that declared the British Crown owned the entire Australian continent and so had the sole right to sell or distribute any land (Cruickshank, 2013). From that moment, no further treaty was signed or proposed as a means to govern acquisition of or access to Aboriginal land and the British treated the Australian colony as *terra nullius*- nobody's land. Under the British colonial law, Aboriginal Australians had no property rights in the land, and colonization accordingly vested ownership of the entire continent in the British government. The doctrine of *terra nullius* remained the law in Australia throughout the colonial period, and indeed right up to 1993, when passage of the groundbreaking *Mabo* legislation formalized statutory recognition that Indigenous property rights existed in colonial Australia (Banner, 2005).

1.2 Mattauw Treaty in Taiwan

The doctrine of *terra nullius* has not always applied in Taiwanese colonial history because the colonialism itself is hybrid[4]. During the Dutch ruled era (1624-1662), the Dutch East India Company

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[2] In the cases of USA, Canada and New Zealand, colonizers did not automatically adopt the doctrine of *terra nullius*. By 1850s, the British imperial policy in North America had turned away *terra nullius* (see Richardson (1994) about how Canada's aboriginal people regain control over their lives). The British acknowledged North American Indians as possessors of property rights in their land, and in practice settlers and colonial governments often acquired the Indians' land in transactions structured as purchases. The British began colonizing New Zealand a few decades after Australia, but they did not treat New Zealand as *terra nullius* either. Instead they signed a treaty explicitly recognizing the Maori as owners of the land (Banner, 2005).

[3] The First Fleet comprising around 1500 people, and including more than 700 convicts, about 250 marines, up to 400 crew, around 50 civilian women and children (the families of the marines) and about 15 officials and passengers (Behrendt, 2012).

[4] As a 'hybrid colony' (Andrade, 2005), Taiwan was colonialized by hybrid settlers whilst Indigenous peoples

(*Dutch: Vereenigde Oost-IndischeCompagnie*; hereafter referred as VOC) signed the Mattauw Treaty with Indigenous People came from Mattauw (麻豆，near the present site of Tainan) in 1636 after a series of military actions and diplomatic moves. The treaty[5] clearly referred to the transfer of sovereignty over Indigenous lands to the States-General of the United Dutch Provinces (Chiu, 2007). After the VOC was defeated by Ming Dynasty leftover loyalist Koxinga and withdrew from Taiwan in 1662, no colonial power or national government signed a treaty to recognize or transfer sovereignty with the Indigenous Peoples.

2. No constitutional recognition

2.1 Australian constitution

Constitutional recognition of Indigenous Australians has been on the Australian national agenda for a long time. There was a significant social movement supporting a treaty in the 1970s (Harris, 1979) and in 2011, all major political parties committed to holding a referendum during the present term of Federal Parliament to recognize the First Australians in the Australian Constitution (Law Council of Australia, 2011), and the referendum might be achievable in 2017, the 50th anniversary of a referendum to recognize Indigenous Australians in the national census and to give the national government responsibility for Indigenous matters (Brooks, 2016), although this seems increasingly improbable as Australian politics faces a series of conflicts and impasses following the 2016 election. In the current Australian Constitution, there are two sections of the Constitution that mention race. The first, section 25, says that the states can ban people from voting based on their race: “For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the

have lived on the island for thousands of years. The island was partly occupied by Netherlands and Spain as part of their colonial trade networks from 1624 to 1662. In 1661, a naval fleet led by the Ming Dynasty leftover loyalist Koxinga arrived in Taiwan to oust the Dutch East India Company and officially established a pro-Ming base in Taiwan in 1662. Then Qing Dynasty annexed Taiwan after sending an army led by General Shi Lang in 1683. After the First Sino- Japanese War, Taiwan was ceded to Japan by the Qing administration under the terms of the Treaty of Shimonoseki in 1895. After World War II, Taiwan was taken over by the Chinese Nationalist Party or Kuomintang (hereafter referred as the KMT government). The rule of the KMT government was severely contested. For example, in 1947, the February 28 Incident, an anti-government uprising, led to the imprisonment and execution of thousands of dissenters and the imposition of martial law on Taiwan. The lifting of Martial Law was proclaimed by President Chiang Ching-kuo on July 14, 1987 followed by the liberalization and democratization of Taiwan (Hsu, 2016). The KMT government was defeated in 2000 national election by DPP, the second biggest opposition party, returned in 2008 and defeated again by DPP in 2016.

[5] The content of this treaty as shown below: 1. That all the relics which they still possessed, be it of beads or garments should be restored to us; 2. That they were to pay a certain contribution in pigs and paddy; 3. That every second year they should bring two pigs to the Castle on the anniversary day of the murder; 4. That they should give us the sovereignty over their country, and as a symbol there of place at the feet of the Governor some little pinang and cocoa trees, planted in the earthen vessels in the soil of their country; 5. That they should promise never again to turn their arms against us; 6. That they should no longer molest the Chinese; 7. That, in case we had to wage war against other villages, they should join us (Campbell, 1903: 119-120).

State or of the Commonwealth, persons of the race resident in that State shall not be counted." The second, section 51(26), gives Parliament power to pass laws that discriminate against people based on their race: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … the people of any race, for whom it is deemed necessary to make special laws." This section, the so-called "races power", has been interpreted by the High Court to allow the federal parliament to make laws that discriminate adversely on the basis of race. Parliament only ever used the races power regarding Aboriginal and Torres Strait Islander people (Castan, 2014).

The Australian Constitution provides no recognition of the existence of the Aboriginal polities that govern these jurisdictions. It is only in legislation — such as the *Native Title Act*, and to some extent, land rights statutes, such as the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Commonwealth) and *Pitjantjatjara Land Rights Act* 1981 (SA) — that there is a lower level of recognition of these polities in order to provide statutory regimes for dealings between resource extractors and the Aboriginal landowning corporations or entities (Langton & Palmer, 2003).

2.2 Taiwanese constitution

In the Taiwanese Constitution, there are three articles mention Indigenous Taiwanese. One is in Article 4 of "Additional Articles of the Constitution", which establishes the number of Indigenous legislators in the Legislative Yuan: "(2) Three members each shall be elected from among the lowland and highland[6] Aborigines in the free area."

The other two both are in the Article 10 "Additional Articles of the Constitution", which renders the basic national policy: "The State affirms cultural pluralism and shall actively preserve and foster the development of Aboriginal languages and cultures. The State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the Aborigines. The State shall also guarantee and provide assistance and encouragement for aboriginal education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare, measures for which shall be established by law. "

The fact that Indigenous sovereignty has never been ceded (at least not ceded to the current Taiwanese government) caused the unrecognized Indigenous sovereignty in the current Taiwanese constitution. With flourishing social movements, the discussion of amending a special chapter of Indigenous Taiwanese in the constitution has been boosting in recent years (Shih, 2005).

Why Compare Taiwan and Australia?

[6] There are totally 55 administrative divisions of Indigenous peoples consisting of 25 Indigenous administrative divisions in lowland and 30 Indigenous administrative divisions in highland according to topographic difference.

The other reason we choose to focus on Australia is more fundamental. The current land registry system in Taiwan is derived from both German right registration system and Australian Torrens title system (Hsu, 2009).The core element of Torrens title system is “title by registration”, which comes with an indefeasible title to that interest (Butt, 2010). The advantage of Torrens title system, for a purchaser, lender or other person dealing with a registered owner, is that they no longer to carry out any historical investigations of the owner's title (Petrow, 1992: 170).

1. Origin of Torrens title system

Given that the origins of Torrens title system are controversy in relevant academic discussions (Esposito, 2003; Taylor, 2008a; 2009), the Torrens title system is commonly deemed as being introduced to the Australian colony by Sir Robert Richard Torrens in 1850s after he realized the English law of real property was not entirely suited to the condition of the new settlements. According to Butt (2010), Torrens identified the problem was “the dependent nature of titles”. This necessitated a retrospective investigation of title each time land was conveyed or otherwise dealt with. It was the chief source of the cost and delay in the conveyancing process. Torrens proposed a system of “independent” title. In essence, on each conveyance the land would be surrendered to the British Crown, which would then re-grant it to the purchaser. This would abolish the need for retrospective investigation of title and grant an indefeasible title for each purchaser. To achieve this goal, Torrens proposed a single document evidencing title to each parcel of land. On this document - the “certificate of title” - would be recorded all transactions affecting the land and replace all the documents that a purchaser was required to investigate whether the title was sound under existing system. This document would be held by the Register-General and available for public inspection, with a copy given to the owner of the land. The legislation implementing Torrens’ reform proposals, the *Real Property Act* 1858 (SA), came into operation in South Australia in 1858, and then introduced to New South Wales by *Real Property Act* 1862 (NSW), which came into operation in 1863 (Butt, 2010, pp. 744-745).

Out of Australia, the Torrens title system also has been implemented in America (Massie, 1917), New Zealand (Hinde, 1971), Canada (Taylor, 2008b), Philippine (Prill-Brett, 1994), Malaysia (Nah, 2006) and Taiwan (Hsu, 2009).

The Torrens title system was designed to bring relief to business men “who felt themselves manacled by chains of title clanked from generation to generation by the captives of harsh and hoary law” (Massie, 1917: 750), whilst it also expressed a policy of **non-recognition** of Indigenous legal institutions (Prill-Brett, 1994). Its implementation created a registry-centric discourse over land title that based on the sole authoritative position of government rather than the recognition of Indigenous sovereignty. Moreover, the indefeasible title that the Torrens system guaranteed to each purchaser abolished the need for retrospective investigation of title. It implies that the historical and social references of title are not valued and concerned under Torrens title system. In Australian settings (and not surprisingly also in Taiwan), it indicates that the land titles were able to be created and redistributed

by the sovereign power (in Australia, the British Crown) without negotiating with Indigenous Peoples or acknowledging their prior and persistent sovereignty.

2. Adoption and adaption of Torrens title system in Taiwan

Taiwan was ceded to the Japanese colonial government after the First Sino - Japanese War in 1895, and the Japanese colonial government firstly conducted comprehensive land surveys in Taiwanese (colonial) history. The fifth Governor-General of Taiwan was Sakuma Samata. In order to conquer Indigenous Peoples and colonize Indigenous areas, he implemented a series of topographic investigations over Indigenous areas. This investigation started in 1907 and ended in 1916 with 68 maps covering the area that the Japanese colonial government categorized as Indigenous areas (Liou, no date). These 68 frames of maps covered locations the Japanese colonial government deemed as Indigenous areas at that moment (see Figure 1) but later the government greatly narrowed the scope of areas classified as Indigenous areas. In 1925, the Japanese colonial government conducted a more nuanced investigation of forest in order to utilize natural resource more efficiently. This investigation divided forests into three categories: conservation area, non-conservation area and quasi-conservation area. The "quasi-conservation area" also named "land of aborigines[7]", which was especially for aborigines and that is the basis of Indigenous reserved land. (Hung, no date) (see Figure 2).

The KMT government took over Taiwan after WWII and continued a similar land categorization policy but adopted different land registry system. The KMT government established the current land registry system by learning from both German right registration system and Australian Torrens title system[8] (C. Y. Hsu, 2009: 1-2). On April 5th, 1946, the KMT government issued an announcement (*tu di quan li renyingyixianxiangsuozai di tu di zheng li chushenbao gong gao* 土地權利人應依限向所在地土地整理處申報公告) that required land title holders to declare their titles to relevant authorities within the limited timeframe, from 21st April 1946 to 20th May 1946. In 7th October 1946, the KMT government claimed that unregistered land would be considered as nation-owned land two-months after the announcement. Yet, due to an anti-government uprising occurred in 1947, the February 28 Incident, the KMT government extended the duration for land title declaration and registration to June 1947. Also, the duration for un-registered land announcement was extended to two years, and then the duration was extended to two and a half years due to the petition from local government in 1949 (Lee, 2009).

In spite of the fact that the land registry policy was implemented in Taiwan from 1946, the

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[7] Unlike Qing citizens and local residents (including Han-Chinese immigrated from China and plain Aborigines), Indigenous peoples lived in remote mountainous area were not deemed as land rights and property rights subjects under Japanese Civil Law. Therefore, the quasi-conservation area were deemed as State property rather than individual registerable area (Lin, 2007: 62-63, 70)

[8] This land registry system is characterized by (1) compulsory registry; (2) substantive examine/review; (3) indefeasible title with certificate; (4) compensation for loss (Ministry of the Interior, 1992: 5). The Torrens title is characterized by indefeasible title with certificate and compensation for loss (NSW Law Reform Commission, 1996: 12) while the German right registration system is characterized by substantive examine/review (M. T. Chen, 2012: 97).

implementation had not reached Indigenous areas the area of Indigenous Reserved Land[9] until 1958. In the other words, before 1958, the land titles in the area of Indigenous Reserved Land remained communal and were not registered by individuals (Kuan, 2014). From 1958 till 1966, the KMT government commenced the Indigenous Reserved Land investigation, which aimed to measure the area of each piece of land, investigate whether a piece of land was suitable for agriculture or forestry , and mark the border between Indigenous Reserved Land and nation-owned forest (Chen, 1986). After eight years of measurement and investigation, the KMT government started individual land title registration in the area of Indigenous Reserved Land in 1966 (for the current distribution of Indigenous Reserved Land, see Figure 3).

The implementation in Taiwan of Torrens title from 1947 brought unimaginable effects to Indigenous People's land title. As noted by Lin (2007), the Mandarin literacy rate at the time was generally low, so it was extremely difficult for Indigenous people to register. Indigenous Peoples also perceived some areas as communal-owned or belonging to certain customary social groups (e.g. clan, hunting group, fishing group and so on), and under that situation, no Indigenous individuals could have registered the land title in their individual name and been acceptable to their community. As a result, some areas that were very significant to Indigenous groups became nation-owned land. Moreover, the dichotomy of public/individual in land registry system was based on the definition that the public is the "central competent authority"[10] and the individual is referred as a citizen. The binary ownership that limited options to individual or state ownership directly undermined the collective land tenure and social system in Indigenous cultures and customs.

[9] The KMT government maintained the land classification policy designed by the Japanese colonial government, which categorized the forest into three categories: reserve-for-forestry, reserve-for-conservation, and reserve-for-Indigenous-people, but amalgamated the first two categories into nation-owned forest; the last category was renamed as Indigenous Reserved Land.

[10] Source: *Regulations on Development and Management of the Lands Reserved for Indigenous People* Article 5: "The For the public lands allocated as the lands reserved for indigenous people for which the general registration has been finished, the municipal or county / city competent authority shall, together with the original department of land management, register the central competent authority as the new management department, and mark the lands reserved for indigenous people in accordance with the preceding paragraph."

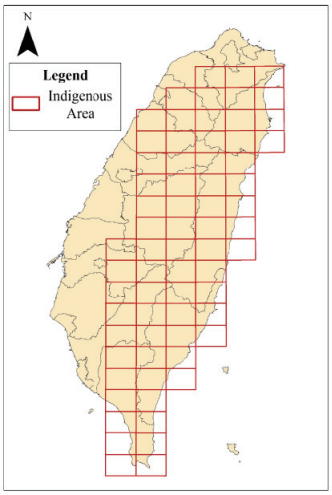

Figure 1 The map frames of the 'Topographic Map of Indigenous Area (1907-1916)'
(Map by: Yi-shiuan Chen; Data source: Academia Sinica)

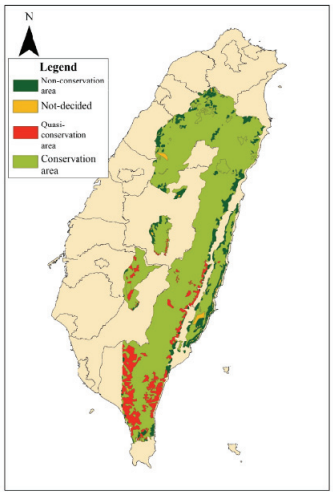

Figure 2 The survey outcome of 'Forest Classification (1925-1935)'
(Map by: Yi-shiuan Chen; Data source: Academia Sinica)

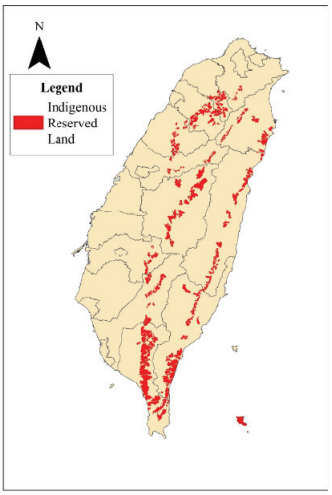

Figure 3 The distribution of Indigenous Reserved Land
(Map by: Yi-shiuan Chen; Revised from: Kuan, 2014)

What to Learn

The fact that the Indigenous land rights in Taiwan had been registered as individual ownerships under Torrens Title system underlies the current dilemma of Indigenous Peoples' land claims. The system created a binary situation, where title had to be either individual or public (i.e. state) title. On the one hand, the registry system undermined the authoritative position of Indigenous customary law; on the other hand, the dichotomous categories of public/individual ownerships omitted the possibility of any prior existing, and persistent communal ownership of property by an Indigenous customary social group. In the present Taiwanese setting, dilemmas arise when Indigenous Peoples attempt claim for communal ownerships over ancestral domain or traditional territory. The Australian setting offers some pointers to discourses that might contribute understanding to this issues faced in Taiwan.

1. Indigenous sovereignty and Indigenous property right

The discourse of Indigenous property rights is embedded in Indigenous people's sovereignty. In the pre-1970s Australian settings, the right to take possession was embedded in British and international common law and rationalized through a discourse of civilization that supported war, physical occupation and the will and desire to possess. Property rights are derived from the Crown, which in the form of the nation-state holds possession (Moreton-Robinson, 2015: 20). The incarceration, removal, and extermination of Indigenous people were validated by regimes of common law based on the assumption that *terra nullius* gave rise to white sovereignty. "Only white possession and occupation of land was validated and therefore privileged as a basis for property rights" and national identity.

(Moreton-Robinson, 2015: 30). Before the 1970s, the implicit subject of the rights discourse was the white subject, who represented the universal in human rights. The white Australia policy was formally abolished in 1972 and multiculturalism was promoted as Australia's new national policy. (Moreton-Robinson, 2015: 133-134).

2. Mabo case, Wik case and Native Title

Although Indigenous sovereignty lacks constitutional recognition, the doctrine of *terra nullius* in Australian common law was invalidated in 1992 by the High Court decision of *Mabo v Queensland (No. 2)* (hereafter referred as *Mabo* decision). The *Mabo* decision recognized Native title as a form of customary title arising from traditions and customs. The common law recognition of Native title by the High Court established that customary rights to land pre-existed and, under certain conditions, survived British sovereignty (Langton & Palmer, 2003).

The *Mabo* decision also prompted enactment of the *Native Title Act* 1993 (Commonwealth) (hereafter referred as NTA) (Butt, 2010). The NTA commits to co-existence of Indigenous and non-Indigenous rights and interests in land and water and recalls past dispossession and states that the NTA is a special measure to address past injustices. The NTA explicitly aims to ensure recognition and protection of Native title. The parliamentary debate of the legislation identified three key principles involved in the accommodation of Native title into Australian legal and social systems (Tehan, 2003: 543):

1. The **principle of co-existence** recognizes that interests, rights and responsibilities created by and recognized in customary law can co-exist with interests, rights and responsibilities created by the Australian Crown under statutory law. For example, Crown leases or public use titles will extinguish some elements of Indigenous property, but not all of them. So the principle of co-existence acknowledges the persistence of some interests, rights and responsibilities created by and recognized in customary law as Native title.
2. The **principle of non-discrimination** establishes a requirement that the actions of governments (i.e. the Crown in the form of either Federal or State governments) cannot extinguish the interests, rights and responsibilities created by and recognized in customary law in a way that is racially discriminating.
3. The **principle of social justice** was acknowledged as requiring a remedy for Indigenous Peoples whose traditional territories was inaccessible to claims under the NTA because legal acts of the Crown (e.g. by creating freehold title in their traditional lands) had completely extinguished Native title as defined in the NTA. The stated intention of the Australian Government was to create both a scheme for determining Native title (the Native title system) and social justice package involving compensation, reparations and other support. It is important to understand that the Australian Parliament never enacted or resourced the Social Justice Package and the incoming conservative Government in 1996 explicitly repudiated the Social Justice Package proposed by the Australian

Labor Party Government.

In 1996, a decision of *Wik* Peoples claimed Native title over two parcels of land which were the subject of pastoral leases, was delivered by the High Court (hereafter referred as *Wik* decision). The High Court decided that the granting of a pastoral lease, whether or not the lease was now expired (or was otherwise been terminated), did not necessarily extinguish all Native title rights and interests that *might* otherwise exist (Hiley, 1998). The *Wik* decision is of great significance in making available for claim to Native title of that vast area of Australia, perhaps as much as one half, with a pastoral lease history. But the decision has more significance in implication of the equal status of Native title at Common Law to interests granted by the Crown (Barlett, 1997).

To conclude, the *Mabo* case invalidated the doctrine of *terra nullius* in common law. The *Native Title Act* embedded the notion of Native title in Australian statue law. Then the *Wik* case profoundly implied the co-existence of Native title and other common law proprietary interests, and simultaneously rendered the equal status of Native title and Crown grants. As Secher (2000) argues, in the context of statutory title, Native title constitutes a new exception to the indefeasibility of the registered proprietor's title[11].

3. Communal title and title-holding organizations

Usually, the Indigenous groups' approach to rights and responsibilities in land and resources emphasizes communal accountability, though individuals may also have specific rights (Butt, 2010). The communal or collective approach is particularly important when dealing with common property such as hunting grounds, forest areas whose resources are shared and sacred or ceremonial areas, while individual rights are more common in connection to homes, gardens and fields – although this of course varies greatly amongst different cultural groups. The content of communal title is a unique proprietary title for the following reasons: it is inalienable; it is a communal title which has an internal dimension regulated by Aboriginal law and custom; it is subject to extinguishment by the valid exercise of Legislative and Executive power in circumstances where other titles to land are not (Pearson, 2000).

The critical issue for bringing customary Indigenous titles together with formalized property title systems such as the Torrens title system, is to constitute a title holding entity (an owner) that is equally appropriate in both systems. That is, to create an entity which adequately represents the shared and collective interests of the Indigenous group whose customary interest in an area precludes its conversion to an individual title (i.e. Taiwan's registration process), and is also not reducible to a "public interest" that can be adequately represented by the state as title holder. This is particularly the case where the

[11] Though this argument is conditional. As stated, this result is achieved, however, because statutory title is excluded from the NTA's implied subjection to the Real Property Acts. Consequently, in cases other than statutory title, the general principle that the registered proprietor has an indefeasible title to land subject to native title pursuant to the Real Property Acts is, prima facie, maintained. Nevertheless, the concept of indefeasibility has never been absolute - a qualification highlighted in the context of the statutory confirmation of extinguishment of native title (Secher, 2000).

state has been the mechanism by which dispossession and marginalization of Indigenous Peoples and their rights and interests has been effected. In Australia, the legislative solutions in various state and federal land rights acts, the NTA and compensatory land transfer processes has been to create a form of trust or statutory body (variously named as land trusts or prescribed bodies corporate) that is accountable under the relevant statute and required to formally hold the title and represent the interests of the collective that successfully claimed the land. Historically, however, states have also sought to create trust-like bodies to hold the title interest in lands that belong to Indigenous groups under customary systems such as reservations and mission stations, that have been, at best, unrepresentative of the Indigenous collectives whose customary property they hold in trust, and at worst corrupt, self-interested and antagonistic to those interests[12]. In many ways, it is ironic that the legal term "trust" has come to represent for many Indigenous groups, a failure of trust in state administration of their property.

The Australian response to recognition of communal title has been to create a variety of title-holding corporations such as state-level land trusts (e.g.Goodall (1996), Wilkie (1985) for NSW, Toyne and Vachon (1984) for South Australia), individual land trusts for single land claims granted under *Aboriginal Land Rights (NT) Act* 1976 in the Northern Territory, and prescribed bodies corporate under the NTA (Mantziaris & Martin, 1999). The record of these various title-holding corporations and their accountability to customary governance is uneven, but the necessity of creating some formal structure to hold communal title that enables incorporation into the wider national and provincial systems of land title, land law and environmental governance is clearly a necessary pre-requisite for negotiating recognition, addressing issues of constitutional reform and sustainable co-existence in both Australia and Taiwan.

What's Next?

1. The reflective contribution on Taiwanese current issues

In Taiwan, the *Indigenous Peoples Basic Law* states: "the government recognizes Indigenous peoples' rights to land and natural resources" (§25) and "the government shall respect Indigenous peoples' rights to choose their …, modes of social and economic institutions, methods of resource utilization and types of land ownership and management (§23)." Then in 2015, an amendment stated: "In order to promote independent development of Indigenous tribe at its will, the tribe should establish Tribal Council. The tribe which ratified by the central authority in charge of Indigenous affairs shall be considered as public juristic person. The central authority in charge of Indigenous affairs shall issue regulations for tribe-ratifying procedure, terms of organization, meeting procedure, the way of reaching

[12] Perhaps the USA's Bureau of Indian Affairs' betrayal of its trust relationship with First Nations in the America is the most significant example of such a breach of trust. See e.g. Buck (2006) for background.

a resolution and related matters of the Tribal Council" (§2-1). The current legislation provides a theoretical framework that allows land title to be registered by tribe, which is considered as public juristic person, and then the land title is communally owned by the tribe members. This theoretical possibility, however, is yet to be supported by enabling legislation, or achieved in practice.

Given that there is the possibility to recognize Indigenous people's communal title in current Taiwanese setting, the Australian experience offers some salient experience to reflect on. In Australian experiences, the NTA has failed to deliver the optimistic outcomes anticipated by its advocates in the 1990s. Some title-holding organizations ironically undermine Indigenous people's controlling and accessibility over lands (Howitt, 2009; National Native Title Tribunal, 2012; Short, 2007). Moreover, the challenges Taiwan society facing is that how to create Indigenous people's communal interests over individually-registered lands. Yet, in Australian context, the Torrens title is indefeasible to Native title. Thus, the Native title claims are only allowed over non-free hold lands.

2. Accommodating communal titles and Indigenous property rights in Taiwan's land title systems: the theoretical contribution

The aim of this paper has been to offer a theoretical insight into some important legal, social and political issues that affect present and future co-existence of Indigenous and settler peoples in Taiwan. Drawing on Australian experiences, we conclude that Taiwan's adoption of Torrens title and its subsequent imposition of a binary title solution that excluded any form of Indigenous communal title or Native title created an impossible situation of Indigenous groups in Taiwan that has continuing serious consequences for local communities and national development. The Australian solution, developed over many years and relying on a complex patchwork of legislation, court decisions and local scale evolution of practices is not simply transferable to Taiwan. Nor is it an ideal solution. The United Nations Declaration on the Rights of Indigenous Peoples offers some framing of the minimum standards required for recognition and both nations have offered some movement towards that standard, in Taiwan through the *Indigenous Peoples Basic Law* of 2005 and in Australia through ratification of the Declaration in 2009. The UN framework, however, requires implementation through legislation, and a political and societal process of recognition and negotiation of the terms for sustainable co-existence. Neither country has progressed convincingly in this direction, although Australia's record of legislative recognition offers some important pointers for Taiwanese discussion. The current situation in Taiwan has created a legal illusion that Indigenous claims over lands can categorized as exclusively either public (i.e. state, not communal) or individual, but Indigenous Peoples' claims to ownership and governance of their ancestral domains, ancient jurisdictions and traditional territories are generally communal. In the current Taiwanese setting, the requirement for all land titles over Indigenous Reserved Land to be registered as individual ownerships has caused what can only be understand as an un-recognition of Indigenous land rights – a denial of the existence of communal interests and an insistence on their erasure, that represents a form of *terra nullius* and lays the foundations for ongoing

conflict over land title, land use and resource governance.

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