

Land Rights of Taiwanese Indigenous Peoples under Natural Disasters: Analysis of
Post-Typhoon Morakot Reconstruction from Legal, Historical, and Cultural Perspectives

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Abstract

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This dissertation discusses indigenous land rights, disaster management law, and recovery problems after Typhoon Morakot in Taiwan, analyzing these issues from legal, historical, and cultural perspectives. The study traces land history of indigenous peoples and development of disaster laws in Taiwan. Based on the history, the study takes post-Typhoon Morakot recovery as an example to examine reconstruction laws and indigenous adaptive strategies in response to natural disaster effects in contemporary Taiwan. By presenting the problems, this dissertation aims to provide suggestions for enhancing protection on Taiwanese indigenous land rights in natural disaster situations.

Since the seventeenth century, indigenous peoples' land has been encroached by settlers and taken by the governments as state-owned property. Indigenous communities were relocated to reach assimilation and development. Only in recent decades, social movements have urged the

government to recognize the collective and individual rights of indigenous people. In regard of disaster laws in Taiwan, from 1945 to 1999, disaster effects were handled by executive power through local administrative regulations and presidential emergency decrees, whose function was limited to retrospective measures. After 1999, the legislature assumes a key role in passing laws to establish a disaster management framework, but none of the fragmented disaster management authorities has adequate power, personnel, and resource to comprehensively address disasters.

The serious disaster of Typhoon Morakot in 2009 posed new challenges to not only disaster management law but also land rights, cultures, and subsistence of Taiwanese indigenous peoples. The disaster recovery laws required risky land to be designated as Special Zone to restrict land use and relocate residents. The land zoning and relocation process was criticized as hurried, careless, and limited local participation. Yet, the affected indigenous people have strived to adapt to the impact of construction laws and natural disasters. In Namasia District, Kananavu and Bunun tribal people dealt with environmental changes by adopting multiple strategies. They resettled, rebuilt at the original site, or returned to their ancestral land to recover from disaster effects and reduce future disaster risks.

This dissertation suggests that future legal reform should enhance indigenous land rights by promoting right registration on indigenous reserved land and recognizing their traditional territories. It is important to create an agency fully committed to and responsible for all disasters stages and coordination between government levels and jurisdictions. This reorganized structure will a bottom-up system that local governments, communities, and individuals have greater capacity for and engagement in disaster management programs. Indigenous peoples should be granted more determination on their land to prevent involuntary displacement, as their traditional yet dynamic knowledge will also inspire flexible ways to handle drastic environmental changes.

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Chapter 1 Introduction

1.1 Background

1.1.1 An Unprecedented Disaster and Reconstruction Laws

In the early morning of August 9, 2009, a massive landslide occurred in a mountainous region of Kaohsiung Municipality, Taiwan. Tons of mud buried the entire village of Xiaolin and killed 491 people. The tragedy was triggered by the record rainfall brought by Typhoon Morakot, which struck Taiwan between August 6 and 10. The heavy rainfall resulted in floods and landslides throughout Kaohsiung Municipality, Kaohsiung County, Pingtung County, and Taitung County in southern Taiwan.¹ The disaster seriously impacted these places and the residents, especially Taiwanese indigenous people living in the mountainous areas. Many roads that had been the only routes to these indigenous communities were either blocked or washed away by the mudslides. The indigenous people were trapped in remote areas, running out of food and water. Critical infrastructure and private homes in the indigenous communities were damaged or destroyed.²

Shortly after the disaster, at the end of that August, the Legislative Yuan passed the Special Act for Post-Typhoon Morakot Disaster Reconstruction (莫拉克颱風災後重建特別條

¹ See TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN (行政院莫拉克颱風災後重建推動委員會), *Ai yu Xiwang Yuedong Shengmingli: Molake Taifeng Zaihou Zhongjian Sanzhounian Chengguo Huibian (shang)* (愛與希望躍動生命力：莫拉克颱風災後重建三周年成果彙編(上)) [LOVE AND HOPE BURSTING WITH VITALITY: ACHIEVEMENTS ON THE THIRD ANNIVERSARY OF POST TYPHOON MORAKOT RECONSTRUCTION VOL.1]18, 23-28 (2012).

² See generally Awi Mona (蔡志偉), *Qihou Bianqian, Shengtai Yongxu yu Yuanzhuminzu Shehui Wenhua Fazhan: Molake Fengzai de Fansi* (氣候變遷、生態永續與原住民族社會文化發展：莫拉克風災的反思) [Climate Change, Ecological Sustainability, and Social-cultural Development of Indigenous People: the Reflection on Typhoon Morakot], 6 TAIWAN INDIGENOUS STUDIES REV. (台灣原住民研究論叢) 27 (2009).

例) [hereafter Special Act] to lay down reconstruction principles and loosen existing legal restrictions for swift disaster relief and recovery. Based on the Special Act, the Executive Yuan established the Typhoon Morakot Post-disaster Reconstruction Council [hereafter Reconstruction Council] to implement post-disaster reconstruction laws and promulgate detailed regulations.³ With guidance from the Special Act and the Reconstruction Council, the central and local governments provided shelter, water, food, and other supplies to assist people affected by the typhoon disaster. The governments also restored infrastructure such as the electrical grid and running water systems in a timely manner.⁴

One of the important purposes of the Special Act was to regulate and conserve the land impacted by Typhoon Morakot. Two weeks after the disaster, the Taiwanese government decided that land conservation and relocation were the major approaches to protect and restore the damaged land.⁵ The government planned to apply scientific assessment technologies to mark out vulnerable parcels of land on which human activities would be restricted and reduced.⁶ The Special Act authorized executive agencies to decide whether a parcel was deeply struck and should be strictly regulated. According to Paragraph 2, Article 20 of the Special Act, after reaching an accord with the original residents, the central, municipal, and county governments could classify a parcel of land as a “Special Zone (特定區域)” to restrict residency and forcibly relocate residents. In such situation, the government would grant appropriate accommodation to the displaced people. Paragraph 4 of the article further authorized that, when the governments

³ Article 4, Special Act for Post-Typhoon Morakot Disaster Reconstruction (莫拉克颱風災後重建特別條例) (2009).

⁴ See TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 1, at 134-174.

⁵ Council for Economic Planning And Development, Executive Yuan (行政院經濟建設委員會), AREA RECONSTRUCTION BRIEF PLAN FOR LAND CONSERVATION AS PRIORITY (以國土保育為先之區域重建綱要計畫) 1 (2009).

⁶ *See id.*

designated Special Zones and relocated the residents, the governments had the power of land taking.

Based on the Special Act, the governments contacted the landowners and residents of the affected parcels of land, inquiring whether they consented to designation of their parcels of land as Special Zones. Not all landowners and residents agreed. Some of them were concerned about possible adverse consequences and restrictions posed by the Special Zone regulations and thus refused to consent. For the affected land, the Ministry of the Interior created an unprecedented land zone called the “Safety Doubtful Zone (安全堪虞區域),” which was absent in the Special Act. Depending on the consent or rejection of the landowners and residents, the Ministry of the Interior, the Council of Agriculture, and other executive agencies designated ninety-eight Special Zones and sixty-two Safety Doubtful Zones.⁷

The Taiwanese government regarded the Special Zones and the Safety Doubtful Zones as risky and included both zones in the official post-disaster reconstruction policy: relocation projects.⁸ The relocated people could receive financial subsidies from the government to rent or purchase new houses, or they might apply for post-disaster resettlement houses built by NGOs, including the Buddhist Compassion Relief Tzu Chi Foundation, World Vision Taiwan, and the Republic of China Red Cross Society.⁹ Although the housing assistance to residents of the

⁷ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 1, at 210.

⁸ Paragraph 2, Article 10, Regulations on Designating Special Zones, Choosing and Changing Resettlement Land, and Distributing Reconstruction Houses in Areas Affected by Typhoon Morakot (莫拉克颱風災區劃定特定區域安置用地勘選變更利用及重建住宅分配辦法) (2009).

⁹ Taiban Sasala, *From Rekai to Labelabe: Disaster and Relocation on the Example of Kucapungane, Taiwan*, 19(1) ANTHROPOLOGICAL NOTEBOOKS 59, 64 (2013); YUNG-LUNG CHEN (陳永龍) & YEN-LIANG CHIU (丘延亮), RESIST NATURAL DISASTERS AND MAN-MADE CALAMITIES: ON HOMESTEAD RESILIENCE AND TAIWAN'S ALTERNATIVES (防天災 禦人禍：原住民抗爭與台灣出路) 118 (2014).

Special Zones and to those of the Safety Doubtful Zones was different, the general goal was to encourage the residents to move from the two zones to safe places.¹⁰

Eventually, among the 19,191 residents in the Special Zones and the Safety Doubtful Zones, 60.98% of the residents relocated. The relocation projects resulted in a large population of 11,703 people moving from their homes to rent elsewhere, buy new houses, or move into the permanent houses in the resettlement communities built by the government and NGOs.¹¹ There were still 7,488 residents remaining in the two zones, although their parcels of land had been assessed by the government to be vulnerable and subject to disaster risks.¹² These people could live in their residences, but they would be ordered to evacuate when a disaster struck.¹³

1.1.2 Problems of Land Zoning and Relocation Policy

While it seemed that the Special Act guided the Taiwanese government to effectively help the Taiwanese people recover from disaster impacts, in fact, the Taiwanese indigenous peoples affected by Typhoon Morakot disagreed and questioned the official reconstruction policy and the relocation projects. Many indigenous people worried about how the land zoning of the Special Zones and the Safety Doubtful Zones would influence their land title and use, and many indigenous people were unwilling to leave their homes and resettle to other places.¹⁴

¹⁰ See Xinjie “Huading Teding Quyū”: Bu Tongyi Jiu Gonggao Nide Mingzi, (新解【劃定特定區域】：不同意，就公告你的名字) [New Interpretation of Designating Special Zones: Publicly Announcing Your Name If You Do Not Consent], 921 EARTHQUAKE RELIEF FOUNDATION (九二一震災重建基金會), available at <http://www.taiwan921.lib.ntu.edu.tw/newpdf/ST038.html> (last visited Nov. 2, 2018).

¹¹ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 1, at 210.

¹² *Id.*

¹³ *Id.*; Article 4, Regulation of Designating Special Zones, Choosing and Changing Resettlement Land, and Distributing Reconstruction Houses in Areas Affected by Typhoon Morakot.

¹⁴ YA-HSIANG WANG (王雅湘), CHIEN CHANG (張筓), NA-HUI YEH (葉娜慧), I-WEN T'AO (陶依玟), AFTER HEAVY RAIN, SEEING RAINBOW (暴雨後，看見彩虹) 114 (2012).

The data of designating the Special Zones and the Safety Doubtful Zones can be used here for the purpose of research to indicate landowners' viewpoints on the land zoning. As mentioned above, according to the Special Act, consent from residents of the affected areas was necessary for the government to designate the damaged parcels of land as Special Zones. If landowners and homeowners did not consent, the government could only unilaterally designate their parcels of land as Safety Doubtful Zones instead of Special Zones. In other words, designation as a Special Zone meant that the legal owners of the land and houses of that area agreed on the land zoning, and a Safety Doubtful Zone represented the residents' rejection of the proposed land zoning.

Table 1-1 shows the significantly different attitudes toward the land zoning policy between non-indigenous and indigenous people in the areas affected by Typhoon Morakot. Among ninety-eight affected areas where non-indigenous people lived, nearly three-quarters (73.47%) of the non-indigenous residents and landowners agreed to their land being designated as Special Zones. In a sharp contrast, less than half (41.94%) of the indigenous people in the affected areas consented to the proposed designation of Special Zones. It is clear that, compared to the non-indigenous people, the Taiwanese indigenous peoples were more suspicious of and opposed to the Special Zones and to subsequent legal effects on their land.

Table 1-1: Numbers of Special Zones and Safety Doubtful Zones

	Special Zone	Safety Doubtful Zone	Total
Non-indigenous land	72 (73.47%)	26 (26.53%)	98 (100%)
Indigenous land	26 (41.94%)	36 (58.06%)	62 (100%)
Total	98	62	160

Source: Jenn-Chuan Chen (陳振川) & Shih-Yi Hung (洪世益), *The Strategy of Community Reconstruction after a Mega Disaster: The Case of Post-Typhoon Morakot Reconstruction in Taiwan* (大規模災害家園重建策略——以莫拉克颱風重建為例), 1(1) JOURNAL OF DISASTER MANAGEMENT (災害防救科技與管理學刊) 63, 73 (2012); 160 *chu Teding Quyu yu Anquan Kanyu Diqu Zaina?* (160 處特定區域與安全堪虞地區在哪?) [Where Are the 160 Sites of Special Zones and Safety Doubtful Zones?], 921 RELIEF FOUNDATION (九

二一震災重建基金會), <http://www.taiwan921.lib.ntu.edu.tw/88pdf/A8801DB4.html> (last visited Sep. 4, 2018).

Note: A zone may be one parcel of land or several adjacent parcels of land, or a zone may include several non-contiguous parcels of land. The size of each zone varied.¹⁵

Despite their huge concerns about the land policy, many Taiwanese indigenous people affected by the typhoon relocated from the disaster areas to the newly built houses in the resettlement sites. These indigenous people had suffered great personal and property loss during the disaster, so they desperately needed assistance from the government and NGOs to recover their lives. Yet, since these indigenous people left their homes and the natural resources on their land, they have encountered legal issues, economic difficulties, cultural and religious conflicts, and other problems associated with displacement.¹⁶

The Taiwanese indigenous people who did not relocate have faced other types of problems because the government distributed most resources and attention to the relocation projects. Without adequate support from the government, indigenous people staying on their land had to spend years recovering economically and rebuilding their homes by themselves through a long, slow process.¹⁷ Some other indigenous people tried to return to their ancestral lands, yet they usually lacked support from the government and encountered legal barriers, such as regulations on environmental assessment of land use.¹⁸

¹⁵ NCKU RESEARCH AND DEVELOPMENT FOUNDATION (成大財團法人成大研究發展基金會), “MORAKOT TYPHOON ZAIQU HUADING TEDING QUYU YU ANQUAN KANYU DIQU ZHI TUDI SHIYONG GUANZHI JIZHI TANTAO” ZONGJIE BAOGAOSHU (「莫拉克颱風災區劃定特定區域與安全堪虞地區之土地使用管制機制探討」總結報告書) [FINAL REPORT: LAND USE AND REGULATION OF SPECIAL ZONES AND SAFETY DOUBTFUL ZONES AFTER TYPHOON MORAKOT IMPACT] 62 (Taipei, Construction and Planning Agency, Ministry of Interior, Taiwan, 2013), https://www.cpami.gov.tw/filesys/file/chinese/o_gov/rp1020409.pdf.

¹⁶ YUNG-LUNG CHEN & YEN-LIANG CHIU, *supra* note 9, at 32; INDEPENDENT NEWS NET OF MORAKOT (莫拉克獨立新聞網), MISSING HOMES IN PERMANENT HOUSES: STORIES ABOUT PEOPLE AND PERMANENT HOUSES, THREE YEARS SINCE THE DISASTER OF TYPHOON MORAKOT (在永久屋裡想家: 莫拉克災後三年, “永久屋”與人的故事) 180-192, 199-203, 206-214 (2013).

¹⁷ Example of Nangisalu village in Namasia District, Kaohsiung City, *see* YA-HSIANG WANG ET AL., *supra* note 14, at 120-127.

¹⁸ Example of Maya village in Namasia District, Kaohsiung Municipality, *see* YUNG-LUNG CHEN & YEN-LIANG CHIU, *supra* note 9, at 112-119.

While Taiwanese indigenous peoples might migrate because of environmental changes, in the event of Typhoon Morakot, it was less the direct impacts of natural disaster than the man-made policies that caused the indigenous people to migrate. Traditionally, the indigenous peoples had migrated for certain reasons: disease and mortality, poverty, conflict with neighboring tribes, and land infertility. Their migration was more autonomous and less a result of external forces.¹⁹ For many indigenous peoples, so-called “natural disasters” are integral parts of nature and their lives. They have lived with natural disturbances for generations and have accumulated experiences and knowledge allowing them to coexist and cope with natural variations.²⁰ However, the voices of Taiwanese indigenous peoples have been overlooked or ignored by the government in the post-disaster recovery process. The indigenous peoples did not have many opportunities to influence the disaster recovery policies, nor could they change the administrative decisions on the safety assessment and reconstruction methods of their communities.

In fact, different indigenous communities had different needs in their specific geological, ecological, historical, economic, social, and cultural contexts. The complex relationship among, and concerns about, disaster laws, indigenous peoples, and land regulation require more detailed discussion. What context and consideration made the Taiwanese government adopt a restrictive land zoning and relocation policy after a major disaster? How have governments applied state laws and official policies to influence indigenous land rights and uses? Why are the indigenous peoples more suspicious of land zoning than the non-indigenous people? What strengths and hardships regarding land have the indigenous peoples had during the post-disaster reconstruction process?

¹⁹ Taiban Sasala, *supra* note 9, at 60.

²⁰ YUNG-LUNG CHEN & YEN-LIANG CHIU, *supra* note 9, at 289.

To open up a discussion on these questions, this dissertation conducts a comprehensive review of the land rights of Taiwanese indigenous peoples, as well as in-depth studies on how their social, cultural, and economic conditions were affected by natural disasters. The dissertation asks how legal systems and disaster impacts have infringed indigenous land rights from the past to the present, especially in the 2009 event of Typhoon Morakot. The aim of this dissertation is to discover the historical causes and contemporary issues of the plights of Taiwanese indigenous peoples and the violations of their land rights in hopes of providing constructive suggestions for promoting and protecting the land rights of indigenous peoples affected by natural disasters.

1.2 Literature Review

This dissertation examines state laws and government policies in Taiwan that have influenced indigenous people's land rights in natural disaster situations, taking the post-Typhoon Morakot reconstruction laws as an example. The purpose of reviewing the history is, based on past legal practice, to discuss how laws in Taiwan and other countries may better regulate land rights and uses to mitigate and adapt to the impact of natural disasters. It is also crucial to know whether and how laws shall encourage voluntary resettlement or compulsorily relocate populations affected or threatened by natural disasters—in the current case, Taiwanese indigenous peoples—to prevent further losses from natural disaster impacts.

These issues are intertwined with two major legal subjects: disaster management law and indigenous land rights. The two themes will be discussed together in three phases: natural disaster legal management, vulnerable groups subjected to natural disasters, and indigenous land

rights in natural disaster situations. This section will start with an introduction of disaster management legal studies, with special attention to such vulnerable groups as indigenous peoples subjected to natural disasters. Indigenous peoples may suffer physical and economic losses caused by disaster impacts; moreover, their rights may be harmed by inappropriate post-disaster reconstruction laws. Thus, this section will provide principles for protecting indigenous land rights that may give guidance and suggestions on these issues.

1.2.1 Natural Disaster Legal Management

To study disaster law, the first step is to define “natural disaster” in the context of this dissertation. Natural disasters have usually been understood as calamities triggered by natural forces. Many US federal laws have taken this approach to dealing with unusual natural events closely linked to geological or meteorological systems.²¹ When defining “major disaster,” the Stafford Disaster Relief and Emergency Assistance Act lists the following natural catastrophes: hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, and drought.²² Similarly, in Taiwan, the Disaster Prevention and Protection Act (災害防救法) illustrates natural disasters with storm, flood, earthquake, drought, frost, mudslide, and volcanic eruption.²³

Yet, strictly speaking, the concept of natural disaster is a misnomer because nearly all natural disasters involve some human contribution. For example, the 2005 surge of Hurricane Katrina was within the federally designated specifications for levee systems, but mistakes in actual levee design and construction under the control and supervision of the federal government

²¹ DANIEL A. FARBER, JIM CHEN, ROBERT R.M. VERCHICK, LISA GROW SUN, *DISASTER LAW AND POLICY* 3 (Third Edition, 2015).

²² 42 U.S.C. §5122 (2).

²³ Article 2, Disaster Prevention and Protection Act (災害防救法) (2017) (Taiwan).

led to serious flooding in New Orleans.²⁴ As human activities have been causing global environmental changes that may increase the occurrence and severity of natural disasters like extreme weather events, it has become more difficult in law, policy, and practice to clearly distinguish natural disasters from human-induced disasters.²⁵

While the distinction of the causes of disasters—man-made or natural—is still commonly used and has its value in preparing for and responding to different types of disasters,²⁶ the focus of studying natural disasters has moved from the natural event itself, like its magnitude, to its impacts on and interaction with people: how human life and property are altered by the destructive event.²⁷ In a similar vein, after years of efforts to elaborate an international protocol to protect people affected by disasters, the International Law Commission adopted the “Draft Articles on the Protection of Persons in the Event of Disasters,” which does not emphasize the distinction of the causes of disasters. Instead, the preamble mentions the increasing severity and impacts of natural and human-made disasters to declare its drafting purpose, and the texts of the draft articles have a broad definition of disaster that intends to facilitate extensive protection of and assistance to people affected by disasters.²⁸ According to Article 3, “disaster” means “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby

²⁴ *Supra* note 21, DANIEL A. FARBER ET AL, at 2-3.

²⁵ Susan C. Breau & Katja L.H. Samuel, “*Introduction*” in RESEARCH HANDBOOK ON DISASTERS AND INTERNATIONAL LAW (ed. Susan C. Breau & Katja L.H. Samuel), 3 (2016); Tim Stephens, “*Disasters, International Environmental Law and the Anthropocene*” in RESEARCH HANDBOOK ON DISASTERS AND INTERNATIONAL LAW (ed. Susan C. Breau & Katja L.H. Samuel), 153 (2016).

²⁶ E Valencia-Ospina, *The Special Rapporteur’s Preliminary Report on the Protection of Persons in the Event of Disasters*, UN Doc. A/CN.4/598 (International Law Commission, May 5, 2008), 152.

²⁷ DANIEL A. FARBER ET AL, *supra* note 21, at 4.

²⁸ Tim Stephens, *supra* note 25, at 154-155.

seriously disrupting the functioning of society.”²⁹ In defining a disaster, the article describes its impacts, regardless of the causes.

Moreover, researchers have started to approach natural disasters from a social perspective. In the past, natural disasters were considered as exterior phenomena caused by great destructive powers of God or nature. The traditional understanding of natural disasters concentrated on hazards. However, in the past fifty years, disaster researchers have paid more attention to social systems unable to manage or withstand the disturbances caused by these hazards. Modern disaster research is based on a social perspective that focuses on resilience, vulnerability, and risk. Disaster is not a pure result of a force of nature but more the consequence of a lack of human resilience—unaddressed social and structural vulnerability and mismanaged or misunderstood risks.³⁰ While the physical phenomena of the acts of nature are a necessary component of disasters, calculating and planning for disaster risks must also account for human weaknesses and capabilities to prepare for, respond to, and recover from disturbances. How people can manipulate the natural environment and manage potential impacts will influence disaster risks, as well as the damages caused by disaster events.³¹

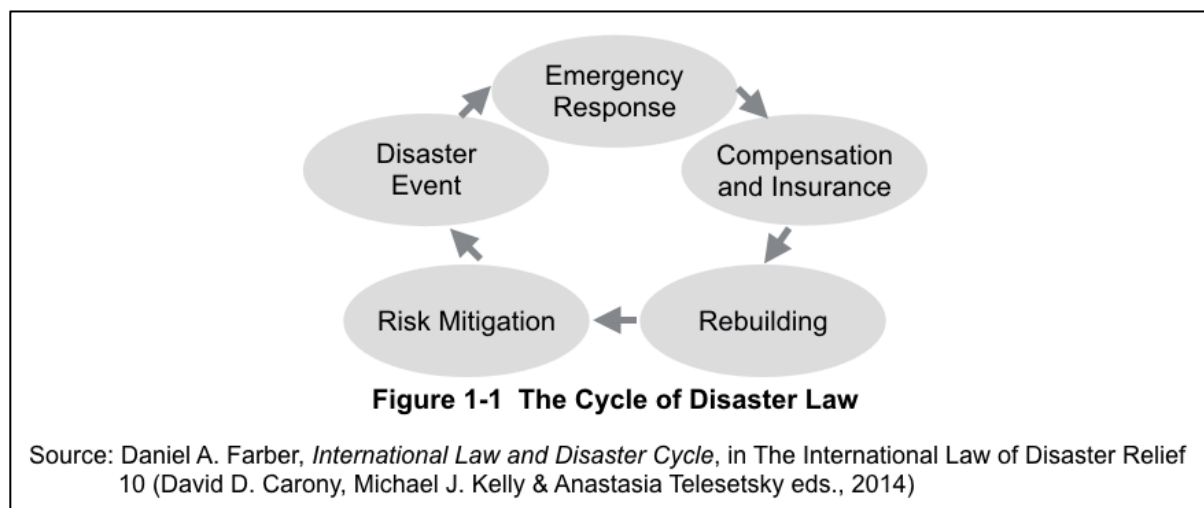
Along with these changes in understanding natural disasters, researchers have studied how to reduce and resist disaster impacts, not only through advancing natural science knowledge but also by improving social institutions and resilience. One of the most important institutions for disaster management is the legal system. Although still underdeveloped, legal scholarship on disaster management has been emerging. One of the important studies is the research on disaster

²⁹ “Draft Articles on the Protection of Persons in the Event of Disasters” had been adopted by the International Law Commission and was submitted to the General Assembly, United Nation, for recommending an elaboration of a convention that protects people in the event of disasters, UN Doc. A/CN.4/L.871 (27 May 2016), Article 3.

³⁰ Kristian Cedervall Lauta, *Human Rights and Natural Disasters*, in RESEARCH HANDBOOK ON DISASTERS AND INTERNATIONAL LAW (ed. Susan Breau & Katja Samuel), 93 (2016).

³¹ Daniel A. Farber, *International Law and Disaster Cycle*, in THE INTERNATIONAL LAW OF DISASTER RELIEF (ed. David D. Carony, Michael J. Kelly, Anastasia Telesetsky), 10 (2014).

and law by Professor Daniel Farber. He proposed the theory of the “disaster cycle” to study disaster management in context, illustrating the stages of disasters and appropriate disaster management strategies for each stage. The cycle includes mitigation, emergency response, insurance and liability compensation, and rebuilding (see Figure 1-1).³²



Farber emphasizes the disaster cycle as a continuous process and the interconnection between the risk management strategies of the disaster stages. No stage can be viewed in isolation; the disaster management strategies of the stages must be considered and designed in context.³³ Failure of risk mitigation often contributes to later disasters, turning an otherwise avoidable or manageable event into a catastrophe.³⁴ Successful disaster mitigation and preparedness—for example, proactive disaster laws and comprehensive programs before a

³² *Id.*, Daniel A. Farber, *International Law and Disaster Cycle*, in *THE INTERNATIONAL LAW OF DISASTER RELIEF*, at 9.

³³ Daniel A. Farber, *Introduction: Legal Scholarship, the Disaster Cycle, and the Fukushima Accident*, 23 *DUKE ENVIRONMENTAL LAW & POLICY FORUM* 1, 4 (2012).

³⁴ Daniel A. Farber, *supra* note 31, at 9.

disaster actually happens—may reduce the degree of disaster impacts and are more likely to lead to efficient emergency response and effective post-disaster recovery.³⁵

Similarly, in the disaster cycle, post-disaster relief and reconstruction determine the severity of the impacts on disaster victims and even the likelihood and seriousness of future disasters. The process of rebuilding may provide an opportunity to investigate and solve the root causes of disasters, such as by adjusting land use and infrastructure to reduce expected harms from disasters.³⁶ In this regard, disaster management is not a short-term job. It requires continuous efforts of long-range investigation, analysis, and improvement. Disaster legal systems must be examined across time to realize their deficiencies and find feasible reforms.

1.2.2 Vulnerable Groups under Natural Disasters: Indigenous Peoples

Natural disasters, as well as climate change and other environmental impacts, do not bring harm equally to all people. As mentioned above, natural disaster legal management needs to take both natural and human factors into account. Social systems play a crucial role not only in causing natural disasters but also in how the disasters might influence human life. From an environmental justice perspective, while government and private-sector programs have produced greenhouse gases and contributed to the climate change crisis, people of color and with low incomes are exposed to disproportionate health and environmental risks.³⁷ While the tribal communities are least responsible for causing climate change, they bear a large share of the

³⁵ *Id.*, at 18.

³⁶ *Id.*

³⁷ Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. (ENVTL. L. INST.) 10681, 10684 (2000).

negative consequences of the carbon-producing activities of the industrialized world that are primarily accountable for human-induced climate change impacts.³⁸

Socially disadvantaged groups are more likely to be harmed by natural disaster impacts. When a disaster strikes, vulnerable groups, including children, women, disabled people, elders, and indigenous peoples, are more prone to hazards and suffer greater damages. They may lack the resources and ability to prevent disaster impacts and thus face more risks and damages. The poor may be unable to reinforce their houses and have limited mobility to run away from an impending disaster. It may also be harder for disadvantaged people to recover their lives because they have already suffered great losses during the disaster but have no savings or insurance for post-disaster reconstruction.³⁹

In the example of Hurricane Katrina in the United States, studies have shown that disasters have particularly devastating impacts on racial minorities and low-income individuals and families. Given the demographic composition of Alabama, Louisiana, and Mississippi, the states mostly damaged by the hurricane, it can be understood that about one-third of people in the areas hit hardest by the hurricane were African Americans.⁴⁰ What made things worse was that the three states ranked among the poorest in the United States when Hurricane Katrina struck these areas in 2005. According to the survey conducted by the Census Bureau, Mississippi was the poorest state, Louisiana was fourth-poorest, and Alabama was eighth-poorest. The poverty rates in Mississippi (17.7%), Louisiana (17.0%), and Alabama (15.5%) were well above the national poverty rate of 12.4%. The three-year average median household annual incomes of

³⁸ Erika M. Zimmerman, *Valuing Traditional Ecological Knowledge: Incorporating the Experiences of Indigenous People into Global climate Change Policies*, 13 N.Y.U. ENVTL. L.J. 803, 807-808 (2005); Julie Koppel Maldonado, Christine Shearer, Robin Bronen, Kristina Peterson, and Heather Lazrus, *The Impact of Climate Change on Tribal Communities in the US: Displacement, Relocation, and Human Rights*, 120 CLIMATIC CHANGE 601, 602 (2013).

³⁹ DANIEL A. FARBER AND JIM CHEN, *DISASTER AND THE LAW: KATRINA AND BEYOND* 129 (2006).

⁴⁰ Arloc Sherman and Isaac Shapiro, *Essential Facts About the Victims of Hurricane Katrina*, CENTER ON BUDGET AND POLICY PRIORITIES (Sep. 19th, 2005), available at <http://www.cbpp.org/9-19-05pov.htm> (last visited April 25, 2018).

2002 to 2004 in Mississippi (\$33,659), Louisiana (\$35,523), and Alabama (\$38,111) were much lower than that of the US population (\$44,473).⁴¹

Before and during the disaster, the poor were less likely to evacuate promptly because of their limited mobility. More than half of the poor households in New Orleans did not have a car, truck, or van, according to the 2000 census.⁴² Thirty-five percent of the black households in New Orleans—and 59% of the poor black households—did not own a vehicle. In contrast, only 15% of the white non-Hispanic households in the area lacked a vehicle.⁴³ Much of New Orleans' white population had departed before the storm came, and the remainder lived in dry areas and could more easily escape if the situation became perilous.⁴⁴ After the flood destroyed these places, the poor were least able to recover their lives because they lacked the money and resources to repair their houses or move to safer places.

Race/ethnicity and poverty, along with age and gender, are all significant factors that influence a person's resilience to natural disaster impacts. The societal factors may operate separately or together.⁴⁵ Indigenous peoples are ethnic minority groups in Taiwan, and they have been economically disadvantaged. In the 1990s, indigenous people had only about half the average income of the general Taiwanese population.⁴⁶ In 2006, the annual income of indigenous households was 47% of the average annual household income in Taiwan, and while it slightly

⁴¹ DeNavas-Walt, Carmen, Bernadette D. Proctor, and Cheryl Hill Lee, U.S. Census Bureau, Current Population Reports, P60-229, *Income, Poverty, and Health Insurance Coverage in the United States: 2004*, 23, 25 (2005), <https://www2.census.gov/library/publications/2005/demo/p60-229/p60-229.pdf>.

⁴² Arloc Sherman and Isaac Shapiro, *supra* note 40.

⁴³ *Id.*

⁴⁴ JOHN MCOUAID AND MARK SCHLEIFSTEIN, PATH OF DECONSTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS 300 (2006).

⁴⁵ Daniel A. Farber, *Disaster Law and Inequality*, 25 LAW & INEQUALITY 297, 302 (2007).

⁴⁶ Mei-Fen Chen (陳美芬), *The Factors of Poverty for Taiwan Aborigines* (台灣原住民社會問題之探討—貧窮問題的思考), 45 AGRICULTURAL EXTENSION ANTHOLOGY (農業推廣文彙) 235, 237 (2001).

increased to 61% in 2014, it was still much lower than the general population.⁴⁷ It is obvious that Taiwanese indigenous people had less capital to prepare for, respond to, and recover from disaster impacts. In addition, social work studies in Taiwan have indicated that an indigenous woman encountered more obstacles to recovering from disaster impacts because of her dual identities as female and indigenous. The indigenous woman faced discrimination and hostility from the mainstream and had difficulty finding a new job when she resettled. At the same time, in her family, she bore the burden of doing housework and taking caring of her children.⁴⁸

Even more than other vulnerable groups, indigenous peoples are especially influenced by disaster impacts and environmental changes due to their close relationship with nature. Tribal communities have been highly dependent on water, forests, plants, animals, and other natural resources. In addition to providing sustenance, natural resources and the land serve important roles in indigenous culture, as well as their economy, health, and other aspects of life.⁴⁹ Once natural disasters affect the environment, the population and distribution of all living things are greatly altered. Disaster impacts, as well as inappropriate government and legal responses to

⁴⁷ COUNCIL OF INDIGENOUS PEOPLES, 2006 ECONOMIC STATUS SURVEY OF INDIGENOUS PEOPLES IN TAIWAN (2007), available at:

<https://www.apc.gov.tw/portal/getfile?source=79ADDD9195DB0E52610217BBF0B058FA9DAB2A97BBE1DD0E0C44C38ED9E0AD283AAC4AF94A196D3D4DDF85752D5122BB1C09121B3612FD83B91B9DF71659F0C&filename=5DB821D38D0AC1F986638084F1FEC25B7455FECE356BA19145FB07016008F5525F893BA76524D685> (last visited: February 27, 2018); COUNCIL OF INDIGENOUS PEOPLES, 2014 ECONOMIC STATUS SURVEY OF INDIGENOUS PEOPLES IN TAIWAN (2015), available at: <https://www.apc.gov.tw/portal/getfile?source=2D838540F5D6F659FAFB9859EF31AC3B381A272F479D65D98D902DFAAFC2E154084F20DD5F0F37964575BA3D2CADEAE87E08C4C4F83F6C7D3B91B9DF71659F0C&filename=D0572478D51EFA60DD66604754BE10B807F619060818CEA0D0636733C6861689> (last visited Feb. 27, 2018).

⁴⁸ See Chin-ju Lin (林津如), *Yanggang Caineng Jiuyuan? Zainan Lunshu zhong (Bei) Jinsheng de Nuxing Guandian (陽剛才能救援? 災難論述中(被)噤聲的女性觀點) [Only Manliness Can Rescue? The Female Perspective Silenced in the Discourse about Disasters]*, 51 GENDER EQUITY EDUCATION QUARTERLY (性別平等教育季刊) 16, 17 (2010).

⁴⁹ See Garrit Voggesser, Kathy Lynn, John Daigle, Frank K. Lake, and Darren Ranco, *Cultural Impacts to Tribes from Climate Change Influences on Forests*, 120 CLIMATIC CHANGE 615, 616 (2013).

disasters, are much more likely to threaten the livelihoods and cultures of indigenous peoples.⁵⁰ For example, drought, wildfires, and storms would affect animal and plant species in the forest ecosystems near indigenous communities. The disruption of the forest ecosystem in turn would disrupt its function and goods, such as fruit, timber, forage, and herbs.⁵¹

For American Indians and Alaska Natives in the United States, water resource and right are crucial in their lives and traditions. Alteration of water resources is likely to impact the rights associated with tribal communities, including fishing, hunting, and gathering rights. Precipitation changes and more frequent extreme weather events may impact water supply and infrastructure, influencing how the tribes negotiate with other stakeholders to quantify tribal water rights.⁵² In addition, the treaty-protected rights of Indian tribes to fish, hunt, and gather are typically linked to their reservation sites and customary areas of public land. However, due to climatic variability and environmental changes, such as increased temperatures of air and water, aquatic species like salmon may have different population sizes, movement patterns, and geographical distributions that mismatch the tribes' locations and access to their traditional practices.⁵³

While indigenous peoples are closely connected to the natural environment, they have been politically marginalized and excluded from the decision-making process about disaster management and land regulation. The dominant groups own most resources and decide important public policies; in contrast, racial minorities have little power or social capital to influence public policy on disaster management and land regulation. Minority groups often

⁵⁰ See Frances Seymour, *Forests, Climate Change and Human Rights: Managing Risks and Trade-offs* in HUMAN RIGHTS AND CLIMATE CHANGE (Stephen Humphreys ed.), 216-217 (2009).

⁵¹ Garrit Voggesser et al., *supra* note 49; *id.* at 216.

⁵² See K. Cozzetto, K. Chief, K. Dittmer, M. Brubaker, R. Gough, K. Souza, F. Ettawageshik, S. Wotkyns, S. Opitz-Stapleton, S. Duren, and P. Chavan, *Climate Change Impacts on the Water Resources of American Indians and Alaska Natives in the U.S.*, 120 CLIMATIC CHANGE 569, 573 (2013).

⁵³ See *id.* at 576-577.

cannot participate in the discussion and decision-making process to express their opinions and defend their interests.⁵⁴

To protect the interests of vulnerable groups, international norms have developed to emphasize that governments should provide special attention and assistance to vulnerable groups such as indigenous peoples. For disaster risk reduction, governments shall broadly include indigenous peoples and other stakeholders—women, children, people with disabilities, poor people, and migrants—in designing and implementing disaster mitigation and adaptation policies and plans.⁵⁵ For specific issues like displacement, in 1998, the United Nations issued the “Guiding Principles on Internal Displacement” to address internal displacement problems caused by natural disasters and other reasons. To protect the rights of internally displaced persons, especially vulnerable groups, Principle 18(3) requires that “[s]pecial efforts should be made to ensure the full participation of women in the planning and distribution of . . . basic supplies.” Principle 28(2) stipulates that “[s]pecial efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.” United Nations resolutions also declared that when natural disasters happen, the government of the affected country, those of foreign countries, and NGOs should especially help and consult vulnerable groups.⁵⁶

1.2.3 Indigenous Land Rights in Natural Disaster Situations

According to disaster management studies, removal from risky areas is a cost-effective strategy to mitigate natural disaster risks and impacts. As the population has grown dramatically

⁵⁴ Daniel A. Farber, *Disaster Law and Inequality*, 25 LAW & INEQUALITY 297, 308 (2007).

⁵⁵ *Sendai Framework for Disaster Risk Reduction 2015–2030*, ¶ 7, A/RES/69/283 (2015).

⁵⁶ See *Protection of and Assistance to Internally Displaced Persons*, G.A. Res 66/165, ¶ 9, U.N. Doc. A/RES/66/165 (Dec. 19, 2011); Human Rights Council, *Human Rights of Internally Displaced Persons*, ¶ 8, A/HRC/20/L.14 (2012).

around the world, people have reclaimed much disaster-prone land, such as coastal areas subject to sea level rise and erosion, floodplains and riversides, and land susceptible to wildfires.⁵⁷ It is suggested to avoid development projects and to encourage the resettlement of communities that have been located in flood-prone and ecologically sensitive areas.⁵⁸ To achieve this goal, legislators may set land use regulations and building codes. Governments may relocate communities and acquire land in the hazard-prone areas through land-taking. The seized land will be limited to uses compatible with the hazard risks of that land. For example, land in the floodplains may be appropriate for picnic shelters and ball fields but not for businesses and private homes.⁵⁹

However, land acquisition and community relocation may not be a general and straightforward solution for every case, especially for indigenous peoples. Acquisition and relocation affect not only land title but also other social, economic, and cultural aspects of human life. For indigenous peoples, land has been sacred in their cultures and important to their livelihoods. Therefore, if unavoidable, land acquisition and relocation should be done in a way that guarantees the procedural and substantial rights of indigenous peoples to their land, for instance, in accordance with international and domestic laws that protect indigenous land rights. Yet, before jumping into the rules and principles regarding indigenous land rights developed in contemporary times, the story should be traced back to the beginning of how indigenous peoples lost their land because of modern state laws.

⁵⁷ See DANIEL A. FARBER ET AL, *supra* note 21, at 26-28, 47.

⁵⁸ Association of Floodplain Managers, FLOODPLAIN MANAGEMENT 2050, A REPORT OF THE 2007 ASSEMBLY OF THE GILBERT F. WHITE NATIONAL FLOOD POLICY FORUM, 33 (2007).

⁵⁹ Anna K. Schwab and David J. Brower, “Increasing Resilience to Natural Hazards: Obstacles and Opportunities for Local Governments under the Disaster Mitigation Act of 2000” in LOSING GROUND: A NATION ON EDGE (John Nolon and Daniel Rodriguez ed.), 288 (2007).

In past centuries, European countries adopted modern legal theories and colonial international laws to deny the sovereignty of indigenous peoples and to encroach on aboriginal lands. One of the most influential legal theories that shaped indigenous land rights was the doctrine of discovery and conquest. The theory of discovery can be traced back to the late fifteenth century, when the pope recognized Spain's ownership of the islands and mainland in Latin America found by Columbus.⁶⁰ Discovery was also used by other European nations as a justification for acquiring parcels of land occupied by the Indians in North America.⁶¹

Following the complicated interaction between the settlers and the Indians, in the nineteenth century, the US Supreme Court consolidated the legal principle regulating Indian lands in the landmark decision *Johnson v. McIntosh* (1823). In this case, Supreme Court Justice John Marshall set forth the doctrine of discovery to deny the complete sovereignty and legal title of American Indians to the land they had occupied. According to the decision, although the American Indians were "rightful occupants of the soil, with a legal as well as just claim to retain possession of it, . . . their power to dispose of the soil at their own will"⁶² was denied by the principle that "discovery gave exclusive title to those who made it."⁶³ Through discovery, the European nations asserted legal ownership of native lands, subject to indigenous rights of use and occupancy.⁶⁴ The American Indians henceforward were recognized as having the rights of use of their land, but transfers of Indian land to third parties without approval by the colonizing nation was generally prohibited. In other words, transfers from indigenous nations to private parties would not be recognized by the colonizing nation unless formal ratification was given.

⁶⁰ ROBERT T. ANDERSON, BETHANY R. BERGER, SARAH KRAKOFF, PHILIP P. FRICKEY, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 17 (Third Edition, 2015).

⁶¹ *Id.* 22

⁶² *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823).

⁶³ *Id.*

⁶⁴ *Id.*, at 587.

In other parts of the world, the doctrine of discovery and similar legal theories were adopted to frame the conception and rationale of indigenous land rights. In Australia, the British government adopted an extreme version of the discovery doctrine, *terra nullius*, that Aborigines had never possessed proprietary rights to the land they had lived on before the British arrived. The British sovereign had “discovered” the land and thus acquired complete and exclusive rights to all land in Australia. Any transaction of land with the Aborigines would be void and had no legal effects without the consent of the Crown.⁶⁵ Even in Asia, the legal concept of *terra nullius* was adopted by the Japanese Empire for its colonies, including Taiwan. The Japanese government regarded all aboriginal land in Taiwan as nobody’s land, making such land state-owned property.⁶⁶

While the traditional international law largely facilitated colonization of the indigenous peoples and expropriation of their land, modern international laws have gradually developed to recognize and promote indigenous land rights. Indigenous populations have claimed their rights through activism, legal advocacy, persistent politics, and resistance movements. They have strived for collective and individual rights of indigenous peoples in both international and domestic realms.⁶⁷ In 1982, the United Nations established the Working Group on Indigenous Populations, which articulated the rights claims of indigenous peoples and consolidated the claims into a draft of rights declaration. The draft was submitted to the UN Commission on Human Rights for discussion and revision, and in 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples to recognize the universal rights of indigenous

⁶⁵ Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 515-518 (2011).

⁶⁶ See Tay-Sheng Wang (王泰升), *Indigenous Peoples in the Legal History of Taiwan: Being a Special Ethnic Group, Territory and Legal Culture* (台灣法律史上的原住民族：作為特殊的人群、地域與法文化), 44:4 NTU LAW JOURNAL (臺大法學論叢) 1639, 1663-1664 (2015).

⁶⁷ See ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FROCKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 891 (Second Edition, 2010).

populations.⁶⁸ Although the Declaration is a soft international law that has no binding legal effect on a nation unless that nation adopts all or part of the Declaration as domestic law, many rights recognized by the Declaration are arguably within the realms of generally accepted customs and binding as international customary law. For example, the provisions supporting indigenous self-determination and land rights reflect customary norms and practices.⁶⁹

Indigenous land rights are one of the fundamental rights recognized by the Declaration on the Rights of Indigenous Peoples. Indigenous peoples have suffered from the historical injustices of colonization and dispossession, so it is urgent and necessary to respect and promote the rights inherent in indigenous cultures and traditions, “especially their rights to their lands, territories and resources.”⁷⁰ To highlight and protect such rights, the Declaration laid down the principles regarding indigenous land rights. The Declaration opposes forced migration of indigenous communities, requesting that “no relocation shall take place without the *free, prior and informed consent* of the indigenous peoples concerned and after agreement on *just and fair compensation* and, where possible, *with the option of return* [emphasis added].”⁷¹ In addition, indigenous peoples shall have the rights to maintain and strengthen their distinctive spiritual relationship with the parcels of land that they have traditionally owned, occupied, or used.⁷² Indigenous peoples are entitled to control and develop their traditional land and resource.⁷³ If there is any controversy or policy on indigenous land rights, governments shall establish and implement a fair, open, transparent decision-making process in which indigenous peoples can participate and voice their opinions.⁷⁴

⁶⁸ See *id.* at 892.

⁶⁹ See *id.* at 903.

⁷⁰ Declaration on the Rights of Indigenous Peoples (2007).

⁷¹ Article 10, Declaration on the Rights of Indigenous Peoples (2007).

⁷² Article 25, Declaration on the Rights of Indigenous Peoples (2007).

⁷³ Article 26, Declaration on the Rights of Indigenous Peoples (2007).

⁷⁴ Article 27, Declaration on the Rights of Indigenous Peoples (2007).

Consulting indigenous peoples not only protects their land rights but also may benefit all people who have been affected or may be threatened by natural disasters. As mentioned above, indigenous peoples have heavy dependence on and close relationships with nature. Most of them have, on the one hand, depended directly on natural resources and been especially impacted by drastic environmental changes. But on the other hand, indigenous peoples have an intimate understanding and a keen awareness of their local environments and their changes. The indigenous experience and knowledge of nature may contribute to better management of natural disaster impacts. Current studies on traditional ecological knowledge have demonstrated that, aside from Western scientific knowledge, indigenous peoples have accumulated insightful understandings of their local environments and natural resources.⁷⁵ Thus, if how the Taiwanese indigenous peoples deal with natural disasters is carefully studied, their experiences and perspectives may be incorporated into the legal system to co-manage natural disaster impacts and improve land regulations in Taiwan and elsewhere.

1.3 Research Methods: Historical Approach and Qualitative Study

While Taiwan has been frequently struck by natural disasters such as typhoons and earthquakes, disaster management laws—especially those for legal protection of people affected by natural disasters—have been underdeveloped in Taiwan. Legal studies in Taiwan have focused on a limited scope of two themes. First, legal scholars have studied the presidential emergency powers, discussing the status, scope, function, and limitation of emergency decrees issued by the presidents in response to major disasters and other national crises. Generally, the

⁷⁵ See generally Fikret Berkes, *SACRED ECOLOGY* (Second Edition, 2008).

emergency decree issued by President Lee in response to the September 21 Earthquake in 1999 was thought of as constitutional, but the provisions of this decree too broadly exempted the government from a variety of regulations ranging from immediate disaster relief to long-term recovery.⁷⁶ The exempted regulations included laws regarding the government's budget (Article 1), public financing (Article 2), state-owned property (Article 3), land use and preservation (Articles 4 and 5), military operation (Articles 8 and 10), and criminal justice (Article 11). Because the emergency decree greatly modified the existing legal system, the decree should be closely examined and approved by legislators.⁷⁷ Moreover, the provisions of the emergency decree were subject to judicial review.⁷⁸

Second, legal scholars have criticized the fragmentation of government disaster management organizations and suggested a single, powerful agency for efficient disaster rescue and relief service.⁷⁹ The studies intended to increase the speed and efficiency of post-disaster

⁷⁶ Tzong-Li Hsu (許宗力), *Cong Jiu Er Yi Zhenzai Kan Jinji Mingling Xiangguan Wenti* (從九二一震災看緊急命令相關問題) [*Discussing Issues of Emergency Decree Based on the 9/21 Earthquake Disaster*], 6 TAIWAN LAW JOURNAL (台灣本土法學) 85, 86 (2000); Chueh-An Yen (顏厥安), *Jinji Mingling de Xingzhi: Yige Chubu de Kanfa* (緊急命令的性質: 一個初步的看法) [*The Nature of Emergency Order: A Preliminary Thought*], 6 TAIWAN LAW JOURNAL (台灣本土法學) 92, 94-96 (2000); Shing-I Liu (劉幸義), *You Falixiao Jiaodu Lun Jinji Mingling Zhidu Benjuan de Hefaxing Wenti* (由法理學角度論「緊急命令制度」本身的合法性問題) [*Analyzing the Legality of Emergency Decree System from A Jurisprudence Perspective*], 56 TAIWAN LAW REVIEW (月旦法學雜誌) 18, 23 (2000).

⁷⁷ See Tzong-Li Hsu, *supra* note 76, at 89-90; Jung-Jie Huang (黃俊杰), *Jiu Er Wu Jinji Mingling zhi Yingxiang Pinggu* (九二五緊急命令之影響評估) [*Evaluating the Effects of 925 Emergency Decree*], 5 TAIWAN LAW JOURNAL (台灣本土法學) 203, 208-209 (1999); Hwang Giin-tarng (黃錦堂), *Jinji Mingling Fazhizhua Wenti zhi Yanjiu* (緊急命令法制化問題之研究) [*Researching Issues of Legalizing Emergency Decree*], 8 TAIWAN NEW CENTURY FOUNDATION JOURNAL (新世紀智庫論壇) 4, 8-9 (1999); Chien-Liang Lee (李建良), *Qianxi Jinji Mingling zhi Xianfa Zhengyi: Cong Jiu Er Wu Jinji Mingling Tanqi* (淺析緊急命令之憲法爭議: 從「九二五緊急命令」談起) [*Brief Analysis of the Constitutional Controversies Regarding Emergency Decree: Discussion on the 925 Emergency Decree*], 6 TAIWAN LAW JOURNAL (台灣本土法學) 97, 100-101 (2000).

⁷⁸ Tzong-Li Hsu, *supra* note 77, at 91.

⁷⁹ See generally Kuang-Min Chang (章光明), Shiouh-Guang Wu (吳秀光), Wen-Ling Hong (洪文玲), and Tzu-Jeng Deng (鄧子正), *ZHONGYANG YU DIFANG ZAIHAI FANGJIU ZUZHI YU ZHINENG ZHI YANJIU* (中央與地方災害防救組織與職能之研究) [STUDY ON THE CENTRAL AND LOCAL DISASTER MANAGEMENT ORGANIZATION AND ITS FUNCTIONS (2000)]; Ban-Jwu Shih (施邦築), *Review and Suggestion of Taiwan's Disaster Prevention and Response System from the Aspect of US and Japan Experience* (從美、日災害防救體系之角度檢視我國災害防救體系), 29(6) RESEARCH AND EVALUATION BIMONTHLY (研考雙月刊) 57 (2005); Chia-yu Chou (周佳宥), *Taiwan Zaihai*

reconstruction processes, but they failed to cover legal difficulties that Taiwanese people have faced during and after disaster impacts, such as compensation for personal injury and property damages during disasters. Few scholars have highlighted the fundamental rights of people affected by natural disasters, for example, the cultural rights of indigenous peoples recognized by international conventions.⁸⁰ These brief discussions could not comprehensively and deeply analyze problems that disaster impacts and reconstruction laws together have brought to Taiwanese indigenous peoples.

As previous scholarship has mostly been limited to theoretical debates on disaster laws in modern-day Taiwan, this dissertation discusses the land rights of Taiwanese indigenous peoples affected by natural disasters through a historical approach and a qualitative research method. As discussed above, disaster management cannot be seen as a short-term event independent of the past and future. Instead, a disaster legal system must be examined and analyzed across time to understand its development and deficiencies. Moreover, indigenous peoples have gone through a long history of losing their lands. Thus, to critically consider the land rights of Taiwanese indigenous peoples, especially in natural disaster situations, this dissertation aims to study the land rights issues by thoroughly reviewing the history of indigenous land rights in Taiwan and fully discussing the issues surrounding land zoning and relocation in the 2009 event of Typhoon Morakot.

Such discussion from a fundamental point of view asks: How have Taiwanese indigenous peoples managed their lands and coped with natural disturbances? From a legal history perspective, have the successive authorities in Taiwan applied state power and laws to impact the

Fangjiu Fa zhi Guoqu, Xianzai yu Weilai (台灣災害防救法之過去、現在與未來) [*The Past, Present, and Future of the Disaster Prevention and Protection Act in Taiwan*], 62(10) THE LAW MONTHLY (法令月刊) 103 (2011).

⁸⁰ See generally Awi Mona, *supra* note 2; Awi Mona (蔡志偉), *Post-Morakot Reconstruction and Human Rights Protection: An Indigenous Culture-Based Reflection* (災後重建與人權保障—以原住民族文化為本的思考), 6(3) TAIWAN FOUNDATION FOR DEMOCRACY (臺灣民主季刊) 179 (2009).

land ownership and culture of the Taiwanese indigenous peoples, and if so, how? After the indigenous land systems were altered by the government, and when natural disasters struck, what legal issues have Taiwanese indigenous peoples encountered? More importantly, if there are problems with the existing legal system and practice in Taiwan, what are their causes and solutions? The purpose of this dissertation is to ascertain the historical facts, explore the legal issues—both theoretical and empirical—and provide reflection and suggestions.

Only by reviewing the peculiar historical, cultural, and legal conditions of Taiwan can this dissertation build a solid foundation on which to consider other legal systems and practices regarding land—for example, international laws about internally displaced persons and the experiences of indigenous people in other countries, such as American Indians—to propose suggestions for better protection of the land rights of Taiwanese indigenous peoples. It is worth noting that this comparative legal study does not necessarily mean that Taiwan should endorse or replicate the exact same laws from other countries or international organizations. While comparative legal study does provide critical information and inspiration, Taiwan must consider legal transplantation and reform according to its particular historical, cultural, and legal contexts.

The dissertation also includes a case study of Namasia District in Kaohsiung, Taiwan, to investigate the legal practice of the post-Typhoon Morakot reconstruction laws and the perspectives of Taiwanese indigenous peoples on the recovery and relocation processes. Namasia District is located in southern Taiwan and has a demographic composition of mostly indigenous peoples—including people of the Bunun Tribe and of the Kanakanavu Tribe—and a few non-indigenous people. The three villages of Namasia District were seriously damaged by floods and mudslides caused by the heavy rainfall of Typhoon Morakot in August 2009. Since the disaster,

the residents of Namasia District have dealt with a long reconstruction process of land zoning and relocation.

To understand the experiences and perspectives of the affected people, public officials, NGO staff, in August and September 2017, I interviewed a total of sixteen people involved in the post-Typhoon Morakot reconstruction. The interviewees were thirteen indigenous people in Namasia District—including both a group living in the mountain villages and a group already relocated to resettlement sites—two former Reconstruction Council officials, and a volunteer at the Tzu Chi Foundation. During the interviews, I asked the interviewees questions about land zoning, the relocation project, disaster mitigation and adaptation, and indigenous lands. After Typhoon Morakot damaged the houses and infrastructure in Namasia District, local indigenous people could relocate, rebuild on the same spots, or return to the homelands of their ancestors. Their coping strategies might follow or contradict the official reconstruction policies and laws. Based on the interview results, this dissertation demonstrates and analyzes the thoughts and actions of the interviewees of different backgrounds, positions, and ethnic groups.

Based on the in-depth discussion of both historical and contemporary issues of the land rights of Taiwanese indigenous peoples and on the experiences described in my interviews, this dissertation aims to find a legal framework for better protection of the safety, dignity, land rights, and cultures of Taiwanese indigenous peoples, even in extreme natural disaster situations. The proposed hypothesis is that Taiwan should seriously consider the specific historical context of land rights in this island country and increase the consultation and participation of the affected people, especially vulnerable groups such as Taiwanese indigenous peoples, in the process of making and enforcing disaster prevention and reconstruction laws and procedures on the affected land. By integrating the knowledge and practices of the affected Taiwanese indigenous people,

the reconstruction laws after natural disasters are more likely to protect both their safety and their cultures. All in all, for the land rights of Taiwanese indigenous peoples in the aftermath of a natural disaster, the goal of this dissertation is to discuss the contemporary and historical issues comprehensively and to propose possible legal reforms that are historically based, culturally sensitive, and legally sound.

1.4 Structure of Dissertation

The dissertation consists of six chapters (See Table 1-2). Chapter One introduces the background, literature review, research question and method, and structure of this dissertation. Chapters Two to Five substantially discuss issues about indigenous land rights and the disaster management legal system in Taiwan. Finally, Chapter Six summarizes the previous chapters and, based on the research results, provides constructive suggestions for better legal protection of the land rights of Taiwanese indigenous peoples affected by natural disasters.

Table 1-2: Structure of Dissertation

Chapter 1	Introduction
Chapter 2	Taiwanese Indigenous Peoples and Their Land Rights
Chapter 3	Development of Disaster Management Law in Taiwan
Chapter 4	Reconstruction Laws after Typhoon Morakot
Chapter 5	Indigenous Adaptive Strategies to Disaster Effects and Reconstruction Laws
Chapter 6	Conclusion

Historical Causes and Development: Chapters 2 and 3

Chapters Two and Three respectively discuss the remote and proximate causes of contemporary controversies concerning Typhoon Morakot. Chapter Two examines the legal history of Taiwanese indigenous peoples and their land in the past four hundred years, and Chapter Three demonstrates the development of disaster laws in modern Taiwanese history. These two chapters about historical factors lay the foundation for discussing the contemporary issues about Typhoon Morakot in Chapters Four and Five because the tragedy of Typhoon Morakot was not an independent event but the consequence of a series of problematic laws and policies. After Typhoon Morakot, the general public and mass media blamed Taiwanese indigenous peoples for triggering floods and mudslides in their homelands. However, a careful study of the history of land-related legal systems and disaster-management legal institutions in Taiwan may show that past state laws and policies also contributed to the natural disasters.

Chapter Two examines the history of Taiwanese indigenous land culture and rights in the periods of different authorities. Specifically, Chapter Two consists of two sections. The first section introduces the indigenous peoples in Taiwan, and the second section examines how indigenous land rights have been affected by state laws and government policies under different regimes. The second section consists of five time periods: (1) rule of Dutch and rule of Zheng Regime, (2) indigenous land in the Qing empire era (1683–1895), (3) Japanese-ruled period (1895–1945), (4) Republic of China assimilation and relocation Policy (1945–1987), and (5) indigenous movements and reclaiming land rights (1987–present). The history of indigenous land rights' retreat and advance is helpful to understand the land rights issues in the post-Typhoon Morakot reconstruction in contemporary Taiwan.

In addition to the successive legal systems that affected indigenous land rights, the slow progress of disaster management laws in Taiwan aggravated the problems regarding the interests of Taiwanese indigenous peoples when natural disasters struck their lands. Located at the Pacific Rim and low and middle latitudes, Taiwan has been frequently struck by earthquakes and typhoons.⁸¹ While natural disasters have frequently struck Taiwan, disaster laws in Taiwan have not been well enough developed to sufficiently protect the affected people. Thus, Chapter Three discusses the development of disaster laws in Taiwan to see what disaster management systems have existed in Taiwan and how the government has managed disaster impacts under such legal institutions. The chapter consists of two sections, representing the two stages of the development of disaster laws in Taiwan: executive authority to respond to natural disasters (1945–1999) and legislation on disaster management (2000–present).

Contemporary Issues of Post-disaster Reconstruction: Chapters 4 and 5

Based on the history of indigenous land rights and the disaster management laws reviewed in Chapters Two and Three, Chapters Four and Five discuss the specific issues regarding indigenous land rights in the event of a natural disaster in contemporary Taiwan. These two chapters focus on the post-disaster reconstruction laws and policies in the aftermath of Typhoon Morakot in 2009, examining the legal system and its implementation in Taiwanese society, especially the application of the reconstruction laws and relocation projects to the indigenous people affected by the disaster.

Chapter Four discusses the reconstruction laws and policies after Typhoon Morakot and subsequent legal issues in the disaster recovery process. This chapter reveals how indigenous

⁸¹ See Central Weather Bureau (中央氣象局), QUESTIONS AND ANSWERS ABOUT NATURAL DISASTERS (天然災害災防問答集), (2015); Central Weather Bureau (中央氣象局): <http://www.cwb.gov.tw> (last visited Nov. 9, 2018).

land rights were impacted by not only natural disasters but also government construction policies and laws after Typhoon Morakot, especially regulations of land zoning and relocation. This chapter uses official reports, newspapers, publications, judicial decisions, and detailed records on the online database established by the Typhoon Morakot Post-disaster Reconstruction Council to analyze the disaster recovery laws and legal practice. These sources' main dispute was whether designating the Special Zones, as well as the Safety Doubtful Zones, was legitimate and reasonable for post-disaster reconstruction. In addition, the Taiwanese government and NGOs cooperated to carry out relocation projects to assist the affected people. While the relocation projects provided resettlement housing for the typhoon victims, this chapter points out that a presumed, simplified measure of relocation could not address all cases of different individuals and disaster areas.

Chapter Five takes Namasia District as an example to illustrate how Taiwanese indigenous people have adapted to the environment affected by Typhoon Morakot and responded to the post-disaster reconstruction laws and policies. After Namasia District was damaged by flooding and mudslides due to Typhoon Morakot, the indigenous communities were affected by the special reconstruction laws, land regulations, and the relocation policy. This chapter analyzes the experiences and insights of sixteen interviewees, including indigenous people in Namasia District, former Reconstruction Council officials, and a volunteer at the Tzu Chi Foundation, the organization that established the Da'ai Community for resettling Namasia's people. This chapter shows not only hardships but also adaptive strategies that the indigenous peoples adopted to cope with natural impacts in their unique social, cultural, and environmental contexts. By revealing the gap between the law and practice in this case study, the chapter intends to contemplate the

current disaster management legal framework in Taiwan and to provide suggestions for better protection of indigenous land rights in natural disaster situations.

Chapter 2 Taiwanese Indigenous Peoples and Their Land Rights

Chapter Two discusses Taiwanese indigenous peoples and the history of indigenous land rights, as influenced by state laws and government policies since the seventeenth century. The chapter first briefly introduces the indigenous peoples in Taiwan, with special attention to their land management and migration. The second section illustrates how the Taiwanese indigenous peoples have lost most of their lands and strived to reclaim them in recent years. Based on which authorities ruled Taiwan and their policies on indigenous peoples, Taiwan's history of indigenous land rights is divided into five periods: (1) rule of the Dutch (1622–1662) and of the Zheng regime (1662–1683), (2) the Qing empire era (1683–1895), (3) the Japanese-ruled period (1895–1945), (4) the Republic of China's assimilation and relocation policy (1945–1987), and (5) the indigenous movement and reclaiming land rights (1987–present).

The legal history not only focuses on laws that regulated parcels of land occupied by indigenous peoples but also examines official relocation policy under Japanese rule and the Republic of China's rule, which have influenced indigenous land use and management. When indigenous people were relocated from their homelands, they could hardly maintain their traditional practices, livelihoods, and relationships with nature. As a result, state laws and policies might have changed both indigenous land titles and the situations of the indigenous peoples when they faced natural variations and their impacts.

2.1 Indigenous Peoples in Taiwan

2.1.1 Categories of Indigenous Tribes

Indigenous peoples in Taiwan are Austronesians who have lived and developed on this island for more than six thousand years before Europeans and Han Chinese began colonizing Taiwan in the seventeenth century.¹ Linguists and archaeologists have different hypotheses that these Austronesian people might originate from southern China, southeast Asia, or Western New Guinea.² Nevertheless, it has been generally accepted that Taiwan may be the origin of Austronesian languages because of the greatest diversity in indigenous languages in Taiwan.³

The tribes in Taiwan are usually classified into two categories depending on their environment: mountain indigenous peoples (高山原住民族) and plain indigenous peoples (平埔原住民族). The mountain indigenous peoples were concentrated in the mountainous areas in central and southern Taiwan before they migrated and spread widely to other parts of the island since two to three hundred years ago.⁴ The plain indigenous peoples lived mostly in the western coastal plains, though a few tribes lived in northern and southern Taiwan.⁵ Yet, anthropologists and governments have adopted different taxonomies regarding the Taiwanese indigenous tribes based on the physical features, customs, and languages of the ethnic groups.⁶

Currently, the Republic of China (hereafter ROC) government has recognized sixteen indigenous tribes in Taiwan: Amis, Atayal, Bunun, Hla'alua, Kanakanavu, Kavalan, Paiwan,

¹ See REN-GUI LI (李壬癸), *TAIWAN NANDAO MINZU DE ZUCYUN YU CHANSI* (台灣南島民族的族群與遷徙) [Ethnic Groups and Migration of the Austronesians in Taiwan] 113 (1997).

² See *id.*, at 20-51.

³ See Jared M. Diamond, *Taiwan's Gift to the World*, 403 *NATURE* 710 (2000).

⁴ See REN-GUI LI, *supra* note 1, at 58, 60.

⁵ See *Id.* at 62.

⁶ See generally 馬淵東一 (Tōichi Mabuchi), *Retrospect on the Classification of the Formosan Aborigines* (高砂族の分類—学史的回顾), 18:1-2 *Minzokugaku kenkū* (民族学研究) [(THE JAPANESE JOURNAL OF ETHNOLOGY) 1 (1954)].

Puyuma, Rukai, Saisiyat, Sakizaya, Sediq, Tao (Yami), Thao, Truku, and Tsou (See Figure 2-1).

Of all the recognized indigenous tribes, as of September 2018, a total of 564,120 people were registered as having indigenous identity in Taiwan, constituting 2.39% of the general population.⁷ The 2018 census shows that, currently, 46.85% of the indigenous people reside in urban areas, 23.59% in plain rural areas, and 29.56% in mountain rural areas.⁸

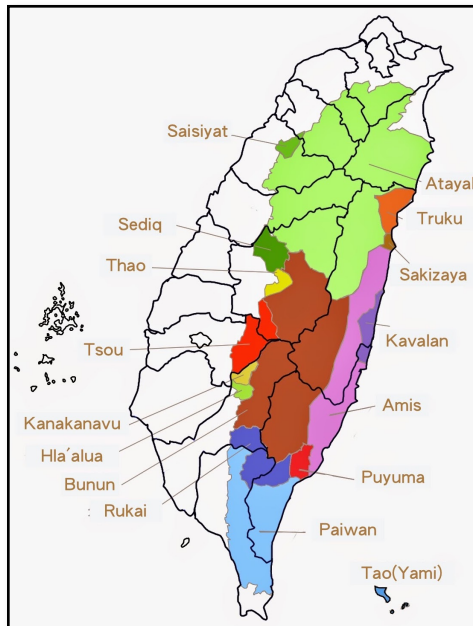


Figure 2-1
Location of Sixteen Recognized Indigenous Tribes in Taiwan

Original picture: Chang Wei-Tuan (張崴崙), available at: <http://taisoci.blogspot.com/2014/09/16.html> (Creative Commons authorization for share, use, and reproduction) (last visited Feb. 20, 2017)

Modified by Yung-hua Kuo

Besides the indigenous tribal recognition granted by the central government, local governments in Taiwan also acknowledge additional indigenous tribes. In 2005, the Tainan County Government acknowledged the Siraya tribe, and in 2013, the Fuli Township in Hualien County approved the Taivoan tribe. However, recognition at the local level does not establish the

⁷ Censuses by Department of Household Registration, Ministry of Interior, available at: <https://www.ris.gov.tw/app/portal/346> (last visited Nov. 9, 2018).

⁸ Censuses by Council of Indigenous Peoples, available at: <https://www.apc.gov.tw/portal/docDetail.html?CID=940F9579765AC6A0&DID=2D9680BFECBE80B627A20ECB76C8CC9E> (last visited Nov. 9, 2018).

status of indigenous identity in the household registration system, nor does it affect the laws applied to members of the tribes recognized by county/city governments.⁹

Still other indigenous people are seeking government recognition of their tribes, especially indigenous people who lived on the accessible plains and whose cultures were mostly altered by outside forces. The plain indigenous peoples have been assimilated into the majority identity, and only in recent years has the government acknowledged the plain indigenous peoples as part of the indigenous group and administration.¹⁰ Nonetheless, the plain indigenous people are excluded by the law governing indigenous identity from its definition and application.¹¹

2.1.2 Livelihood and Migration of Taiwanese Indigenous Peoples

In the past, the primary production activities of the indigenous peoples in Taiwan were agriculture, gathering, hunting, and fishing. The specific subsistence of each tribe varied. Generally, most indigenous peoples adopted shifting cultivation, cultivating a piece of land for several years and moving to another plot to allow the cultivated land to recover its soil fertility. The indigenous people did not continuously cultivate one parcel of land through irrigation. The farmland was communal property owned by the whole village or the chief, managed by patrilineal or matrilineal clans—depending on the organization of each tribe—and used by families and individuals. These families and individuals could occupy and use a specific parcel

⁹ See Jolan Hsieh (謝若蘭), *Pingpu Indigenous Status Recognition Movement and Challenge* (平埔族群正名運動與官方認定之挑戰), 4:2 TAIWAN JOURNAL OF INDIGENOUS STUDIES (台灣原住民族研究季刊) 121, 132, 134-136 (2011).

¹⁰ Jolan Hsieh (謝若蘭), *The Rights and Strategy of Official Recognition in Pingpu Peoples* (平埔族群恢復族群身份之權利伸張與策略建), 5:1 JOURNAL OF THE TAIWAN INDIGENOUS STUDIES ASSOCIATION (台灣原住民族研究學報) 43, 51 (2015).

¹¹ Article 2, Status Act For Indigenous Peoples (原住民身分法) (2008).

of land while they were cultivating it. Yet, once they had exhausted the fertility of that piece of land and abandoned it for recovery, the land returned to communal property.¹²

Because the indigenous peoples themselves did not have written history, they were first systematically studied by Japanese officials and researchers in the late nineteenth and early twentieth centuries through fieldwork, oral history, and documents made during Dutch rule and the Qing empire. According to the studies by Japanese anthropologists, the indigenous peoples had massively migrated and expanded for only one to two hundred years before Japan conquered Taiwan and subjugated the indigenous peoples in the mountain areas.¹³ The studies showed that the indigenous peoples migrated because of natural disaster, fertile land, armed conflict, or infectious disease.

The indigenous peoples might migrate or disperse to find new hunting grounds and farmland.¹⁴ For instance, the Taudā group and the Tōroko group of the Sediq tribal people used to live on the west side of the Central Mountain Range, which was chilly and lacked arable land. During the period around 1731 to 1781, when the Sediq people left their homeland to hunt on the east side of the Central Mountain Range, they found fertile land and gradually moved eastward to establish new communities in pursuit of more food production.¹⁵ Similarly, the Bunun tribe had lived in the mountains in central Taiwan for generations. The Take-‘banuað group of the Bunun tribe had very limited arable land, and the Take-vatan group suffered from

¹² See AI-CHING YEN (顏愛靜) & KUO-CHU YANG (楊國柱), *YUANZHUMINZU TUDI YUNDONG YU JINGJI FAZHAN* (原住民族土地制度與經濟發展) [LAND SYSTEMS OF INDIGENOUS PEOPLES AND ECONOMIC DEVELOPMENT] 19-31 (2004).

¹³ See Tōichi Mabuchi (馬淵東一), *Migration and Distribution of the Formosan Aborigines: Part 1* (高砂族の移動および分布：第一部) 18:1-2 *MINZOKUGAKU KENKŪ* (民族学研究) [(THE JAPANESE JOURNAL OF ETHNOLOGY] 123, 134 (1954).

¹⁴ *TAIWAN SŌTOKUFU RIBANKA* (台灣總督府警務局理蕃課), translated by INSTITUTE OF ETHNOLOGY, ACADEMIC SINICA (中央研究院民族學研究所), *GAOSHAZU DIAOCHASHU: FANSHE GAIKUANG* (高砂族調查書：番社概況) [AN INVESTIGATION OF THE ABORIGINES IN TAIWAN: THE OVERVIEW OF INDIGENOUS] 138, 140-141, 149, 171, 181 (Japanese edition originally published in 1931; Chinese edition in 2011).

¹⁵ See 馬淵東一 (Tōichi Mabuchi), *supra* note 13, at 134, 136-137.

crop failure resulting from frost damages. After some exploration near their villages, beginning in the early eighteenth century, the Bunun tribal people started to travel far eastward, then southward, and finally southwestward to acquire more land and expand their territory throughout the eighteenth and nineteenth centuries.¹⁶

Usually, migration did not have a single cause but was the result of multiple hardships and pressures imposed on the indigenous peoples. When the Bunun people encountered the problems of infertile land and harsh weather, they were also facing disruption and aggression from the plains indigenous people.¹⁷ The tension and conflicts between the indigenous tribes made tribal people retreat or resettle elsewhere. The Tsə'ole system of the Atayal tribe expelled the Saisiat tribal people from their territory and took their land.¹⁸ The eastward migration and expansion of the Atayal and the Bunun tribes, as discussed above, subsequently suppressed the Amis people, who had lived in Takilis, Hualien, in eastern Taiwan. Around the mid-seventeenth century, the Amis people in Takilis were forced to flee from their ancestral land and escape southward to Hengchun, the southern tip of Taiwan.¹⁹

Disease also caused Taiwanese indigenous peoples to migrate, disperse, dissolve, and incorporate into other communities. The Tsou tribe, originating from the upstream region of the Zengwun River, faced not only the expanding power of the Bunun tribe but also deadly threats of infectious disease from the lowlands, especially smallpox, tuberculosis, and influenza.²⁰ The diseases struck the Tsou tribe and caused its population to decline continuously throughout the eighteenth century. Smallpox almost exterminated the Tosukü clan of the Tsou tribe. The few

¹⁶ See *id.* at 145-148.

¹⁷ See *id.* at 146.

¹⁸ See *id.* at 133.

¹⁹ See Tōichi Mabuchi (馬淵東一), *Migration and Distribution of the Formosan Aborigines: Part 2* (高砂族の移動および分布：第二部) 18:4 MINZOKUGAKU KENKŪ (民族学研究) [(THE JAPANESE JOURNAL OF ETHNOLOGY) 23, 51-52 (1954).

²⁰ See Tōichi Mabuchi (馬淵東一), *supra* note 13, at 148.

survivors of the Tosukü clan abandoned their houses and land in the Saviki community, dispersing and joining other Tsou communities.²¹

2.2 History of Taiwanese Indigenous Peoples and Their Land

2.2.1 Rule of Dutch and Rule of Zheng Regime

The Dutch Rule Era (1624–1662)

The first part of this section introduces the period when the Dutch and Zheng Ch'eng-kung (also known as Koxinga) ruled Taiwan; both authorities ruled only parts of Taiwan and changed indigenous culture and land system to a limited extent. Beginning in the seventeenth century, Western powers and Han Chinese arrived and settled in Taiwan. At this stage, the European settlers and the Zheng troops started to loosely rule some indigenous communities on the plains in Taiwan, leaving the indigenous culture mostly unchanged.²² The majority of the indigenous peoples in Taiwan, especially indigenous peoples living in the mountains, kept their traditional practices and remained isolated from the outside world.

During the maritime expansion of Western colonial powers in the sixteenth and seventeenth centuries, European explorers, missionaries, and traders came to Asia in search of resources and merchandise. To trade with China and Japan, the Dutch Republic established its authority in Taiwan in 1624 through the operation of the Dutch East India Company.²³ The

²¹ See *id.* at 151.

²² TAY-SHENG WANG (王泰升), TAIWAN FALU SHI GAILUN (台灣法律史概論) [INTRODUCTION OF TAIWAN LEGAL HISTORY] 23-24 (Third Edition, 2009).

²³ See TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895-1945: THE RECEPTION OF WESTERN LAW 12-14 (2000).

Dutch ruled southwestern coastal Taiwan, as well as parts of northern and eastern Taiwan, but they never controlled the whole island or all indigenous tribes.²⁴

The Dutch claimed its authority over Taiwan based on the *terra nullius* theory, occupying land belonging to nobody.²⁵ In practice, in the 1630s, the Dutch conquered Soulang, Mattau, and other indigenous communities by force to sign treaty with them. By the treaties, the Dutch authority acquired the territory of the indigenous people under its rule.²⁶ The indigenous communities ruled by the Dutch increased to a total of twenty-eight in 1636.²⁷ According to household registration records, after continual expansion, in 1647, the Dutch ruled 246 indigenous villages with 13,619 indigenous households, comprising 62,849 indigenous people.²⁸

With a small number of personnel, the Dutch ruled the indigenous people indirectly and loosely through a feudal system. In this lord–vassal relationship, the Dutch had authority over the obedient indigenous communities but respected some aspects of indigenous sovereignty.²⁹ The indigenous peoples were allowed to select chief candidates for their communities, who would be decided and approved by the Dutch authority at the annual gathering, the *landdag*. In the symbolic ceremony of the *landdag*, the Dutch governor appointed indigenous elders for the next year, delegating power and delivering orders to them. Under Dutch instruction, the indigenous chiefs returned to their communities to manage administrative and judicial issues within the tribes. After the elders were appointed, the Dutch governor also dealt with specific issues, such as hearing disputes and rewarding indigenous elders who were especially obedient.³⁰

²⁴ TAY-SHENG WANG, *supra* note 22.

²⁵ *Id.* at 23.

²⁶ *Id.*

²⁷ Takashi Nakamura (中村孝志), *The Modern History of Formosa* (台湾史概要(近代)), 18:1-2 MINZOKUGAKU KENKŪ (民族学研究) [(THE JAPANESE JOURNAL OF ETHNOLOGY)] 113, 116 (1954).

²⁸ *Id.*

²⁹ TONIO ANDRADE, *HOW TAIWAN BECAME CHINESE: DUTCH, SPANISH, AND HAN COLONIZATION IN THE SEVENTEENTH CENTURY* 185 (2008).

³⁰ *Id.* at 186-188; TAY-SHENG WANG, *supra* note 23, at 14; Takashi Nakamura, *supra* note 27.

At that time, the labor force in Taiwan was scarce, so the Dutch recruited Han Chinese from mainland China, mostly southern provinces like Fujian, across the strait to cultivate, trade, and hunt in Taiwan.³¹ To attract migration to and investment in Taiwan, the Dutch provided the Han settlers with free parcels of land, cultivation tools, and freedom from taxes. In addition, the Dutch military protected the settlers from attacks by indigenous people.³² Because of the Dutch support and protection, by the early 1640s, the Han settlers were producing large and increasing amounts of rice and sugar in Taiwan.³³ The Han settlers also got licenses to hunt deer on indigenous land, which greatly reduced the deer population and the incomes of the indigenous people.³⁴

The interaction among the Dutch, Han Chinese settlers, and indigenous peoples affected life and land practice in Taiwan. First, the Dutch government specified and measured the land yet occupied by the indigenous people and granted land title to the Han settlers. Sometimes, the areas of this type of land were controversial and debated, even between the Dutch government in Taiwan and its supervising authority in Batavia, Java.³⁵

For land already occupied by indigenous people, the Dutch authority recognized and protected indigenous land rights to a certain extent. The indigenous people could keep their ownership of their land, which were supposed not to be alienated without their consent. When the Han settlers wished to cut timber or farm on indigenous land, they generally paid the Dutch East India Company a fee that was meant to subsidize indigenous people. While this practice did not require indigenous consent, the Dutch officials used the revenue to maintain churches,

³¹ See TONIO ANDRADE, *supra* note 29, at 118.

³² See *id.* at 120-123.

³³ See *id.* at 125.

³⁴ *Id.* at 136; TAY-SHENG WANG, *supra* note 23, at 14.

³⁵ TONIO ANDRADE, *supra* note 29, at 122-123.

missions, and schools in the indigenous villages. The Dutch saw this as a way to fulfill their duty as lords and preserve their vassals' sovereignty over the land.³⁶

Rule of the Zheng Regime (1662–1683)

Dutch dominance came to an end in 1662 when the Dutch were defeated by the Zheng troops led by Koxinga, who took Taiwan as a temporary base of the collapsed Ming Dynasty to attack the Qing Empire in China.³⁷ Koxinga signed a treaty with the Dutch to gain sovereignty over Taiwan and rule the people on the island, mostly indigenous people. Because the Zheng government aimed to restore the Ming Dynasty in mainland China, it did not put much effort into expanding its rule to the entire island. The Zheng regime focused on southwestern Taiwan, similar to the previous Dutch government. The Zheng government ruled almost the same indigenous villages as had been governed by the Dutch and allowed the indigenous chiefs to manage tribal affairs within their indigenous communities.³⁸

Compared to the Dutch, the Zheng government had greater impacts on the indigenous peoples through Sinicization and land exploitation. The Zheng government distinguished and prioritized the Han Chinese as citizens over the wild, un-Sinicized aborigines.³⁹ The Zheng government also authorized its officials and soldiers to cultivate land not yet occupied. Yet, “unoccupied” land might have been land temporarily not being farmed by indigenous people simply because the land was in the fallow period of shifting cultivation. Seemingly unoccupied land might also have been hunting grounds for an indigenous community.⁴⁰

³⁶ *Id.* at 185-186.

³⁷ TAY-SHENG WANG, *supra* note 23, at 16.

³⁸ *See* TAY-SHENG WANG, *supra* note 22, at 30-31.

³⁹ *Id.* at 30.

⁴⁰ SHU-YA LIN (林淑雅), DE-/RECONSTRUCTING THE LAND POLICIES FOR INDIGENOUS PEOPLES IN TAIWAN (解／重構台灣原住民族土地政策) 34-36 (2007) (dissertation).

Oftentimes, the land reclamation was executed and accompanied by military force. Facing such encroachment on their land, the indigenous people fought back against the Han Chinese settlers. Some indigenous people were forced to comply and ultimately retreated from their ancestral lands.⁴¹ To stop the conflicts between the Han settlers and the indigenous people, the Zheng government stationed troops and established boundaries, the “earth oxen” border, to separate the Han settlers from the indigenous people.⁴²

However, the indigenous peoples continued losing their land to the Han settlers during the Zheng regime period. In this period, the land cultivated by the Han settlers increased to more than 30,000 hectares, tripling the amount of land cultivated under Dutch rule.⁴³ It was likely that much of the newly cultivated land had been used and possessed by indigenous peoples. Only a small part of land was truly never occupied. The demand for and aggression toward the indigenous land became even clearer and stronger in the next period, when the Qing empire began to rule Taiwan in the late seventeenth century and brought more Han Chinese to this island.

2.2.2 Indigenous Land in the Qing Empire Era (1683–1895)

Quarantine Policy in Early Qing Rule

In 1683 the Qing empire defeated the Zheng band to terminate its twenty-one-year rule in Taiwan.⁴⁴ The Qing government did not actively colonize Taiwan, which was located at the periphery of the empire. The primary purpose of the Qing government in ruling Taiwan was to prevent the island’s developing into a threat against the empire. Generally, the Qing empire

⁴¹ See *id.*; KANORI INŌ (伊能嘉矩), TAIWAN SHI VOL.1 (臺灣志) [TAIWAN HISTORY] 107-108 (1902).

⁴² TAY-SHENG WANG, *supra* note 22, at 30.

⁴³ AI-CHING YEN & KUO-CHU YANG, *supra* note 12, at 92.

⁴⁴ Qing empire was an imperial dynasty in China established by Manchu people from Manchuria, a region in northeast Asia. The empire existed from 1644 to 1912 and formed the territorial base for modern China.

adopted a partial quarantine policy regarding migration to and governance of Taiwan.⁴⁵ To reduce administrative cost and rebellious power, the Qing court strictly restricted migration to Taiwan and deployed a limited number of officials to maintain order. According to the regulation on migration in 1684, only those who had family and property in Taiwan and did not commit severe crimes could continue staying in Taiwan. In mainland China, only married men with official permits could move to Taiwan, but they had to leave their families in mainland China. After 1760, immigrants were finally allowed to bring their families to Taiwan.⁴⁶

In reality, the official policy of restriction could not stop the Han Chinese from southeastern China from migrating and smuggling to Taiwan.⁴⁷ As an increasing number of Han Chinese immigrants poured into Taiwan and interacted with the local population, the Qing government tried to separate the Han Chinese settlers and the aborigines to reduce their contact and collision and thereby keep local society stable.⁴⁸ On the one hand, the policy was intended to restrain the growing power of Han Chinese immigrants. For the government, the Han settlers—mostly illegal immigrants violating the migration restriction—were potential troublemakers who were likely to encroach on aboriginal land, developing force against the Qing authority and provoking rebellion among the aborigines. On the other hand, the segregation policy was to protect the aborigines against invasion by the Han settlers.⁴⁹

From 1704 to 1724, the quarantine policy was implemented by recognizing aboriginal land rights and restricting Han Chinese settlement. During the Qing-ruled period, the aborigines were classified as Sinicized aborigines (熟蕃) and wild aborigines (生蕃). The Sinicized

⁴⁵ JOHN SHEPHERD, STATECRAFT AND POLITICAL ECONOMY ON THE TAIWAN FRONTIER, 1600-1800 15 (1993)

⁴⁶ See TAY-SHENG WANG, *supra* note 23, at 18.

⁴⁷ See *id.* at 18, 20.

⁴⁸ CHIA-LING LIN (林佳陵), LUN GUANYU TAIWAN YUANZHUMIN TUDI ZHI TONGZHI ZHENGCE YU FALING (論關於台灣原住民土地之統治政策與法令) [Discussing the Ruling Policies and Laws on the Land of Taiwanese Indigenous Peoples] 12-15 (1996) (dissertation).

⁴⁹ See TAY-SHENG WANG, *supra* note 23, at 19; *id.* at 27.

aborigines were those who complied with the Qing authority, paid head tax, and did corvée for the government.⁵⁰ Through taxpaying, the Sinicized aborigines became loyal subjects to the empire, so the Qing government acknowledged and protected their land titles. The Sinicized aborigines were encouraged to develop and cultivate land by themselves. They could register with the government to legally own parcels of land and were exempted from land tax.⁵¹

In the early Qing-ruled era, the only legal way for the Han settlers to acquire aboriginal land was by paying tribal head tax on behalf of the aboriginal tribe in exchange for the right to cultivate the aboriginal land. The Han settlers obtained documents from the aborigines to prove a parcel of land was unoccupied and uncultivated to get government permission to open the aboriginal land. After that, the settlers registered the land with the government and paid land tax to be the legitimate landowners.⁵²

Han Chinese settlers were prohibited from encroaching on aboriginal land without government permission and recognition. In addition, the aborigines were not permitted to rent out aboriginal land until the Qing government removed this restriction in 1724. Although no regulation explicitly forbade the sale of aboriginal land, it was very likely that selling aboriginal land to Han settlers was prohibited because the transaction would permanently deprive the aborigines of their parcels of land and reduce their ability to pay tax.⁵³

However, in fact, the government regulations could not completely prevent Han Chinese settlers from invading and occupying aboriginal land. To more clearly separate the Han Chinese settlers and the Sinicized aborigines from the wild aborigines, beginning in 1722, the Qing

⁵⁰ See CHIA-LING LIN, *supra* note 48, at 10-11.

⁵¹ See SHU-YA LIN, *supra* note 40, at 37.

⁵² See SHU-YA LIN, *supra* note 40, at 37-38; Chih-Ming Ka (柯志明), *The Classification and Transformation of Aborigine Land Rights in Qing Taiwan (清代台灣熟番地權的分類與演變)*, 23 THE TAIWANESE JOURNAL OF SOCIOLOGY (台灣社會學刊) 25, 37-38 (2000).

⁵³ See JOHN SHEPHERD, *supra* note 45, at 248.

government gradually set a border, the so-called earth oxen and red line. Within the border, the Han Chinese settlers and the Sinicized aborigines lived in the integrated areas. Outside the border, the wild aborigines were not governed by the empire until 1875, when the Qing government changed its policy on the wild aboriginal land and started to conquer these areas.

Reclaiming Plain Aboriginal Land in the Eighteenth Century

Within the border, the Han Chinese settlers and the Sinicized aborigines lived together, and the former continuously gained land from the latter through force, agreement, and sometimes fraud. As mentioned above, in the early Qing-ruled era, the Han settlers could acquire aboriginal land only by paying tribal tax. This method was gradually superseded by a split-ownership/aborigine large-rent model that came into existence in the 1920s. In this dual-lease relationship, the aborigines leased large tracts of land to Han Chinese developers, who acquired the rights to the land in perpetuity. The developers invested capital in cultivation, divided land into smaller parcels, and sublet the parcels of land to reclaiming tenants. The developers were called small-rent holders because they collected a rent called “small-rent” from the tenants. Having permanent renting rights, the Han developers got large profits and held actual control over the parcels of land. By contrast, the aborigines were large-rent holders who received “large-rent,” usually a tiny amount, from the Han developers but lost substantial control of the parcels of land.⁵⁴

Cultivating aboriginal land through lease contract was facilitated and became common after the 1720s for several reasons. First, the legal restriction of renting aboriginal land was lifted

⁵⁴ See JOHN SHEPHERD, *supra* note 45, at 254-255.

by the Qing government in 1724.⁵⁵ Moreover, many of the aborigines were unable to afford a variety of heavy taxes and duties imposed by the Qing government, including head tax and public service.⁵⁶ The plain aborigines also encountered increasing power and eagerness for land among the Han settlers, as well as occasional attacks from wild aborigines. Under these pressures, many plain aborigines had no choice but to lease their land to the Han settlers to cultivate through irrigation and produce more crops.⁵⁷

The situation got worse for the aborigines, whose right to receive rent was usually nominal after the tax reform from 1727 to 1731. The new tax system requested that Han developers, small-rent holders who actually used and controlled the aboriginal land, report their parcels of land to the government and pay tax. Thus, the Han settlers would pay tax to the government, but they did not always pay rent to the aboriginal landlords, who had little or no power to get the rent.⁵⁸ Furthermore, when the settlers did pay rent to the aboriginal landowners, it could cause chaos in the aboriginal communities: When the Han settlers paid the rent, tribal members argued about how to distribute the rent among the community and tribal members.⁵⁹

The plain aborigines of the Siraya tribe in southwestern Taiwan were an example showing how land reclamation by Han settlers changed aboriginal land use and institutions. Before the outsiders came to Taiwan, the Siraya tribe had adopted shifting cultivation, hunting, and gathering for their livelihood. Tribal land was communal property possessed and used by

⁵⁵ See *id.* at 256; Tay-Sheng Wang (王泰升), *Indigenous Peoples in the Legal History of Taiwan: Being a Special Ethnic Group, Territory and Legal Culture* (台灣法律史上的原住民族：作為特殊的人群、地域與法文化), 44(4) NTU LAW JOURNAL (台大法學論叢) 1639, 1656 (2015).

⁵⁶ See TIEN-FU SHIH (施添福), *Qing dai "fan li bu an geng zuo" de yuan you: yi zhu qian di qu wei li* (清代〈番黎不諳耕作〉的緣由：以竹塹地區為例) [*Cause of "Aborigines Not Good at Cultivation" in the Ch'ing Dynasty: Taking Zhu-qian Area as an Example*] in QING DAI TAIWAN DE DI YU SHE HUI: ZHU QIAN DI QU DE LI SHI DI LI YAN JIU (清代臺灣的地域社會：竹塹地區的歷史地理研究) [LOCAL SOCIETY OF CH'ING-RULED TAIWAN: RESEARCH ON HISTORY AND GEOGRAPHY OF THE ZHU-QIAN AREA] 126-129 (2001).

⁵⁷ See CHIA-LING LIN, *supra* note 48, at 22-23.

⁵⁸ See SHU-YA LIN, *supra* note 40, at 38.

⁵⁹ See *id.* at 40-41.

tribal members.⁶⁰ Yet, the Siraya tribal people were unable to continue their traditional practice when the Han settlers arrived Taiwan in the Qing period and had high demand for land. The Han settlers registered and cultivated “unoccupied” land that used to be hunting grounds for the Siraya tribe. With the reduced amount of land, Siraya tribal people abandoned shifting cultivation and learned how to farm a specific, limited area of land through irrigation.⁶¹

Moreover, the tribal lands were divided into individual land titles of personal property. In addition to possessing land communally as a tribe, Siraya tribal people registered with the government to own individual parcels of land that tribal members took turns using. Once the Siraya tribal people became owners of specific plots of land, they could own the land to cultivate exclusively by themselves or sell and lease the land to Han settlers.⁶² After Siraya aboriginal landowners signed lease contracts with the Han settlers to use the land for a definite or even indefinite period, the aboriginal landowners further lost substantial control over their land.⁶³

Facing the brutal exploitation of aboriginal land, the Qing authority tried to limit Han reclamation and cultivation of aboriginal land. In 1738, the government prohibited the Han settlers from acquiring aboriginal land by paying tribal head tax.⁶⁴ To enforce the 1738 regulation, in 1746, the Qing government promulgated a decree to punish illicit leasing and squatting on aboriginal land, requiring these parcels of land to be returned to the aborigines.⁶⁵ However, it became apparent to the Qing authority that, in reality, the ineffective land regulations failed to stop the Han settlers from cultivating and acquiring land where the

⁶⁰ Hong-chein Yang (楊鴻謙) & Ai-ching Yen (顏愛靜), *The Study on Institutional Change of Siraya's Land Rights for Taiwan's Plains Aborigines in the Ching Era* (清代臺灣西拉雅族番社地權制度之變遷), 6:1 JOURNAL OF TAIWAN LAND RESEARCH (台灣土地研究) 17, 26 (2003).

⁶¹ *Id.* at 27-29.

⁶² *Id.* at 32.

⁶³ *See Id.* at 36, 40, 42.

⁶⁴ *See* SHU-YA LIN, *supra* note 40, at 38.

⁶⁵ *See* JOHN SHEPHERD, *supra* note 45, at 272.

aborigines had lived. In 1788, the Qing government loosened the restrictions on land transactions, officially recognizing that the Han settlers could buy land from the Sinicized aborigines.⁶⁶

Along with the legal change, in 1790, the Qing government redrew the border to distinguish the Han Chinese and the plain aborigines from the wild aborigines, setting two new borders to classify the territory of Taiwan into three zones: a Han cultivation zone, a zone reserved for Sinicized aborigines, and a wild aboriginal zone.⁶⁷ The Han settlers were free to rent and purchase aboriginal land in the zone reserved for Sinicized aborigines, and the plain aborigines lost a large amount of land to the Han settlers. Their aboriginal traditions and languages were also greatly influenced or even extinguished by the dominant Chinese culture.⁶⁸ Only parcels of land in the wild aboriginal zone were prohibited from cultivation and acquisition by the Han settlers.⁶⁹

⁶⁶ See CHIA-LING LIN, *supra* note 48, at 28.

⁶⁷ See *id.* at 17.

⁶⁸ See Tay-Sheng Wang, *supra* note 55, at 1654-1656; Cheng-Feng Shih (施正鋒), *The Unrecognized Plains Indigenous Peoples in Taiwan: The Extinguishment and Restoration of Their Indigenous Status* (平埔族原住民族身分的喪失與回復), 2:4 JOURNAL OF THE TAIWAN INDIGENOUS STUDIES ASSOCIATION (台灣原住民族研究學報) 111, 113 (2012).

⁶⁹ See CHIA-LING LIN, *supra* note 48, at 41.

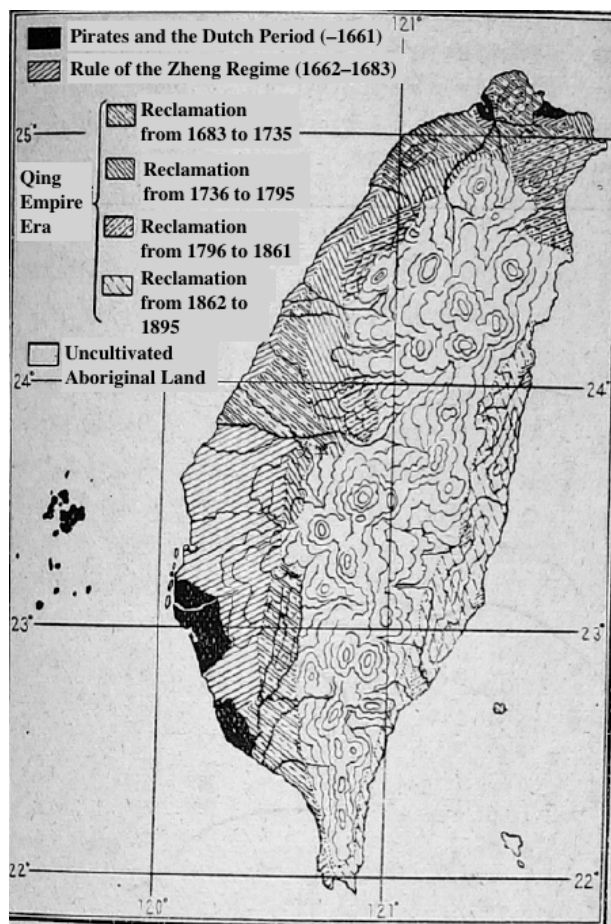


Figure 2-2
Land Reclamation from the Seventeenth to
Nineteenth Centuries

Original picture: Tōichi Mabuchi (馬淵東一),
 Migration and Distribution of the Formosan
 Aborigines: Part 1 (高砂族の移動および分布：第一
 部) 18:1-2 MINZOKUGAKU KENKŪ (民族学研究) [(THE
 JAPANESE JOURNAL OF ETHNOLOGY] 123, 127
 (1954).

Modified by Yung-hua Kuo

Opening Wild Aboriginal Land in Late Qing Rule

During most of the Qing rule period, from 1683 to 1874, Han settlers were prohibited from crossing the border and cultivating land where the wild aborigines lived, but the regulation was not strictly enforced by the Qing government and its few officials in Taiwan. The Han settlers and the Sinicized aborigines continually entered the space where the wild aborigines were living. As more Han settlers and Sinicized aborigines moved onward and occupied land in the wild aboriginal zone, the wild aborigines retreated into the mountains.⁷⁰ The border was modified and redrawn several times to conform to the expanding area of cultivated land and the

⁷⁰ SANTARŌ OKAMATSU, PROVISIONAL REPORT ON INVESTIGATIONS OF LAWS AND CUSTOMS IN THE ISLAND OF FORMOSA 8 (originally published in 1902, republished in 1971).

smaller living space of the wild aborigines. Although the legal prohibition on crossing the border was valid for almost two hundred years, its practice and actual outcome were that the wild aborigines possessed fewer and fewer parcels of land defined by the redrawn boundary.⁷¹

In 1875, the Qing empire changed its policy on the wild aboriginal zone after the empire had a dispute with Japan about the sovereignty over the wild aborigines. In the Mudan Incident of 1874, a ship of fishermen from Ryukyu, Japan, landed on the shore in southern Taiwan and were killed by wild aborigines of the Mudan community of the Paiwan tribe. Japan requested that the Qing empire take responsibility for the incident; otherwise, Japan would consider the Qing empire not to be ruling the wild aborigines and dispatch Japanese troops to Taiwan to take the “unoccupied” land.⁷² While Japan and the Qing empire were arguing with each other based on international legal theory, the wild aborigines were never seen as legal subjects competent to claim their sovereignty over and possession of land.

To reject the Japanese claim on the wild aboriginal land, the Qing empire no longer excluded the wild aborigines from its governance. The empire not only included the wild aboriginal land into its territory but also adopted the policy of “Opening the mountains and pacifying the aborigines” with the aim of conquering the wild aborigines. In 1875, the Qing government abolished the migration restriction and started to recruit Han people from mainland China to come to Taiwan to build roads and cultivate land in the wild aboriginal zone.⁷³ The plan was to build roads in remote areas in northeastern coastal Taiwan, the mountains in central Taiwan, and southern Taiwan to access and control these regions. Accompanying the road construction, the Qing government sent troops to conquer aboriginal tribes, including Atayal,

⁷¹ See SHU-YA LIN, *supra* note 40, at 46.

⁷² See CHIA-LING LIN, *supra* note 48, at 37-41.

⁷³ See *id.* at 41-42.

Paiwan, Amis, Kavalan, Pinuyumayan, and Siraya.⁷⁴ While some parts of the roads were built as planned, these routes were ultimately abandoned in the 1880s because of the difficulty of construction in mountain ranges and continuous resistance from the wild aborigines.⁷⁵

The Qing government also tried to rule the wild aborigines more effectively by reorganizing administrative divisions and strengthening government power in Taiwan. Suggested by Governor Shen Pao-chen in 1874, new administrative zones were created to rule the wild aborigines in southern Taiwan (Hengchun County), eastern Taiwan (Beinan Subprefecture), and central Taiwan (Puli Subprefecture).⁷⁶ After the Sino-French War in 1884, Taiwan was upgraded from a prefecture to a province in 1885 to increase the efficiency and power of government authority over the island. The first Taiwan Governor-General Liu Ming-chuan (served 1885–1891) not only facilitated many modernization plans and constructions in Taiwan, but he also actively implemented the opening the mountains and pacifying the aborigines policy by building roads and sending soldiers to the wild aboriginal areas. In 1886, Liu established the Pacification Settlement Bureau and its sub-bureaus to specifically manage wild aboriginal affairs.⁷⁷

As a result of these efforts, the Qing empire established authority over some wild aboriginal communities in southern and eastern Taiwan. Yet, due to limited force and the limited number of officials in Taiwan, the Qing government had limited influence and control over the wild aborigines in remote inland mountains. These wild aborigines retained much of their traditional social structure, land ownership and management, and customary rules.⁷⁸

⁷⁴ See *Id.* at 109-120.

⁷⁵ See CHEN-HUA WEN (溫振華), HISTORY OF FORMOSA ABORIGINES: POLICY FORMULATION VOL. 2 (QING-RULED PERIOD) (台灣原住民史: 政策篇二(清治時期)) 101-105 (2007)

⁷⁶ See *id.* at 139-143.

⁷⁷ See *id.* at 143-145.

⁷⁸ See *id.* at 145; CHIA-LING LIN, *supra* note 48, at 43; SANTARŌ OKAMATSU, *supra* note 70, at 9.

It is worth noting that, at the end of Qing rule, the plain/Sinicized aborigines lost ownership and profit from their parcels of land to an even greater extent. The land survey and tax reform in 1888 confirmed that, in the split-ownership/large-rent relationship, small-rent holders were actual landowners, that is, Han developers who rented and managed aboriginal land. On the one hand, being legitimate landowners, small-rent holders were required to pay land tax to the government, but their responsibility to pay large-rent to was reduced by 40%. On the other hand, large-rent holders no longer paid land tax, but they could receive only 60% of the original large-rent.⁷⁹ The problem was, far before the tax reform in 1888, the Qing government exempted all aboriginal land from taxation in 1768 to protect and assist aboriginal livelihood.⁸⁰ The tax reform made the aborigine large-rent holders not only completely lose the legal status of landowner but also receive much less rent from the Han small-holders.⁸¹

2.2.3 Japanese-Ruled Period (1895–1945)

Indigenous Land as State-Owned Property

The Qing empire lost the Sino-Japanese War and ceded Taiwan to Japan in May 1895. Japan therefore ruled people on the island, including Han Chinese, Sinicized aborigines, and wild aborigines. For the Japanese colonial government, the most important reason and purpose to rule the aboriginal peoples was to exploit and develop natural resources on their land, specifically, taking forest products and manufacturing camphor.⁸² During the Japanese-ruled period, camphor

⁷⁹ See CHEN-HUA WEN, *supra* note 75, at 146.

⁸⁰ CHIA-LING LIN, *supra* note 48, at 21.

⁸¹ See CHEN-HUA WEN, *supra* note 75, at 146.

⁸² TAIWAN SŌTOKUFU MINSEIBU (台湾総督府民政部), RIBANSHI KŌ VOL.1 (理蕃誌稿 第一編) 20 (1911).

was one of the most profitable products exported from Taiwan to other countries for use in medicine, for industry product, and as gunpowder.⁸³

In the very beginning of its rule over Taiwan, in 1895, the Government-General of Taiwan—the highest Japanese colonial administration in Taiwan—issued the ordinance Regulation Concerning Governmental Forests and Camphor Manufacturing (官有林野及樟腦製造業取締規則), which declared all mountains and forests, except for property proved by official document and private deed, to be state-owned property. This regulation made it almost impossible for the indigenous peoples, who had been marginalized under the Qing governance, to provide paper documents as proof to assert their rights to the land and forests they had occupied and used.⁸⁴

In 1896, the Japanese government adopted the boundary from the Qing-ruled period that separated Han Chinese and Sinicized aborigines from wild aborigines, classifying the territory of Taiwan into two types of administrative zone. The first type was the Special Aboriginal Zone, where the wild aborigines lived and required special governance.⁸⁵ The other was the Ordinary Administrative Zone, where the Japanese, Han Chinese, and plain aborigines lived. Although the plain aborigines were labeled as “Sinicized” in the Japanese household registration system, they were classified under the same category of “islander” with the Han Chinese. For the Japanese government, the plain aborigines were Sinicized, living in plains and obedient to authority,

⁸³ SHIZUE FUJII (藤井志津枝), HISTORY OF FORMOSA ABORIGINES: POLICY FORMULATION VOL. 3 (台灣原住民史: 政策篇(三)) 5, 30 (2001).

⁸⁴ *Id.* at 5-7.

⁸⁵ *Id.* at 8.

which made them not much different from the Han Chinese. The Sinicized aborigines were regulated by the laws that equally applied to all islanders.⁸⁶

A Special Aboriginal Zone was transformed into an Ordinary Administrative Zone when it satisfied three conditions: First, the state of the Special Aboriginal Zone was stable. Second, the wild aborigines in the zone became no different from the Han Chinese and Sinicized aborigines. Third, the wild aborigines developed their intelligence, became capable of understanding currency, and complied with the Japanese government order. As Japan expanded its effective control over Taiwan through the military and police, the number of Special Aboriginal Zones and the wild aboriginal population gradually decreased in the Japanese-ruled period as a result of assimilation.⁸⁷

From the Japanese government's perspective, the aborigines in the Special Aboriginal Zones—the wild aborigines in the Qing-ruled period—were not yet civilized or compliant with the Japanese authority. These uncivilized barbarians were not Japanese citizens eligible to exercise legal rights and obligations, for example, having land title and paying tax.⁸⁸ By declaring the wild aborigines as flying birds and walking beasts that could not possess legal rights and obligations, the Japanese government regarded all indigenous land as nobody's land to claim such land as state-owned property. Although the Sinicized aborigines in the Ordinary Administrative Zones might possess land as personal property, the aborigines in the Special Aboriginal Zones could not claim land ownership.⁸⁹ Thus, 1,613,200 hectares of aboriginal land

⁸⁶ See Wei-ling Huang (黃唯玲), *Emergence and Legal Treatment of "Flatland Aborigines" under Japanese Rule (1895-1937)* (日治時期「平地蕃人」的出現及其法律上待遇 (1895-1937)), 19(2) TAIWAN HISTORICAL RESEARCH (台灣史研究) 99, 101-102 (2012).

⁸⁷ See Tay-Sheng Wang, *supra* note 55, at 1662.

⁸⁸ See Wei-ling Huang, *supra* note 86, at 106.

⁸⁹ See Tay-Sheng Wang, *supra* note 55, at 1663-1664; SHU-YA LIN, *supra* note 40, at 70; JI WEN (溫吉), TAIWAN FANZHENGZHI VOL.2 [台灣番政志 二] [HISTORY OF TAIWAN ABORIGINAL ADMINISTRATION VOL.2] 661 (1957).

(44% of Taiwan) became state-owned property for the Japanese colonial government to develop and extract natural resources from.⁹⁰

The Japanese government put the aboriginal land as state-owned property policy into effect by gradually controlling, measuring, and registering all parcels of land in Taiwan. Based on the Regulation on Land Registration in Taiwan (台灣地籍規則) and the Regulation on Land Investigation in Taiwan (台灣土地調查規則) of 1898, the colonial government investigated ownership of parcels of land in the lowlands in western Taiwan that had been cultivated during the Qing-ruled period.⁹¹ The government then conducted land surveys from 1910 to 1925 to clarify ownership of the forests. According to the Regulation of Investigating Forest and Wild Land in Taiwan (台灣林野調查規則), except for land ownership reported to and verified by the Japanese government, all forests and wild parcels of land belonged to the country.⁹² The last step was to clarify the parcels of land where the wild aborigines lived by implementing the ten-year project “Forest Plan Industry” with land investigations beginning in 1925.⁹³ Through the process of land investigation and registration, Japan became the first authority that had complete and effective control over the entire island, including the wild aboriginal land never governed by the previous rulers.

To efficiently utilize the indigenous land for different functions, from 1914 to 1925, Japan classified the state-owned forests and parcels of land in Taiwan into two categories for distinct regulation and management. The first type, the “preserved forest and land (要存置林野),” totaling 309,689 hectares, was prohibited from cultivation and used to achieve government

⁹⁰ TAIWAN SŌTOKUFU RIBANKA, *supra* note 14, at 1.

⁹¹ SHIZUE FUJII, *supra* note 83, at 47.

⁹² Regulation of Investigating Forest and Wild Land in Taiwan (臺灣林野調查規則), Governor-General of Taiwan Gazette No.3086 (臺灣總督府府報第 3086 號) (Oct. 30, 1910), available at <http://ds3.th.gov.tw/ds3/app007/list3.php?ID1=0071013086a001> (last visited May 19, 2018).

⁹³ SHU-YA LIN, *supra* note 40, at 71.

interests, including land conservation, natural resources exploitation, military service, protection of government buildings, and academic research. The second type, the “non-preserved forest (不要存置林野),” totaling 386,912 hectares, was open to purchase, and more than half was sold to private buyers.⁹⁴ In 1928, the Japanese government designated part of the state-owned forests and wild parcels of land as the “quasi-preserved forest and land (準要存置林野)” to maintain military and public security, assist aborigines with their livelihood, and reward relocated aborigines.⁹⁵ The quasi-preserved forests and parcels of land used for the latter two functions of helping the indigenous people were called the “land reserved for aborigines (蕃人所要地),” a legal classification that has influenced indigenous land rights until today.

Although the Japanese government designated certain areas for the aborigines to use for their livelihood, the land reserved for aborigines only accounted for 15.56% of the aboriginal land, far less than the amount of land needed by the aborigines to maintain their traditional practices.⁹⁶ Moreover, the reserved land policy also ignored the flexibility and mobility of the aborigines to use land in response to specific environmental situations. In many cases, the designated areas were infertile and cliffy parcels of land near indigenous communities, or locations different and distant from the traditional territory of a tribe.⁹⁷

The size of the reserved parcels of land was based on the government’s assumption that each aboriginal person needed three hectares of land to live, farm, gather, raise livestock, and so on.⁹⁸ It is worth noting that no individual parcels of land were allotted to the aborigines. The number of three hectares was used by the government to calculate the total size of the parcels of

⁹⁴ See AI-CHING YEN & KUO-CHU YANG, *supra* note 12, at 204.

⁹⁵ *Id.* at 205; SHU-YA LIN, *supra* note 40, at 75.

⁹⁶ See AI-CHING YEN & KUO-CHU YANG, *supra* note 12, at 206-207.

⁹⁷ SHU-YA LIN, *supra* note 40, at 75; CHUAN-JU CHENG, A NEW LEGAL ERA FOR THE INDIGENOUS PEOPLES IN TAIWAN—SELF-GOVERNMENT? 29 (2010) (dissertation).

⁹⁸ See AI-CHING YEN & KUO-CHU YANG, *supra* note 12, at 205-206.

land reserved for the aborigines. The calculation considered the indigenous tradition of multiple land uses, but it greatly reduced the size of hunting grounds.⁹⁹ The policy of reducing hunting grounds, combined with settled agriculture discussed in the next part, was adopted by the Japanese government to discourage aboriginal hunting activities, extinguish belligerent spirit of the aborigines, and restrict their possession of firearms.¹⁰⁰

Along with its full control over Taiwan, Japan gradually applied modern institutions and transplanted Western laws to Taiwan throughout its fifty-year rule.¹⁰¹ While the colonial government implemented modern laws for the Japanese, Han Chinese, and Sinicized aborigines in Taiwan, the wild aborigines were ruled by another distinct legal framework. The government authorized police officers to decide aboriginal affairs and adjudicate disputes in the Special Administrative Zones according to police authority and executive discretion, not promulgated laws.¹⁰² On the one hand, the special legal treatment gave the Japanese police huge power and discretion to govern the aborigines under limited legislative control. On the other hand, in both criminal and civil cases, the police officers might adopt the traditional customs of aborigines to decide their issues. Although it depended on the decision of each police officer, the traditional rules and institutions of the aboriginal peoples were partially maintained within the tribes.¹⁰³

⁹⁹ SHU-YA LIN, *supra* note 40, at 75-76.

¹⁰⁰ See SASALA TAIBAN, *THE LOST LILY: STATE, SOCIOCULTURAL CHANGE AND THE DECLINE OF HUNTING CULTURE IN KAOCHAPOGAN, TAIWAN*, 124-126 (2006) (dissertation).

¹⁰¹ See generally TAY-SHENG WANG, *supra* note 23.

¹⁰² See Wang Tay-Sheng, *Mountain Indigenous Peoples' Initial Encounter with Modern Law under the Japanese Rule in Taiwan: On the Criminal Sanctions* (日治時期高山族原住民族的現代法治初體驗：以關於惡行的制裁為中心), 40(1) NATIONAL TAIWAN UNIVERSITY LAW JOURNAL (台大法學論叢) 1, 22-47, 49-50 (2011).

¹⁰³ See Tay-Sheng Wang, *Taking Note of Indigenous Peoples' Laws in Legal Science and State Law* (在法學與國家法中看見原住民族法律), 134 *Chengchi Law Rev.* (政大法學評論) 1, 19-21 (2013).

Conquer by Settled Agriculture and Forced Relocation

In addition to the laws regulating the aboriginal land, the Japanese colonial government implemented a settled agriculture and group relocation policy for the aboriginal peoples in Taiwan. The major purposes of the policy included terminating shifting cultivation among the aboriginal peoples, exploiting the natural resources in the mountains, ruling the aboriginal peoples with fewer government officials and administrative resources, and dispersing the oppositional force of the aboriginal peoples against Japan.¹⁰⁴

Before the outsiders arrived in Taiwan in the seventeenth century, the indigenous peoples had adopted shifting cultivation, farming a parcel of land for a period of time and moving to another field. As part of the official policy of eliminating indigenous culture and practices such as headhunting, the Japanese government taught the aborigines to quit their traditional way of shifting cultivation and turn to settled agriculture: cultivating a fixed area of land and farming water fields through irrigation.¹⁰⁵

Along with the settled agriculture policy, starting in the 1900s, the government convinced the indigenous people to relocate their villages from remote mountains to more accessible places at the foot of the mountains and in the lowlands.¹⁰⁶ The relocation policy was enforced by resettling, splitting, and merging indigenous villages. In these flat areas, the aboriginal people could cultivate and irrigate farmlands. More importantly, the convenient resettlement sites allowed the colonial government to rule and manage the aborigines more easily and effectively.¹⁰⁷ The official report by the Government-General of Taiwan indicated that the

¹⁰⁴ See Kamehiko Iwaki (岩城龜彦), 臺灣の蕃地開發と蕃人 [Development of Aboriginal Land and Aboriginal People in Taiwan] 172-174 (1936).

¹⁰⁵ See TAIWAN SŌTOKUFU RIBANKA, *supra* note 14, at 2, 4, 7, 10, 12, 13, 22, 42, 71-73, 94.

¹⁰⁶ See *id.* at 8; SHU-YA LIN, *supra* note 40, at 74.

¹⁰⁷ See TAIWAN SŌTOKUFU RIBANKA, *supra* note 14, at 161.

relocation of aboriginal villages was for the purpose of supervising, educating, and developing the aborigines.¹⁰⁸

It was clear that Japan intended to strictly control and monitor the aborigines by relocating them to places close to the Japanese police force.¹⁰⁹ For example, the M'ihuw community of the Atayal tribe resisted and evaded Japanese control from 1911 to 1920. Suffering from harsh weather and a food shortage, the weakened M'ihuw community was eventually suppressed by Japanese force and relocated to a village near the M'ihuw police station.¹¹⁰ Likewise, after the Lobongku community was conquered by Japan in 1923, the community was ordered to live adjacent to the Lobongku police station. In 1929, the Lobongku community was persuaded by the police to further relocate to the bench land at the riverside.¹¹¹ In addition, the government would relocate individual indigenous villages and houses, merging them into one village to regulate the aboriginal people with fewer administrative resources.¹¹²

Relocation was a particular method for the Japanese colonial government to control the rebellious aboriginal people involved in the Musha Incident, the strongest armed resistance event of Taiwanese indigenous people against Japan in the late Japanese-ruled period. After the Musha Incident, the Japanese government uprooted six indigenous communities involved in the armed resistance from their homelands in Musha and concentrated them into one village, Alang Guluban.¹¹³ Through relocation, the rebellious indigenous people were segregated from other compliant indigenous communities, and the Japanese government could rigorously monitor and

¹⁰⁸ *See id.* at 129-131, 134, 143-144, 151-153, 173.

¹⁰⁹ *See id.* at 172.

¹¹⁰ *See id.* at 125-126.

¹¹¹ *See id.* at 126-127.

¹¹² *See id.* at 122-124, 158, 210.

¹¹³ *See id.* at 153.

pacify the rebellious indigenous communities in a centralized location distant from their base in the indigenous homelands.¹¹⁴

2.2.4 Republic of China Assimilation and Relocation Policy (1945–1987)

Mountain Fellows and Reserved Land

As a result of Japan's surrender at the end of World War II,¹¹⁵ Taiwan became a province of the Republic of China ruled by the Kuomintang (KMT) in 1945. Due to the war against the Communist Party in Mainland China, the KMT government proclaimed martial law and retreated to Taiwan in 1949, and the martial legal system strictly controlled Taiwanese people and their rights until 1987. Corresponding to the transformation of Taiwan from dictatorship to democracy, the development of indigenous land rights under ROC rule was divided into two stages based on different policies and laws governing indigenous land. In the first period (1945–1987), although the ROC government regulated indigenous land with policies and laws different from those of the Japanese-ruled period, the new legal system was hesitant to grant indigenous peoples more autonomy and authority on their lands. In the second period (1987–present), the indigenous peoples have gradually reclaimed rights and determination on their lands, which will be discussed in the next section.

After taking over Taiwan, the ROC government strived to extinguish the Japanese legacy and foster Chinese culture in Taiwanese society. Except for a few Japanese laws that were

¹¹⁴ *See id.* at 154.

¹¹⁵ In the late Japanese-ruled period, the colonial government actively implemented the assimilation policy to make Taiwanese people, including aborigines, become Japanese. The aborigines received Japanese education, abandoned tradition culture, and joined police and military service. During World War II, the Japanese government recruited the aborigines to form the "Takasago Volunteers," sending thousands of aboriginal males to front lines in Southeast Asia as combat troops from 1942 to 1944. The aboriginal females were also mobilized to build fortification in Taiwan, *see* SHIZUE FUJII, *supra* note 83, at 144-150.

temporarily upheld, all laws enacted by Japan were terminated.¹¹⁶ To suppress the Japanese culture, the government requested that the local population once ruled by Japan speak Mandarin, use Chinese names, and study Chinese textbooks.¹¹⁷ The indigenous peoples were no exception. They were asked to register their names in Chinese characters; traditional spelling of indigenous names was not allowed in the ROC household registration system.¹¹⁸

The wild aborigines were regarded by Japan as a separate group that needed special legal treatment, but under the ROC legal framework, the indigenous peoples were governed by the same laws that also regulated all other citizens. The ROC government abolished the Special Administrative Zones established by Japan, reorganizing these areas into thirty new mountain townships.¹¹⁹ On the one hand, the government maintained the mountain townships as separate zones that required government permission for non-indigenous people to enter.¹²⁰ On the other hand, most mountain township affairs were incorporated into regular local government administration, and the indigenous peoples were regulated by the same laws that also applied to non-indigenous people.¹²¹

For the ROC government, the uniqueness of the indigenous peoples was not their ethnicity but where they lived. The identity of wild aborigines in the Japanese-ruled period was transformed to “mountain fellows” to emphasize that the indigenous peoples and Han Chinese shared brotherhood as fellow people of one nation.¹²² The mountain fellows living in the

¹¹⁶ TAIWANSHENG HANGZHENG ZHANGGUAN GONGSHU GONGBAO (台灣省行政長官公署公報) [TAIWAN PROVINCE ADMINISTRATIVE EXECUTIVE OFFICE GAZETTE], Winter Vol. No. 20, 327-332 (1946).

¹¹⁷ See TIAN ZHE-YI (田哲益), TAIWAN YUANZHUMIN SHEHUI YUNDONG (台灣原住民社會運動) [TAIWANESE INDIGENOUS PEOPLES SOCIAL MOVEMENTS] 84-87 (2010).

¹¹⁸ Article 4, Regulations on Restoration of Name of People in the Taiwan Province (台灣省人民回復原有姓名辦法) (1945).

¹¹⁹ SHIZUE FUJII, *supra* note 83, at 162-164.

¹²⁰ TAIWAN PROVINCIAL GOVERNMENT INFORMATION DEPARTMENT (台灣省政府新聞處), GAI SHAN SHAN BAO SHENG HUO (改善山胞生活) [IMPROVING LIFE OF MOUNTAIN FELLOWS] 53 (1971).

¹²¹ See SHIZUE FUJII, *supra* note 83, at 164-167.

¹²² *Id.* at 159-160.

mountain townships were called “mountain-based mountain fellows,” and the mountain fellows living in other ordinary administrative zones could report their identity as “plain-based mountain fellows” in the official household registration system.¹²³

Even though the ROC government endeavored to eliminate Japanese factors in Taiwan, the Japanese laws and policies on aborigines influenced how the ROC authority dealt with indigenous land. As mentioned above, the ROC government terminated most of the laws from the Japanese-ruled period, but some laws were temporarily upheld to maintain social order and public interest. The Japanese regulations on forest and wild land were on the list of the temporarily effective laws.¹²⁴ In 1947, the Taiwan Provincial Government—the highest ROC political subdivision in Taiwan—declared that the state-owned properties received from Japan, including the indigenous land, would not be refunded or returned.¹²⁵

In addition, adopting the Japanese policy regarding indigenous land, in 1948, the Taiwan Provincial Government issued the Regulation on the Management of Reserved Mountain Land in the Counties of Taiwan Province (臺灣省各縣山地保留地管理辦法) to turn the lands previously reserved for aborigines into “mountain reserved land (山地保留地).” By promulgating these laws, the ROC authority retained the ownership of the indigenous land. Mountain fellows were only allowed to use natural resources on the reserved land within the scope and quantity permitted by the government.¹²⁶

While the mountain reserved land was supposed to support the lives of the mountain fellows, the legal system actually brought adverse effects on indigenous livelihoods and

¹²³ TAIWAN PROVINCIAL GOVERNMENT INFORMATION DEPARTMENT, *supra* note 120, at 1.

¹²⁴ TAIWAN SHENG HANGZHENG ZHANGGUAN GONGSHU GONGBAO, *supra* note 116, at 329.

¹²⁵ Article 8, Taiwan Provincial Regulations on the Clarification of Land Rights (臺灣省土地權利清理清理辦法), *see* TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [Taiwan Provincial Government Gazette], Winter Vol. No. 68, 1069 (1947).

¹²⁶ *See* TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Spring Vol. No. 3, 50-52 (1948).

development. According to the land survey in 1952, the mountain reserved lands comprised 127,090 hectares, far less than the proposed 241,206 hectares of land reserved for aborigines in the late Japanese-ruled period.¹²⁷ The average amount of farmland shared by each indigenous household was 0.88 hectares.¹²⁸ This small amount of arable land was unable to support livelihood of an indigenous family. From 1958 to 1967, the Taiwan Provincial Government spent nine years conducting more land surveys to accurately assess the current conditions of mountainous land. According to the survey results, the total mountain reserved land accounted for 240,634.2819 hectares: 19.24% suitable for agriculture, 73.68% for forest, 1.20% for husbandry, and 5.88% for other uses. More than half (68.9%) of the reserved land was located on mountainous slopes.¹²⁹ The Taiwan Provincial Government admitted that the agricultural land available for farming was scarce, so the government planned to distribute fruit tree saplings to the mountain fellows to improve their lives.¹³⁰

Compared to the government authority, mountain fellows were in an inferior position to use the mountain reserved land. According the Regulation on the Management of Mountain Reserved Land in Taiwan Province (臺灣省山地保留地管理辦法), the mountain fellows were to farm the reserved parcels of land and gather natural resources under the supervision and permission of township offices and county governments. For example, mountain fellows had to

¹²⁷ RU-HE LI (李汝和), QING-YI SHENG (盛清沂), TAIWAN SHENG WEN XIAN WEI YUAN HUI (台灣省文獻委員會), TAIWAN SHENG TONG ZHI JUAN SAN ZHENG SHI ZHI DI ZHENG PIAN (台灣省通志卷三政事志地政篇) [GENERAL HISTORY OF TAIWAN PROVINCE VOL. 3 GOVERNMENT AFFAIR HISTORY, GEOGRAPHIC AFFAIR CHAPTER], 123 (1971); MING-ZHE GAO (高明哲), TAI WAN YUAN ZHU MIN ZU TU DI SUO YOU QUAN ZHI DU YU TU DI LI YONG GUAN XI ZHI YAN JIU (臺灣原住民族土地所有權制度與土地利用關係之研究) [STUDY ON TAIWANESE INDIGENOUS LAND OWNERSHIP SYSTEM AND LAND USE RELATIONSHIP] 73 (2002) (thesis).

¹²⁸ AI-CHING YEN & KUO-CHU YANG, *supra* note 12, at 241.

¹²⁹ MINISTRY OF THE INTERIOR (內政部), ZHENG FU ZHI HANG YUAN ZHUMIN BAOLIUDI TUDI ZHENG CE JI GONG ZUO SHILU (政府執行原住民保留地土地政策及工作實錄) [RECORDS OF GOVERNMENT IMPLEMENTING INDIGENOUS RESERVED LAND POLICY AND WORK VOL.1], 34-35 (1996).

¹³⁰ See Taiwan Historica (國史館臺灣文獻館), Provincial Government Council Meeting Archives (省府委員會議檔案), No. 00502008411 (Jul. 17th, 1967), available at http://ds3.th.gov.tw/ds3/app005/list_pic1.php?ID1=00502008411&v=0010# (last visited Jun. 4, 2018).

apply and register at a government office to plant trees on the reserved parcels of land.

Harvesting timber also required permission from the government.¹³¹ The natural resources could be taken and used only by the mountain fellows themselves, not for business.¹³²

In contrast, the local governments had huge power to extract and use natural resources on the mountain reserved land. Local governments could allocate, take back, and reallocate parcels of land to the mountain fellows.¹³³ The reserved parcels of land could be used to build schools and leased to non-indigenous private individuals and companies.¹³⁴ The government could also use forest products—for example, timber—for public infrastructure or put the timber up for public auction.¹³⁵ All land management could be done solely by government decision, without consultation and consent of the mountain fellows.¹³⁶

In 1966, the Taiwan Provincial Government amended the Regulation on the Management of Mountain Reserved Land in Taiwan Province to for the first time to recognize indigenous private property rights and usufructs of the reserved land.¹³⁷ According to the amended regulation, mountain fellows were allowed to use or collect profits from forest products for free within the mountain reserved land if such land had never been registered by the government. Yet, the mountain fellows could not use the land for sale, rent, mortgage, transfer, or partition.¹³⁸ For parcels of land that had already been measured and recorded by the government, the mountain fellows might acquire land ownership after they had registered cultivation rights on a piece of

¹³¹ Article 30, 31, Regulation on the Management of Reserved Mountain Land in Taiwan Province (臺灣省山地保留地管理辦法) (1960).

¹³² *Id.* Article 32.

¹³³ *Id.* Article 7.

¹³⁴ *Id.* Article 8, 13.

¹³⁵ *Id.* Article 19, 20.

¹³⁶ See TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Summer Vol. No. 14, 171 (1960).

¹³⁷ See Tay-Sheng Wang, *supra* note 64, at 1678-1679.

¹³⁸ Article 6, Regulation on the Management of Mountain Reserved Land in Taiwan Province (臺灣省山地保留地管理辦法) (1966).

farmland and continually farmed the land for ten years. Also, the mountain fellows might rent a parcel of the mountain reserved land from the government to harvest timber or graze cattle, as long as the lease contract did not exceed ten years.¹³⁹

Compared to the freely exercisable rights of ordinary landowners, the property rights of the mountain reserved land were under strict government control and tight legal restriction. For example, except for inheritance and gifts, mountain fellow landowners of the reserved land could not sell, lease, or create a right *in rem* over the land.¹⁴⁰ In exceptional situations when the mountain fellow landowners were permitted to transfer their land ownership, the landowners could only transfer the land property rights to other mountain fellows. If they gave land to someone who was not officially registered as mountain fellow on the household registration record, the transfer of land rights would be deemed illegal and invalid.¹⁴¹

The purpose of such legal regulations was to prevent the mountain fellow landowners from losing their parcels of land to non-indigenous people; however, the restriction limited the exercise of their land property rights. Mountain fellows agreed that the regulation might reduce land loss to non-indigenous people, but they also complained about the legal restriction for interfering with their free and full use of the land according to the specific needs of each landowner.¹⁴² Since 1966, the Regulations on Management of the Mountain Reserved Parcels of land in Taiwan has been amended several times, but the basic principles of regulating the

¹³⁹ *Id.* Article 7.

¹⁴⁰ *Id.* Article 6, 8.

¹⁴¹ See Tay-Sheng Wang, *supra* note 64, at 1679.

¹⁴² See HSI-CHUN HSIE (謝世忠), LING-HWEI YANG (楊鈴慧), RUI-CHAO LIU (劉瑞超), WEI-CHENG LEE (李韋誠), YU-CHUNG HUANG (黃昱中), YUANZHUMINZU CHUANTONG XIGUAN ZHI DIAOCHA, ZHENGLI JI PINGGU NARU XIANXING FAZHI DIWUQI WEITUO YANJIU: BUNONGZU, SHAOZU (原住民族傳統習慣之調查、整理及評估納入現行法制第五期委託研究—布農族、邵族) [THE FIFTH RESEARCH REPORT OF INVESTIGATING INDIGENOUS TRADITIONAL CUSTOM AND EVALUATING ITS INCORPORATION INTO CURRENT LEGAL SYSTEM], 224-232 (2008); ICYANG PAROD ED. (夷將·拔路兒), DOCUMENTARY COLLECTION ON THE INDIGENOUS MOVEMENT IN TAIWAN VOL.2 (台灣原住民族運動史料彙編 下) 599 (2008).

mountain reserved land have generally remained unchanged.¹⁴³ During the first period of ROC rule, the indigenous peoples owned and used the reserved parcels of land to some extent, but the scope of such land rights was remarkably limited. Uses of the mountain reserved land were tightly restricted and overseen by the ROC government.

Assimilation by Relocation and Settled Farming

As discussed above, the ROC government intended to generalize the indigenous peoples by applying the same legal system to them and non-indigenous citizens. In the first four decades of ROC rule, assimilation was the central principle that shaped indigenous laws. In the earliest indigenous policy, the Directions Governing Mountain Administration in Taiwan Province (台灣省山地施政要點) of 1951, the Taiwan Provincial Government declared that mountain administration, consistent with general local administration, aimed to advance the intelligence of mountain fellows and assist their development. It was planned that, in the long term, the mountain fellows would share equal rights when they became as mature and capable as non-indigenous citizens. The policy intended to change the overall lifestyle of the mountain fellows, including their languages, knowledge, cultures, health conditions, infrastructure, and livelihoods.¹⁴⁴

The above directions and follow-up laws regarding mountain fellows focused on economic development through relocation and settled farming. The ROC government pursued assimilation of the mountain fellows, encouraging them to relocate from remote areas to

¹⁴³ See Tay-Sheng Wang, *supra* note 55, at 1689.

¹⁴⁴ See SHIZUE FUJII, *supra* note 83, at 183-194.

locations with convenient access and traffic.¹⁴⁵ Thus, the mountain fellows would be exposed to the mainstream Chinese culture in the lowlands.

Settled farming was also strongly promoted through the issuance of the Regulation on Encouraging the Implementation of Settled Agriculture on Mountain Land (獎勵山地實行定耕農業辦法) and the Regulation of Encouraging Seedling Cultivation and Afforestation on Mountain Land (獎勵山地育苗及造林實施辦法). The regulations suggested details of the areas and new methods, for example, using pesticides and cultivating terraces, for the mountain fellows to adopt in lieu of their “bad traditional practice” of shifting cultivation to increase agricultural production.¹⁴⁶ Township, county, and provincial governments also held annual competitions to evaluate the achievements of settled farming and reward winning indigenous households and supervising government departments.¹⁴⁷

The implementation of settled farming had a close relationship with the mountain reserved land policy, altogether leading to further loss of indigenous land to non-indigenous people. When the ROC government supported settled agriculture and outlawed traditional indigenous activities like hunting, the mountain fellows were confined to specific areas to cultivate the reserved parcels of land. As not all of the reserved mountain land was used by the mountain fellows, the government utilized the surplus land to develop industry.¹⁴⁸ The 1960 amendment of the Regulation on the Management of Mountain Reserved Land in Taiwan

¹⁴⁵ See TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Spring Vol. No. 26, 171 (1951).

¹⁴⁶ Article 1, Regulation on Encouraging the Implementation of Settled Agriculture on Mountain Land (獎勵山地實行定耕農業辦法) (1951).

¹⁴⁷ See TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Summer Vol. No. 71, 962-964 (1951).

¹⁴⁸ See SHIZUE FUJII, *supra* note 83, at 207-208.

Province opened up the reserved parcels of land not farmed by the mountain fellows to non-indigenous individuals and companies.

The goal of the 1960 regulation was the complete opposite of that of its earlier version from 1948, which had aimed to reduce the lease of the reserved parcels of land to non-indigenous people. According to the 1960 regulation, non-indigenous people who registered their domiciles in the mountain reserved land areas, government officials serving in mountain townships, and private industry—the mining industry, as well as agricultural, forestry, fishery, and husbandry business—were all eligible to apply to the government for use and lease of the reserved land. The regulation was further amended in 1966 and 1974 to more freely open up the land to non-indigenous private parties who operated tourism businesses, transportation, factories, timber harvest, and hotels.¹⁴⁹

Toward the end of this first period of ROC indigenous land policy, in 1983, nearly 40% of the mountain reserved land was used by the government and non-indigenous private parties. Only 62% of the reserved land was left to the mountain fellows. The actual situation was worse. According to a study, among those parcels of land occupied by the mountain fellows, about 10–20% were illegally transferred or rented to non-indigenous people.¹⁵⁰

The settled farming policy not only resulted in the loss of the mountain reserved land to non-indigenous people but also changed land relationships within indigenous tribes. Because the ROC government aimed to assimilate the mountain fellows and treated them no differently from non-indigenous people, the mountain reserved land legal system—as a special protection for the mountain fellows—was designed to be ultimately lifted after the mountain fellows had better

¹⁴⁹ See Article 33, Regulation on the Management of Mountain Reserved Land in Taiwan Province (臺灣省山地保留地管理辦法) (1966); Article 34, Regulation on the Management of Mountain Reserved Land in Taiwan Province (臺灣省山地保留地管理辦法) (1974).

¹⁵⁰ See ICYANG PAROD ED., *supra* note 142, at 898, 902.

lives and had developed to be self-sustaining.¹⁵¹ The ROC government believed that settled agriculture would improve the lives of the mountain fellows and help them live like non-indigenous people in the lowlands. The government also planned to allocate the reserved land to the mountain fellows, who would thus have legal rights on specific parcels of land similar to normal land rights in the ROC property law system. To prepare for the land allocation, the government conducted land surveys from 1958 to 1967 to measure and record the status of the reserved parcels of land.¹⁵²

The example of the Taketonpu community of the Bunun tribe shows how the government policies have changed the land relationships and practices of the indigenous peoples.

Traditionally, the Taketonpu tribal people had grown millet by shifting cultivation, but in the 1940s, the Japanese government requested that they cultivate paddy rice by settled agriculture on the land reserved for the wild aborigines. The Taketonpu tribal people were removed from their homeland in cold, high-altitude mountains to areas lower than 1,200 meters in altitude for the warm climate that paddy rice needed.¹⁵³

The ROC government continued the settled agriculture policy and, with the aim of allocating land for termination of the mountain reserved land system, conducted land surveys to clarify land status. During the land surveys, township officials told the Taketonpu community that the government would record land usufructs based on who was currently cultivating a piece of land. To claim land usufructs, many Taketonpu tribal people farmed the land that should have been resting in the fallow period. Moreover, because the land surveys specified the land area and

¹⁵¹ Article 28, Regulation on the Management of Reserved Mountain Land in the Counties of Taiwan Province (1948), see TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Spring Vol. No. 3, 52 (1948).

¹⁵² See SHIZUE FUJII, *supra* note 83, at 218.

¹⁵³ See Ying-Gui Huang (黃應貴), *Crops, Economy and Society of the Bunun of Taketonpu* (作物、經濟與社會: 東埔社布農人的例子), 27:6 JOURNAL OF GUANGXI UNIVERSITY FOR NATIONALITIES (廣西民族大學學報) 13, 17 (2005).

rights enjoyed by the Taketonpu households, thereafter, the tribal people could cultivate only their particular parcels of land. Under the new land registration and legal system, it became illegitimate for the Taketonpu tribal people to exercise their traditional practice of using fallow land possessed by other families and members of the same clan.¹⁵⁴

2.2.5 Indigenous Movements and Reclaiming Land Rights (1987–present)

Rise of Indigenous Rights

Beginning in the 1980s, Taiwan began to transition from authoritarian rule to a more liberal, democratic society. The martial legal system was lifted in 1987, and Taiwanese people regained fundamental constitutional rights such as freedom of speech, association, and assembly. Along with the social change, indigenous peoples in Taiwan realized the injustice done to them and established NGOs to promote the dignity and autonomy of their indigenous tribes. In 1987, the Indigenous Rights Advocacy Association, the first major organization to mobilize indigenous movements, issued the Taiwanese Indigenous Right Declaration to claim the collective right of Taiwanese indigenous peoples, being Austronesian rather than Han Chinese, to resist cultural assimilation, economic exploitation, and social discrimination. The indigenous peoples requested the rights to participate in government policy-making, self-govern tribal land, reclaim the land deprived illegally, and restore their indigenous names, languages, and cultures.¹⁵⁵ The indigenous peoples facilitated the “Returning My Land” movements three times in 1988, 1989, and from 1990 to 1993 to request that the government return indigenous land and reserve more

¹⁵⁴ See SHIZUE FUJII, *supra* note 83, at 218.

¹⁵⁵ Taiwanese Indigenous Right Declaration (台灣原住民族權利宣言), see ICYANG PAROD ED. (夷將·拔路兒), DOCUMENTARY COLLECTION ON THE INDIGENOUS MOVEMENT IN TAIWAN VOL.1 (台灣原住民族運動史料彙編 上) 192 (2008).

land for indigenous people.¹⁵⁶ Through social movements and legislative lobbying, the Taiwanese indigenous peoples advocated for rectifying indigenous tribal names,¹⁵⁷ restoring indigenous personal names,¹⁵⁸ and recovering indigenous languages and extending indigenous education.¹⁵⁹

In response, the Amendment of the Constitution in 1994 adopted a provision protecting the rights of “indigenous people” to replace the previous discriminatory term of “mountain fellows.” Accordingly, the regulation concerning mountain reserved land was renamed “land reserved for indigenous people” in 1995.¹⁶⁰ In 1996, the Legislative Yuan passed the Council of Indigenous People Executive Yuan Organization Bylaws to create the Council of Indigenous People, an agency at the national level that has full authority over and obligation of managing indigenous affairs. In 1997, the Constitution was further amended to change the legal term “indigenous people,” which protected the individual rights of indigenous persons, to “indigenous peoples” to recognize their collective rights. However, although the ROC government started to respect indigenous culture and advance the interests of indigenous peoples through better social welfare, the government did not grant the request of self-government of tribal nations.¹⁶¹

The Legislative Yuan has enacted and amended laws to promote indigenous rights and culture. For example, the Indigenous Peoples Basic Law of 2005 acknowledged indigenous rights to land and natural resources.¹⁶² When the government and private sectors propose plans for land development, resource utilization, ecological conservation, and academic research on indigenous land, the government department and private parties shall consult and obtain the

¹⁵⁶ See TIAN ZHE-YI, *supra* note 117, at 111-125; SHIZUE FUJII, *supra* note 83, at 251-252; ICYANG PAROD ED., *supra* note 142, at 580-586.

¹⁵⁷ See TIAN ZHE-YI, *supra* note 117, at 51-59, 68-80.

¹⁵⁸ *Id.* at 96-102.

¹⁵⁹ *Id.* at 88-92.

¹⁶⁰ See ZONGTONGFU GONGBAO (總統府公報) [OFFICE OF THE PRESIDENT GAZETTE], No.6000, 1-5 (Mar. 22, 1995).

¹⁶¹ See SHIZUE FUJII, *supra* note 83, at 265; ICYANG PAROD, *supra* note 155, at 215-217.

¹⁶² Article 20, Indigenous Peoples Basic Law (原住民族基本法) (2005).

consent of the indigenous peoples. The indigenous peoples have the right to participate in the land management process and share the benefits of the land's use. The government and law can restrict indigenous peoples' use of indigenous land and natural resources only after the indigenous peoples have been consulted and given consent to the proposed legal regulation and restriction.¹⁶³

Expanding Land Reserved for Indigenous Peoples

In 1990, the Executive Yuan promulgated the Regulation on Development and Management of the Lands Reserved for Mountain Fellows (山胞保留地開發管理辦法) to replace the previous Regulation on the Management of Mountain Reserved Land in Taiwan Province issued by the Taiwan Provincial Government.¹⁶⁴ Although the existing rights of land use by non-indigenous people and companies would not be affected, under the new regulation, indigenous people had priority to apply for development projects on the reserved mountainous land. Non-indigenous people were limited to living on the reserved parcels of land and could rent the land to build their houses.¹⁶⁵ The new regulation had more detailed articles to grant indigenous people land rights in a shorter period. For example, according to the old regulation, mountain fellows could acquire land ownership after they had registered cultivation rights on a piece of farmland and continually farmed the land for ten years. In the new 1990 regulation, the time to acquire land ownership was halved to five years.¹⁶⁶

The new regulation also broadened the area of the mountain reserved land. In addition to the reserved land recorded in the earlier land surveys, the law authorized the government to

¹⁶³ *Id.* Article 21.

¹⁶⁴ See FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZETTE], No.119, 16-19 (May 31, 1990).

¹⁶⁵ Article 23, 26, Regulation on Development and Management of the Parcels of land Reserved for Mountain Fellow (山胞保留地開發管理辦法) (1990).

¹⁶⁶ *Id.* Article 8, Section 2.

designate more land as mountain reserved land for the growing indigenous population.¹⁶⁷ The law was put into practice due to the strong demand from the indigenous peoples to recover their land rights. In the Returning My Land movements, the indigenous peoples claimed that they had lived on the island long before the settlers had arrived, and that they were the original owners of the land and true sovereigns in the territory. Indigenous land had been illegitimately taken by the Dutch, the Zheng regime, the Qing empire, Japan, and the ROC government through force and without fair compensation. The rulers had implemented laws to seriously restrict indigenous land rights and management.¹⁶⁸ The indigenous peoples requested that the ROC government remedy the unjust land exploitation and return the indigenous land, for example, indigenous reserved parcels of land that were devoted to government use irrelevant to indigenous well-being, allocated to state-owned enterprises, and leased to private companies.¹⁶⁹

In response to the indigenous land rights claims, the ROC government expanded the areas of mountain reserved land through additional allocation (增編) and delimited allocation (劃編). In 1989, the Taiwan Provincial Government began the process of additional allocation of mountain reserved land. Indigenous people could apply to the government for an area of public land to be designated as reserved land if the indigenous people had received the land from their ancestors and had continuously used the land until 1988. The delimited allocation meant that indigenous people could apply for designation as reserved land of a parcel of public land where they had resided. After the indigenous people submitted their applications, the government would check the land's status and designate qualified land as the reserved land.¹⁷⁰ Between 1990

¹⁶⁷ *Id.* Article 3, Section 2; see ICYANG PAROD ED., *supra* note 142, at 622.

¹⁶⁸ See ICYANG PAROD ED., *supra* note 142, at 605-608, 876.

¹⁶⁹ See *id.*, at 631-633.

¹⁷⁰ COUNCIL OF INDIGENOUS PEOPLES (原住民族委員會), BUBAN ZENG HUA BIAN YUANZHUMIN BAOLIUDI SHISHI JIHUA (補辦增劃編原住民保留地實施計畫) [PROJECT OF THE SUPPLEMENTARY PROCESS FOR ADDITIONAL ALLOCATION AND DELIMITED ALLOCATION OF LAND RESERVED FOR INDIGENOUS PEOPLES] 2 (2016), available at

and 1998, the newly designated areas of land reserved for indigenous people amounted to about 17,000 hectares by additional allocation and 284 hectares by delimited allocation.¹⁷¹

The additional allocation and delimited allocation of the land reserved for indigenous people relied on the indigenous people themselves to initiate the process for the government to investigate, verify, and designate indigenous land. The applications were accepted only from 1990 to 1998, when the government was working on this project. However, many indigenous people were unaware of this information and missed the application deadline. This problem was noticed by the ROC government, and it was recognized that missing the submission deadline did not extinguish the substantial right to claim qualified land as land reserved for indigenous people.¹⁷²

To better protect indigenous land rights, in 2007, the Council of Indigenous Peoples, Executive Yuan, issued regulations to reopen the process of additional allocation and delimited allocation.¹⁷³ This time, not only did the government accept new submissions, but the delimited allocation was also expanded from plains indigenous townships to also include mountain indigenous townships.¹⁷⁴ The progress showed that the government was more cautious of indigenous land rights and made efforts for their advancement.

According to the latest data available from the Council of Indigenous Peoples, the overall land reserved for indigenous peoples in 2015 was 262,700 hectares—about 22,000 hectares more

<https://www.apc.gov.tw/portal/getfile?source=2D838540F5D6F659FAFB9859EF31AC3B381A272F479D65D98D902DFAAFC2E15428FFC60FB190448BD86B807911B4EDA3E190E1E9A64205DB3B91B9DF71659F0C&filename=35F89B62C00F6146679B4BA2B4AC8A89F4529F7086A01A7BE80B95016A3ABFE38871762399743F95> (last visited Jun. 6, 2018).

¹⁷¹ *Id.* at 3.

¹⁷² *Id.* at 3-5.

¹⁷³ Gongyoutudi Zengbian Yuanzhumin Baoliudi Chuli Yuanze (公有土地增編原住民保留地處理原則) [Regulation on Additional Allocation of Public Land as Parcels of land Reserved for Indigenous People] (2007); Gongyoutudi Huabian Yuanzhumin Baoliudi Yaodian (公有土地劃編原住民保留地要點) [Regulation on Delimited Allocation of Public Land as Parcels of land Reserved for Indigenous People] (2007).

¹⁷⁴ COUNCIL OF INDIGENOUS PEOPLES, *supra* note 170, at 6-7.

than the mountain reserved land in the late 1960s.¹⁷⁵ One possible concern may be that, compared to the expansion of the land reserved for indigenous people, the indigenous population in 2015 was 4.5 times bigger than in the early ROC period.¹⁷⁶ When the indigenous population increased in both urban and rural areas, many indigenous people migrated to cities because they did not have enough land to earn a livelihood in their hometowns.¹⁷⁷ Even after the additional allocation and delimited allocation increased the reserved parcels of land, it is likely that indigenous people still have the problem of insufficient parcels of land.

Moreover, according to the 2015 data from the Council of Indigenous Peoples, only 45.90% of the reserved parcels of land were registered by indigenous people to formally have land rights. The types of the registered land rights included fee simple ownership (35.64%), superficies (0.04%),¹⁷⁸ agricultural right (6.83%),¹⁷⁹ and cultivation right (2.96%). Another small amount (0.42%) of the reserved land was leased to indigenous people and groups. The rest of the reserved land (54.10%) was used by the government or leased to public enterprises and non-indigenous private sectors.¹⁸⁰ The data did not reflect to what extent the reserved parcels of land

¹⁷⁵ COUNCIL OF INDIGENOUS PEOPLES (原住民族委員會), 104 NIAN YUAN ZHU MIN BAO LIU DI QUAN LI FEN PEI TONG JI BAO BIAO (104 年原住民保留地權利分配統計報表) [2015 STATISTICAL REPORT OF RIGHT TO INDIGENOUS RESERVED LAND] (2016), available at <https://www.apc.gov.tw/portal/getfile?source=2D838540F5D6F659FAFB9859EF31AC3B381A272F479D65D98D902DFAAFC2E154ED7B1105FF32273A147E7C03276EFA7016CA15C3986E2F773B91B9DF71659F0C&filename=6E4D84E785A51E791DADD59743F26305C4469E4C8AAD9C65A852238F00A7C162> (last visited: April 2nd, 2018).

¹⁷⁶ ICYANG PAROD ED., *supra* note 142, at 923; COUNCIL OF INDIGENOUS PEOPLES (原住民族委員會), TAI MIN XIANSHI YUANZHUMINZU RENKOU—AN XINGBIE NIANLING (台閩縣市原住民族人口—按性別年齡) [INDIGENOUS POPULATION OF COUNTIES AND CITIES IN TAIWAN AND FUJIAN—GENDER AND AGE VARIABLES] (2015), available at <https://www.apc.gov.tw/portal/docDetail.html?CID=940F9579765AC6A0&DID=0C3331F0EBD318C250723039230B4821> (last visited Jun 12th, 2018).

¹⁷⁷ See RESEARCH, DEVELOPMENT AND EVALUATION COMMISSION (行政院研究發展考核委員會), TAIWAN SHANBAO QIANYI DUSHI HOU SHIYING WENTI ZHI YANJIU (台灣山胞遷移都市後適應問題之研究) [STUDY OF ADAPTION ISSUES OF TAIWANESE MOUNTAIN FELLOWS AFTER MIGRATING TO CITIES] 65-69, 74, 129-133 (1991).

¹⁷⁸ Superficies is a right to use land of another person for the purpose of constructing a building or other works, *see* Article 832, Civil Code (民法) (2015).

¹⁷⁹ Agricultural right is a right to cultivate, forest, farm, plant bamboos and trees, or conserve land of another person, which cannot exceed twenty years, *see* Article 850-1, Civil Code (民法) (2015).

¹⁸⁰ COUNCIL OF INDIGENOUS PEOPLES, *supra* note 175.

were actually used by indigenous people without formal land rights registration. Nonetheless, it is fair to say the parcels of land reserved for indigenous peoples have not completely allocated to and utilized for them, as less than half of the land was in their possession and under their management.

From Reserved Land to Traditional Territory

In addition to insufficient control by indigenous people, other issues of indigenous land have also been significant. The land allocation has granted only individual land rights to indigenous persons but refused to recognize the right of indigenous communities to hold land in common, which has caused the privatization of indigenous land rights. The indigenous land became personal property, not shared and transferred by means of family and clan relationships. A further issue is that the reserved parcels of land sometimes are not the ancestral parcels of land of the indigenous peoples. Both the quasi-preserved forests and parcels of land in the Japanese rule period and the mountain reserved land in the ROC period were locations picked by the authorities to confine and relocate indigenous people. Even though the ROC government has allocated the rights of the reserved parcels of land to the indigenous people, this practice has failed to solve the most essential problem: The indigenous people have been alienated from their homelands and are powerless against any decision to exploit those ancestral parcels of land.

As mentioned above, Article 21 of the Indigenous Peoples Basic Law requires any government or private party that intends to utilize indigenous land for a proposed project to consult with, obtain consent from, and share interests with the indigenous peoples. The Council of Indigenous Peoples has a mandate to promulgate detailed regulation on how to define and designate indigenous land, as well as the consultation with, participation of, and compensation of

the indigenous peoples for use of indigenous land. Indigenous land consists of not only the indigenous reserved lands but also the traditional territories of indigenous tribes.¹⁸¹ Only after the traditional territories are specifically marked out can indigenous peoples exercise their rights to these areas. Moreover, while the current reserved land system allocates the rights of specific parcels of land to individual indigenous persons, traditional territories may allow collective rights for an indigenous tribe.

Since 2007, bills of demarcation of traditional indigenous land and water territory have been proposed to the Legislative Yuan, but the bills have been under discussion and debate. None have been enacted by the legislators.¹⁸² Aside from the slow legislation, in 2017, the Council of Indigenous Peoples promulgated an executive regulation, the Regulation for Demarcating Indigenous Traditional Territory and Tribal Land (原住民族土地及部落範圍土地劃設辦法), to define traditional territory and specify how to investigate and determine the geographic areas of traditional territories.

On the one hand, the regulation defines traditional territory quite broadly to advance the right of indigenous peoples to be informed and included in the land management decision-making process. According to Article 3 of the regulation, traditional territories include six land types: (1) sacred land where indigenous people exercise traditional rituals; (2) land where ancestral spirits rest, for example, cemetery land; (3) tribal land where the indigenous people have lived for generations and where they had lived before forced relocation—related back to the coercive group relocation practice under Japanese rule—and voluntary migration; (4) hunting

¹⁸¹ Article 2, Item 5, Indigenous Peoples Basic Law (2015).

¹⁸² LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol.96 No.85, 5-6 (2007); LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol.105 No.55, 10 (2016); LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol.105 No.30, 6 (2016); LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol.107 No.008, 297-348 (2017).

grounds; (5) parcels of land cultivated by old indigenous communities; and (6) land not belonging to category 2, but whose areas can be specified according to indigenous cultural meaning and traditional custom.¹⁸³

On the other hand, Article 3 was criticized for illegitimately limiting traditional territory to only public land, excluding privately owned parcels of land that were cultivated by or transferred to private parties. According to the Indigenous Peoples Basic Law, the indigenous right of informed consent applies to indigenous land and tribal parcels of land owned by the government.¹⁸⁴ The Council of Indigenous Peoples interpreted the legal text as indigenous land and tribal parcels of land, both owned by the government. Indigenous people and some scholars have argued that the law intends to protect the informed consent rights of (1) indigenous land, including public parcels of land and private parcels of land, and (2) tribal parcels of land owned by the government. As traditional territories were indigenous land, they should include both public and private parcels of land.

When the Regulation for Demarcating Indigenous Traditional Territory and Tribal Land limited traditional territory to only public land, the executive regulation added an extra restriction that violated the higher legal authority of the Indigenous Peoples Basic Law.¹⁸⁵ Although protecting the indigenous rights of informed consent on land management may be a common goal for contemporary Taiwanese society, legislators, legal scholars, and the general public are still debating whether future laws can and should make traditional territories cover not only

¹⁸³ Executive Yuan (行政院), Yuanzhuminzu Tudi huo Buluo Fanwei Tudi Huashe Banfa zong Shuoming (原住民族土地或部落範圍土地劃設辦法總說明) [General Introduction of Demarcating Indigenous Traditional Territory and Tribal Land], available at https://gazette.nat.gov.tw/EG_FileManager/eguploadpub/eg023031/ch02/type1/gov13/num1/images/AA.pdf.

¹⁸⁴ Article 21, Indigenous Peoples Basic Law (2015).

¹⁸⁵ See Cheng-Feng Shih (施正鋒), *The Demarcation of Indigenous Territories (原住民族傳統領域的劃設)*, 7:1 JOURNAL OF THE TAIWAN INDIGENOUS STUDIES ASSOCIATION (台灣原住民族研究學報) 165, 167-168 (2017).

public parcels of land but also privately owned land cultivated by or transferred to non-indigenous private entities in the distant past.¹⁸⁶

¹⁸⁶ See Xiaoshi de 100 Wan Gongqing “Chuantong Lingyu”—Yuanzhuminzu Yaode Bushi “Tudi,” Ershi “Zhuquan” (消失的 100 萬公頃「傳統領域」—原住民族要的不是「土地」，而是「主權」) (The Missing One Million Hectares of “Traditional Territory—What the Indigenous Peoples Want Is Not “Land,” but “Sovereignty”), THE NEWS LENS (關鍵評論網) (Mar. 21st, 2017), available at <https://www.thenewslens.com/article/63214> (last visited May 31, 2018).

Chapter 3 Development of Disaster Management Law in Taiwan

Located on the Pacific Rim and at low and middle latitudes, Taiwan has frequently been struck by natural disasters such as earthquakes and typhoons. Since 1898, when Taiwan first installed seismological equipment, there have been 101 earthquakes that caused death, injury, property loss, and other damages in Taiwan. According to statistical data, on average, twenty-four earthquakes with magnitudes greater than five occur in Taiwan in a year, and one becomes a disaster that results in harm.¹ In addition, typhoons strike Taiwan every summer and autumn, especially from July to September. The typhoons usually bring strong winds and heavy rainfall to Taiwan, causing floods, mudflows, and landslides. About three to four typhoons directly hit Taiwan every year, many of which lead to great loss of life and property for the Taiwanese people.²

While natural disasters have frequently struck Taiwan, disaster laws and policies in Taiwan have developed slowly and failed to protect the people from disasters' harms. The slow progress of disaster management, as well as improper infrastructural plans and changes, have aggravated the plights of Taiwanese indigenous peoples when they and their land were seriously impacted by natural disasters. To understand how Taiwan has developed its disaster management legal system and its deficiency, this chapter reviews the history of disaster management laws since the Republic of China began to rule Taiwan in 1945. The two sections of this chapter

¹ CENTRAL WEATHER BUREAU (中央氣象局), TIANRAN ZAIHAI ZAIFANG WENDA JI (天然災害災防問答集) [QUESTIONS AND ANSWERS ABOUT NATURAL DISASTERS] 1 (2015), available at https://www.cwb.gov.tw/V7/prevent/plan/prevent-faq/prevent_faq.pdf

² See TAIWAN HISTORICA (國史館文獻館), ZOUGUO FENGYU: DAORYU RENMIN TAIFENG JIYI JIEAN BAOGAO (走過風雨—島嶼人民颱風記憶結案報告) [WALKING THROUGH WIND AND RAIN: FINAL REPORT OF ISLANDERS' MEMORY OF TYPHOON] 15-19 (2010).

respectively examine the two periods of disaster management laws in Taiwan. In the first period (1945–1999), disaster impacts were principally handled by executive power through administrative regulation and presidential emergency decree. In the second period (2000–present), legislation has assumed a key role in government disaster management, with laws being actively passed and amended to regulate the disaster management authority, its mission, and its procedure in Taiwan.

3.1 Executive Authority to Respond to Natural Disasters (1945–1999)

The first period of executive power over disaster management lasted over half a century in Taiwan. In this long period, there were no national statutes specifically regarding disaster management. Without a unified legal framework at the national level, government departments worked independently to deal with problems relating to their authority after a natural disaster had occurred. No single disaster management agency coordinated central and local governments to comprehensively prepare for, prevent, respond to, and recover from hazards. The problem was especially serious when a large-scale disaster affected several counties.³ Under such circumstance, the Taiwanese government relied on two executive approaches to deal with the disaster's impacts: local administrative regulation and presidential emergency decree.

3.1.1 Local Administrative Regulation on Disaster Management

Before a national statute on disaster management was enacted in 2000, for more than half a century, Taiwan relied on administrative regulations issued by local governments to deal with

³ See Chia-Yu Chou (周佳宥), *The Past, Present and Future of Disaster Prevention and Protection Act* (台灣災害防救法之過去、現在與未來), 62:10 THE LAW MONTHLY (法令月刊)103, 105 (2011).

natural disasters' impacts. Specifically, the primary first-level administrative division of the Republic of China (hereafter ROC) is the province/municipality. After the ROC government came into conflict with the Communist Party and retreated to the island of Taiwan in 1949, the ROC's territory consisted of Taiwan Province and a small portion of Fujian Province. In 1967, Taipei City was split off from Taiwan Province and upgraded to Taipei Municipality, and Kaohsiung City became Kaohsiung Municipality in 1979.

Accordingly, disaster management was gradually divided into four regions: Taiwan Province, Taipei Municipality, Kaohsiung Municipality, and Fujian Province. Each region was governed by its local regulations regarding disaster affairs. Among them, the legal disaster management of Taiwan province had the greatest significance because the province constituted more than 98% of the ROC's territory.⁴ The province's population also accounted for 80.43% of the total population in 1979 after Kaohsiung, following Taipei, was split off from Taiwan Province.⁵ Therefore, this section focuses on the disaster laws in the Taiwan Province, including their development, characteristics, and deficiencies.

Aid after Natural Disasters

The first disaster relief law in Taiwan was the Regulation on Disaster Relief in Taiwan Province (台灣省災害救濟辦法), issued by the Taiwan Provincial Governor's Office in 1947. The regulation had only nine articles for disaster response and assistance, which was too brief to guide the government in effective disaster relief. According to the regulation, when a disaster

⁴ See National Statics (行政院主計總處), available at <https://statdb.dgbas.gov.tw/pxweb/Dialog/varval.asp?ma=CS0101A0A&ti=&path=../database/CountyStatistics/&lang=9> (last visited Nov. 21, 2018).

⁵ See Department of Household Registration, <https://www.ris.gov.tw/app/portal/346> (last visited Nov. 21, 2018).

occurred, township offices should report to county governments.⁶ The county governments then inspected the areas affected by the disaster and provided temporary shelter, food, water, and medical care to disaster victims.⁷ If the magnitude and severity of the disaster was beyond the capability of the county governments, they could ask the provincial government for financial support.⁸

In 1956, the Regulation on Disaster Relief in Taiwan Province was abolished. In its stead, the Taiwan Provincial Government issued the Regulation on Relief to Casualties and Collapsed Houses Due to Disasters in Taiwan Province (台灣省人民因災死傷及住屋倒塌救濟辦法) to articulate specific procedures and government duties of relief funds for deaths, casualties, and houses damaged by wind, flood, fire, earthquake, or another major disaster.⁹ Under the supervision of the Taiwan Provincial Government, county governments' primary responsibility was to investigate disaster damage and distribute assistance. The county governments were to immediately inspect human and property loss and then report to the provincial government within fifteen days following the disaster, or as soon as possible in a catastrophic event.¹⁰ In addition to receiving financial assistance, the disaster victims would be provided with temporary shelter and food.¹¹ The expense for the disaster relief in a county, if under twenty thousand Taiwan dollars, was paid by the county governments. If the disaster relief cost more, the county

⁶ Article 2, Regulations on Disaster Relief in Taiwan Province (台灣省災害救濟辦法) (1947), *see* TAIWAN SHENG HANGZHENG ZHANGGUAN GONGSHU GONGBAO (台灣省行政長官公署公報) [TAIWAN PROVINCIAL GOVERNOR'S OFFICE GAZETTE], Vol. 36: Spring: 15, 229 (Jan. 21st, 1947).

⁷ *Id.* Article 4.

⁸ *Id.* Article 6.

⁹ Article 2, Regulations on Relief to Casualties and Collapsed House Due to Disasters in Taiwan Province (台灣省人民因災死傷及住屋倒塌救濟辦法) (1956), *see* TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 42: Sumer: 12, 127 (Apr. 14, 1956).

¹⁰ *Id.* Article 3.

¹¹ *Id.* Article 9.

governments paid only a third, and the other two-thirds of the cost would be covered by the provincial government.¹²

Disaster Management Governmental Structure

Before 1958, the government disaster management effort in Taiwan was limited to post-disaster relief provided after a disaster had already happened and caused losses among Taiwanese people.¹³ To alleviate and respond to disaster impacts more promptly, in April 1958 the Taiwan Provincial Government created its first disaster management government organization, the Disaster Prevention and Relief Commission (防救災害會報), by issuing the Taiwan Provincial Regulations on the Typhoon, Earthquake, and Disaster Prevention and Relief Commission (台灣省政府防救颱風地震災害會報設置辦法). According to the regulation, the provincial government would form the Disaster Prevention and Rescue Commission when there was imminent threat of typhoon, torrential rain, or landslide in Taiwan.¹⁴ With the police department director as the convener, the commission called up senior officials—from the Civil Defense Command, Vehicle and Mobility Committee, Office of Civil Affairs, Office of Finance, Office of Construction, Office of Education, Office of Agriculture and Forest, Department of Societal Affairs, Department of Transportation, Department of Health, Police Department, Bureau of Food, Weather Institute, and other departments of the provincial government—to meet

¹² *Id.* Article 11. For actual case, see TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 46: Spring: 6, 46 (1957).

¹³ Taiwan Provincial Government Committee Meeting Archive (臺灣省政府委員會議檔案), Taiwan Historica (國史館臺灣文獻館), No. 00507002305 (1958), available at <http://ds3.th.gov.tw/ds3/app005/list3.php?ID1=00507002305> (last visited Jul. 3rd, 2018).

¹⁴ Article 2, 4, Regulations on the Taiwan Provincial Government Typhoon, Earthquake, and Disaster Prevention and Relief Commission (台灣省政府防救颱風地震災害會報辦法), see TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 47: Summer: 22, 324 (1958).

and cooperate in coping with possible disaster impacts and damages.¹⁵ The commission members supervised and coordinated all disaster management efforts of all departments in the provincial government.¹⁶

Three months later, in July 1958, a corresponding system of commissions for disaster prevention and relief in county governments was established to fulfill their responsibility to respond to disaster right away. The county disaster prevention and relief commissions were formed by officials from various departments of county government relating to disaster issues and elected representatives of county councils. The convener of the commission was the magistrate of that county, assisted by the police department commissioner as secretary-general of the commission. The county disaster prevention and relief commissions had primary responsibility for dealing with disaster impacts and communicating closely with the provincial Disaster Prevention and Relief Commission.¹⁷

Before long, the two-level disaster management organization was replaced with a new disaster management governmental structure after a serious flood in 1959. In early August of that year, Typhoon Ellen struck Taiwan and caused flooding throughout central and southern Taiwan, which caused 667 deaths, 408 people missing, and 942 injured.¹⁸ Eighteen thousand and two houses were damaged, and 22,426 houses rendered completely uninhabitable or inaccessible.¹⁹

The total economic loss in agriculture, industry, public infrastructure, and private property

¹⁵ *Id.* article 3.

¹⁶ *Id.* article 6, 7.

¹⁷ TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 47: Autumn: 19, 293 (1958).

¹⁸ TAIWAN PROVINCIAL GOVERNMENT (台灣省政府), TAIWAN SHENG ZHENGFU BAQI SHUIZAI BAOGAOSHU: DIERZHANG GONGSI SUNSHI JI YINGXIANG (臺灣省政府八七水災報告書) [TAIWAN PROVINCIAL GOVERNMENT REPORT OF AUGUST 7TH FLOODING], 18 (1959), available at <https://ahonline.drnh.gov.tw/index.php?act=Display/image/1779403LMA=owl#ugA9> (last visited Jun. 27, 2018).

¹⁹ *Id.* at 17.

reached more than 111 million US dollars, equal to one-tenth of the gross national product of Taiwan at that time.²⁰

After the flood in 1959, the Taiwan Provincial Government aimed to improve the existing disaster management structure and efficiency by specifying the duties of each government level, on the one hand, and strengthening the cooperation of all levels of governments, on the other.²¹ In 1960, the previous regulations were revised to establish new three-level disaster management organizations in provinces, counties, and townships and to have detailed articles on the specific responsibilities of these governments.²² When a typhoon warning was issued or in another disaster threat situation, the Taiwan Provincial Government would create a Disaster Prevention and Relief Commission (防颱救災會報). In correspondence, county governments would form Typhoon Prevention and Disaster Relief Command Centers (防颱救災指揮中心), and township offices established Typhoon Prevention and Disaster Relief Executive Centers (防颱救災執行中心).²³ The commission, command centers, and executive centers were all temporary organizations operating to prepare for and respond to specific disasters.

In the government's three-level disaster management structure, township offices had primary responsibility for providing direct assistance to citizens against disaster risk and impact. With a potential disaster looming, township officials disseminated information about the disaster,

²⁰ *Id.* at 9-18.

²¹ See Taiwan Provincial Government Committee Meeting Archive (臺灣省政府委員會議檔案), Taiwan Historical Archives (國史館臺灣文獻館), No.00501063311 (1960), available at http://ds3.th.gov.tw/ds3/app005/list_pic1.php?ID1=00501063311&v=0105# (last visited July 5th, 2018).

²² Pei-Shan Lin (林貝珊), Jing-Chein Lu (盧鏡臣), and Tzu-Jeng Deng (鄧子正), *A Review of Recent Major Disasters and Their Impacts on the Disaster Management System* (台灣近年重大災害及其對防救災體系之影響回顧) in TAIWAN IN BOOK FOR CENTRAL POLICE UNIVERSITY 80TH ANNIVERSARY (警察科技學院 80 週年校慶專書), 8 (2016).

²³ Article 3, 4, Regulations on the Establishment of Typhoon Prevention and Disaster Relief Command Centers in County/City, Taiwan Province (台灣省各縣市防颱救災指揮中心設置辦法), see TAIWANSHENG ZHENG FU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 49: Autumn: 13, 194 (1960).

helped people evacuate from vulnerable areas and buildings, and set up shelters.²⁴ During the disaster, the township officials, police officers, and firefighters undertook rescue services and provided shelter to the wounded, the homeless, and people whose houses had collapsed.²⁵ After the disaster, the officials investigated damages in the disaster areas, maintained social order, cleared debris, repaired transportation infrastructure, and requested disaster relief funds from the county government.²⁶

The township offices did not have much discretion and mostly performed the basic disaster preparedness, response, and recovery work under the supervision of county governments, especially the Typhoon Prevention and Disaster Relief Command Centers, which were authorized to guide, determine, and monitor the disaster management efforts. The county governments were supposed to be in control of the disaster situation and report the information to the provincial Disaster Prevention and Relief Commission. The provincial commission was not directly involved in providing disaster relief to individual disaster victims. Its primary focus was vertical coordination of the disaster management organizations and horizontal collaboration among various departments to deal with the problems and needs resulting from the disaster.

The regulations distinguished the missions assigned to the disaster management organization at each of the three governmental levels, hoping to improve their efficiency and accountability. However, the system suffered a big problem: All the disaster management organizations were temporary teams comprising officials from a variety of departments. The officials gathered for a probable disaster event and were dismissed once they had finished the tasks of solving the problems caused by that specific disaster. Among these departments, the

²⁴ Article 6, Regulations on the Establishment of Typhoon Prevention and Disaster Relief Executive Centers in Township/City, Taiwan Province (台灣省各鄉鎮(市)防颱救災執行中心設置辦法), *see* TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 49: Autumn: 13, 196 (1960).

²⁵ *Id.* Article 7.

²⁶ *Id.* Article 8.

police took charge of the local disaster management system. The police department commissioner was authorized to form the provincial Disaster Prevention and Relief Commission, advised by the Taiwan Garrison Command.²⁷

At the county level, police bureau directors were the conveners and deputy-commanders of the Typhoon Prevention and Disaster Relief Command Centers.²⁸ In addition to the command centers, county police stations would establish disaster prevention and relief command posts, which had the power to (1) assign government vehicles; (2) request help from the police, fire department, and military in neighboring counties; and (3) give orders to the townships' Typhoon Prevention and Disaster Relief Executive Centers for disaster preparedness and relief.²⁹ Similarly, it was the township's police station that gathered the township's office secretary-general, civil affairs section chief, construction section chief, and other officials to form the township's Typhoon Prevention and Disaster Relief Executive Centers.³⁰ Police officers worked with township officials to conduct disaster preparedness, response, and recovery work.³¹

Local Disaster Management System and Its Problems

In addition to the regulations on disaster management organizations discussed above, other laws regarding government resource distribution, disaster relief, typhoon prevention, investigation of disaster areas, and post-disaster recovery also existed at the local level. To incorporate the fragmented regulations into one comprehensive, inclusive regulation, in 1965, the Taiwan Provincial Government issued the Taiwan Provincial Regulations on Natural Disaster

²⁷ Article 3, Regulations on the Establishment of Taiwan Provincial Government Disaster Prevention and Relief Commission (台灣省政府防颱救災會報設置辦法), *see* TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 49: Autumn: 12, 180 (1960).

²⁸ Article 3, *supra* note 23.

²⁹ *Id.* Article 4, 6; Article 4, *supra* note 24.

³⁰ Article 3, *supra* note 24.

³¹ *See Id.* Article 6, 7, 8.

Prevention, Relief, and Recovery (台灣省天然災害防救及善後處理辦法).³² For the most part, the regulations maintained the existing three-level natural disaster management system, with slight changes to the order and text of the articles. For example, the county disaster management organization retained similar authority and obligation, but its name was changed from the Typhoon Prevention and Disaster Relief Command Center to the Disaster Prevention and Relief Headquarters (防救災害指揮部).³³

Compared to the previous regulations, which had used the term of “typhoon prevention and disaster relief,” the new 1965 regulations were called “natural disaster prevention, relief, and recovery” to conform to their content and scope, which covered not only typhoons but also earthquakes, floods, and other natural disasters.³⁴ However, the disaster response in the regulations still focused on threats and damage related to typhoon impacts like strong winds and heavy rainfall. For example, township executive centers were to inspect and repair vulnerable houses, help people evacuate from low-lying areas, carry out patrols of rivers and dikes, and disseminate warnings and information about typhoons.³⁵ When a typhoon warning was issued and in effect, buses were required to carry warning signs to remind the public to be cautious of the danger.³⁶ The regulations also had detailed articles about the mandate for the Department of Information, Taiwan Provincial Government, to hold annual events to spread knowledge about typhoon prevention.³⁷

³² Taiwan Provincial Government Council Meeting Archive (台灣省政府委員會議檔案), No. 00501078812 (1963), available at <http://ds3.th.gov.tw/ds3/app005/list3.php?ID1=00501078812> (last visited Jul. 21, 2018).

³³ *See generally* Regulations on Natural Disaster Prevention, Relief, and Recovery in Taiwan Province (台灣省防救天然災害及善後處理辦法) (1965), *see* TAIWANSHENG ZHENGFU GONGBAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Vol. 54 Summer: 48, 2-7 (1965).

³⁴ *Supra* note 32.

³⁵ Article 17, *supra* note 33, at 3.

³⁶ *See id.* article 27-30, at 4.

³⁷ *See id.* article 24-36.

The regulations reaffirmed that the local disaster management governmental structure consisted of three levels of temporary organizations. When a natural disaster was anticipated, each of the provincial, county, and township governments would establish its disaster management organization to prepare for, respond to, and recover from the disaster's impact.³⁸ Those organizations would be dismissed after their missions of coping with that specific incident were accomplished. When the next disaster happened, the governments would again establish the organizations, composed of new personnel, to handle that disaster.

The disaster management organizations were formed when a natural disaster was very likely to happen, such as when a typhoon warning was issued, or when a disaster had already happened, such as in the case of an earthquake. Usually, the governments were caught unprepared for sudden, catastrophic events, so they failed to prevent damage and provide disaster relief. For example, in September 1969, the provincial Disaster Prevention and Relief Commission, the county Disaster Prevention and Relief Headquarters, and the township Disaster Prevention and Relief Executive Centers were established only one day before Typhoon Elsie made landfall in Taiwan.³⁹ The disaster management organizations had little time to react to the typhoon's impacts and subsequent problems. The communication and coordination among the government organizations were poor as the typhoon swept through Taiwan and caused serious flooding.

The accountability of the members in the disaster management organizations were also ambiguous and confusing when they were called up all of a sudden. In the case of Typhoon Elsie, while the typhoon was looming over Taiwan, no provincial government heads were on duty to

³⁸ See *id.* Article 4, at, 2.

³⁹ Su-Huei Huang (黃素慧), *After Typhoon Disaster, The Succors of Taiwanese Provincial Government Relief Policies for Typhoon Disaster* (颱風災後臺灣省政府的救濟措施), 60:4 TAIWAN HISTORICA (台灣文獻) 299, 312 (2009).

monitor the typhoon situation and solve urgent problem.⁴⁰ This example proved that ambiguous authority and duty in disaster management was likely to allow government departments and officials to shirk their responsibilities, assuming or wishing that others would take actions to address the problem. Sadly, it usually turned out that no one took action, eventually leading to government failures in disaster response.

Moreover, the government and legal management at the local level were limited to individual, specific disaster events. Only one week a year did county governments and township offices hold educational activities to propagate knowledge of how to prepare for a typhoon disaster and alleviate its damage.⁴¹ Along with the activities, government officials and schools inspected houses and infrastructure subject to typhoon impacts.⁴² These efforts were inadequate to reduce future disaster risks and minimize disaster damages in the long run. In most cases, the governments rushed to help people when disaster risk was imminent and assisted disaster victims after they already had suffered injury and loss.

The local administrative regulations lacked plans and measures to minimize disaster risks, impacts, and damages caused by the disaster in the long run. This issue was partially addressed by legislation in 2000, namely, the Disaster Prevention and Protection Act, which established a permanent council in the national government to develop long-term strategies on disaster risk reduction and mitigation. The improvement in disaster management and the remaining problems will be discussed later in the second section of this chapter.

⁴⁰ Taiwan Provincial Government Council Meeting Archive (台灣省政府委員會議檔案), No. 00502017201 (1969), available at <http://ds3.th.gov.tw/ds3/app005/list3.php?ID1=00502017201> (last visited Jul. 7th, 2018).

⁴¹ Article 24, 25, *supra* note 33, at 4.

⁴² *Id.* article 31-37.

3.1.2 Presidential Emergency Decree

Presidential Power in Times of Emergency

When a destructive natural disaster struck Taiwan, its magnitude and severity might overwhelm the capacity of local governments and existing laws to respond. The disaster relief and assistance required coordination and communication among multiple agencies. The situation exceeded the scope of local administrative capacity and required more comprehensive management at a higher level. However, during the twentieth century, Taiwan had no national statute specifically regulating disaster preparedness, response, and recovery. In addition, existing laws designed for ordinary life might restrict the government's response and aid activities needed for the exceptional situation after a huge disaster. The legal restrictions of national statutes could not be lifted by the local government or administrative regulation. These obstacles could be removed only by a higher level of national executive and/or legislative authority.

On the national level, the ROC Constitution vested the president with the power to issue emergency decrees in times of serious economic crisis and natural disaster. Article 43 of the Constitution provided that, when a natural calamity, epidemic, or national economic crisis that required emergency measures occurred during the recess of the Legislative Yuan, by resolution of the Executive Yuan Council and in accordance with the Law on Emergency Decrees, the president had the power to issue an emergency decree to take necessary actions to handle the situation. The decree had to be presented to the Legislative Yuan for ratification within one month after its issuance. In case the Legislative Yuan withheld the ratification, the emergency decree immediately ceased to be valid.

During the period of the martial law system from 1948 to 1991, the presidential emergency powers were expanded beyond the Constitutional bounds. While Article 43 of the

Constitution imposed multiple restrictions on the issuance of emergency decrees, the 1948 Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (動員戡亂時期臨時條款) (hereafter Temporary Provisions) authorized the president to issue an emergency decree merely by resolution of the Executive Yuan Council. The president was not required to issue an emergency decree compliant with the law on emergency decrees, and the decree was not subject to review and validation by the Legislative Yuan. The legislative oversight of the executive power before and after the issuance of an emergency decree was completely removed. Under the martial legal framework, the presidential emergency power was not evaluated and limited by the legislative branch or the law.

After the Temporary Provisions were abrogated in 1991, the presidential emergency power did not return to the regulation of the Constitution. Article 43 of the Constitution was inapplicable because it explicitly required the president to issue an emergency decree in accordance with the law on emergency decrees, but the legislators had never enacted such a law for the president to follow.⁴³ In 1991, the Constitution was amended to modify the presidential power, as well as the legislative and judicial authorities, in Taiwan. The Seventh Amendment granted the president the power to issue an emergency decree to deal with emergent danger and grave economic crisis by resolution of the Executive Yuan Council. The emergency decree had to be presented to and validated by the Legislative Yuan within ten days after its issuance; otherwise, the decree would cease to be in effect.⁴⁴

⁴³ Shing-I Liu (劉幸義), *You Falixue Jiaodu lun "Jinji Mingling Zhidu" Benshen de Hefaxing Wenti* (由法理學角度論「緊急命令制度」本身的合法性問題) [Discussing the Legality of "Emergency Decree System" from a Jurisprudence Perspective], 56 THE TAIWAN LAW REVIEW (月旦法學雜誌) 18, 21 (2000).

⁴⁴ The amendments to the Constitution were revised in 1992, 1994, 1997, 1999, 2000, and 2004. Although the article number and legal text were changed, the content of the presidential emergency power was basically the same, *see* Seventh Amendment (1992), Second Amendment (1994), Second Amendment (1997), Second Amendment (1999), Second Amendment (2000), Second Amendment (2004).

Compared to Article 43 of the Constitution, which required the emergency decree to be ratified by the Legislative Yuan within one month, the Seventh Amendment of 1991 requested the legislative ratification in a much shorter period, ten days, to check as soon as possible whether the emergency decree was necessary and legitimate. Yet, the Amendment removed the requirement of following a law on emergency decrees and allowed the president to issue emergency decrees no matter whether the Legislative Yuan was in session for the legislators to promptly make laws. Even if the legislative branch were ready and capable of immediately making laws to address chaos and needs caused by a disaster, the president could still issue an emergency decree if he or she thought it necessary.⁴⁵

Another significant problem has existed in the Constitution, the Temporary Provisions, and the Amendments: All the constitutional provisions have no specific criteria or limitations on the procedure, scope, duration, and other aspects of the presidential emergency decree. In theory, the content of emergency decrees was limited to measures necessary to meet urgent needs during and closely following a disaster, but in reality, the president might go too far to address issues that were not emergent.⁴⁶ This problem was exposed in the emergency decrees issued in 1959 and 1999 in response to actual disaster events in Taiwan, which will be discussed in the next section.

It was also discussed to what extent the president could exercise executive discretion, lift legal restrictions, and limit human rights. For example, campaigns and elections of legislative representatives in Taiwan were temporarily suspended from 1978 to 1979 by a presidential decree after the United States ended its diplomatic relations with ROC. The suspension impeded

⁴⁵ Shing-I Liu, *supra* note 43, at 24.

⁴⁶ Huai-ying Tu (涂懷瑩), *Jinji Chufen yu Zaiqu Zhongjian* (緊急處分與災區重建) [*Emergency Decree and Recovery of Disaster Areas*], 12:7 ZHONGGUO DIFANG ZIZHI (中國地方自治) [CHINA LOCAL SELF-GOVERNMENT] 13, 13 (1959).

the voting rights in the ROC Constitution, which might be permitted in the extraordinary martial legal system of the Temporary Provision. Yet, after the martial legal system was lifted, according to the Constitutional Amendments, the emergency decree was generally thought of as a special type of executive order having authority equal to law. The decree could modify existing laws, but it could neither contradict nor amend the provisions and values of the Constitution.⁴⁷

Even in times of emergency, international humanitarian laws have indicated that governments cannot violate fundamental rights and human dignity. According to the International Covenant on Civil and Political Rights, which was ratified by Taiwan in 2009, when a state is gravely threatened by an emergency, to eke out its existence, the state may take measures derogating from its obligations under the Covenant. The measures taken are strictly limited to the requirement for the exigency, must be consistent with international laws, and must not involve discrimination solely based on race, color, sex, language, religion, or social origin.⁴⁸ Even in situation of emergency, the state shall not violate Articles 6 (no arbitrary deprivation of life), 7 (freedom from cruel and inhumane punishment), 8 (prohibition of slavery), 11 (prohibition of imprisonment for failing to fulfill contractual obligation), 15 (no criminal offence of an act if such act did not constitute a crime when committed), 16 (right to recognition as a person before the law), and 18 (freedom of thought, conscience, and religion) of the Covenant.⁴⁹

⁴⁷ See Tzong-Li Hsu (許宗力), *Cong Jiueryi Zhenzai Kan Jinji Mingling Xiangguan Wenti* (從九二一震災看緊急命令相關問題) [*Discussing Issues regarding Emergency Decree from the 921 Earthquake*], 6 TAIWAN LAW JOURNAL (台灣法學雜誌) 85, 88-89 (2000); Chueh-An Yen (顏厥安), *Jinji Mingling de Xingzhi: Yige Chubu Kanfa* (緊急命令的性質：一個初步看法) [*The Nature of Emergency Decree: A Preliminary Perspective*], 6 TAIWAN LAW JOURNAL (台灣本土法學) 92, 95 (2000); Chien-Liang Lee (李建良), *Qianxi Jinji Mingling zhi Xianfa Zhengyi: Cong "Jiu Erwu Jinji Mingling" Tanqi* (淺析緊急命令之憲法爭議：從「九二五緊急命令」談起) [*Brief Analysis on the Constitutional Controversies on Emergency Decrees: Discussing based on the 9/25 Emergency Decree*], 6 TAIWAN LAW JOURNAL (台灣本土法學) 97, 99 (2000).

⁴⁸ Section 1, Article 4, International Covenant on Civil and Political Rights (1976).

⁴⁹ *Id.* Section 2, Article 4.

Emergency Decrees Issued in Response to Natural Disasters

From 1945 to 1999, presidents have issued twelve emergency decrees; ten of them were issued to deal with emergency needs and maintain social order in times of political and economic crises.⁵⁰ For example, in response to the termination of diplomatic relations between the ROC and the United States, on December 16, 1978, President Chiang Ching-kuo, based on the Temporary Provisions, issued an emergency decree to increase security under the martial law system, maintain economic stability, and postpone the election for central representatives.⁵¹ On January 13, 1988, when President Chiang Ching-kuo passed away, an emergency decree was issued by the succeeding President Lee Teng-hui to prohibit activities of demonstration, petition, and assembly from that day^{to February}^{12.52} Among the twelve emergency decrees, only two were issued to address urgent needs and problems caused by natural disasters.

(1) Emergency Decree for 8/7 Flood (1959)

The first emergency decree for natural disaster response and relief was issued after the serious flood in August 1959. On August 31, 1959, President Chiang Kai-shek issued an emergency decree to raise reconstruction funds by limiting consumption, increasing taxes, and issuing bonds. While emergency decrees were only supposed to address rescue service and urgent needs during and immediately following a disaster, the 8/7 Flood emergency decree was an exception that aimed to raise funds for long-term post-disaster recovery.⁵³ The decree, in effect for eleven months, was unreasonably long.

⁵⁰ See Chin-Tian Chen, (陳青田), *Research the effect of "Disaster Prevention and Response Act" and the best timing to issue "Emergency order power"* (災害防救法實質效應與緊急命令權發布時機之研究), 4:2 J. Of Toko U. (稻江學報) 1, 5 (2010).

⁵¹ ZONGTONGFU GONGBAO (總統府公報) [OFFICE OF THE PRESIDENT GAZETTE], Vol. 3448, 3 (Dec. 18, 1978).

⁵² ZONGTONGFU GONGBAO (總統府公報) [OFFICE OF THE PRESIDENT GAZETTE], Vol. 4874, 4 (Jan. 14, 1988).

⁵³ See Tzong-Li Hsu, *supra* note 47, at 86.

For the purpose of swift disaster recovery, the emergency decree gave huge flexibility to the government by exempting it from many legal restraints. According to the emergency decree, the government was not bound by the Budget Act to adjust budget allocation and suspend non-urgent costs to allocate expenses for post-disaster reconstruction.⁵⁴ To facilitate the process of rebuilding houses, the period and interest of housing loans handled by the government were not restricted by the Regulations on Public Housing Loans.⁵⁵ However, the Budget Act and the Regulations on Public Housing Loans already had articles that contemplated emergency situations to warrant special rules.⁵⁶ The emergency decree also authorized the government to collect a special flood recovery tax along with the normal taxation, electricity fees, and public transportation fares, forcing citizens to share the cost of disaster relief and recovery.⁵⁷

The articles in the emergency decree provided the government with great discretion and immunity to conduct post-disaster recovery work. The government could expropriate land, labor, and resources for disaster relief and take necessary actions to maintain economic order based on the National Mobilization Law and other laws. If there were no applicable laws, the government could adopt emergency measures to meet actual needs.⁵⁸ In addition, the accounting administrative procedures for post-disaster reconstruction costs were exempted from any laws regarding public construction contract and procurement.⁵⁹ If government officials were corrupt or failed to fulfill their duty of disaster management, they would be sanctioned more severely than the normal punishment of the Public Functionaries Discipline Act and other related laws. The ambiguous terms like “any laws regarding . . .” and “other related laws” in those articles

⁵⁴ Article 1, Emergency Decree (August 31, 1959), *see* SIFAYUAN GONGBAO (司法院公報) [JUDICIAL YUAN GAZETTE], Vol 1:10, 4 (1959).

⁵⁵ *Id.* article 8, at 5.

⁵⁶ Huai-ying Tu, *supra* note 46, at 14.

⁵⁷ *Id.*; article 3, 5, *supra* note 54, at 4-5.

⁵⁸ *Id.* article 9.

⁵⁹ *Id.* article 10.

made the government immune from a broad scope of regulations when carrying out the reconstruction projects. Without clear regulations or criteria, the courts found it difficult to review whether the executive agencies had violated the laws and infringed the rights of the affected people during the reconstruction process.

(2) Emergency Decree for 9/21 Earthquake (1999)

Four decades after the 8/7 Flood in 1959, the second emergency decree in response to a natural disaster was issued when a devastating earthquake hit central Taiwan on September 21, 1999. The earthquake took a terrible toll of 2,455 deaths and 11,305 injuries. Fifty thousand six hundred and thirty-two houses were completely destroyed, and 53,615 houses partially collapsed. Countless infrastructure and transportation facilities were seriously damaged. The total economic loss reached almost twelve billion US dollars.⁶⁰ Four days after the earthquake, on September 25, President Lee Teng-hui issued an emergency decree to exempt the government from normal administrative procedures and legal restrictions to flexibly assist citizens affected by the earthquake as quickly as possible.⁶¹ The decree had twelve articles to regulate disaster relief and recovery funds, rescue and evacuation actions, shelter and temporary housing for disaster victims, and the use of public and private resources, including the military, for rescue service and reconstruction works.

After its issuance, the 9/25 Earthquake emergency decree raised much legal discussion in Taiwanese society. Most legal scholars agreed that, in the current case, it was necessary and legitimate for President Lee to issue the emergency decree. The destructive earthquake had

⁶⁰ 9/21 EARTHQUAKE RECONSTRUCTION COUNCIL, EXECUTIVE YUAN (行政院九二一震災災後重建推動委員會), *JUERYI ZHENZAI ZHONGJIAN JINGYAN, VOL.1* (九二一震災重建經驗(上)) [EXPERIENCE OF THE 9/21 EARTHQUAKE RECONSTRUCTION, VOL.1] 4-5 (2006).

⁶¹ Presidential Emergency Decree for the 9/21 Earthquake (民國八十八年九月二十五日總統緊急命令(九二一震災)) (Sep. 25, 1999).

already overwhelmed local capability and paralyzed local government operation, and there were no statutes to regulate disaster management and relief at the national level. The overall situation satisfied the constitutional requirements of issuing an emergency decree, so it was legitimate for President Lee to issue the decree to lay down principles for immediate disaster relief and loosen existing restrictions on disaster recovery.⁶²

Yet, the emergency decree did not set clear and concrete standards for emergent rescue services. The decree also extensively included too many disaster response and recovery efforts incompatible with the nature of an “emergent” special law.⁶³ For example, for the purpose of accommodating disaster victims and reconstructing the affected areas, Article 4 of the emergency decree exempted the government from the restrictions of the Urban Planning Law, the Regional Plan Act, the Environmental Impact Assessment Act, the Soil and Water Conservation Act, the Building Act, the Land Act, and the National Property Act. Article 5 exempted the national government from regulations on the land of urban planning areas, forests, rivers, mountainous slopes, and national parks, as well as related environmental protection laws, to quickly repair the electricity system, transportation facilities, and other public infrastructure. The emergency decree also modified laws on government budgets and expropriation and increased the punishments for crimes during the disaster period.

Moreover, according to the Amendment to the Constitution, an emergency decree shall be issued only for urgent needs, and its application must be strictly limited to the period during

⁶² See Tzong-Li Hsu (許宗力), *Cong Jiu Er Yi Zhenzai Kan Jinji Mingling Xiangguan Wenti* (從九二一震災看緊急命令相關問題) [Discussing Issues of Emergency Decree Based on the 9/21 Earthquake Disaster], 6 TAIWAN LAW JOURNAL (台灣本土法學) 85, 86 (2000); Maw-In Tsai (蔡茂寅), Hui-chieh Su (蘇慧婕), Po-Hsuan Ni (倪伯萱), (緊急命令之憲法問題研討會議題討論) [Discussion of the Conference on the Constitutional Issues of Emergency Decrees], 6 TAIWAN LAW JOURNAL (台灣本土法學) 103, 106 (2000).

⁶³ See CHANG WEN-CHEN (張文貞), 緊急狀態法制之探討委託研究報告 [REPORT OF “DISCUSSION ON THE LEGAL SYSTEM OF EMERGENCY STATUS”], 92 (2007); Huang Jung-Jie (黃俊杰), 九二五緊急命令之影響評估 [Evaluating the Effects of 925 Emergency Decree], 5 TAIWAN LAW JOURNAL (台灣本土法學) 203, 205, 208, 210 (1999); Yen Chueh-An, *supra* note 47, at 96.

and immediately following a disaster. However, the 9/21 Earthquake emergency decree was in effect for six months, too long for a special law to handle an emergency.⁶⁴

One month later, in October 1999, the Executive Yuan issued the Enforcement Directions Governing the 9/25 Emergency Decree to elucidate the 9/21 Earthquake emergency decree in detail, which raised the constitutional controversy over whether the Executive Yuan could issue supplementary laws for an emergency decree to clarify its content. The Justices of the Constitutional Court, Judicial Yuan, replied that, in principle, the executive branch could not make regulations to supplement and elaborate the emergency decree. The Constitution and its Amendment granted the executive branch the power to make law—issuing an emergency decree—in exceptional emergency situations. The emergency decree was aimed to address imminent danger and immediate needs, so the articles in the decree by themselves must be clear and explicit enough to be executed right away. The emergency decree should leave no space for the Executive Yuan to issue regulations to supplement the decree.⁶⁵

Yet, the Justices also recognized the possibility that an emergency decree issued extremely suddenly might fail to address all practical details and need further explanation. When this situation happened, an article must be added to the emergency decree to explicitly authorize the Executive Yuan to issue supplementary regulations. Only after the emergency decree had been ratified by the Legislative Yuan could the Executive Yuan issue the supplementary regulations. The regulations needed to go through the same legislative review process as ordinary executive orders, being examined and recognized by the Legislative Yuan. If the legislators rejected the supplementary regulations, the regulations would not be in effect.

⁶⁴ See Hwang Giin-tarng (黃錦堂), 緊急命令法治化問題之研究 [A Study on Issues of Legalizing Emergency Decrees], 8 TAIWAN NEW CENTURY FOUNDATION JOURNAL (新世紀智庫論壇) 4, 9 (1999); Yen Chueh-An, *supra* note 47, at 95.

⁶⁵ See Justice of the Constitutional Court, Judicial Yuan, R.O.C., Interpretation No. 543 (2002).

Nevertheless, the Justices decided that the directions supplementary to the 9/21 Earthquake emergency decree were not unconstitutional because there had been no precedent on this issue before the judicial interpretation. In the current case, the Executive Yuan had sent the supplementary regulation to the Legislative Yuan to respect the legislative power. Although the regulation's content and procedure did not completely meet all the requirements interpreted by the Justices in this decision, the executive regulation was constitutional.⁶⁶

3.2 Legislation on Disaster Management (2000–present)

3.2.1 Laws for 9/21 Earthquake Reconstruction

Legislation on the 9/21 Earthquake Recovery

Under the ROC's constitutional system, only in emergency situations can the executive authority replace the legislative power to make laws to deal with sudden needs. In situations of major disasters, the law should focus on the most emergent disaster relief and be in effect during the disaster impacts and a short period thereafter. As soon as the state of emergency has eased, the executive authority should return to its normal function under the system of checks and balances. Medium- and long-term issues regarding the disaster should be dealt with by laws carefully contemplated by the legislators, representing people's opinions and interests.

The nature of the 9/21 Earthquake emergency decree made it only appropriate for addressing emergent disaster relief, when the decree was actually involved in disaster recovery. To comprehensively regulate the reconstruction work, in January 2000, the Legislative Yuan passed the Temporary Act for 9/21 Earthquake Reconstruction (九二一震災重建暫行條例),

⁶⁶ *Id.*

which remained in effect for five years.⁶⁷ The law directed the government to manage post-disaster reconstruction through the following approaches:

1. establishing reconstruction councils at the national and local levels to assist individuals and communities affected by the earthquake;
2. providing tax benefits and life assistance to disaster victims;
3. enacting and amending laws to regulate issues raised by the earthquake, for example, the land rights of the changed landscape and guardianship in circumstance of multiple family members dying in the earthquake;
4. loosening legal restrictions and simplifying administrative procedures to accelerate the post-disaster reconstruction process.

For post-9/21 Earthquake reconstruction, the legislature showed its enthusiasm for regulating disaster relief and recovery by not only enacting and amending the Temporary Act for 9/21 Earthquake Reconstruction but also making twenty-seven laws in the following eight months for detailed guidance and regulations for post-disaster recovery.⁶⁸ Compared to the previous natural disasters managed by the executive power, after the 9/21 Earthquake, the legislature played a vital role in planning and guiding disaster recovery. Under the martial legal system from 1948 to 1992, the executive power in Taiwan—especially the president—was barely restricted by laws. After martial law was lifted, the ROC returned to the normal constitutional legal framework, under which all government powers and operations shall be ruled by law. Disaster management was no exception. The legislative branch, instead of the executive authority, take primary responsibility to lay down reconstruction principles, modify legal restrictions, and approve special budgets and funds for post-disaster recovery.

Another significant change was, unlike the previous disaster management administrative regulations and the emergency decrees that had focused on governmental structure and

⁶⁷ Article 75, Temporary Act for 9/21 Earthquake Reconstruction (九二一震災重建暫行條例) (2000).

⁶⁸ See Chii-Day Chung (鍾起岱), *Key to the Successful Reconstruction of the Chi-chi Earthquake: On the Inauguration and Amendment of the 921 Earthquake Reconstruction Act* (集集地震災後重建之鑰：論九二一震災後重建條例的啟動與修正), 11 OPEN PUBLIC ADMINISTRATION REVIEW (空大行政學報)73, 84-86 (2001).

obligations of disaster relief, the laws made for the 9/21 Earthquake began paying attention to the inclusion and empowerment of all stakeholders affected by the earthquake in the post-disaster recovery process. When the Temporary Act was enacted in January 2000, the 9/21 Earthquake Reconstruction Council was designed to be composed of executive agency and local government officials.⁶⁹ Later, the law was amended in October of the same year to modify the composition of the reconstruction council from government officials exclusively to mandatorily include at least five representatives from the disaster victims, working together on coordination, decision-making, enforcement, and supervision of the reconstruction efforts.⁷⁰

The legislation attempted to promote a decentralized, bottom-up approach of disaster recovery by including disaster victim representatives in the reconstruction councils, but the actual practice was still a top-down governance model. Specifically, executive agencies and county governments drew up and proposed reconstruction plans to the Reconstruction Council, Executive Yuan. After the council had incorporated and decided the final reconstruction programs, the central government would allocate budget to the local governments for implementation of the programs.

The central government not only provided support to county and township governments but also took full leadership and control of the reconstruction policy and resources.⁷¹ While the commands from higher levels of government might unify and accelerate reconstruction work, the lower-level governments lost the opportunity to develop their ability to undertake disaster recovery tasks and their resilience to future disaster impacts. At the local level, the capacity of emergency response and recovery remained weak.

⁶⁹ Article 5, *supra* note 67.

⁷⁰ See Chii-Day Chung, *supra* note 68, at 88.

⁷¹ 9/21 EARTHQUAKE RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 60, at 14.

The post-earthquake reconstruction organizations and operation suffered other problems. As discussed above, there had been only local administrative regulations on disaster relief. No statutes or organizations specifically for disaster management existed at the national level. When a destructive disaster like the 9/21 Earthquake happened, it overwhelmed both the local and the central government, which lacked preparedness for and experience of dealing with deadly disasters. The 9/21 Earthquake Reconstruction Council established by the Executive Yuan was a temporary organization, and council members were officials temporarily transferred from their original departments who were not familiar with disaster management laws and mechanism.⁷²

During the reconstruction process, the 9/21 Earthquake Reconstruction Council frequently modified reconstruction policies and regulations after they had been issued. On the one hand, the adjustments were made to meet the changing situation in the recovery process and actual needs of disaster victims. On the other hand, the continual policy alteration reflected the personnel change of council members and that the government officials did not have much experience in managing major disasters.⁷³

Rebuilding Indigenous Communities after the 9/21 Earthquake

Because many indigenous villages in central Taiwan were affected by the 9/21 Earthquake, the Temporary Act had articles aiming to help the affected indigenous communities to recover their lives. The Temporary Act stated that community characteristics and the views of local people should be taken into consideration when the government conducted indigenous community reconstruction.⁷⁴ County/city governments should, by themselves or through NGOs,

⁷² *See id.*

⁷³ ORAL HISTORY OF 921 EARTHQUAKE ON ITS DECENNIAL (災後十年:九二一地震口述訪問紀錄) 9, 27, 51-52, 69-72 (Hsueh-chi Hsu (許雪姬) & Su-chuan Chan (詹素娟) eds., 2012).

⁷⁴ Section 1, article 20, *supra* note 67.

establish Life Reconstruction Service Centers in disaster areas to provide assistance and support to indigenous people, the elderly, children and adolescents, disabled people, low-income families, and other minority groups subjected to disaster impacts and damages.⁷⁵

The law also provided financial subsidies to help indigenous people repair and rebuild their houses. Under the normal procedure, banks would require security for a mortgage loan, but many earthquake victims had suffered great losses and could not provide security to get a loan. For indigenous people whose houses were located on lands reserved for indigenous peoples and needed reconstruction due to the earthquake, the ROC government would help them receive mortgages by securing their debts with the government Indigenous Peoples Economy Development Fund.⁷⁶

While the legislative purposes and texts were ideal, usually there were gaps between the law and the reality of its implementation. Taking the above law, mortgage security by government fund, as an example, only two banks participated in the projects of offering indigenous people mortgage loans secured by the government fund. Even if the government fund provided the security, the mortgage application required the indigenous people to meet other standards by providing documents: land title deed, proof of financial ability, and construction permit. However, only a handful of indigenous people in at least fair economic condition might satisfy all the requirements and successfully receive loans to rebuild their houses in the disaster areas. The majority of indigenous people in the disaster areas were of inferior socioeconomic status or did not have formal registration of land rights. They were unlikely to be able to prepare

⁷⁵ *Id.* article 22.

⁷⁶ *Id.* article 51.

the required documents to apply for mortgages, even though they were the ones who most needed the financial assistance.⁷⁷

The damage from the 9/21 Earthquake and the slow recovery of indigenous areas could be partially attributed to inappropriate policy and infrastructure on indigenous lands, especially the mountainous areas in central Taiwan that were seriously affected by the earthquake. As discussed in section two of Chapter Two, from 1945 to 1987, much of the reserved mountain land had been utilized by the government and opened to non-indigenous private-sector organizations for economic and industrial development. After the 8/7 Flood in 1959, government timber cutting was criticized for causing water loss and soil erosion in the mountains, but under the martial legal system and government authority, critics were unable to change the policy and regulation on forest and indigenous land.⁷⁸

In 1960, the Central Cross-Island Highway was completed, which runs through the high mountain ranges in central Taiwan to connect the east and west coasts of Taiwan. Land along the highway was used for military service and cultivated for fruit trees and vegetables, which did not conserve water and soil.⁷⁹ The bad farming and forestry operation encouraged erosion and disasters, such as mudslide and collapse. After the earthquake hit Taiwan in 1999, the highway route was repaired and damaged several times, and some sections of the highway have remained closed since then.

During the post-earthquake reconstruction, indigenous communities encountered difficulties because of the long marginalization of indigenous peoples in geographical, economic, political, and other spheres. Many indigenous communities affected by the 9/21 Earthquake were

⁷⁷ HWA-SAN KWAN (關華山), YUANZHUMIN KECHIXU JUZHU HUANJING DE ZHANWANG (原住民可持續居住環境的展望) [PROSPECTUS OF THE SUSTAINABLE LIVING ENVIRONMENT FOR INDIGENOUS PEOPLE] 80 (2010).

⁷⁸ YU-WEI CHEN (陳育偉), THE POLITICAL ECONOMY OF FORESTLAND POLICY IN TAIWAN, 1945–2012 (台灣山林政策之政經分析, 1945–2012) 32 (2012) (thesis).

⁷⁹ *See id.* at 37-38, 40-43.

located on slopes in remote mountainous areas. Delivering construction materials and hiring workers to build houses in the remote indigenous villages were much more expensive than the construction costs in easily accessible plain areas. The mountain slopes shaken by the earthquake were also vulnerable to erosion. When it rained in the disaster areas, landslides and mudflows usually disrupted or even ruined the construction work.⁸⁰ These negative factors delayed the post-disaster recovery of the indigenous communities.

In addition, fallen rocks and mud in the mountainous areas might block the roads connecting indigenous villages to the outside world. The indigenous people had no access or took much longer routes to bring their agricultural products to the market. In addition, although there were hot springs and beautiful natural scenery in the mountain villages, it was hard and risky for outsiders, such as tourists, to pass through the dangerous routes to visit the indigenous villages. In some areas where hot springs tourism was developed, most developers were non-indigenous people. Few local indigenous people ran small businesses to profit from tourism, such as farms, stores, and guesthouses. As agriculture, tourism, and other activities were limited after the disaster, the economic recovery of the indigenous communities was slow, even several years after the 9/21 Earthquake.⁸¹

The development of the indigenous villages was also limited by the regulations regarding land reserved for indigenous peoples. Many indigenous villages affected by the earthquake were located on mountain reserved land that belonged to the national government and were subject to strict land use restrictions. In addition, indigenous people often used the reserved land without formal registration. They did not have clear land title and legal basis to claim assistance and

⁸⁰ 9/21 EARTHQUAKE RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 60, at 424.

⁸¹ HWA-SAN KWAN, *supra* note 77, at 106-110.

compensation for their losses after a major disaster.⁸² The disadvantages made it more difficult for the indigenous communities in the disaster areas to recover from the impacts.

Another important question regarding the reconstruction of indigenous communities was whether the indigenous people had the power of deciding reconstruction projects applied to their own communities. Article 20 of the Temporary Act stated that the reconstruction of indigenous villages should take the communities' features and opinions into consideration. The Council of Indigenous Peoples also issued the Operation Rules of Indigenous Village Recovery after the 9/21 Earthquake (九二一震災原住民聚落重建作業規範), in which Article 6 asked indigenous residents to form indigenous village reconstruction committees to boost post-disaster recovery. By encouraging the indigenous people to participate in and contribute to the reconstruction projects, the laws hoped that the indigenous villages would be restored and rebuilt to fit the actual needs and perspectives of the indigenous people.

Despite the legal texts, in most cases, the reconstruction of the indigenous communities was actually led and enforced by the government. The Council of Indigenous Peoples took primary responsibility for investigating the disaster situation of indigenous communities, making reconstruction plans, and supervising township offices carrying out the construction projects.⁸³ While the council invited county governments, township offices, village heads, as well as experts and scholars to discuss the reconstruction projects, the laws did not mandate that the government include affected indigenous people in the determination and implementation process. Without

⁸² See DA-GUAN CONSTRUCTION CONSULTING COMPANY (達觀工程顧問公司), TAIZHONGXIAN ZHENGFU JIUYEYI ZHENZAI ZAIQU ZHUZHAI JI SHEQU ZHONG JIAN ZIXUN FUWU TUAN JI GONGZUOZHAN JIA ZHI JIHUA: 2003 ZONGJIE BAOGAO (台中縣政府九二一震災災區住宅及社區重建諮詢服務團暨工作站建置計畫: 2003 總結報告) [PROJECT OF ESTABLISHING TAICHUNG COUNTY GOVERNMENT HOUSE AND COMMUNITY RECOVERY CONSULTATION SERVICE TEAMS AND WORK STATIONS IN 9/21 EARTHQUAKE DISASTER AREAS: 2003 FINAL REPORT], Vol. 8, 1–12 (2003).

⁸³ Article 7, 8, 9, Operation Rules of Indigenous Village Recovery after 9/21 Earthquake (九二一震災原住民聚落重建作業規範) (2001).

laws to guarantee local participation and consultation, they highly depended on whether each township office and its contract team incorporated the indigenous communities. Oftentimes, local indigenous people were not included and consulted in the decision-making process to determine their community's future.⁸⁴

Although there were a few examples of indigenous people involved in the reconstruction projects, their success relied on the non-governmental organizations and professional teams that partnered with the government to undertake the reconstruction work. For instance, in the case of the Alang Nakahara community in the Huzhu village, Ren'ai Township, Nantou County, it was the experts and scholars from the Department of Architecture, Tamkang University, who developed and implemented the reconstruction plans in consideration of the household size of indigenous families, financial condition of disaster victims, neighborhood relationship, and Seediq tribal culture.⁸⁵

The Tamkang team also worked with the Ren'ai Township Offices to hold public hearings and open meetings to communicate with the indigenous communities about their thoughts and needs. The indigenous people in Huzhu village expressed their opinions and had full power to vote on and decide the architectural firm and construction project for their village.⁸⁶ This is a positive example that may be learned from and replicated in other affected areas. Yet, in most cases, the indigenous people in the disaster areas could only accept and follow the reconstruction plans suggested by the government and expert teams.⁸⁷

⁸⁴ HWA-SAN KWAN, *supra* note 77, at 98.

⁸⁵ See DEPARTMENT OF ARCHITECTURE, TAMKANG UNIVERSITY (淡江大學建築系), NANTOUXIAN RENAIXIANG HUZHUCUN ZHONGYUANKOU XINQIANZHUDI (南投縣仁愛鄉互助村中原口新遷住地) [RESETTLEMENT SITE AT ZHONGYUANKOU, HUZHU VILLAGE, REN'AI TOWNSHIP, NANTOU COUNTY] 2, 9-12 (2001).

⁸⁶ See *id.* at 17, 25.

⁸⁷ HWA-SAN KWAN, *supra* note 77, at 98.

3.2.2 A New National Disaster Management Legal Framework

Enactment of the Disaster Prevention and Protection Act

In 1994, the Executive Yuan began to develop a holistic disaster management legal framework to encompass the complete cycle of a variety of hazards, from potential disaster threat to actual impact to dissolution. In January 1994, the Northridge Earthquake hit the San Fernando Valley region of Los Angeles, causing more than sixty deaths and nine thousand injuries, as well as widespread damage in California. The destructive earthquake and its great loss reminded Taiwanese people how destructive a major disaster could be and that a similar disaster might also happen in Taiwan, an island located on the Pacific Rim that is prone to earthquakes. It had been over half a century since the 1935 Taichung Earthquake, which had a death toll of 3,276 in Taiwan. According to statistical data, another big earthquake might strike Taiwan at any time.

Considering the high possibility and frequency of natural disasters in Taiwan, the Executive Yuan started to design a disaster management system at the national level to cope with more natural disasters than the only three disaster types—typhoon, earthquake, and flood—addressed by the previous local administrative regulations.⁸⁸ Before long, on April 26, 1994, a China Airlines flight from Taiwan crashed in Nagoya, Japan, killing 264 passengers and crewmembers. The tragedy made the Executive Yuan expand the draft of its “natural disaster prevention and protection plan” to a more inclusive “disaster prevention and protection plan” that covered hazards caused by both natural forces and human factors. In August of that year, the

⁸⁸ Chia-Yu Chou, *supra* note 3, at 105.

Executive Yuan finalized the Disaster Prevention and Protection Plan to regulate the prevention of, response to, and recovery from ten types of natural and man-made disasters.

The 1994 plan established a four-level disaster management structure in the national, provincial, county, and township governments. In normal times, there were disaster prevention commissions at each of the four government levels to make disaster prevention programs. In times of disaster, every government level would establish its Emergency Operation Center to respond to the disaster.⁸⁹ Based on this model, in 1996, the Executive Yuan drafted a bill and presented it to the Legislative Yuan, hoping to make the Disaster Prevention and Protection Plan, an executive order that did not have direct legal binding force, into a statutory scheme for all governments and citizens.⁹⁰

After the bill was brought in the Legislative Yuan, the bill was left aside for three years because the legislators had disagreements on its scope and content. They disputed whether the term “disaster” in the law included nuclear accidents and which government agency was the most appropriate authority to undertake disaster management missions.⁹¹ It was not until the destructive 9/21 Earthquake in 1999 that the legislators finally became aware of the urgent need for a disaster management system in Taiwan and speeded up the legislation process. In 2000, the Legislative Yuan passed the Disaster Prevention and Protection Act (災害防救法), the first national statute that directed the Taiwanese government to mitigate, prepare for, respond to, and recover from various natural and man-made disasters. Although the act gave the most space to

⁸⁹ See Ban-Jwu Shih (施邦築) & Hsin-I Chang (張歆儀), *Taiwan Zaihai Fangjiu Tixi de Yange yu Xianzhuang Tanta* (台灣災害防救體系的沿革與現狀探討) [Discussing the History and Contemporary Situation of the Disaster Prevention and Response System in Taiwan], 36:4 JOURNAL OF CIVIL AND HYDRAULIC ENGINEERING (土木水利) 52, 53-54 (2009).

⁹⁰ See LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 85:55, 215-217, 222 (1996).

⁹¹ CHENG-HSIN TAI (戴正新), THE STUDY OF THE PROCESS FOR PUBLIC POLICY MAKING IN TAIWAN: FOR THE DAMAGE PREVENTION AND PROTECTION ACTS EXAMPLE (我國公共政策制定過程之研究：以災害防救法為例), 59 (2003) (thesis).

articulating the disaster management governmental structure, a small part of the act touched on long-term disaster management issues, especially disaster risk reduction, that had been little addressed by previous administrative regulations.

New Disaster Management Governmental Structure

Despite the progress in managing the full cycle of disasters, the Disaster Prevention and Protection Act maintained or even exacerbated some problems that had existed in the previous administrative regulations: fragmentation and discontinuity of disaster management organizations. First, the statute did not assign or create an agency to take full charge of disaster management authority and functions. In Taiwan, the disaster management missions were distributed to a variety of departments. The agencies were assigned to be responsible for managing specific types of disaster:

1. Ministry of the Interior: Wind hazard, earthquake, serious fire incident, and explosion;
2. Ministry of Economic Affairs: Flood, drought, disaster of public gas and fuel pipelines, and power transmission line failure;
3. Council of Agriculture, Executive Yuan: Frost and mudflow;
4. Ministry of Transportation and Communications: Air crash, shipwreck, and ground traffic accidents;
5. Environmental Protection Administration, Executive Yuan: Disaster of toxic chemical material;
6. Other types of disaster were dealt with by the department designated by law or the Central Disaster Prevention and Protection Council.⁹²

However, many incidents are compound disasters that involve multiple causes or precipitate another disaster; disasters may not be sharply distinguished and classified into one disaster type. Additionally, sometimes it is difficult to immediately identify the cause of a disastrous event at the outset and decide which department should be responsible for that disaster.

⁹² Article 3, Disaster Prevention and Protection Act (災害防救法) (2000).

When the accountability for government disaster management is ambiguous, the danger is that every department may assume or hope other agencies will take actions to handle the disaster in the first place. Such delay could make the government fail to respond to a disaster in a timely manner, and the departments could try to evade their responsibility for the bad performance on disaster management.

To address this issue, it has been suggested that Taiwan might establish an agency dealing with all disasters, regardless of their cause.⁹³ A possible model is the Federal Emergency Management Agency in the United States, which deals with all hazards—including natural disasters, acts of terrorism, and other man-made disasters—in a comprehensive, risk-based emergency management program.⁹⁴

Second, the previous three-level disaster management structure—province, county, and township—was replaced by the new disaster prevention and protection organizations at the national, municipality/county, and township levels. The disaster management organization at the provincial level was removed because the Taiwan Provincial Government was downsized in the 1990s. After the ROC president became directly elected by Taiwanese citizens in 1996, the newly elected President Lee administration initiated government reorganization, attempting to solve the conflicts that had resulted from the almost exactly overlapping administrative zones of Taiwan Province and the ROC's territory. In 1997, the constitutional amendments terminated the elections for Taiwan Provincial governor and Taiwan Provincial Council representatives.⁹⁵ The constitutional amendment and follow-up legal reforms transferred most of the provincial government authority to the national government and strengthened the self-government of

⁹³ Pang-Chu Shih & Hsin-I Chang, *supra* note 89, at 57.

⁹⁴ See DANIEL A. FARBER, JIM CHEN, ROBERT R.M. VERCHICK, LISA GROW SUN, *DISASTER LAW AND POLICY* 156-157 (Third Edition, 2015).

⁹⁵ See Ninth Amendment to the Constitution (1997).

municipalities/counties. The Taiwan Provincial Government no longer had the power and resources to conduct missions like disaster management.⁹⁶

Except for the removal of the provincial government department, the new disaster management organizations established by the Disaster Prevention and Protection Act were still temporary teams formed every time a disaster was under way or had already hit Taiwan. When a disaster was looming or had happened, municipality/county governments and township offices would establish temporary regional Disaster Response Centers to prepare for and respond to disaster impacts.⁹⁷ If the disaster was huge, at the national level, the Executive Yuan might form the Central Disaster Response Center to communicate disaster information and coordinate an intergovernmental emergency response and relief effort.⁹⁸

These organizations were not much different from the disaster management organizations existing in the local governments before 2000, which were formed before a disaster and then dismissed after the disaster had diminished. Similar to the previous local disaster management organization commanders, the commanders of the new Disaster Response Centers were also department heads—ministers, municipality mayors/county magistrates, and township mayors—not specialized in disaster management.

Third, in addition to the Disaster Response Centers formed in times of emergency, the Disaster Prevention and Protection Act created unprecedented organizations that operated in normal times to make long-term plans for disaster prevention, response, and recovery. Parallel to

⁹⁶ In 1998, the Taiwan Provincial Government became a council whose members were appointed by the president. Most of the provincial government authorities and duties were transferred to executive agencies and local governments. Since then, the operation of the Taiwan Provincial Government continued to be scaled down. In 2018, the Executive Yuan Council resolution approved that the budget for the Taiwan Provincial Government will be reduced to zero since 2019, *see* Executive Yuan Council Resolution No. 3606 (行政院第 3606 次院會決議) (Jun. 28, 2018), available at <https://www.ey.gov.tw/Page/4EC2394BE4EE9DD0/0161f732-c213-4d06-a37e-d5ee27d8ded2> (last visited Nov. 27, 2018).

⁹⁷ Article 12, *supra* note 92.

⁹⁸ *Id.* Article 13; Article 2, Operation Rules of the Central Disaster Response Center (中央災害應變中心作業要點) (2001).

the three-level temporary Disaster Response Centers, the system of the permanent Disaster Prevention and Protection Councils was also established at the national, municipality/county, and township levels. At the national level, the Central Disaster Prevention and Protection Council in the Executive Yuan oversaw disaster management efforts in the whole country, (1) setting fundamental disaster management directions; (2) deciding policy, strategy, and measures for emergency management; and (3) supervising and evaluating the disaster management performance of all levels of government.⁹⁹ The Municipality/County Disaster Prevention and Protection Councils were in the middle to approve regional disaster management plans and measures. The municipality/county councils also supervised and evaluated the disaster prevention and response operation in their administrative zones.¹⁰⁰ At the lowest level, the Township Disaster Prevention and Protection Councils made township disaster management plans and implemented emergency response measures.¹⁰¹

While these Disaster Prevention and Protection Councils were charged with the important tasks of addressing long-term issues relating to disasters, the councils suffered inherent problems that made them weak and ineffective in reducing disaster risk and improving disaster response. Taking the Central Disaster Prevention and Protection Council as an example, most councilors were the premier, vice premier, ministers without portfolios,¹⁰² and ministers from other agencies.¹⁰³ For the councilors, disaster management missions might not be the first priority because they had to focus on their duties in their agencies, including the Ministry of the Interior,

⁹⁹ Article 6, *supra* note 92.

¹⁰⁰ *Id.* Article 8.

¹⁰¹ *Id.* Article 10.

¹⁰² In the ROC executive branch, ministers without portfolio of the Executive Yuan are government ministers who do not head any particular ministry and agency. The duties of the ministers without portfolio are coordinating issue across departments, undertaking special task, and casting vote in the Executive Yuan Council (Cabinet).

¹⁰³ Article 7, *supra* note 92.

Ministry of Economic Affairs, and Ministry of Transportation and Communication.¹⁰⁴ Under the heavy workload, it was unlikely for the councilors to spend much time contemplating the additional duties of disaster management. The Central Disaster Prevention and Protection Council lacked permanent staff to assist the councilors, and its subdivision—the Central Disaster Prevention and Protection Committee (災害防救委員會)—suffered the same problem: The committee was composed of officials from other departments, such as the vice premier and vice ministers busy working for their own departments.¹⁰⁵

The council and committee members met at a low frequency to discuss and promulgate very general guidelines on emergency management. The regular meeting of the Central Disaster Prevention and Response Council was held once a year, and the council members might also meet when needed.¹⁰⁶ The average length of the council meetings was one to two hours.¹⁰⁷ The Central Disaster Prevention and Response Committee was a little better; its members met every other month to decide disaster management projects and supervise the local governments carrying out the projects.¹⁰⁸ Because of the low frequency of the meetings, the council and committee members could hardly discuss national disaster management plans in detail and carefully evaluate how the local governments carried out the plans and whether the goal of disaster prevention had been achieved.

¹⁰⁴ Article 3, Directions for Establishment of the Central Disaster Prevention and Response Council (中央災害防救會報設置要點) (2000), *see* FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZETTE], Vol. 243, 28-29 (2000).

¹⁰⁵ Article 4, Direction for Establishment of the Central Disaster Prevention and Response Committee (中央災害防救委員會設置要點) (2000), *see* FAWUBU GONGBAO (法務部公報) [MINISTRY OF JUSTICE GAZETTE], Vol. 243, 30 (2000).

¹⁰⁶ Article 2, 4, *supra* note 104.

¹⁰⁷ *See generally* meeting records of the Central Disaster Prevention and Response Council: <http://www.cdprc.ey.gov.tw/news.aspx?n=F4E83CEA84EF03EF&page=1&PageSize=20> (last visited Jul. 18, 2018).

¹⁰⁸ Article 2, 6, *supra* note 105, at 29-30.

The function of the Central Disaster Prevention and Response Council was further impaired by the fragmented disaster management organizations in Taiwan. In addition to the Central Disaster Prevention and Response Council, other government organizations also shared the power of disaster mitigation, preparation, response, and recovery. For example, the National Fire Agency was responsible for evacuation and rescue service. The National Science and Technology Center for Disaster Reduction was devoted to research on disaster prevention and protection technology.¹⁰⁹ Under such circumstance, the Central Disaster Prevention and Response Council did not have much authority, or many personnel or resources, to lead and support the national and local governments' prevention of and response to potential disaster impacts.

The powerless council not only was a problem itself but also worsened the issues of the temporary disaster response centers discussed above. Because the permanent Disaster Prevention and Response Councils failed to modify disasters' causes and minimize disasters' effects on Taiwanese people, the temporary Disaster Response Centers would be formed every time a disaster was about to happen or had just happened. The vicious circle of forming and dismissing these organizations resulted in serious problems of inexperienced officials and inconsistent policies on disaster management.

Legal Reforms of Disaster Management

Natural disasters in Taiwan have posed challenges to the Disaster Prevention and Protection Act since its enactment in June 2000. On July 22, 2000, four workers were trapped on a sandbank isolated by the rising water of the Bazhang River after sudden heavy rainfall that

¹⁰⁹ See Article 7, *supra* note 92; National Science and Technology Center for Disaster Reduction (國家災害防救科技中心), available at <http://www.ncdr.nat.gov.tw/> (last visited Jul. 18, 2018).

afternoon. After two hours had passed, the workers were swept away by the river while the Fire Agency, the National Rescue Command Center, and the Air Police Department were still communicating about the rescue mission. The scene of this tragedy was broadcast live on television news, and the Taiwanese government came under strong criticism for its poor performance and coordination in emergency response.

In 2001, Typhoon Toraji struck Taiwan and resulted in 111 deaths, 103 missing, and economic loss of 250 million US dollars.¹¹⁰ Less than two months after Typhoon Toraji, Typhoon Nari brought heavy rainfall in Taiwan. More than four thousand buildings in the Taipei Municipality were flooded, and the Taipei MRT subway took three months to resume operation.¹¹¹ In May 2002, a China Airlines aircraft crashed in the sea near Penghu, Taiwan, killing 225 people on board. In addition to the above incidents, the 3/31 Earthquake in 2002, Typhoon Morakot in 2009, the 2/6 Kaohsiung Earthquake in 2016, and other natural disasters have occurred in Taiwan and seriously harmed the Taiwanese people.

Since its enactment in 2000, the Disaster Prevention and Protection Act has been amended seven times, many of which were triggered by lessons learned from the experiences, especially government failures, of managing the disasters. For example, in the 2002 China Airlines incident, the flight crashed in the ocean near the Penghu islands, but the sea area was not administered by the Penghu County government. To clarify which agency should be responsible for disasters in similar conditions, in 2008, the newly added Section 5, Paragraph 2, Article 3 of the Disaster Prevention and Protection Act directed the central government to coordinate with

¹¹⁰ Tai-Kuang Chiou (丘台光), *Report on Typhoon Toraji in 2001*, Meteorological Satellite Center, Central Weather Bureau (民國九十年颱風調查報告—第八號桃芝颱風), 84 (2001), available at <http://photino.cwb.gov.tw/rdcweb/lib/cd/cd02tyrp/typ/2001/0108.pdf>

¹¹¹ Hsin-chin Hsu (徐辛欽), *Report on Typhoon Nari of 2001*, Weather Forecast Center, Central Weather Bureau (民國九十年颱風調查報告—第十六號納莉颱風), 112 (2001), available at <http://photino.cwb.gov.tw/rdcweb/lib/cd/cd02tyrp/typ/2001/0116.pdf>

local governments to deal with disasters that involved maritime space, crossed more than two municipality/county administrative zones, or overwhelmed the local capacity for disaster response.¹¹²

The most significant amendment to the Disaster Prevention and Protection Act was adopted in July 2010 after Typhoon Morakot devastated Taiwan and exposed problems of the Taiwanese disaster management legal systems. From August 5 to 10, 2009, Typhoon Morakot struck Taiwan and brought about a record-breaking amount of rainfall. The heavy rainfall triggered mudslides and floods throughout southern Taiwan, causing serious loss of life and property. Facing the terrible disaster, President Ma Ying-jeou did not issue an emergency decree to address the national emergency. Instead, when the government discovered that the calamity of Typhoon Morakot had gone beyond expectations, on August 28, the Legislative Yuan passed the Special Act for Post-Typhoon Morakot Reconstruction to lay down disaster relief and recovery principles, establish a reconstruction council, and lift legal restrictions that might delay disaster recovery. The enactment of the Special Act affirmed that the legislature became the superior authority to manage disasters. The executive branch could not deal with disaster impacts and damages solely by exercising its power and discretion; the branch had to implement disaster relief and recovery policy in accordance with the direction and regulation of law.

The Special Act in response to the Typhoon Morakot disaster marked the complete transition of disaster management from executive authority to legislative power. In the first phase, the executive branch took full authority and responsibility over conducting disaster response and relief efforts. In addition to local administrative regulations, the president would issue an emergency decree to address disaster relief and recovery issues when a disaster was too

¹¹² LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 97:16, 107-108 (2008).

destructive for the local governments to handle, as in the cases of the 8/7 Flood in 1959 and the 9/21 Earthquake in 1999.

Things began to change when the legislators took vigorous actions to make abundant laws to guide and regulate post-earthquake recovery. In 2000, the Legislative Yuan not only passed a series of laws for disaster recovery after the 9/21 Earthquake, but the legislature also enacted the Disaster Prevention and Protection to establish a comprehensive statutory scheme that covers disaster mitigation, preparedness, response, and recovery. Even when an unexpected terrible disaster occurred, like the 2009 Typhoon Morakot, the legislators actively and immediately passed the special law to address the needs and problems caused by the disaster.

Even as the Taiwanese disaster management system became completely ruled by law, the legal framework suffered several problems. In Taiwan, a variety of executive agencies shared disaster management authorities and functions. The fragmented disaster management government organizations were unable to mitigate and prepare for potential disasters effectively, nor could they respond to and recover from disaster impacts in a timely manner. The tragic event of Typhoon Morakot showed that the disaster management organizations had failed to fulfill their missions of preventing and minimizing disaster impacts like the harms that the typhoon brought to Taiwanese people.

In addition, the Legislative Yuan rushed to pass the Special Act for Post-Typhoon Morakot Reconstruction to articulate disaster relief and recovery work. Not only did the Special Act itself arouse controversies surrounding land zoning and relocation, which will be further discussed in the next chapter, but the hasty legislation also indicated that the existing legal framework was far from perfect and unable to solve the issues caused by Typhoon Morakot. The

insufficient and imperfect disaster laws forced the legislators to make the special law immediately after Typhoon Morakot.

Based on the lessons learned from Typhoon Morakot, in July 2010, the Legislative Yuan amended the Disaster Prevention and Protection Act to a substantial degree. Among the amendments, the two most important changes were the creation of the Disaster Prevention and Protection Office (災害防救辦公室) and the improvement of local capacity and obligation to deal with disasters.

After the Typhoon Morakot disaster, the Executive Yuan wished to enhance its disaster management efficiency through government reorganization at the national level. It was proposed that the Central Disaster Prevention and Protection Committee be removed because its functions highly overlapped with the Central Disaster Prevention and Protection Council. Instead, the Central Disaster Prevention and Protection Council would have a new subdivision, the Disaster Prevention and Protection Office, composed of full-time personnel to put disaster management plans into practice.¹¹³ However, only half of the suggestion was adopted by the legislators. The amended law did create the Disaster Prevention and Protection Office with full-time officials specifically responsible for enforcing disaster management plans and coordinating disaster management efforts among government departments, but the law kept the Central Disaster Prevention and Protection Committee.¹¹⁴

Currently, the Central Disaster Prevention and Protection Council, the Central Disaster Prevention and Protection Committee, and the Disaster Prevention and Protection Office coexist in the national government and have overlapping duties.¹¹⁵ Besides, there are other disaster

¹¹³ LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 99:4, 94 (2009).

¹¹⁴ LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 99:49, 9-10 (2010).

¹¹⁵ See Chia-Yu Chou, *supra* note 3, at 110.

management organizations like the Disaster Prevention and Protection Expert Consultation Committee to develop disaster management policy, the National Science and Technology Center to study disaster prevention and protection technology, and the National Fire Agency to conduct disaster prevention and protection works, including evacuation and rescue service.¹¹⁶

In addition to the above permanent organizations, the government would form the Disaster Response Centers when a disaster was approaching or had already happened. If the disaster damages were too serious to be repaired by existing executive agencies and normal procedures, the legislature might pass a law to create temporary special councils responsible for post-disaster recovery, like the reconstruction council operating in the five years following Typhoon Morakot. The fragmentation of disaster management authorities has remained an unsolved problem in Taiwan.

To conform to the reorganization in the central government, the amendments to the Disaster and Prevention Act in 2010 also modified the disaster management organizations at the local level. Like the Disaster Prevention and Protection Office created in the Executive Yuan, new disaster prevention and protection offices were set up in municipality/county governments to undertake work assigned by the Municipality/County Disaster and Prevention Councils.¹¹⁷ Township offices also have their disaster prevention and protection offices to carry out the Township Disaster Prevention and Protection Council's missions.¹¹⁸ By establishing these offices with full-time personnel, the amendment aimed to strengthen local government's resilience to disaster impacts and ability to cope with disaster issues.

While the legislative purpose was good, in reality, most township offices do not have enough resource to undertake disaster management tasks. In Taiwan, a township is a small

¹¹⁶ Article 7, Disaster Prevention and Protection Act (2017).

¹¹⁷ Paragraph 2, Article 9, Disaster Prevention and Protection Act (2010).

¹¹⁸ *Id.* Paragraph 2, Article 11.

administrative zone with limited capacity and personnel. It would be unrealistic to require the township offices to afford full-time positions in the disaster prevention and protection offices to design and implement long-term disaster management plans specifically for that township. It was also impossible for the township offices to deal with short-term disaster issues by themselves in times of emergency. Based on experience of past disasters in Taiwan, a major disaster could easily overwhelm and paralyze the operation of township offices.¹¹⁹

Two years later, the amendment of the Disaster Prevention and Protection Act in 2012 proved that the township offices did not have sufficient human resource to manage disasters. Before the amendment, Article 26 required that all levels of government be staffed by full-time officials to implement disaster prevention work, but the fiscal condition of township offices could not afford these full-time positions. Given that most township offices could not satisfy this legal requirement, the legislators compromised with the reality and amended the law to allow township officials in other positions and part-time employees to concurrently do the disaster prevention work.¹²⁰

Some scholars have suggested that the disaster management burden on township offices be reduced. The small-scale townships usually do not have enough officials and resources to support a wide range of disaster management work, so it is more feasible to ask the township offices to pay full attention to the implementation of disaster management plans made and assigned by the municipality/county governments, which would be supervised and coordinated by the highest disaster management authorities in the national government.¹²¹

¹¹⁹ See Chia-Yu Chou, *supra* note 3, at 108.

¹²⁰ Article 26, Disaster Prevention and Protection Act (2012); LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol.101:38, 151 (2012).

¹²¹ See Chia-Yu Chou, *supra* note 3, at 108-109.

However, this suggestion returns to the top-down management model in which the specific context and needs at the local level are often overlooked. Thus, instead of excluding local officials and citizens from decision-making, future reforms may be that the central government provide more resources and assistance to help local governments build their capacity to manage disaster impacts. On the other hand, the local governments may incorporate NGOs and citizens in disaster management to alleviate the burden on local officials and strengthen the resilience of local communities.

Moreover, future amendments to the Disaster Prevention and Protection Act may consider incorporating the fragmented disaster management authorities at the national level into one powerful agency to effectively cope with the complete process of disasters of any types, from mitigation and preparedness to response and recovery. Nowadays, the increased complexity of society and change of weather patterns have made disaster management more challenging. The government needs an organization that can flexibly and comprehensively deal with a variety of disasters. Currently, in Taiwan, each agency is responsible for specific types of disasters. Moreover, at all three national, municipality/county, and township levels, there are both permanent and temporary organizations committed to general disaster management plans and immediate disaster management work, respectively. Both types of work need to be better incorporated into an organization that can deal with all stages of possible hazards, taking proactive measures to handle dynamic and unpredictable issues from disasters, such as the unprecedented rainfall and problems caused by Typhoon Morakot.

It should be noted that establishing a powerful disaster management organization in the national government does not mean it can overlook the opinions of local governments, communities, and individuals. To the contrary, good communication and collaboration across all

levels of government facilitate disaster management work. Partnership with local organizations and people offers an opportunity to understand the actual needs of local communities and empower them as full partners in realizing disaster management success.¹²²

¹²² See DANIEL A. FARBER ET AL., *supra* note 94, at 223.

Chapter 4 Reconstruction Laws after Typhoon Morakot

In August 2009, the heavy rainfall of Typhoon Morakot triggered serious floods and mudslides throughout southern Taiwan and damaged many indigenous communities. After the disaster, the Taiwanese government passed laws to regulate disaster relief and recovery efforts. Among the laws, regulations on affected land and disaster housing policy have greatly influenced the indigenous communities and raised issues regarding indigenous land rights. These controversies will be discussed in this chapter.

The first section introduces the unprecedented disaster caused by Typhoon Morakot in Taiwan and laws made in response to and for recovery from the typhoon impacts. After the disaster, the Taiwanese government conducted disaster risk and safety assessments of the affected areas, mostly indigenous land, to determine which parcels of land should be strictly regulated to protect human safety and conserve the environment. Section two reviews the land examination process and its controversies, as well as two cases of compensation for typhoon victims. In these cases, indigenous communities faced higher disaster risks and damages because of government policy, so they tried to seek state compensation in the lawsuits.

To reduce disaster risks to vulnerable land, recovery efforts after Typhoon Morakot included a regulation that restricted inappropriate land uses by designating disaster-prone land as Special Zones (特定區域). Section three discusses issues regarding the requirements, procedures, functions, and effects of the zoning law and its practice on indigenous land. The land zoning was further combined with another problematic disaster recovery policy: relocation. Section four

analyzes why the government adopted permanent resettlement housing instead of interim disaster housing for post-typhoon reconstruction and the problems of the disaster housing options.

4.1 Typhoon Morakot and Disaster Recovery Laws

4.1.1 The Unprecedented Disaster of Typhoon Morakot

Climate change and extreme weather are pressing issues around the world, and there has been growing attention to and concern about the risks and impacts of natural disasters. The Fourth Intergovernmental Panel on Climate Change Report warned of the dangerous results of climate change. From 1901 to 2010, the sea level rose by 0.19 meters.¹ It is predicted that weather pattern will become more extreme. Dry regions are likely to have more droughts, and wet regions to have more rainfall. “Extreme precipitation events over most of the mid-latitude land masses and over wet tropical regions will very likely become more intense and more frequent.”²

Being located across low and middle latitudes, Taiwan has been frequently struck by typhoons during summer and autumn, especially from July to September. On average, three to four typhoons directly hit Taiwan every year, many of which have brought strong winds and heavy rainfall.³ Compared to typhoons from 1961 to 1989, the frequency and severity of

¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE SYNTHESIS REPORT 4 (2014), http://ar5-syr.ipcc.ch/ipcc/resources/pdf/IPCC_SynthesisReport.pdf.

² *Id.* at 11.

³ Cumulative Number of typhoons that struck Taiwan during 1911–2015

Month	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Whole year
Number	1	9	26	93	106	84	30	10	1	360
Average	0.01	0.09	0.25	0.89	1.01	0.80	0.29	0.10	0.01	3.42

See Central Weather Bureau website: <https://www.cwb.gov.tw/V7/knowledge/encyclopedia/ty038.htm> (last visited Sep. 12, 2018).

typhoons that hit Taiwan after 1990 have increased.⁴ Extreme precipitation in typhoon events has also increased significantly since 2000.⁵ The weather patterns and their impacts have become more unpredictable.

In early August 2009, Typhoon Morakot struck Taiwan, and its impacts caused severe damage. Although the forecast agencies and scientists predicted the path of Typhoon Morakot through northern Taiwan, it was to their surprise that the typhoon produced extremely heavy rainfall in southern Taiwan. In only one day, on August 8, the rainfall in Pingtung County was 1,402 mm, the largest amount of daily precipitation in Taiwan's history.⁶ While the average amount of rainfall in Taiwan in August is between 300 and 600 mm, the cumulative precipitation in southern Taiwan from August 6 to 10, 2009, was more than 2,500 mm, also the highest ever.⁷ The heavy rainfall triggered enormous floods, mudflows, landslides, barrier lakes, bridge collapses, and levee breaches⁸ (see Figures 4-1 and 4-2). The disasters left 699 people dead and missing; 140,424 houses were damaged, among which 1,766 houses were rendered completely uninhabitable. The total economic loss reached almost two hundred billion new Taiwan dollars, or 6.75 billion US dollars.⁹

⁴ HUANG-HSIUNG HSU (許晃雄), SCIENTIFIC REPORT OF TAIWAN CLIMATE CHANGE (台灣氣候變遷科學報告) 4 (2011).

⁵ *Id.* at 19.

⁶ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN (行政院莫拉克颱風災後重建推動委員會), *Ai yu Xiwang Yuedong Shengmingli: Molake Taifeng Zaihou Zhongjian Sanzhounian Chengguo Huibian (shang)* (愛與希望躍動生命力：莫拉克颱風災後重建三周年成果彙編(上)) [LOVE AND HOPE BURSTING WITH VITALITY: ACHIEVEMENTS ON THE THIRD ANNIVERSARY OF POST TYPHOON MORAKOT RECONSTRUCTION VOL.1] 13 (2012).

⁷ *Id.* at 18.

⁸ WEI-SEN LI (李維森), DISASTER SURVEY AND ANALYSIS OF TYPHOON MORAKOT (莫拉克颱風災情之勘查與分析) 1 (2010).

⁹ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 1.

The disaster had significant impacts on indigenous communities in southern Taiwan, especially those in mountainous areas. Many roads that had been the only routes to the indigenous communities were either blocked or washed away. Indigenous people were trapped in the remote areas, running out of food and water. Critical infrastructure and private houses in the indigenous communities were damaged or destroyed.¹⁰ The 13,911 indigenous people living in the disaster areas accounted for 72.5% of the typhoon victims.¹¹

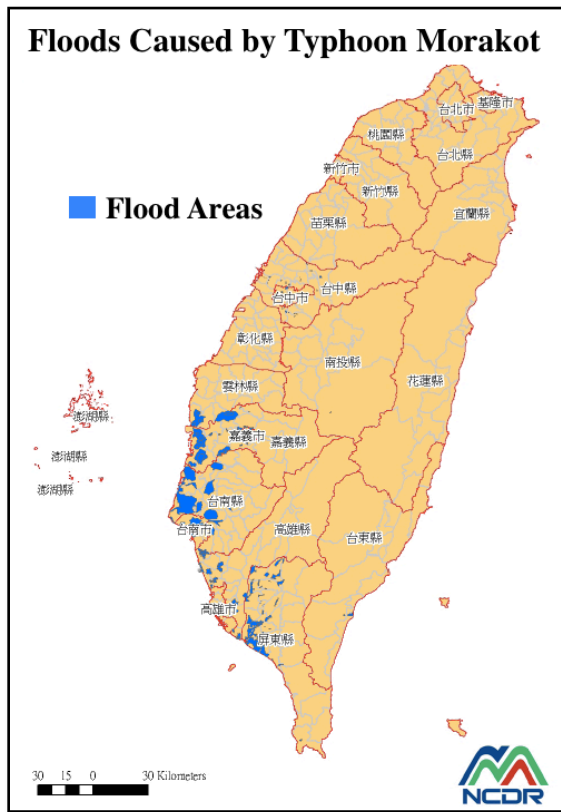


Figure 4-1
Map of Floods Caused by Typhoon Morakot

Original picture: WEI-SEN LI (李維森), DISASTER SURVEY AND ANALYSIS OF MORAKOT TYPHOON (莫拉克颱風之災情勘查與分析) 57 (2010). Modified by Yung-hua Kuo

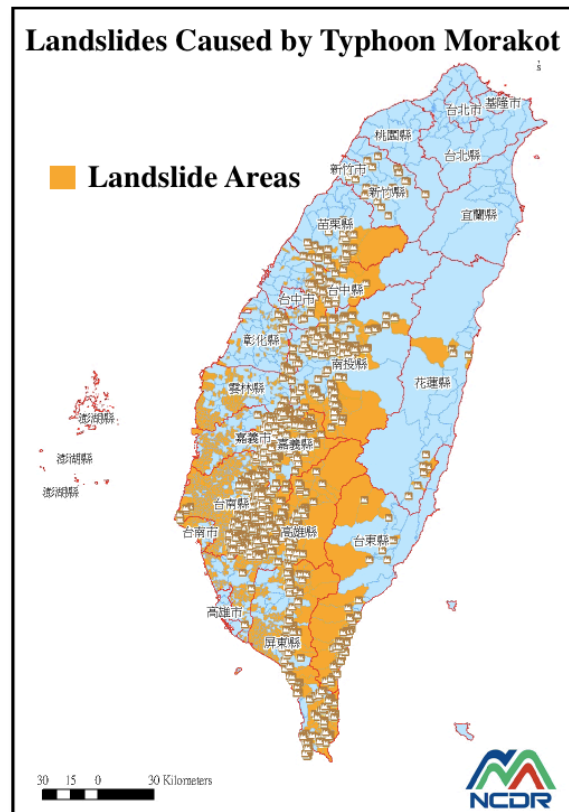


Figure 4-2
Map of Landslides Caused by Typhoon Morakot

Original picture: WEI-SEN LI (李維森), DISASTER SURVEY AND ANALYSIS OF MORAKOT TYPHOON (莫拉克颱風之災情勘查與分析) 103 (2010). Modified by Yung-hua Kuo

¹⁰ See generally Awi Mona, *Qihou Bianqian, Shengtai Yongxu yu Yuanzhuminzu Shehui Wenhua Fazhan: Molake Fengzai de Fansi* (氣候變遷、生態永續與原住民族社會文化發展: 莫拉克風災的反思) [*Climate Change, Ecological Sustainability, and Social-cultural Development of Indigenous People: the Reflection on Typhoon Morakot*], 6 TAIWAN INDIGENOUS STUDIES REV. (台灣原住民研究論叢) 27 (2009).

¹¹ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 210.

4.1.2 Legislation for Typhoon Morakot Recovery

Two weeks after the disaster, the Legislative Yuan held an extraordinary session to pass the Special Act for Post-Typhoon Morakot Disaster Reconstruction (莫拉克颱風災後重建特別條例) (hereafter Special Act) on August 28, 2009, to lay down reconstruction principles and loosen existing legal restrictions for swift disaster relief and recovery. The legislation process of the Special Act was much shorter than that of the 9/21 Earthquake's reconstruction laws, which were passed five months after the earthquake. In that disaster event, the legislators had a few months to contemplate the laws for intermediate and long-term disaster recovery because the presidential emergency decree had dealt with the most urgent problems and needs immediately after the disaster. The laws regulated and facilitated the recovery from the earthquake, and their imperfection led the Legislative Yuan to pass the Disaster Prevention and Protection Act in 2000 for better legal management of future disasters.

While the Disaster Prevention and Protection Act was supposed to create a comprehensive legal framework covering tasks at all disaster management stages, most articles of the act focus on government disaster management structure and organization duties. The act did not set the principles and processes of disaster preparedness, response, and recovery well. There are only four abstract articles listing government recovery missions, establishing reconstruction organizations, and simplifying administrative procedures for restoration of transportation facilities and disaster areas.¹² The few articles were insufficient to guide and regulate a wide range of recovery works after a major disaster, especially when some disaster reconstruction plans would change or limit rights, for example, restricting the property right of land use.

¹² See Article 36, 37, 37-1, 37-2, Disaster Prevention and Protection Act (災害防救法) (2008).

Facing this chaotic situation, the Executive Yuan quickly drafted a bill of post-typhoon reconstruction, and the Legislative Yuan enacted the Special Act in late August 2009. The executive and legislative branches spent only ten days drafting and passing the law.¹³ Compared to previous disaster management laws, the Special Act paid more attention to involving not only government officials but also community members in the disaster recovery process. The statute asked the Executive Yuan to establish the Typhoon Morakot Post-Disaster Reconstruction Council (莫拉克颱風災後重建推動委員會) (hereafter Reconstruction Council) to decide, coordinate, implement, and supervise disaster recovery efforts. The Reconstruction Council was composed of government officials, experts, scholars, private organizations, and individuals, among whom at least one-fifth of the council members had to be representatives of indigenous people and typhoon victims.¹⁴

In addition, the Special Act highlighted the importance of public participation and cultural diversity in post-disaster recovery.

Article 1. Paragraph 2, Legislative Purpose and Application of Most-Favorable Laws.

In the event that a region under reconstruction lies in an area where indigenous people live, the reconstruction shall be . . . duly handled in accordance with the provisions of the Basic Law for Indigenous Peoples.

Article 2. Human-Centered Recovery.

Post-Morakot disaster reconstruction shall be human-centered and focus on the restoration of ordinary life. The reconstruction efforts shall respect plural cultural characteristics, assure community participation, and meanwhile achieve conservation of land and environmental resources.

¹³ See MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN (行政院莫拉克颱風災後重建推動委員會), MOLAKE TAIFENG ZAIHOU ZHONGJIAN ZUOYE CHENGXU CANKAO SHOUCE (莫拉克颱風災後重建作業程序參考手冊) [POST-TYPHOON MORAKOT DISASTER RECOVERY WORK PROCESS HANDBOOK] 13 (2013).

¹⁴ Article 4, Special Act for Post-Typhoon Morakot Disaster Reconstruction (莫拉克颱風災後重建特別條例) (2009).

Article 20. Designation of Special Zones, Measures of Shelter, and Acquisition of Land.

Paragraph 1.

Reconstruction of the disaster areas shall respect the culture and lifestyle of local people, communities, and tribal organizations.

Paragraph 2.

For risky and illegally developed land in affected areas, central, municipal, and county/city governments may, *after reaching an accord with residents on the land*, designate the land as a Special Zone to restrict residence, order residents to resettle, or relocate entire villages (emphasis added).

It is worth noting that none of the legal mandates to increase public participation and respect local opinion appeared in the bill drafted by the Executive Yuan.¹⁵ Most of the requirements were suggested by another Special Act bill proposed by the opposition party, the Democratic Progressive Party.¹⁶ The bill required, for example, that projects regarding Special Zones and relocation policy “should be decided through an open and democratic procedure and respect the rights of diverse groups to choose their lifestyle, customs, socioeconomic structure, resource management, and land ownership and use.”¹⁷

When the bills were discussed in the Legislative Yuan, indigenous legislative representatives from multiple political parties stood up for indigenous rights to defend indigenous peoples against arbitrary relocation and land expropriation by the government. The indigenous representatives requested that people living on affected lands, especially indigenous people, not be relocated unless they agreed.¹⁸ These opinions and motions were negotiated by the parties and mostly adopted in the final version of the Special Act.¹⁹

¹⁵ See LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 98:45, 1-10 (2009).

¹⁶ See *id.* at 10-25.

¹⁷ See *id.* at 18.

¹⁸ See *id.* at 41, 45-46, 48-49.

¹⁹ See *id.* at 56-57, 75-79.

The legislation of the Special Act shows the importance of making disaster management laws through a democratic process that includes all stakeholders involved, particularly the minority group of Taiwanese indigenous peoples. Since 1991, the Amendment to the Constitution guaranteed six reserved seats for indigenous representatives in the Legislative Yuan.²⁰ During the legislative process of the Special Act, the indigenous representatives expressed the concerns of indigenous people and influenced the law-making. If there had not been multiple bills and claims from the indigenous representatives, disaster recovery work might have been guided by the bill proposed by the Executive Yuan, which did not pursue public participation or cultural diversity.

4.2 Disaster Risk and Land Use Regulation

4.2.1 Regulating Vulnerable Lands for Disaster Recovery

In the aftermath of Typhoon Morakot, the Taiwanese reaction to the destruction of the disaster exhibited a strong belief that humans are too weak to sustain and resist the power of nature. Following the typhoon disaster, President Ma and government officials repeatedly claimed that humans could not fight against nature, and that staying away from disasters was more important than preventing disasters from happening.²¹ According to the government, separating humans from nature was the best way to protect both of them. Hence, the Special Act, which implemented the reconstruction plans with the aim of land conservation by applying

²⁰ Paragraph 1, Article 4, Amendment to the Constitution (1991): “Beginning with the Seventh Legislative Yuan, the Legislative Yuan shall have 113 members, [.....]. Three members each shall be elected from the lowland and mountain indigenous peoples.”

²¹ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 134.

scientific assessment technology and restricting human activities, emphasized not only reconstruction but also moving people to safer areas in the lowlands.²²

Some non-governmental organizations (hereafter NGOs) raised the opinion that indigenous people living in mountainous areas should be responsible for the damage of Typhoon Morakot. Such opinion requested that, to prevent disasters from recurring, the government should use its authority to restrict or even prohibit human activities in the natural surroundings and ask the indigenous people to retreat from the mountain areas. For example, the Buddhist Compassion Relief Tzu Chi Foundation claimed that the typhoon victims should completely relocate their villages away from the mountains and forests to let nature rest.²³ Yet, this opinion was based on subjective experience of disaster relief and reconstruction in Taiwan and overseas, not on either geological investigation results or surveys on the residents' thoughts. The pressure for relocation also came from the mass media. Just four days after Typhoon Morakot hit Taiwan, before any proper investigation, a newspaper report blamed the Xiaolin villagers for the tragedy that had happened to them, declaring that irrigation and exploitation of the land had disturbed the balance of nature and resulted in the mudslide that had buried the Xiaolin village.²⁴

One month after the typhoon, the Executive Yuan proposed the Basic Plan of Regional Reconstruction Prioritizing the Protection of National Land (hereafter Basic Plan) as the framework and guidance to examine, monitor, classify, and manage lands affected by the disaster. To determine whether certain land was vulnerable, the Taiwanese government applied scientific methods and modern technologies to investigate the structure of the affected land, its sensitivity

²² *Id.* at 134-174.

²³ INDEPENDENT NEWS NET OF MORAKOT (莫拉克獨立新聞網), MISSING HOMES IN PERMANENT HOUSES: STORIES ABOUT PEOPLE AND PERMANENT HOUSES, THREE YEARS SINCE THE DISASTER OF TYPHOON MORAKOT (在永久屋裡想家: 莫拉克災後三年, “永久屋”與人的故事) 30-33 (2013).

²⁴ UNITED DAILY NEWS (聯合報), *The Village Destroyed: Dire Warning to Taiwan Given from Land* (滅村: 大地給台灣的驚天警告) (Aug. 13, 2009).

to impacts, as well as the possibility of erosion, landslides, and other disasters.²⁵ The Basic Plan established a hierarchy of different levels of restrictions on land use, and the government would impose stricter restrictions on more vulnerable land to achieve the goal of land conservation.²⁶

Specifically, the affected lands were classified into three types. The first land type was extremely disaster-prone areas prohibited from any development and reserved for special purposes, such as protecting headwaters and preserving wildlife. The second type of land could be used for limited development and was further divided into the subcategories 2A and 2B. Land of subcategory 2A was subject to disaster risks including medium or high vulnerability, high potential for mudflows, and medium possibility of influence by rivers, land subsidence, low river terraces, and river bank erosion. The government would not open up these lands to new development plans, and reconstruction was allowed only after safety assessment and with official permission. Other vulnerable land was classified in subcategory 2B. Once this type of land was restored to its use before the disaster, new development might be allowed with proper environmental assessment. Other land affected by Typhoon Morakot that did not belong to the previous two vulnerable land types was classified in the third category, which could be reconstructed and used according to general disaster recovery regulations.²⁷

4.2.2 Land Examination, Disaster Risk, and Safety Assessment

When considering how to assist typhoon victims to recover from disaster impacts, the Taiwanese government decided to map land subject to future disaster risks and restrict land use

²⁵ Typhoon Morakot Post-disaster Reconstruction Council, Executive Yuan, *supra* note 6, 186-199.

²⁶ COUNCIL FOR ECONOMIC PLANNING AND DEVELOPMENT, EXECUTIVE YUAN (行政院經濟建設委員會), BASIC PLAN OF REGIONAL RECONSTRUCTION PRIORITIZING THE PROTECTION OF NATIONAL LAND (以國土保育為先之區域重建綱要計畫) 12-13 (2009).

²⁷ *Id.* at 23-24; TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 221-225.

in the risky areas. According to Paragraph 2, Article 20 of the Special Act, with consent of the residents of the risky lands, central, municipal, and county governments could designate deeply struck and illegally used lands as Special Zones to restrict residence and relocate residents from the areas.²⁸ Based on the Special Act, the Ministry of the Interior issued the Regulations on Designating Special Zones, Choosing and Changing Resettlement Land, and Distributing Reconstruction Houses in Areas Affected by Typhoon Morakot (hereafter Designation Regulations) to explain and classify vulnerable land into eight types: (1) area prohibited from development and construction by law; (2) high potential debris flow torrent area;⁽³⁾ area with severely degraded ecosystem;⁽⁴⁾ over-exploited land; (5) area that had suffered serious landslide; (6) severe land subsidence area; (7) area where the river ecosystem was degraded, where the river management and safety were damaged, or that was subject to flood risk; and⁽⁸⁾ other areas.²⁹ The ambiguous and inclusive legal texts about the eighth type gave broad discretion to executive agencies to determine which land was risky and supposed to be designated as a Special Zone.

To identify risky land in preparation for the designation of Special Zones, the Taiwanese government conducted geographical surveys of land affected by the floods, mudslides, and other typhoon impacts to evaluate land condition, vulnerability to future disasters, and possible safety concerns. From November 12 to December 11, 2009, the government investigated and assessed eighty non-indigenous villages affected by Typhoon Morakot, determining sixty villages unsafe and twenty villages safe.³⁰

²⁸ Illegally-used lands may be areas where development and construction are restricted or prohibited, but houses and factories, for example, were built without proper environmental impact assessment and construction permit.

²⁹ Paragraph 1, Article 2, Regulations on Designating Special Zones, Choosing and Changing Resettlement Land, and Distributing Reconstruction Houses in Areas Affected by Typhoon Morakot (莫拉克颱風災區劃定特定區域安置用地勘選變更利用及重建住宅分配辦法) (2009).

³⁰ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 213.

The government also examined sixty-four indigenous villages in an even shorter period, from September 10 to 19. Among the indigenous villages, thirty-three were determined risky and thirty-one conditionally safe.³¹ The conditionally safe villages required repair and small-scale construction, such as drainage works and revetment walls, to improve land stability; otherwise, in the long run, the indigenous villages would become unsafe.³²

The land survey process was criticized for being hurried, careless, and for limited local participation. While the government claimed that it would rely on scientists and scientific technologies to make its reconstruction policy, the government did not truly and fully implement scientific methods to assess whether an area of land was subject to disaster risk. Bureaucrats and scientists examined as many as eight sites in a single day, spending little time investigating land conditions. Some experts visited the sites for only a few hours or relied on aerial photography to decide whether an indigenous village was safe.³³

Moreover, compared to the bureaucrats and the scientists who had the power to make land zoning decisions, the local people of the indigenous villages, social scientists such as anthropologists and historians, and social workers had little chance to participate in the policy-making process and had limited power to influence the reconstruction policy.³⁴ As the experts who had the power to investigate and designate were mostly technicians, they focused on

³¹ COUNCIL OF INDIGENOUS PEOPLES, EXECUTIVE YUAN (行政院原住民族委員會), 98 NIANDU MOLAKE TAIFENG ZAIHAI BULUO JUZHUDI XINKAN JI FUKAN ZUOYE JI ANQUAN PINGGU BAOGAOSHU JIHUA: FUKAN BAOGAOSHU (98 年度莫拉克颱風災害部落居住地新勘及複勘作業暨安全評估報告書計畫: 複勘報告書) [NEW INVESTIGATION AND REEXAMINATION OF INDIGENOUS COMMUNITY LANDS AFFECTED BY 2009 TYPHOON MORAKOT DISASTER AND SAFETY ASSESSMENT REPORT: REEXAMINATION REPORT] 1 (2009).

³² *Id.* at 2.

³³ YUNG-LUNG CHEN (陳永龍) & YEN-LIANG CHIU (丘延亮), RESIST NATURAL DISASTERS AND MAN-MADE CALAMITIES: ON HOMESTEAD RESILIENCE AND TAIWAN'S ALTERNATIVES (防天災禦人禍: 原住民抗爭與台灣出路) 122 (2014).

³⁴ Jyh-Cherng Shieh (謝志誠), Jwu-Shang Chen (陳竹上), Wan-I Lin (林萬億), *Skip to Permanence without Transition? Policy-making in Post-Morakot Reconstruction* (跳過中繼直達永久? 探討莫拉克災後永久屋政策的形成), 93 TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES (台灣社會研究季刊) 49, 55 (2013).

technical issues and construction safety but ignored the specific ecological, social, cultural, and economic contexts of each village when evaluating the condition of the affected land.³⁵

Faced with strong criticism of the land examination process and its results, particularly disagreements from indigenous people in the disaster areas, the Taiwanese government conducted a second land examination of the indigenous communities to reconfirm which parcels of land were too risky to live on and which areas might be safe for residence. The second land examination emphasized on-site observation of the indigenous land and communication with local people to hear their thoughts and understand how typhoon impacts changed land conditions and sustainability.³⁶

From November 7 to 26, 2009, government officials reexamined the land of thirty indigenous communities to check and correct the data and assessment results of the first land examination.³⁷ Among the reexamined indigenous communities, seven communities' safety assessment results were changed and given more detailed analysis.³⁸ In addition, at the request of indigenous people, the government officials also visited fifteen indigenous communities not in the first land examination, assessing their condition and safety through scientific evaluation, field research, geographic information system data, and integration of the first and second land examination results.³⁹

³⁵ YUNG-LUNG CHEN & YEN-LIANG CHIU, *supra* note 33, at 123-124.

³⁶ COUNCIL OF INDIGENOUS PEOPLES, EXECUTIVE YUAN, *supra* note 31; COUNCIL OF INDIGENOUS PEOPLES, EXECUTIVE YUAN (行政院原住民族委員會), 98 NIANDU MOLAKE TAIFENG ZAIHAI BULUO JUZHUDI XINKAN JI FUKAN ZUOYE JI ANQUAN PINGGU BAOGAOSHU JIHUA: XINKAN BAOGAOSHU (98 年度莫拉克颱風災害部落居住地新勘及複勘作業暨安全評估報告書計畫: 新勘報告書) [NEW INVESTIGATION AND REEXAMINATION OF INDIGENOUS COMMUNITY LANDS AFFECTED BY 2009 TYPHOON MORAKOT DISASTER AND SAFETY ASSESSMENT REPORT: NEW INVESTIGATION REPORT] 1 (2009).

³⁷ COUNCIL OF INDIGENOUS PEOPLES, EXECUTIVE YUAN, *supra* note 31, at 1-3.

³⁸ The reassessed seven indigenous communities were 'Oponoho (萬山), Kudrengere (谷川/伊拉), Karamemedesane (舊佳暮), Tapangṭ (達邦), Tfuya (特富野), Pnguu (外來吉), and Saviki (山美), *see id.* at 4-6.

³⁹ *See* COUNCIL OF INDIGENOUS PEOPLES, EXECUTIVE YUAN, *supra* note 36, at 1-5.

Based on the investigation and analysis of the two land examinations on a total of ninety-five indigenous communities, forty-seven were determined unsafe, fifteen partially safe and partially unsafe, five conditionally safe, and twenty-eight safe.⁴⁰ About 70% of the affected indigenous communities were subject to future disasters risks to different extents. This disaster risk assessment result was not accepted by all of the local indigenous population. Some indigenous communities continued to express their disagreement and concerns about the disaster recovery work when government officials were visiting affected areas for land zoning plans. The indigenous people protested or even filed lawsuits to challenge the safety assessments and zoning decisions on indigenous land, which will be further discussed in the third section of this chapter.

4.2.3 Disaster Cause and Compensation

When the majority of the affected indigenous communities were assessed and determined unsafe and hazard-prone, it should be asked what caused and increased disaster risk on indigenous land. Indigenous representatives in the Legislative Yuan and scholars argued that inappropriate government policies had exposed Taiwanese indigenous peoples to threats of natural disasters. Many indigenous communities assessed unsafe or partially unsafe in the aftermath of Typhoon Morakot were relocated from their homelands to sites designated by the authorities, which were proven vulnerable to flooding and mudslides.⁴¹ The cases of Kaaluwan and Kucapungane, which will be discussed as follows, are prime examples of indigenous communities that were moved to riverbanks and floodplains with high disaster risks and suffered great damage in the Typhoon Morakot event.

⁴⁰ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 211-212.

⁴¹ LIFAYUAN GONGBAO, *supra* note 15, at 45.

During the Japanese-ruled period, the colonial government strengthened its control over the rebellious indigenous communities like Slamaw (Kayo) by relocating them to more accessible and controllable locations.⁴² In addition, under the Japanese settled agriculture and group relocation policy, many indigenous communities were moved from their homelands to places suitable for settled paddy agriculture, though the floodplains might be prone to flooding and mudslides. Examples include the indigenous communities of Kudrengere,⁴³ Kus-kus,⁴⁴ Buliblosan,⁴⁵ Nangnisalu,⁴⁶ Maya,⁴⁷ and Husida.⁴⁸

After 1945, the ROC government also relocated indigenous communities for the purpose of development. The relocation of the Qalang-bubun and Slamaw (Kayo) communities allowed the construction of the Central Cross-Island Highway and the Te-chi Dam.⁴⁹ The indigenous communities of Tabuk and Maya relocated to their current location near newly built roads to have more convenient transportation to plains.⁵⁰

⁴² TAIWAN SŌTOKUFU RIBANKA (台灣總督府警務局理蕃課), translated by INSTITUTE OF ETHNOLOGY, ACADEMIC SINICA (中央研究院民族學研究所), GAOSHAZU DIAOCHASHU: FANSHE GAIKUANG (高砂族調查書: 番社概況) [AN INVESTIGATION OF THE ABORIGINES IN TAIWAN: THE OVERVIEW OF INDIGENOUS] 133-134 (Japanese edition originally published in 1931; Chinese edition in 2011).

⁴³ Taiwan's Indigenous Peoples Portal (台灣原住民族資訊資源網), http://www.tipp.org.tw/tribe_detail3.asp?City_No=17&TA_No=12&T_ID=253 (last visited Sep. 12, 2018).

⁴⁴ Taiwan's Indigenous Peoples Portal (台灣原住民族資訊資源網), http://www.tipp.org.tw/tribe_detail3.asp?City_No=17&TA_No=9&T_ID=372 (last visited Sep. 12, 2018).

⁴⁵ Taiwan's Indigenous Peoples Portal (台灣原住民族資訊資源網), http://www.tipp.org.tw/tribe_detail3.asp?City_No=18&TA_No=9&T_ID=17 (last visited Sep. 12, 2018).

⁴⁶ TANAPIMA TU TAKI-KOSALAN SOULI (達那畢馬·紹立), GAOXIONG DIQU (LAONONGXI, NANZIXIANXI LIUYU) BUNUN (BUNONGZU) ZHI QIANXI GUOCHENG YU JINGLUE (高雄地區(荖濃溪、楠梓仙河流域) BUNUN (布農族) 之遷徙過程與經略) [MIGRATION PROCESS AND PRACTICE OF BUNUN PEOPLE (BUNUN TRIBE) IN KAOHSIUNG AREA (LOANING RIVER AND NANZIHSIAN RIVER DRAINAGES)] 168 (2005).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Taiwan's Indigenous Peoples Portal (台灣原住民族資訊資源網), http://www.tipp.org.tw/tribe_detail3.asp?City_No=11&TA_No=8&T_ID=452 (last visited Sep. 12, 2018); TAIWAN SŌTOKUFU RIBANKA, *supra* note 42, at 133-135.

⁵⁰ Taiwan's Indigenous Peoples Portal (台灣原住民族資訊資源網), http://www.tipp.org.tw/tribe_detail3.asp?City_No=9&TA_No=8&T_ID=424 (last visited Sep. 12, 2018); YA-HSIANG WANG (王雅湘), CHIEN CHANG (張寬), NA-HUI YEH (葉娜慧), I-WEN T'AO (陶依玟), AFTER HEAVY RAIN, SEEING RAINBOW (暴雨後, 看見彩虹) 112-114 (2012).

In the indigenous communities destroyed by Typhoon Morakot, tribal people of the Kaaluwan (嘉蘭) and Kucapungane (好茶) communities filed lawsuits for state compensation, claiming that the government should be responsible for their losses suffered in the typhoon disaster. Both communities had been relocated earlier from their homelands to locations designated by the government. The relocation of indigenous communities to inappropriate locations subjected the indigenous people to significant disaster risk, but the indigenous people could not obtain compensation for their losses through the judicial process after Typhoon Morakot.

The Kaaluwan Case

Kaaluwan, an indigenous community of the Paiwan tribe, was relocated from a remote mountainous area upriver on the Jhi-ben River to the floodplain at downriver on Taimali River in 1939 under the Japanese group relocation policy. From 1951 to 1956, the ROC government further requested that other Paiwan communities up the Taimali River relocate and incorporate into the Kaaluwan village. Unfortunately, the Kaaluwan tribal people's homes were flooded in July 2005 when Typhoon Haitang struck Taiwan, and the village was inundated by an even greater flood in the 2009 Typhoon Morakot disaster.⁵¹

Based on the State Compensation Act, sixty-six Kaaluwan tribal people suffering losses in the typhoon disaster brought a lawsuit against the Taitung County Government, the Eighth River Management Office of the Water Resource Agency, Soil and Water Conservation Bureau,

⁵¹ Taidong Difang Fayuan (臺東地方法院) [Taitung District Court], Minshi (民事) [Civil Division], 101 Zhong Guo Zi No. 1 (101 年度重國字第 1 號民事判決) (2015) (Taiwan); Taiwan Gaodeng Fayuan Hualien Fenyuan (臺灣高等法院花蓮分院) [Taiwan High Court Hualien Branch Court], Minshi (民事) [Civil Division], 104 Zhong Shang Guo Zi No. 1 (104 年度重上國字第 1 號民事判決) (2015) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Minshi (民事) [Civil Division], 106 Tai Shang Zi No. 1248 (106 年度台上字第 1248 號民事裁定) (2017) (Taiwan).

Forestry Bureau of the Council of Agriculture, and the Executive Yuan.⁵² According to the plaintiffs, the Taitung County Government had failed to properly manage the Taimali River, inspect and maintain the levee system, and issue timely disaster warnings. The Kaaluwan people also claimed that the River Management Office had not effectively dredged the Taimali River, and that the Soil and Water Conservation Bureau and the Forestry Bureau had not conserved mountain slopes with appropriate conservation construction and forestry policy. Lastly, the Executive Yuan should be liable for its Disaster Response Center, temporarily established for Typhoon Morakot, not promptly warning the county government and the Kaaluwan community to take action to alleviate disaster impacts and damages.⁵³

The Taitung District Court, as well the subsequent Hualien High Court and the Supreme Court, adopted the defendants' arguments, deciding that the county government and the executive agencies were not liable for the Kaaluwan tribal people's losses in Typhoon Morakot. According to the court decisions, the Taitung County Government and the River Management Office did dredge the Taimali River and inspect the levees. These disaster prevention methods, designed and built to hold back a fifty-year flood, could not sustain and avoid the two-hundred-year flood caused by the extreme rainfall of Typhoon Morakot. The bureaus had tried to conserve land on the mountain slopes at the riverbank, prohibiting cutting trees since 1991, but the accumulated rainfall of 1,500 to 2,100 mm in upstream Taimali River far exceeded the maximum sustainability of the mountain slopes, 400 mm.⁵⁴

⁵² State Compensation Act (國家賠償法) (1980):

Paragraph 2, Article 2: The State shall be liable for any damage arising from the intent or negligent act of any employee of the Government acting within the scope of his or her office or employment which infringes upon the freedom or right of any person.

Paragraph 1, Article 3: The State shall be liable for damage to any person's life, body, or property resulting from a defect in the installation or management of any government-owned public facility.

⁵³ See *supra* note 51.

⁵⁴ See *id.*

Moreover, the weather forecast agency had estimated that the rainfall in Taitung County would only be 200 to 400 mm, based on which the Disaster Response Center prepared for the possible disaster impact. The estimated precipitation was drastically revised upward after Typhoon Morakot actually struck Taiwan. As soon as the weather information was updated, the Disaster Response Center immediately notified the Taitung County Government to evacuate the Kaaluwan people to protect their safety. The Executive Yuan did not violate its obligation required by the Disaster Prevention and Protection Act. Facing the strong and unpredictable power of nature, the local government and the executive agencies had already fulfilled their legal duties and thus were not liable for the damages of the Kaaluwan people.⁵⁵

While the excessive rainfall of Typhoon Morakot might have been the primary cause of the flood in Kaaluwan village, the flood would not have struck the village if the village had not been where the flood was. It was the Japanese and the ROC governments that had moved the indigenous people from their traditional land to their current village location on the disaster-prone floodplain. To address the past injustice, the government may settle with the Kaaluwan people for reconciliation and empowerment of the indigenous community, which suffered great losses in the typhoon and needed resources for disaster recovery. The settlements may be paid to affected people or village reconstruction programs to help them relocate from the floodplain and start new lives at other appropriate, safe locations.

The Kucapungane Case

Kucapungane was an indigenous community of the Rukai tribe that had relocated from their homeland to pursue better education, employment, and medical care for tribal people. From

⁵⁵ *See id.*

1977 to 1980, the Kucapungane community was moved from the slopes at an altitude of about 930 meters on at upstream Ailiaonan River to the river terrace land on the left bank of the Ailiaonan River at an altitude of 230 meters, a site only eleven kilometers from the plains.⁵⁶ While the new Kucapungane village had greater accessibility, the relocation site was chosen by government officials but deemed risky by tribal people. From the indigenous perspective, the new village site was situated on an ancient watercourse^{and under threats of} floods and landslides.⁵⁷ These concerns became fact in August 2007 when one typhoon after another brought heavy rainfall to Taiwan. Due to the torrential rains, mud and rocks fell and damaged the houses and school in Kucapungane. The rising water of the Ailiaonan River destroyed the bridges connecting the Kucapungane village and the outside world.⁵⁸

When the Kucapungane community was starting to develop its disaster recovery and prevention strategy, the heavy rainfall of Typhoon Morakot caused the Ailiaonan River to rise and flood the village again. Suffering from great loss of health and property with rich Rukai culture and history, 118 households in Kucapungane filed a lawsuit to ask for compensation from the Pingtung County Government, the Council of Indigenous Peoples, the Water Resource Agency, the Soil and Water Conservation Bureau, the Council of Agriculture, and the Forestry Bureau. The plaintiffs of the Kucapungane people claimed that the local government and the executive agencies had failed to protect the community from disaster impacts through proper relocation policy, river management, and forest and soil conservation.⁵⁹

⁵⁶ SASALA TAIBAN, *THE LOST LILY: STATE, SOCIOCULTURAL CHANGE AND THE DECLINE OF HUNTING CULTURE IN KAOCHAPOGAN, TAIWAN* 18 (2006) (dissertation); SASALA TAIBAN, *LUKAIZU HAOCHA BULUO LISHI YANJIU* (魯凱族好茶部落歷史研究) [HISTORICAL STUDY OF RUKAI TRIBE KAOCHAPOGAN COMMUNITY] 53, 190 (2016).

⁵⁷ SASALA TAIBAN, *supra* note 56, *LUKAIZU HAOCHA BULUO LISHI YANJIU*, at 191-193.

⁵⁸ *Id.* at 235-237.

⁵⁹ *Id.* at 260-266.

The first instance of the Pingtung District Court and the second instance of the Taiwan High Court Kaohsiung Branch Court both ruled that the defendants had neither violated their legal duty nor damaged the property and cultural rights of the Kucapungane tribal people. According to the decisions, after the typhoon disasters in 2007, the Pingtung County Government and the Council of Indigenous Peoples were aware of the disaster risks in Kucapungane and took actions to mitigate the risk. The government commissioned a university to investigate, analyze, and suggest possible disaster mitigation strategies. Relocation was one of the four proposed mitigation strategies, depending on the government's budget and the community's views. How to manage the strategies—including but not limited to relocation—was the power of the county government. The government had discretion over the relocation plan and schedule, which was not unreasonably delayed. In addition, not all Kucapungane tribal people agreed with relocation. The relocation project required considerable time to search for a proper resettlement site, acquire resettlement land, get a budget for relocation expenses, and communicate with local people and all government agencies involved to reach a consensus.⁶⁰

When the relocation project was still under discussion, Typhoon Morakot struck Taiwan and brought extreme rainfall to cause the flood in Kucapungane. The court adopted the statement that the precipitation of 2,194.5 mm within seventy-two hours in Pingtung, far exceeding the sustainability of disaster prevention construction and the natural environment near Kucapungane, was the major cause of the flood. The Water Resource Agency, Soil and Water Conservation Bureau, Council of Agriculture, and Forestry Bureau also fulfilled their duties of dredging the Ailiaonan River and conserving the forest and soil of the mountain slopes along the river. The

⁶⁰ Pindong Difang Fayuan (屏東地方法院) [Pingdong District Court], Minshi (民事) [Civil Division], 102 Yuan Zhong Guo Zi No. 1 (102 年度原重國字第 1 號民事判決) (2014) (Taiwan); Taiwan Gaodeng Fayuan Gaoxiong Fenyuan (臺灣高等法院高雄分院) [Taiwan High Court Kaohsiung Branch Court], Minshi (民事) [Civil Division], 104 Yuan Zhong Shang Guo Zi No. 2 (104 年度原重上國字第 2 號民事判決) (2015) (Taiwan).

courts decided that it was the irresistible power of nature that led to the damages, so the local county government and the executive agencies were not liable for the losses of the Kucapungane people in the Typhoon Morakot disaster.⁶¹

4.3 Regulating Disaster-Prone Lands through Zoning

4.3.1 Process and Requirement for Designating Special Zones

In the Kucapungane case, the courts ruled that the Taitung County Government and the Council of Indigenous Peoples did not illegally delay the disaster mitigation strategy because it took time to communicate with and consult the tribal people regarding relocation. The court decisions highlighted the request of Article 32 of the Indigenous Peoples Basic Law to respect the land rights of Taiwanese indigenous peoples: “[t]he government may not forcefully displace indigenous persons from their land, except in the situation of imminent and obvious danger.”⁶² The county government did not relocate the Kucapungane community before Typhoon Morakot because “relocation required long-term communication between indigenous people and the government to reach consensus.”⁶³ Consultation with the indigenous people was used as a reason for not relocating Kucapungane in advance of the disaster. Yet, in the aftermath of Typhoon Morakot, the self-determination and land rights of the indigenous peoples were sacrificed for disaster recovery.

According to Articles 1 and 2 of the Special Act, in the event that reconstruction was to take place in an area where indigenous people resided, the government should handle disaster

⁶¹ *Supra* note 60, Pindong Difang Fayuan, Minshi, 102 Yuan Zhong Guo Zi No. 1.

⁶² Paragraph 1, article 32, Indigenous Peoples Basic Law (原住民族基本法) (2005).

⁶³ *Supra* note 60.

reconstruction in accordance with the Basic Law for Indigenous Peoples to preserve the plural cultures and unique lifestyles of Taiwanese indigenous peoples. The government should respect the traditional culture of the indigenous peoples when considering and regulating their lands.⁶⁴ Article 20 on the zoning of Special Zones also explicitly required the government to consult residents and landowners in disaster-prone areas to reach an agreement about designating their parcels of land as Special Zones. These legal requirements were designed to enhance indigenous rights, but their functions were challenged by the disaster impacts and the reconstruction practice.

In September and October 2009, the government held twenty-three public meetings in the indigenous disaster areas to communicate and discuss with the indigenous people about the Special Zones.⁶⁵ Yet, the meetings did not resolve their questions and concerns regarding the land zoning and its consequent restrictions on indigenous land use. Many indigenous communities were concerned about possible restrictions on their lands. The indigenous villages in Sandimen, Laiya, and Wutai townships, Pingtung County, and the Mizuhu community in Tauyuan District, Kaohsiung Municipality, blocked roads to demonstrate against the zoning policy.⁶⁶ The indigenous communities of Nangisalu, Maya, and Takanua in the Namasia District, Kaohsiung Municipality, also protested and flatly refused the proposed designation of a Special Zone.⁶⁷

⁶⁴ See Article 1, 2, Special Act For Post-Typhoon Morakot Disaster Reconstruction.

⁶⁵ Heng-Yu Zhang (張恒裕), Molake Taifeng Zaiqu Huading, Yuanjuzhudi Anquan Pinggu ji Huading Teding Quyu (莫拉克颱風災區劃定、原居住地安全評估及劃定特定區域) [Designation of Typhoon Morakot Disaster Areas, Safety Assessment of Indigenous Lands, and Designation of Special Zone] 12 (Feb. 18, 2014), <http://morakotdatabase.nstm.gov.tw/download-88flood.www.gov.tw/activity/inheritance/file/pdf/家園重建/1030218-議題四-莫拉克颱風災區劃定、原居住地安全評估及劃定特定區域-張恒裕主秘.pdf>.

⁶⁶ *Id.* at 16.

⁶⁷ Xingzhengyuan Molake Taifeng Zaiqu Huading Teding Quyu Zhuanan Xiaozu Di 5 Ci Huiyi Jilu (行政院莫拉克颱風災區劃定特定區域專案小組第 5 次會議紀錄) [Special Zone Designation of Typhoon Morakot Disaster Areas Task Force, Executive Yuan, Fifth Meeting Record] 5 (2010), <https://www.apc.gov.tw/portal/getfile?source=79ADDD9195DB0E52610217BBF0B058FA9DAB2A97BBE1DD069833B4B7E17A57D982E5E9FBC6146B773E128E5F0623441C57062AF29E51F7E599A1CE66EB96E15&file>

In other indigenous communities where tribal members had different thoughts regarding Special Zones, it was problematic to decide whether the community had reached an agreement on the land zoning proposal. The legal texts of Article 20, Special Act, did not specify the required agreement of residents and landowners of a disaster-prone area, which might be a simple majority, a supermajority, or the unanimous consensus of all tribal members. When drafting the Operation Rules of the Task Force on Designating Special Zones in Disaster Areas (hereafter Operation Rules) in October and November 2009, the Reconstruction Council and other agencies considered that consent from more than half of the residents and landowners in a risky area was enough to constitute the community's agreement on the proposed land zoning, but this proposition was criticized and opposed by people in the disaster areas.⁶⁸

The final Operation Rules issued by the Reconstruction Council did not mention the threshold for reaching an agreement on the land zoning at all.⁶⁹ In its propaganda documents, the Reconstruction Council only stated that the different procedures applied to non-indigenous and indigenous disaster areas, but the documents did not specify the condition of reaching agreement either. According to the documents, the government would respect every person in a non-indigenous disaster area and include their opinions in the decision on land zoning. For indigenous communities assessed as unsafe in the land examination, the community might establish its disaster recovery council or organization approved by the township office to hold meetings to reach an agreement on whether they agreed on the indigenous land's being

ame=F78ECFF80DA3481EE64619B5162644C8C5407A53B6E652B4482B618F1F68DD689EA59C485D0E1B735DBE8554D90777182A081980BD256F2C36CCF494907F2BB6.

⁶⁸ Zaiqu Huading Quyu Caoan Jiangcai Guobanshu Tongyi Rending Qiancun Gongshi (「災區劃定區域」草案將採「過半數同意」認定遷村共識) [Disaster Area Designation Draft Would Adopt Simple Majority to Reach Community Relocation Agreement] (2009), <http://www.88news.org/posts/1162> (last visited Sep. 9, 2018).

⁶⁹ MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 13, at Appendix 262.

designated as a Special Zone. The indigenous community members also might be consulted individually like people in the non-indigenous disaster areas.⁷⁰

The disaster recovery laws did not define the required consent/agreement for designating a Special Zone. Eventually, this legal ambiguity led to controversies and even a lawsuit over the zoning of indigenous lands. The indigenous communities of Pnguu, Qaljapitj, and Adiri disagreed with the designation of their lands as Special Zones, filing petitions to challenge the land zoning decisions. After the petitions were all rejected by the executive agencies, eleven Adiri community members brought a lawsuit to vacate the zoning decision on their land.⁷¹

Adiri is an indigenous community of the Rukai tribe that includes four neighborhoods: The first and second neighborhood were called lower Adiri, and the third and fourth neighborhood were upper Adiri. After Typhoon Morakot, both the lower and upper Adiri communities were designated as Special Zones by the Council of Agriculture. Yet, the land zoning was not agreed upon by all tribal members of the upper Adiri community; the designation was opposed by the Adiri people who filed the lawsuit. The plaintiffs claimed that the upper Adiri community was not disaster-prone and that their lands should not be included in the Special Zone without their consent.

The plaintiffs argued that, when other Adiri people agreed with land zoning in the public meeting in January 2010, they had explicitly expressed their rejection of the proposed Special Zone designation. The Reconstruction Council officials in the meeting took records of the dissenting opinion and orally promised that land in Adiri would be designated separately based

⁷⁰ Morakot Post-disaster Reconstruction Council, Executive Yuan (行政院莫拉克颱風災後重建推動委員會), Molake Taifeng Zaiqu Huading Teding Quyu Shuomingshu (莫拉克颱風災區劃定特定區域說明書) [Explanatory Document of Designating Special Zone of Typhoon Morakot Disaster Areas] 2-3 (2009), http://morakotdatabase.nstm.gov.tw/download-88flood.www.gov.tw/special_list/990112_98年12月30日第9次委員會議通過莫拉克颱風災區劃定特定區域說明書.pdf.

⁷¹ Heng-Yu Zhang, *supra* note 65, at 27.

on the opinion of each household. However, one month later, the government broke its promise and designated the entire upper Adiri community as a Special Zone, including the plaintiffs' parcels of land.⁷²

For the first issue, whether upper Adiri was a disaster-prone area, the Taipei High Administrative Court ruled for the government based on the reason that the safety assessment of Adiri had been made under the legal procedure. According to the Administrative Litigation Act, the courts reviewed only whether an administrative decision was legal, not whether the decision was appropriate. As long as an executive agency followed the required process to make a decision on disaster risk and safety assessment, the courts would respect the administrative judgment and deem it not arbitrary. In the current case, the ambiguous legal texts of Article 20 of the Special Act granted wide discretion to the executive branch in managing land zoning for disaster recovery. The executive agencies commissioned scientists and technicians with professional knowledge to investigate and assess disaster risk and land vulnerability of the upper Adiri community. Because the scientists and technicians were competent to make the assessment, the administrative decision on land zoning based on the assessment was legal.⁷³

For the second issue regarding the required agreement for designating a Special Zone, the court ruled that such agreement did not require the unanimous consent of all members of an indigenous community to form their agreement on a land zoning proposal. The court began reasoning by declaring that, according to Article 1 of the Special Act, the legislative purpose of the act and first priority in disaster recovery was safety and efficiency. Although disaster recovery works could not violate fundamental human dignity, when necessary, the requirement

⁷² Taipei Gaodeng Xingzheng Fayuan (臺北高等行政法院) [Taipei High Administrative Court], 99 Su Zi No. 1677 (99 年度訴字第 1677 號) (2012) (Taiwan); Zuigao Xingzheng Fayuan (最高行政法院) [Supreme Administrative Court], 101 Pan Zi No. 1073 (101 年度判字第 1073 號) (2012) (Taiwan).

⁷³ *Id.*

of respecting the local community, culture, and lifestyle might be sacrificed or compromised to achieve safe, speedy, and effective reconstruction.⁷⁴

In the Adiri case, indigenous land rights were limited by the land zoning decision, but the Reconstruction Council had already tried to respect indigenous opinions through making records of the plaintiffs' dissenting opinion and not enforcing Article 20 of the Special Act, which granted executive agencies the power of compulsory relocation and land taking. The Reconstruction Council allowed people in the Special Zones to choose resettlement with assistance from the government and NGOs or to remain on their land with less reconstruction subsidy. Even if the plaintiffs' land was included in the Special Zone, the zoning would not practically limit how they used the indigenous lands. The government's exercise of power—designating upper Adiri as a Special Zone but not forcibly relocating community members—was within its discretion and took into account both disaster recovery and indigenous land rights.⁷⁵

The court recognized that the land zoning process suffered some deficiencies, but the deficiencies did not render the land zoning decision illegal. For example, the government officials did not provide sufficient information on land zoning in the indigenous language when communicating with the Adiri people in the public meetings. Nevertheless, the executive agencies did not enforce the law to forcibly relocate people. In practice, each tribal person and household could freely choose to stay in or relocate from the upper Adiri Special Zones. This result was quite similar to the government's promise that land zoning decisions would be made individually according to the thoughts of each landowner. Thus, the court decided that the zoning decision did not contradict the conclusion of the public meetings.

⁷⁴ *Id.*

⁷⁵ *Id.*

However, the problems might have been more serious than the court said. While the government found competent experts to assess the Adiri community as disaster-prone, the court rejected different opinions from other experts in the land examination and safety assessment team. According to two university researchers specializing in construction and forestry, the upper Adiri community was not subject to the disaster risk of landslide and did not need to be designated as a Special Zone. The indigenous perspective of the environment was neither discussed nor adopted in the decision. The procedure of disaster risk and safety assessment was not completely without doubt.

If the upper Adiri community was not under imminent and obvious danger, the indigenous people should be entitled to reject the zoning and possible restrictions on their lands. It did not matter whether at a later point the government chose to enforce the law and forcibly move the people out of the Adiri Special Zone. The government should not have designated the plaintiffs' lands in Adiri in violation of their thoughts, and indigenous self-determination should not be unjustly sacrificed for disaster recovery.

Another issue exposed by the Adiri case was that the executive agencies had too much discretion on land zoning, which could barely be reviewed by the courts. Sometimes, the executive agencies and officials performed their disaster management duties terribly, but they were exempted from responsibility as long as an administrative decision was not made arbitrarily. The Special Act, which took only ten days of legislation after Typhoon Morakot, had brief and ambiguous legal texts on the government's powers of disaster recovery.

In such circumstance, although the court found that the Reconstruction Council poorly communicated with the Adiri people and ignored its own promise of zoning the lands individually, the court could only respect the administrative determination within the executive

discretion and ruled the land zoning as legal. Learning from this experience, future legislation may carefully draft, discuss, and pass disaster management laws to specify the government's power and rights protection in natural disaster situations. Moreover, the law should be made in normal times before a disaster instead of passing laws in a hurry after a disaster has happened.

4.3.2 Zoning Effects: Forced Relocation and Land Use Restriction?

In the Adiri case, the most crucial reason for the court to rule for the government was that the government had not enforced the law to forcibly relocate people in the Adiri Special Zone, so the administrative determination on land zoning did not violate plaintiffs' land rights. In its propaganda documents, the Reconstruction Council emphasized that designating Special Zones was for the purpose of identifying typhoon victims to grant them with disaster relief and recovery assistance. The zoning would not influence any legal rights of people in the disaster areas, which meant no restrictions on land use in the Special Zones.⁷⁶ In January 2010, the Reconstruction Council highlighted the claim in its announcement to the typhoon victims that “the designation of Special Zones was completely beneficial and helpful for typhoon victims and would not cause any negative effects.”⁷⁷

The Reconstruction Council's interpretation and application of the Special Act had three major issues. First, while the Reconstruction Council declared that land zoning would not actually limit land use in the Special Zones, the legal practice has rendered Article 20

⁷⁶ Morakot Post-disaster Reconstruction Council, Executive Yuan, *supra* note 70, at 1 ; Post-Typhoon Morakot Reconstruction Council, Executive Yuan (行政院莫拉克颱風災後重建推動委員會), Zhengfu Tigong Zaiqu Zaimin Anquan Shenghuo Huanjing—Zhongjian Tiaoli yu Tedingqu Huashe (政府提供災區災民安全生活環境—重建條例與特定區劃設) [Government Providing Safe Living Environment to Typhoon Victims in Disaster Areas: Reconstruction Special Act and Special Zone Designation] 5-6 (January 6, 2010), http://morakotdatabase.nstm.gov.tw/download-88flood.www.gov.tw/special_list/990106 政府提供災區災民安全生活環境—重建條例與特定區劃設.pdf.

⁷⁷ Huading Tedingqu Wenda (劃定特定區問答), 1 (Jan. 12, 2010), http://morakotdatabase.nstm.gov.tw/download-88flood.www.gov.tw/special_list/990112 劃定特定區域問答.pdf.

meaningless. The article was passed with the aim to reduce inappropriate land exploitation and prohibit illegal development of vulnerable lands to protect the people and conserve the environment in disaster-prone areas.⁷⁸ The zoning law, without any legal effect, could not achieve the legislative purpose of land use regulation for disaster recovery and risk reduction.

Second, the Reconstruction Council's claims contradicted the disaster recovery principle set by the council itself in an earlier phase of post-Typhoon Morakot reconstruction. In October 2009, when discussing the land examination in preparation for zoning, the Reconstruction Council decided that the second land examination would include landowners to reexamine and reassess land safety to remedy the complaint that the first land examination had been conducted only by scientific experts. Once the land was ultimately assessed as unsafe, exploitation of the vulnerable lands had to be reduced and limited. To those who were willing to evacuate the risky areas, the government would provide resettlement housing and help to switch jobs or change career fields. If residents and landowners refused to evacuate, the government would still notify them that "the risky lands could not be used for residence, and land uses must be reduced."⁷⁹

Third, the Reconstruction Council's declaration of "no land use restrictions on the Special Zone" in January 2010 also contradicted its Designation Regulations issued around the same time. According to Paragraph 1, Article 4 of the regulations, after the Special Zones were announced, municipality, county, and township governments shall notify, in writing, the residents in the designated Special Zones, advising them to relocate before the set deadline. If the residents refused, relocation could be done by compulsion. The Reconstruction Council might

⁷⁸ See LIFAYUAN GONGBAO, *supra* note 15, at 6, 18, 75-76.

⁷⁹ Yanshang Molake Taifeng Zaihou Huading Teding Quyu Yuanzhu Jumin Qiancun Yuanze Gongzuo Huibao Jilu (研商莫拉克颱風災後劃定特定區域原住民遷村原則工作會報紀錄) [Discussing Principles of Post-Typhoon Morakot Special Zone Designation and Resident Relocation Staff Conference Record]1 (Oct. 6, 2009), http://morakotdatabase.nstm.gov.tw/88flood.www.gov.tw/files/committee_other/31.pdf?id=31&type=pdf&location=committee_other.

explain that, as in the Adiri case, this regulation was applied only to those who had agreed on relocation and received resettlement housing. Residents who did not apply for resettlement housing were not included. Although the executive agencies might consider limiting this power in practice, the regulation itself did not have such distinction. The government had power to forcibly relocate all people living in the Special Zones.

Faced with the complicated and inconsistent information on Special Zones, many people in the disaster areas were confused and concerned about how zoning would influence and restrict their land rights. They worried about whether the government would take their land through land acquisition and how the government would limit or even prohibit land use in the Special Zones. As a result, not all people in the disaster areas consented to the proposed designation of Special Zones. Disaster-prone parcels of land that landowners consented to zoning were designated as Special Zones. For parcels of affected land where landowners rejected zoning, the Ministry of the Interior created a term, Safety Doubtful Zone (安全堪虞區域), by administrative regulation. The land type of Safety Doubtful Zone was not authorized by the Special Act through the legislation process. The classification between Special Zone and Safety Doubtful Zone was controversial because it caused different treatment of typhoon victims in the two zones and restrictions on their land rights, which will be further discussed in the following section.

The number of Special Zones and Safety Doubtful Zones indicated the general attitudes of residents and landowners in the disaster areas toward the land zoning policy. According to the Special Act, the consent of residents and landowners was necessary to designate lands as Special Zones. If the residents and landowners did not consent, the government could only unilaterally designate their lands as Safety Doubtful Zones. In other words, a Special Zone meant that the

landowner agreed with the proposed designation of Special Zone, and a Safety Doubtful Zone represented rejection of that land zoning proposal.

Table 4-1 shows the significantly different attitudes toward the zoning policy between non-indigenous and indigenous people in the disaster areas. Among ninety-eight disaster-prone parcels where non-indigenous people lived, nearly three-quarters (73.47%) of the non-indigenous landowners consented to their land being designated as Special Zones. In contrast, less than half (41.94%) of the indigenous landowners consented to the proposed designation of Special Zones. Compared to the non-indigenous landowners, the indigenous peoples were more suspicious of and opposed to the Special Zone and its subsequent legal restrictions on their land.

Table 4-1: Numbers of Special Zones and Safety Doubtful Zones

	Special Zone	Safety Doubtful Zone	Total
Non-indigenous area of land	72 (73.47%)	26 (26.53%)	98 (100%)
Indigenous area of land	26 (41.94%)	36 (58.06%)	62 (100%)
Total	98	62	160

Source: Jenn-Chuan Chern (陳振川) & Shih-Yi Hung (洪世益), *The Strategy of Community Reconstruction after a Mega Disaster: The Case of Post-Typhoon Morakot Reconstruction in Taiwan* (大規模災害家園重建策略——以莫拉克颱風重建為例), 1(1) JOURNAL OF DISASTER MANAGEMENT (災害防救科技與管理學刊) 63, 73 (2012); *160 chu Teding Quyu yu Anquan Kanyu Diqu Zaina? (160 處特定區域與安全堪虞地區在哪?) [Where Are the 160 Sites of Special Zones and Safety Doubtful Zones?]*, 921 RELIEF FOUNDATION (九二一震災重建基金會), <http://www.taiwan921.lib.ntu.edu.tw/88pdf/A8801DB4.html> (last visited Sep. 4, 2018).

Another problem regarding Article 20 of the Special Act was that the Reconstruction Council confused land use regulation with disaster relief law. According to the council, the designation of Special Zones was aimed to identify Typhoon Morakot victims and provide them with assistance. The government provided a discriminative subsidy to people living in the Special Zones and the Safety Doubtful Zones (Table 4-2), while designating either zone depended on the landowner's consent, but not on the land's condition or other substantial criteria.

Many people in the disaster areas worried that the government might not reconstruct their community if they refused land zoning as a Special Zone.⁸⁰

Table 4-2: Assistance to Residents Living on Risky Land

	Residents in Special Zones	Residents in Safety Doubtful Zones
Relocation cost subsidy	○	●
Living subsidy	○	●
Rent subsidy	△	●
Subsidy for purchasing house	○	●
Subsidy for mortgage	△	●

Note: White circle (○) indicates that residents could apply for the assistance. Triangle (△) indicates that residents could apply for either rent subsidy or subsidy for mortgage. Black circle (●) indicates that the resident could not apply for the assistance.

Source: Construction and Planning Agency, Ministry of Interior (內政部營建署): http://morakotdatabase.nstm.gov.tw/download-88flood.www.gov.tw/special_list/990729 特定區域及安全勘虞地區遷居戶差異說明.pdf (Last visited Aug. 29, 2018)

By providing different assistance to people in the Special Zones and Safety Doubtful Zones, the government failed to help citizens in the same vulnerable situation. From the government's perspective and assessment, the lands in both zones were subject to disaster risk and should have been designated as Special Zones. It was just that some people refused the zoning proposal, and their lands were given the name of Safety Doubtful Zone. However, if the disaster risk in the two zones was the same, the government had the responsibility to provide equal assistance to ensure those people's safety and help them recover from the disaster. Consent to land zoning should not be a condition for government assistance in the aftermath of a major disaster.

This problem of discriminative subsidies was partially fixed by the amendment of the Designation Regulations in January 2010. The amended paragraph 1, Article 10 of the

⁸⁰ Bu Huading Jiu Bu Xiezhu? Meishan Cunmin Dui Zhengfu de Yilu (不劃定就不協助? 梅山村民對政府的疑慮) [No zoning, no assistance? Meishan Villagers' Concern of the Government], <http://www.88news.org/posts/2374> (last visited Sep. 7, 2018).

regulations provided resettlement housing not only to people in the Special Zones but also to people who did not consent to the zoning and whose lands were regarded as Safety Doubtful Zones.⁸¹ Despite this improvement, compared to people in the Special Zones, typhoon victims in the Safety Doubtful Zones received much less government assistance simply because they refused the label of Special Zone, a label that the Reconstruction Council claimed had no practical influence on land rights at all.

On the one hand, the government insisted that the disaster-prone parcels of land should be designated as Special Zones; on the other hand, the land zoning was claimed not to bring any legal effects on land use restriction and forced relocation. Such legal interpretation and application did not comply with the legislative purpose of safety protection and environmental conservation of vulnerable lands. The executive agencies also violated their duty to help all disaster victims who desperately needed assistance following the serious Typhoon Morakot disaster. The identification of typhoon victims could have been done based on the land examination results or criteria for disaster areas. In September 2009, the Reconstruction Council made regulations to clarify the specific criteria for mapping areas seriously impacted by the typhoon and requiring disaster recovery assistance.⁸²

Article 20 of the Special Act should be applied as it was legislated: a land use regulation that restricted inappropriate land use and development to facilitate disaster recovery and reduce disaster risk. In the Adiri case, the plaintiffs of the Adiri people complained that the government had not provided them with clear, sufficient information about how land zoning would influence their land rights or how the Adiri people would be relocated elsewhere. Unnecessary pursuit of the formality of zoning—ignoring indigenous voices yet having no legal effect—has led only to

⁸¹ *Supra* note 67, at 2.

⁸² See MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 13, at 19-21, Appendix 243-244.

controversy, not to successful disaster recovery. It is more important to achieve the legislative purpose of land use regulation for disaster mitigation and adaptation through substantial communication with and proper accommodation of people in disaster-prone areas. Only when the typhoon victims had fully realized the disaster risk and government recovery policy could they give informed consent to the proposed land zoning plans and choose disaster adaptive strategies suitable to their needs.

4.4 Relocation Policy

In the case that the land has become too unstable and unsustainable due to disaster impacts, recovery may not be rebuilding the communities in the places prone to future disasters. Possible alternatives include resettlement of all or some portion of the affected communities to safer places and restoration of the affected areas to a more natural environment.⁸³ In the Typhoon Morakot event, the floods and landslides damaged or destroyed thousands of houses and infrastructures.⁸⁴ After the disaster, the Taiwanese government not only provided short-term monetary housing assistance, such as subsidies toward mortgages and leases, but also adopted relocation policies for long-term disaster recovery.⁸⁵

While relocation from vulnerable land might be an effective way to protect human safety, the problem lay in a simplistic idea that relocation was presumed to be the primary disaster recovery measure before investigating actual damages, land conditions, and various needs in a wide range of disaster areas. As early as August 27, 2009, the Reconstruction Council, in its third

⁸³ DANIEL A. FARBER, JIM CHEN, ROBERT R.M. VERCHICK, LISA GROW Sun, *DISASTER LAW AND POLICY* 397 (Third Edition, 2015).

⁸⁴ See TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 24, 39-45.

⁸⁵ See *id.* at 110-111, 226-232.

meeting, decided that permanent resettlement would be the principal method for intermediate- and long-term disaster recovery. Only in exceptional situations might the government provide manufactured houses to displaced typhoon victims.⁸⁶

In a later Reconstruction Council meeting, four indigenous council members proposed adding an interim housing option that allowed the typhoon victims to recover from disaster impact and develop long-term plans, but the suggestion was rejected.⁸⁷ Compared to thousands of individuals and houses affected by the floods and mudslides in Typhoon Morakot, only 312 manufactured houses were built after the disaster to host a small portion of the typhoon victims.⁸⁸ Other typhoon victims in emergency shelters would move directly into permanent resettlement houses, return to their homes, rent houses, or stay with their relatives and friends.

The permanent resettlement housing policy for post-Typhoon Morakot reconstruction was the biggest change in disaster recovery strategy from the post-9/21 Earthquake reconstruction. In the 9/21 Earthquake in 1999, more than ten thousand buildings were damaged or collapsed.⁸⁹ In addition to emergency sheltering immediately after the earthquake, the government, NGOs, and private companies cooperated to provide 5,854 manufactured housing units on 112 sites to people whose houses had been damaged or collapsed in the earthquake.⁹⁰

⁸⁶ Xingzhengyuan Molake Taifeng Zaihou Zhongjian Tuidong Weiyuanhui Di 3 Ci Gongzuo Xiaozu Huiyi Jilu (行政院莫拉克颱風災後重建推動委員會第 3 次工作小組會議紀錄) [Morakot Typhoon Post-disaster Reconstruction Council, Executive Yuan, Work Team 3rd Meeting Record], 3 (Aug. 27, 2009), http://morakotdatabase.nstm.gov.tw/88flood.www.gov.tw/files/committee_workgroup/9.pdf?id=9&type=pdf&location=committee_workgroup.

⁸⁷ Xingzhengyuan Molake Taifeng Zaihou Zhongjian Tuidong Weiyuanhui Di 12 Ci Gongzuo Xiaozu Huiyi Jilu (行政院莫拉克颱風災後重建推動委員會第 12 次工作小組會議紀錄) [Morakot Typhoon Post-disaster Reconstruction Council, Executive Yuan, Work Team 3rd Meeting Record], 3-4 (Nov. 6, 2009), http://morakotdatabase.nstm.gov.tw/88flood.www.gov.tw/files/committee_workgroup/40.pdf?id=40&type=pdf&location=committee_workgroup.

⁸⁸ See TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 113.

⁸⁹ 9/21 EARTHQUAKE RECONSTRUCTION COUNCIL, EXECUTIVE YUAN (行政院九二一震災災後重建推動委員會), JIUERYI ZHENZAI ZHONGJIAN JINGYAN, VOL.1 (九二一震災重建經驗(上)) [EXPERIENCE OF THE 9/21 EARTHQUAKE RECONSTRUCTION, VOL.1] 63 (2006).

⁹⁰ *Id.* at 65.

The policy was expected to provide one-year temporary housing to the earthquake victims, and they might live in the manufactured houses for a maximum of three years.⁹¹

Before the interim housing program expired in 2003, the Temporary Act for 9/21 Earthquake Reconstruction was amended to grant a one-year extension of the temporary housing policy, giving earthquake victims more time to become self-sufficient and locate permanent housing. The amended law also had a new rule that, when necessary, the interim housing assistance might be extended by Legislative Yuan resolution.⁹² In January 2004, the Legislative Yuan passed a resolution that the disaster housing program would continue for two more years.⁹³ In the end, the “temporary” housing assistance after the 9/21 Earthquake lasted a total of nearly six years from October 1999 to February 2005.⁹⁴

The post-9/21 Earthquake disaster housing policy provided displaced victims with interim housing assistance to help them stabilize their lives and develop long-term recovery plans, but the policy also led to problems in management and regulation. First, the need for manufactured housing was overestimated, so the surplus housing units were opened to disadvantaged individuals who had nothing to do with the earthquake. In addition, the housing units were not applied for and allocated through a comprehensive information system and based on the same eligibility requirements. Private sector organizations granted interim housing not only to eligible victims but also to elderly people who had not been displaced by the earthquake. Some earthquake victims living in the manufactured houses also received other disaster housing assistance, causing injustice in disaster resource allocation.

⁹¹ *Id.* at 67-68; Article 23, Temporary Act for 9/21 Earthquake Reconstruction (九二一震災重建暫行條例) (2000).

⁹² Paragraph 1, Article 23, Temporary Act for 9/21 Earthquake Reconstruction (九二一震災重建暫行條例) (2003).

⁹³ See LIFAYUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE], Vol. 93:110 (2004).

⁹⁴ See 9/21 EARTHQUAKE RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 89, at 67-69.

Moreover, after a few years had passed, some earthquake victims did not return to self-sufficiency and still needed disaster housing assistance, and some other recovered people continued to occupy the interim housing units, which were not designed and built for permanent use. These problems resulted in additional government spending, support, and accommodation to end the interim disaster housing program.⁹⁵

Because of the experience of post-9/21 Earthquake disaster recovery, the temporary disaster housing strategy was abandoned when the floods and mudslides in Typhoon Morakot similarly rendered a large number of houses uninhabitable. Following the typhoon disaster, permanent resettlement housing was soon adopted for disaster recovery.⁹⁶ On the one hand, the permanent housing might stabilize lives of typhoon victims as soon as possible. However, on the other hand, in the case of Typhoon Morakot, permanent resettlement housing was decided by the government and promoted by NGOs, like the Tzu Chi Foundation, before careful examination of all affected land and communication with the typhoon victims.

It was assumed that relocation would best help indigenous typhoon victims recover from disaster impacts by moving them from the affected land in the mountain areas to safer places. Without sufficient time, accurate information, and substantial discussion about the housing strategy, the typhoon victims were forced to decide whether they were going to leave their previous residences and relocate elsewhere. If the typhoon victims agreed to relocate, they would receive much larger subsidies than those reconstructing their houses at their previous sites.⁹⁷

The problems of the relocation policy were also pointed out by the Legislative Yuan when it reviewed reconstruction work two months after the disaster. In September 2009, the Executive Yuan submitted a revised budget request to the Legislative Yuan. Before the budget

⁹⁵ See *id.* at 70-75.

⁹⁶ See TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 6, at 227.

⁹⁷ See Jyh-Cherng Shieh et al, *supra* note 34, 64-70.

proposal was approved by the full Legislative Yuan, it was first reviewed by the Interior Committee, Economic Committee, Education and Culture Committee, Transportation Committee, and Social Welfare and Health Environment Committee.⁹⁸ The five committees made a review report to comprehensively examine ongoing recovery work and highlight major issues that should be especially addressed and improved, including in the relocation policy and process.

According to the review report, disaster recovery should include short-, intermediate-, and long-term housing options to meet the various needs of disaster victims, but the post-Typhoon Morakot reconstruction policy ignored the important transition process in which the typhoon victims stayed at interim housing units for a period to gradually recover and develop long-term housing plans. The report criticized the reckless relocation policy, especially its harm to the affected indigenous people, suggesting that a collaborative decision-making process would be more likely to protect indigenous rights and achieve successful disaster recovery:

[After Typhoon Morakot, t]he disaster victims were asked to sign permanent housing agreements before the announcement of designated Special Zones, safety assessment results, and communication with indigenous people about the resettlement sites, which in some cases were limited to one specific relocation site. The practice seriously violated the democratic process. It especially did not respect the collective, traditional decision-making process of indigenous peoples, causing alienation of indigenous identity and separation of indigenous communities. Therefore, the Executive Yuan should follow the community recovery process to consult with typhoon victims and, based on their needs, to provide appropriate temporary and permanent housing.⁹⁹

The post-Typhoon Morakot reconstruction needed not to completely preclude an interim disaster housing option because it was possible to avoid the problems that occurred after the 9/21

⁹⁸ 98 zhi 101 Niandu Zhongyang Zhengfu Molake Taifeng Zaihou Zhongjian Tebie Yusuanan Shencha Baogao (Xiuzhengben) (98 至 101 年度年度中央政府莫拉克颱風災後重建特別預算案審查報告(修正本)) [98 to 101 ROC Calendar Year Central Government Post-Typhoon Morakot Reconstruction Special Budget Bill Review Report (Revised Version)], 1 (Nov. 20, 2009), <https://www.president.gov.tw/Portals/0/Bulletins/paper/pdf/6892-1.pdf>.

⁹⁹ *Id.* at 8.

Earthquake. To reduce the number of unnecessary manufactured houses, the government might investigate the disaster situation well to estimate the actual need before building a large number of housing units at once. To prevent people from continuously occupying manufactured houses, all involved should establish a clear expectation about the function of temporary housing assistance.¹⁰⁰

Interim housing should not simply provide physical structures. Disaster victims should also be provided with support, tools, and incentives to become self-sufficient and eventually able to move out of the temporary houses to their permanent residences.¹⁰¹ Without such efforts, the problems after the 9/21 Earthquake might still have occurred following Typhoon Morakot, no matter whether the disaster housing was interim or permanent. For example, similar to earthquake victims who could not return to self-sufficiency, some Typhoon Morakot victims accepting permanent resettlement housing failed to secure their livelihoods because they were displaced from their land.

A simple presumed solution cannot solve a wide range of problems because natural environments and resources are actually very complex. A single solution may be too precise to be flexibly adapted to each different case, or it may be too vague to provide useful suggestions.¹⁰² In the aftermath of Typhoon Morakot, permanent relocation was adopted to help the disaster areas and typhoon victims recover from the disaster impacts, but the rigid housing strategy was unlikely to meet the needs of individuals, households, and communities with various backgrounds and different land conditions.

¹⁰⁰ See FEDERAL EMERGENCY MANAGEMENT AGENCY, NATIONAL DISASTER HOUSING STRATEGY, 51-53 (2009), https://www.fema.gov/media-library-data/20130726-1819-25045-9288/ndhs_core.pdf.

¹⁰¹ See *id.* at 52-53.

¹⁰² Elinor Ostrom and Michael Cox, *Moving beyond panaceas: A Multi-tiered Diagnostic Approach for Social-ecological Analysis*, 37(4) ENVIRONMENTAL CONSERVATION 451, 452 (2010).

The post-Typhoon Morakot reconstruction's sticking to relocation has caused problems associated with displacement and overlooked other possible disaster housing options that would have been flexible, adaptive, and helpful to typhoon victims with special needs, such as indigenous people with intimate connections to their lands. These issues will be further discussed in the next chapter by analyzing how the indigenous communities in Namasia District and other disaster areas have reacted to the post-typhoon reconstruction laws and the permanent relocation policy and what difficulties they have faced on their path to recovery.

Chapter 5 Indigenous Indigenous Adaptive Strategies to Disaster Effects and Reconstruction Laws

This chapter examines how Taiwanese indigenous peoples responded to disaster impacts and reconstruction laws, as well as their ideas and considerations regarding disaster mitigation and adaptation. The primary focus is on the disputes between the government and affected indigenous people on the land zoning and relocation policy. To discuss the issues, this chapter uses a case study of the indigenous villages in Namasia District, Kaohsiung Municipality, Taiwan, which were seriously damaged by floods and mudslides in August 2009 when Typhoon Morakot struck Taiwan. The first section reviews the history of indigenous people in Namasia and introduces their situation in contemporary Taiwan. The second section analyzes how Taiwanese indigenous peoples, especially indigenous people in Namasia, reacted and adapted to the complex and difficult situation in the aftermath of a major disaster.

The discussion of disaster recovery legal practice and indigenous adaptive strategies is based on the results of interviewing thirteen affected indigenous people in Namasia, one volunteer of the Buddhist Compassion Relief Tzu Chi Foundation, the NGO that built the Da'ai Community for relocated Namasia people, and two public officials formerly serving in the Post-Typhoon Morakot Reconstruction Council. Of the thirteen indigenous people who had lived in Namasia, three of them moved from the mountain villages to the Da'ai Community on the plains after the disaster. The interview results show the different perspectives of the affected indigenous people, the disaster assistance organization staff, and the government officials about land zoning, relocation policy, disaster adaptation, and indigenous land rights.

5.1 Indigenous People in Namasia, Kaohsiung, Taiwan

5.1.1 History of Indigenous Communities in Namasia



Figure 5-1
Location of Namasia District,
Kaohsiung Municipality in Taiwan

Original picture: 2017 Map of Taiwan (台灣全圖), DEPARTMENT OF LAND ADMINISTRATION, MINISTRY OF THE INTERIOR (中華民國內政部地政司), available at <https://www.land.moi.gov.tw/chhtml/content.asp?cid=91&mcid=158&qcode=4> (last visited Dec 3, 2018).
Modified by Yung-hua Kuo

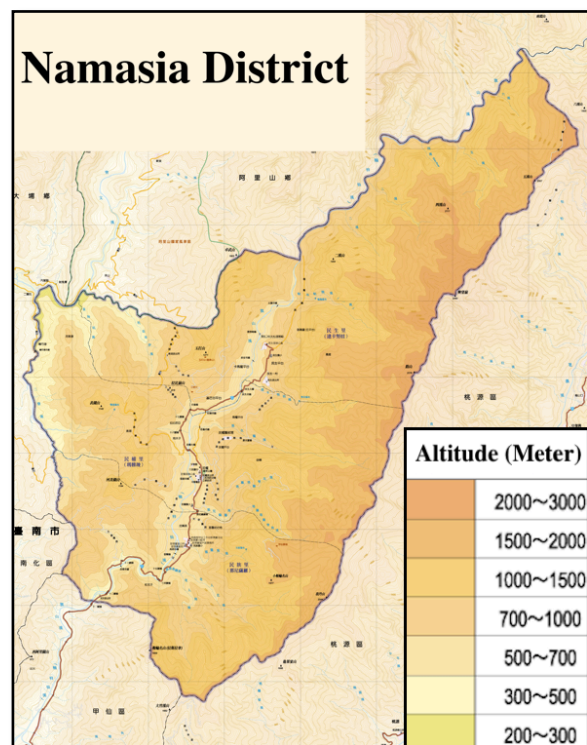


Figure 5-2
Geography of Namasia District

Original picture: Maps of Kaohsiung Municipality Administrative Zones, CIVIL AFFAIRS BUREAU, KAOHSIUNG CITY GOVERNMENT (高雄市政府民政局), available at <https://cabu.kcg.gov.tw/Web/DistrictE/LocalCultural/RegionMap.htm> (last visited Dec 3, 2018).
Modified by Yung-hua Kuo

Namasia before the Nineteenth Century

Namasia District is located in a mountainous area in Kaohsiung Municipality, Taiwan, at an altitude between 600 to 900 meters. There are three villages in the district: Nangnisalu, Maya,

and Takanua. Most indigenous people in Namasia belong to the Kanakanavu and Bunun tribes. The records of Kanakanavu, a tribe that originally lived in the lower elevations of Taiwan's central mountain range, can be traced back to the seventeenth century, when the Dutch settled in southern Taiwan and ruled indigenous communities through a feudal system.¹ To establish and confirm the lord-vassal bond, the Dutch East India Company held annual ceremonies, *landdag*, to which it summoned indigenous communities under its rule for the purposes of rewarding their obedience, announcing regulations, and appointing indigenous elders for the next year. In 1644, Kanakanavu became one of the indigenous communities subject to the Dutch authority and attended the *landdag*.²

In 1662, Zheng troops led by Koxinga expelled the Dutch authorities in Taiwan and ruled the island until 1683, when they were defeated by the Qing empire. During this period, the Zheng authority introduced Han Chinese settlers from mainland China to Taiwan. The settlers cultivated land on the flatlands and interacted with indigenous communities living on the plains. Although the migration of the plain indigenous communities put pressure on indigenous people living in mountain areas, during this period the Han Chinese had no direct or strong influence on Kanakanavu or other indigenous communities living in the mountains.³

Still, in the next period, Kanakanavu people lost most of their homelands and eventually retreated to remote mountains in the upstream Qishan River areas because of the growing pressure from the settlers. In the Qing-ruled period, an increasing number of Han Chinese migrants from mainland China poured into Taiwan with a huge demand for lands. The official segregation policy could not stop Han settlers from invading areas where indigenous people had

¹ For more details of the feudal system of the Dutch and indigenous peoples in Taiwan in the seventeenth century, see Chapter 2, Section 2.2.1, indigenous land rights in the Dutch rule era (1624–1662).

² See YING-CHIEH CHEN (陳英杰) & JU-PING CHOU (周如萍), KANAKANAFU BULUO SHI (卡那卡那富部落史) [KANAKANAVU TRIBAL HISTORY] 44-49 (2016).

³ *Id.* at 51-52.

lived and cultivating indigenous lands. The boundaries among the Han settlers, plain/Sinicized aborigines, and wild aborigines were redrawn and moved from the plains further into the mountains. This pressure caused Taivoan, a Sinicized aboriginal community in Tainan, to move from the Chianan Plain to the hills from 1744 to 1781, placing it into ongoing conflict with the Kanakanavu people who had lived there.⁴

After the Taivoan people joined the Qing troops to suppress the fierce rebellion led by Lin Shuang-wen from 1786 to 1788, the Qing government intervened to solve the conflicts between the Taivoan and Kanakanavu. Eventually, the Taivoan people obtained land rights to use the areas at the midstream Laonong River and Qishan River, which used to be traditional Kanakanavu territory. The Kanakanavu people retained only a nominal right to collect rent that the Taivoan tenants often did not pay to their Kanakanavu landlords. The Kanakanavu people could no longer use these lands to produce crops, so they moved higher to the Dajhusi Mountain slopes in search of more arable land.⁵

In addition to the influence of migrating Sinicized aborigines on the plains, in the nineteenth century, the Kanakanavu people faced the increasing direct pressure from and effects of Han Chinese settlers. Beginning in the eighteenth century, Han settlers started to rent and cultivate the lands of a Kanakanavu community, Lalabulu, in the midstream and upstream areas of the Zengwun River watershed. From 1856 to 1875, the number of Han settlers in these areas

⁴ SHIN-SHOUNG CHEN (陳幸雄), CULTURAL IDENTITY DEVELOPMENT PROCESS OF KANAKANAVU ETHNIC GROUP: FROM “OTHER” TO “WE” (卡那卡那富族群文化認同發展歷程: 從「Other」到「We」), 20-21 (2013) (thesis).

⁵ See *Id.* at 21-22; I-CHUN CHEN (陳逸君) & HUAN-YUE LIU (劉還月), TINGLI ZAI FENGYU ZHONG DE NEIYOU SHEQUN: MOLAKE TAIFENG QIAN HOU DE SHAALUWA ZU, KANAKANAFU ZU YU XIASAN SHEQUN (挺立在風雨中的內優社群: 莫拉克颱風前後的沙阿魯娃族、卡那卡那富族與下三社群) [NEI-YUNG COMMUNITIES STANDING IN CLOUDS AND WINDS: HLA'ALUA TRIBE, KANAKANAVU TRIBE, AND RUKAI TRIBE SHIA-SAN COMMUNITIES BEFORE AND AFTER TYPHOON MORAKOT] 128-129 (2011).

increased significantly. Because of the growing power of the settlers, Lalabulu community members left the Zengwun River areas and moved south to search for new lands.⁶

The Qing empire changed its indigenous policy in 1875, turning the previous segregation policy into an aggressive “Opening the mountains and pacifying the aborigines” policy with an aim of actually controlling the wild aborigines. Military forces were sent into remote mountains to build roads and conquer the wild aboriginal tribes, including the Kananavu.⁷ On the one hand, the Qing government did not completely suppress the Kananavu people, who hid in the mountains and attacked the Han Chinese and Sinicized aborigines when the tenants did not pay rents to their Kananavu landlords.⁸ On the other hand, the Qing government gained at least a basic understanding of the Kananavu, such as its population.⁹

To evade the reconnaissance and suppression of the Qing government, Kananavu people were forced to move into even more inaccessible places deep in the mountains.¹⁰ Ultimately, they retreated to limited areas on the slopes near the headwaters of the Qishan River and established three small villages there—Naqisar, Napawana, and Tabarana—which became the Nangnisalu, Maya, and Takanua villages today.¹¹

Namasia under Japanese Rule

In the Japanese-ruled period from 1895 to 1945, the Japanese authority and policies greatly changed the life of indigenous peoples, including the Kananavu people, who had lived

⁶ See I-CHUN CHEN & HUAN-YUE LIU, *supra* note 5, at 67-68.

⁷ *Id.*, at 129-130; YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 67.

⁸ See YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 68-69.

⁹ See TAIWAN YINHANG JINGJI YANJIUSHI (臺灣銀行經濟研究室) [TAIWAN BANK ECONOMIC RESEARCH OFFICE], LIU MINGCHUAN FU TAI QIANHOU DANGAN (劉銘傳撫臺前後檔案) [RECORDS BEFORE AND AFTER LIU MINGCHUAN GOVERNED TAIWAN] 81 (1969).

¹⁰ See YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 67-68.

¹¹ See I-CHUN CHEN & HUAN-YUE LIU, *supra* note 5, at 134, 136-137.

in Namasia, and the Bunun people, who were forcibly relocated to Namasia by the government. During Japan's rule of Taiwan, the colonial government used its huge military and police force to conquer the wild aboriginal communities that had not been fully controlled by the Qing government. The Kanakanavu people first came into contact with Japanese officials in 1897, receiving gifts from the Japanese government and promising to abandon their custom of hunting heads. The Kanakanavu people also assisted the government in capturing Han Chinese bandits in 1902.¹² The government strengthened its control over Kanakanavu by stationing police officers in the Naqisar and Napawana communities in 1904.¹³ In general, the Kanakanavu people cooperated and complied with the authorities in the early Japanese-ruled period. This might be because the small population of Kanakanavu, less than three hundred, was unlikely to resist the enormous Japanese military and police force.¹⁴

The Japanese indigenous policy had a strong influence over the land culture and rights of the Kanakanavu. Beginning from the early Japanese-ruled period, the government discouraged the hunting activities of the indigenous tribes. The colonial government confiscated and strictly regulated firearms and bullets in order to strengthen its control over the indigenous people and prevent indigenous rebellions.¹⁵ When the Kanakanavu people asked the government to ease its restrictions on hunting weapons in 1909, Japanese officials told them to relinquish their hunting custom and develop settled agriculture so they would have a safe and wealthy life like the Han Chinese on the plains. The officials also said that no indigenous community could possess firearms and that only the police could have firearms to protect the life and property of all Han

¹² YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 75.

¹³ *Id.* at 76.

¹⁴ TAIWAN YINHANG JINGJI YANJIUSHI, *supra* note 9.

¹⁵ YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 83-84.

Chinese and aboriginal people. According to government record, the Kanakanavu people accepted this explanation and did not request gunpowder.¹⁶

Compared with their policy toward the docile indigenous tribes like the Kanakanavu, the Japanese government was more cautious about Bunun and other unruly indigenous tribes, adopting measures such as relocation to uproot them and weaken their power. Bunun is one of the major indigenous tribes of Taiwan.¹⁷ Although the exact timeline and path are still unclear, as early as more than three thousand years ago, Bunun people on the plains in western and southern Taiwan, as well as other places, began to gather at Asang Daingaz, a mountainous area in today's Nantou County in central Taiwan. They had established communities at Asang Daingaz before settlers arrived in Taiwan and left records of the Bunun people in the seventeenth century. It is generally accepted that Asang Daingaz is the ancestral land for the Bunun tribe.¹⁸

From the seventeenth to nineteenth centuries, the Bunun people spread beyond Asang Daingaz to a much wider area across eastern and southern Taiwan to obtain more arable land and hunting grounds.¹⁹ In the late seventeenth and eighteenth centuries, the Takivatan, Takbanuaz, and Isbukun bands of the Bunun tribe moved eastward to places in the current Hualien and Taitung Counties.²⁰ In the middle and late eighteenth century, some Bunun people, mostly of the Isbukun band, moved southward and then continued migrating southwestward in the southern

¹⁶ TAIWAN SŌTOKUFU KEIMUKYOKU (台湾総督府警務局), RIBANSHI KŌ VOL. 3-1(理蕃誌稿第三編上卷) 103-104 (1921).

¹⁷ COUNCIL OF INDIGENOUS PEOPLES (原住民族委員會), 1078 TAI MIN XIANSHI YUANZHUMINZU RENKOU: AN XINGBIE ZUBIE (1078 台閩縣市原住民族人口-按性別族別) [AUGUST 2018 STATISTIC OF INDIGENOUS POPULATION IN TAIWAN AND FUJIAN BY GENDER AND COUNTY/CITY], available at <https://www.apc.gov.tw/portal/docDetail.html?CID=940F9579765AC6A0&DID=2D9680BFECBE80B69A60B97823D561AD> (last visited: Dec. 2, 2018).

¹⁸ See HAI SUL PALALAVI (海樹兒·爻刺拉菲), BUNONG ZU: BULUO QIYUAN JI BULUO QIANYI SHI (布農族: 部落起源及部落遷移史) [BUNUN TRIBE: TRIBAL ORIGIN AND TRIBAL MIGRATION HISTORY] 139-143 (2006).

¹⁹ *Id.* at 154.

²⁰ *Id.* at 155, 159-162, 167.

section of the Central Mountain Range throughout the nineteenth century.²¹ Around 1885, the Ismaxasan clan of the Isbukun band at Lito (in today's Taitung County) defeated the Opunuho community of the Rukai tribe at Balisan (in today's Kaohsiung Municipality), occupying the fertile land for farming, hunting, and fishing.²² Other clans of the Bunun tribe also moved to join the Balisan community in the late nineteenth and early twentieth centuries.²³

In the 1930s and 1940s, Bunun and other unruly tribes were relocated by the Japanese government to reduce indigenous rebellious power and put them under the control of the nearby government and police. As the Japanese government gradually conquered more indigenous areas in Taiwan and enforced tight regulation over indigenous peoples, for instance by prohibiting firearms, the Bunun resisted strongly. From 1915 to 1926, the Bunun people carried out 126 attacks against the Japanese, Han Chinese, and other indigenous people.²⁴ In 1930, the fiercest armed resistance in the late Japanese-ruled period occurred in Musha. About 300 Seqip indigenous people attacked Japanese government offices, police stations, and schools to resist the colonial oppression.²⁵ After the Musha Incident, the Japanese government adopted the group relocation policy to uproot rebellious indigenous people from their homelands to places close to police stations for stricter control and civilization.²⁶

²¹ See *Id.* at 169-175.

²² See Jia-ning Ye (葉家寧), *Gaoxiongxian Sanminxiang Minzu, Minquan Cun Bunongzu Qianyi Guocheng* (高雄縣三民鄉民族、民權村布農族遷移過程) [*Migration of Bunun People in the Minzu and Minquan Villages, Sanmin Township, Kaohsiung County*] in TAIWAN YUANZHUMIN SHILIAO HUIBIAN 1: YAMEI, BUNONG, BEINANZU JI DOUSHI YUANZHUMIN CAIFANG JILU (台灣原住民史料彙編 1: 雅美、布農、卑南族及都市原住民採訪紀錄) [TAIWAN INDIGENOUS PEOPLE HISTORICAL MATERIAL COLLECTION VOL. 1: RECORDS OF INTERVIEWING WITH YAMI, BUNUN, PINUYUMAYAN, AND URBAN INDIGENOUS PEOPLE] 235-236 (Taiwan Historica ed. (台灣省文獻委員會編), 1995).

²³ See *Id.* at 236-238

²⁴ See HAISUL PALALAVI, *supra* note 18, at 191.

²⁵ SHEAU SHYA HWU (胡曉俠), A RESEARCH ON ABORIGINE'S COLLECTIVE MOVEMENT OF THE ABORIGINE'S POLICY IN THE PERIOD OF JAPANESE DOMINANCE (日據時期理蕃事業下的原住民集團移住之研究) 152 (1996) (thesis).

²⁶ HAISUL PALALAVI, *supra* note 18, at 197.

Under the group relocation policy, more than six hundred Bunun people were relocated to Namasia, where the Japanese authority had been maintaining control for decades.²⁷ From 1932 to 1934, the government relocated the Bunun people of the Balisan community, as well as other Bunun clans in Baolai, to Magacu (also called Mangacun, today's Maya village) in Namasia.²⁸ When the Bunun people first arrived in Magacu, each family could cultivate land anywhere within the area designated by the Japanese government. After that, the government further concentrated the Bunun people, who had been scattered in Magacu, onto the Liang-quan Plateau to control and monitor them.²⁹ From 1940 to 1944, all other Bunun people in Balisan were forcibly relocated to Nagisalu (today's Nangnisalu village) in Namasia, to a confined village site designed by the Japanese government and specific parcels of farmland for settled agriculture.³⁰

The relocation policy and practice had huge effects on the Kanakanavu people in Namasia. First, Kanakanavu households had resided individually near their land, but the group relocation policy required the relocation of not only the Bunun people but also the local Kanakanavu people to the dense villages on the river terrace land along the upstream Qishan River.³¹ Second, when more than six hundred Bunun people moved to Namasia and adopted settled agriculture, they competed with the local Kanakanavu people for the limited resources of arable land and hunting grounds in Namasia. Third, having a population overwhelmingly larger than Kanakanavu, the Bunun became the major and leading indigenous tribe in Namasia. Bunun have influenced and even changed the language and culture of the Kanakanavu through the interaction between people of the two tribes, like intermarriage.³²

²⁷ YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 101.

²⁸ See Jia-ning Ye, *supra* note 22, at 240-243.

²⁹ *Id.* at 243-244.

³⁰ *Id.* at 245-246.

³¹ YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 104-105.

³² *Id.* at 106-107.

Relocation to Namasia forced by the Japanese government also changed the social structure, economic activity, and cultural practice of the Bunun people, who were forced to abandon their land for hunting and shifting cultivation and turn to settled agriculture in an unfamiliar environment. In addition, they no longer chose their leaders based on their personal abilities to lead, fight, and hunt. The Japanese government suspended the “barbarian” Bunun traditions—for example, hunting heads—and manipulated elections of Bunun chiefs.³³

5.1.2 Indigenous Communities in Namasia under ROC Rule

The current authority in Taiwan, Republic of China [hereafter ROC], took power in 1945 when Japan lost the Second World War and renounced its sovereignty over Taiwan. Beginning in the 1950s, the ROC government planned to make indigenous peoples as well as non-indigenous people live on the plains through cultural assimilation and settled agriculture. Through the Directions Governing Mountain Administration in Taiwan Province, the Regulations on Encouraging Settled Farming on Mountain Lands, the Regulations on Promoting Chinese in Mountain Areas, and other laws for indigenous development, the government pressured indigenous people to change their livelihoods, abandon their traditional beliefs and practices, change their appearance, and learn Chinese language and culture.³⁴

The lives of indigenous people in Namasia were changed enormously by the ROC’s indigenous policy and administration. The indigenous people in Namasia soon began to obey the policy and implemented settled farming. The collaboration and outstanding agricultural production in Namasia were rewarded by the government in 1952, 1953, 1955, and 1956.³⁵ To further develop the remote indigenous villages, the government paved and widened the poor

³³ See HAI SUI PALALAVI, *supra* note 18, at 212-214.

³⁴ YING-CHIEH CHEN & JU-PING CHOU, *supra* note 2, at 111, 115.

³⁵ *Id.* at 115, 116, 118.

roads to Namasia after 1969. Along with the road construction projects, the government planned to relocate the Maya community on the Min-quan Plateau to lower locations closer to the roads. The relocation plan was disapproved of by some Kanakanavu community members who thought the resettlement site was an unclean place because it was the location of wars between their ancestors and other tribes. Still, most households of the Maya community agreed to relocate, and eventually they all moved from the plateau to the sites near the newly built roads for more convenient access to the plains.³⁶

Under the ROC legal system, indigenous peoples and non-indigenous citizens were all regulated by the same legislative and judicial system, but the indigenous people and areas were governed differently in some ways. The Special Administrative Zones in the Japanese-ruled period, including Namasia, were transformed to Mountain Townships in the ROC administrative system. Since 1949, many Mountain Townships and nearby areas were designated as restricted areas. Indigenous people could freely leave and return to the restricted mountain areas, but non-indigenous people could not enter the restricted areas unless they applied for and got permission from the police department in advance. The restriction was designed to control people who entered the mountains areas and monitor their activities.³⁷ It was maintained throughout the entire martial legal system period for about four decades in Taiwan.

Following the termination of the martial legal system in 1991, legal reforms and social movements have made Taiwan a more democratic society that promotes the protection of human rights and respects cultural plurality. To loosen control and monitoring of the indigenous areas, the ROC government has also dissolved most of the restricted areas and lifted the restriction on

³⁶ *Id.* at 139-140.

³⁷ Taiwan Provincial Regulations on Plain People Entering Mountains (台灣省平地人民進入山地管制辦法) (1949), *see* TAIWAN SHENG ZHENG FU GONG BAO (台灣省政府公報) [TAIWAN PROVINCIAL GOVERNMENT GAZETTE], Winter Vol. No. 36, 499-500 (1949).

entering the Mountain Townships since the 1990s. The requirement for a permit to enter Namasia Township and the adjacent mountain area was cancelled in 1997.³⁸ Anyone can freely visit Namasia and other Mountain Townships removed from the list of restricted areas.³⁹

Moreover, the unique culture and tribal rights of the Kanakanavu were acknowledged by the ROC government through tribal recognition. Beginning from the Japanese-ruled period, the Kanakanavu were classified as one branch of the Tsou tribe throughout the twentieth century. As a result of continuous efforts by tribal members and academic studies provided by researchers over the past decade, the Kanakanavu was finally recognized as one distinct indigenous tribe by the ROC government in 2014. As of August 2018, there are 339 people in Taiwan registered as Kanakanavu tribal members, and 67.55% of them (229 people) live in Namasia District. While most of the Kanakanavu population is concentrated in Namasia, the largest indigenous group in the district is the Bunun people, with a number of 2,025 out of a total Bunun population of 58,664.⁴⁰

Namasia has maintained its special status and governance over the indigenous affairs during the transformation of the ROC local government system. In April 2009, the Legislative Yuan amended the Local Government Act to reorganize and simplify the local government structure in Taiwan. Four counties, two cities, and one municipality were individually upgraded

³⁸ See HANGZHENG YUAN GONGBAO (行政院公報) [EXECUTIVE YUAN GAZETTE], Vol. 3:45, 9-10 (1997).

³⁹ United Daily News (聯合新聞網), Xinzhu Shandixiang Jiechu Shishi 30 Nian Rushan Guanzhi (新竹山地鄉解除實施 30 年入山管制) [Regulations on Entering Mountain Townships in Hsinchu Were Lifted After 30-year Restriction] (Nov. 16th, 2017), <https://udn.com/news/story/11322/2823544>; Eastern Daily News (東方報), Xiulin Xiang Jie Guanzhi Buyong Shenqing Rushanzheng (秀林鄉解管制 不用申請入山證) [Restriction Lifted from Sioulin Township, No Need to Apply for Mountain Entry Permits] (Jul. 1, 2018), http://eastnews.tw/index.php?option=com_content&view=article&id=86156:2018-07-01-01-53-27&catid=34:focus&Itemid=54 (last visited Oct. 18, 2018).

⁴⁰ COUNCIL OF INDIGENOUS PEOPLES, *supra* note 17; COUNCIL OF INDIGENOUS PEOPLES (原住民族委員會), TAI MIN XIANSI XIANGZHEN SHIQU YUANZHUMINZU RENKOU: RENSHU TONGJI (1078 台閩縣市鄉鎮市區原住民族人口-人數統計 (AUGUST 2018 STATISTIC OF INDIGENOUS POPULATION IN TAIWAN AND FUJIAN BY COUNTY, CITY, TOWNSHIP, AND DISTRICT)), available at <https://www.apc.gov.tw/portal/docDetail.html?CID=940F9579765AC6A0&DID=2D9680BFECBE80B69A60B97823D561AD> (last visited: Dec. 2, 2018).

or combined to become four new municipalities.⁴¹ According to the government reorganization plan, since 2010 the Kaohsiung Municipality and the Kaohsiung County were combined into a new Kaohsiung Municipality, under which Namasia and other townships of the former Kaohsiung County became districts of the new Kaohsiung Municipality.

Before the local government reorganization, townships were self-government bodies with their own executives and legislative branches to determine and conduct local affairs, and township heads were elected directly by township citizens. Once the townships were transformed into districts, according to the amended Local Government Act of 2009, the district heads were appointed by municipality mayors. The new official system was criticized by indigenous people who pursued self-determination on indigenous affairs. Responding to critics and requests by the indigenous people, the Legislative Yuan amended the Local Government Act in 2014 to restore the election in Namasia and other four indigenous districts of the new municipalities. Citizens in these five indigenous districts could choose their district heads by election. In contrast, district heads of the non-indigenous districts continued to be appointed officials.

5.2 Indigenous Adaptive Strategies after Typhoon Morakot

5.2.1 Typhoon Morakot's Effects on Namasia

In August 2009, Typhoon Morakot brought heavy rainfall to the mountainous areas in southern Taiwan. Triggered by the torrential rain, floods and mudslides damaged houses and infrastructure in many mountain villages, including the Nangnisalu, Maya, and Takanua villages

⁴¹ Article 7-1, Local Government Act (地方制度法) (2009); Cheng-Feng Shih (施正鋒), *Wudou yu Xianshi Shengge zhi Tizhi Wenti Tanta* (五都與縣市升格之體制問題探討) [*Discussing Issues of Upgrading Five Municipalities and Counties/Cities Structure*], 17 XIANDAI XIAOSHU YANJIU (現代學術研究) [MODERN ACADEMIC RESEARCHES] 74, 74 (2010).

in Namasia District. During the very brief period of August 6 to 9, 2009, more than 1,600 mm of rain poured on Namasia, causing floods and mudslides that led to severe life and property loss for the indigenous people.⁴² The landslide in the mountain slopes near Nangnisalu not only destroyed eighty houses in the village but also killed forty-one villagers.⁴³ In Maya and Takanua, buildings and residents were also injured by the disaster.⁴⁴ More than 95% of the roads and bridges connecting Namasia and the outside world were washed away, leaving the indigenous people stranded in their mountain villages and in need of assistance.⁴⁵

The typhoon resulted in serious damage in Namasia that forced the indigenous people to evacuate their homes and lands. A week or two after the disaster, the injured, elderly, and children were first evacuated by helicopter from the isolated mountain areas to emergency shelters for immediate treatment and care. Due to the disaster, 1,772 people were eventually evacuated from Namasia District.⁴⁶ After the power outage in Namasia had lasted forty days, the power system was partially restored.⁴⁷ Although the government tried to restore the roads and bridges to Namasia, the repaired and rebuilt traffic infrastructure was mostly broken again after another heavy rainfall in the wet season.⁴⁸

The typhoon disaster made had a huge effect on the life and natural environment in Namasia and other indigenous areas. Facing this terrible situation, the Taiwanese government

⁴² Soil and Water Conservation Bureau, Council of Agricultural, Executive Yuan (行政院農業委員會水土保持局), 98 nian Molake Taifeng Chongda Tushi Zaili Subao (98 年莫拉克颱風重大土石災例速報) [Rapid Report of Major Debris Flow Disasters of 2009 Typhoon Morakot], Appendix B-28 2/7 (2009), available at [http://246.swcb.gov.tw/allfiles/PDF/98年莫拉克颱風-高雄那瑪夏-003-\(速\).pdf](http://246.swcb.gov.tw/allfiles/PDF/98年莫拉克颱風-高雄那瑪夏-003-(速).pdf).

⁴³ *Id.* at Appendix B-28 1/7.

⁴⁴ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN (行政院莫拉克颱風災後重建推動委員會), *Ai yu Xiwang Yuedong Shengmingli: Molake Taifeng Zaihou Zhongjian Sanzhounian Chengguo Huibian (shang)* (愛與希望躍動生命力：莫拉克颱風災後重建三周年成果彙編(上)) [LOVE AND HOPE BURSTING WITH VITALITY: ACHIEVEMENTS ON THE THIRD ANNIVERSARY OF POST TYPHOON MORAKOT RECONSTRUCTION VOL.1] 39-40 (2012).

⁴⁵ See I-CHUN CHEN & HUAN-YUE LIU, *supra* note 5, at 224-227.

⁴⁶ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 44, at 54.

⁴⁷ See I-CHUN CHEN & HUAN-YUE LIU, *supra* note 5, at 225.

⁴⁸ *Id.* at 239.

assumed that relocation was the primary disaster recovery measure that would help typhoon victims. Indigenous peoples, however, have strong attachment to their lands. Many were unwilling to leave their homes and resettle elsewhere.⁴⁹

For indigenous peoples, environmental changes—even so-called “natural” disasters—are an inherent part of nature and human life. In the past, when typhoons brought rains, local people in Namasia continued to work on their farms, catch fish in rivers, and bathe in rain showers.⁵⁰ As the indigenous people have lived with these natural disasters for generations, they may use their accumulated experience and traditional wisdom to co-exist and cope with natural disasters.⁵¹ For example, an interviewee observed that, when it rained, river water in Namasia had a color between clear and slightly yellow, so he knew that no soil had washed down to damage houses in his village.⁵²

Traditionally, Taiwanese indigenous peoples migrated for particular reasons: disease and mortality, poverty, conflicts with neighboring tribes, and land infertility. Their migration was relatively autonomous and less the result of external forces.⁵³ While the indigenous peoples might migrate because of environmental changes, in recent decades, their migration has resulted more from state power and government policies. In fact, after Typhoon Morakot, it was less the direct effects of the disaster than the government policies that made indigenous peoples migrate.

As the following discussion will show, not only were consequences of the disaster influenced by reconstruction projects, but causes of the disaster were also associated with past

⁴⁹ YA-HSIANG WANG (王雅湘), CHIEN CHANG (張筓), NA-HUI YEH (葉娜慧), I-WEN T'AO (陶伊玟), AFTER HEAVY RAIN, SEEING RAINBOW (暴雨後, 看見彩虹) 114 (2012).

⁵⁰ Anonymous residents of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29 and 30, 2017).

⁵¹ YUNG-LUNG CHEN (陳永龍) & YEN-LIANG CHIU (丘延亮), RESIST NATURAL DISASTERS AND MAN-MADE CALAMITIES: ON HOMESTEAD RESILIENCE AND TAIWAN'S ALTERNATIVES (防天災禦人禍：原住民抗爭與台灣出路) 289 (2014).

⁵² Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29, 2017).

⁵³ Sasala Taiban, *From Rekai to Labelabe: Disaster and Relocation on the Example of Kucapungane, Taiwan* 19 (1) ANTHROPOLOGICAL NOTEBOOKS 59, 60 (2013).

government policies about indigenous peoples. Post-Typhoon Morakot disaster recovery policy affected whether the Namasia people left their homeland and what issues they faced in a new surrounding at a relocation site or a changed environment in the mountains. Moreover, the disaster in the village of Maya, Namasia, was an outcome of a past inappropriate relocation plan in the 1970s that moved the village to its current location near the river and subject to high flood risks.

This situation also occurred in other indigenous villages, for example the Kaaluwan and Kucapungane communities discussed in Chapter Four. The Kaaluwan community was relocated by the Japanese and ROC governments to a floodplain near the Taimali River, and the village was flooded when the heavy rainfall of typhoons caused a dramatic increase in river water. Similarly, the Kucapungane community was relocated to low river terrace land on the riverbank under a government relocation project in the late 1970s. After relocation, the village was damaged by mud and flooding several times when typhoons caused excessive precipitation in Taiwan.

5.2.2 Adaptive Strategies in Namasia after Typhoon Morakot

The effects of Typhoon Morakot not only shaped government reconstruction policies and laws but also influenced the way of life of the indigenous people who lived there. After the typhoon, as the flooding and mudslides dramatically altered the landscape of their homelands in the mountains, indigenous people struggled with pressure from the government, the threat of natural hazards, and the difficulties of rebuilding their homes and economy. Each indigenous community chose its adaptive strategy according to its specific environmental, social, historical, and cultural contexts. Ultimately, different Taiwanese indigenous communities and individuals

reacted and adapted to the impact of natural disaster and the reconstruction laws with different strategies, which I classify into three categories: relocation, reconstruction, and return.

(1) Relocation

As discussed in Chapter Four, after Typhoon Morakot, the Taiwanese government implemented land zoning laws and decided on relocation as the primary post-disaster reconstruction measure before investigating the land conditions of all disaster areas or fully consulting the thoughts of affected people. Under the disaster recovery policy, 60.98% of the typhoon victims in the Special Zones and the Safety Doubtful Zones applied for and received permanent resettlement housing assistance from the government and NGOs. A total of 11,703 people moved from their old homes to the resettlement sites in the three years following Typhoon Morakot.⁵⁴

Relocation may be a necessary and effective adaptive strategy when an area is disaster-prone or when, after a natural disaster, the area becomes too risky and uninhabitable due to the strong effects of the disaster. When it is clear that a place will be destroyed again in the next disaster, indigenous people aware of the disaster risk may wish to move to other safe locations. For example, as discussed in the previous chapter, after the flood in the Kaaluwan community caused by Typhoon Haitang in July 2005, the Kaaluwan people sought government assistance for relocating them from the disaster-prone floodplain to a safer site.⁵⁵ Similarly, after the Kucapungane community relocated from the mountain slopes to the lower river terrace land in

⁵⁴ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 44, at 210.

⁵⁵ Taidong Difang Fayuan (臺東地方法院) [Taitung District Court], Minshi (民事) [Civil Division], 101 Zhong Guo Zi No. 1 (101 年度重國字第 1 號民事判決) (2015) (Taiwan); Taiwan Gaodeng Fayuan Hualian Fenyuan (臺灣高等法院花蓮分院) [Taiwan High Court Hualien Branch Court], Minshi (民事) [Civil Division], 104 Zhong Shang Guo Zi No. 1 (104 年度重上國字第 1 號民事判決) (2015) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Minshi (民事) [Civil Division], 106 Tai Shang Zi No. 1248 (106 年度台上字第 1248 號民事裁定) (2017) (Taiwan).

the late 1970s, the people and assets in Kucapungane were damaged by mud and rocks when typhoons caused heavy rainfall in the area. Since 2007, Kucapungane community members had been considering relocation to prevent further harms by natural disasters.⁵⁶

When the Kaaluwan and Kucapungane people were engaging with the local governments and other agencies, such as the Council of Indigenous Peoples, to search for possible relocation sites and funding, the excessive rainfall of Typhoon Morakot in 2009 caused floods and mudslides that seriously damaged these two indigenous communities. After the disaster, the Kaaluwan people agreed for their lands to be designated as a Special Zone. In contrast, the lands in Kucapungane were regarded as a Safety Doubtful Zone, which meant that the government assessed the condition of the local lands as unstable but that the Kucapungane community members did not agree to the government's land zoning proposal.⁵⁷

Although the Kaaluwan and Kucapungane reacted differently to land zoning, both indigenous communities decided to move to other safer locations for recovery and to prevent future disaster. To prevent being flooded again by the Taimali River, ninety Kaaluwan households relocated from the southern corner of the village by the riverside to the permanent resettlement houses on the eastern and western sides of the village.⁵⁸ The resettled housing for Kaaluwan was not far from its old village site; in contrast, Kucapungane villagers moved away from the old site, which had been damaged by landslides in Typhoon Herb in 1996, Typhoon Bilis in 2006, Typhoon Wuti and Typhoon Sepat in 2007, and the most destructive event of

⁵⁶ See SASALA TAIBAN, LUKAIZU HAOWA BULUO LISHI YANJIU (魯凱族好茶部落歷史研究) [HISTORICAL STUDY OF RUKAI TRIBE KUCAPUNGANE COMMUNITY] 235-242 (2016).

⁵⁷ 921 Relief Foundation, (160 處特定區域與安全堪虞地區在哪?) [Where Are the 160 areas of Special Zones and Safety Doubtful Zones?], <http://www.taiwan921.lib.ntu.edu.tw/88pdf/A8801DB4.html> (last visited Oct. 4, 2018).

⁵⁸ INDEPENDENT NEWS NET OF MORAKOT (莫拉克獨立新聞網), MISSING HOMES IN PERMANENT HOUSES: STORIES ABOUT PEOPLE AND PERMANENT HOUSES, THREE YEARS SINCE THE DISASTER OF TYPHOON MORAKOT (在永久屋裡想家: 莫拉克災後三年, “永久屋”與人的故事) 268-269, 277 (2013); TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 44, at 230.

Typhoon Morakot in 2009.⁵⁹ The resettlement location of Rinari was distant from the Kucapungane village site on the floodplain, let alone its older site on the mountain slopes before its relocation in 1980 and the traditional Rukai territory.⁶⁰

In the case of the Nangnisalu village in Namasia, most houses were destroyed or buried by the mudslides in Typhoon Morakot. Losing homes in the disaster and having nowhere to go, almost all typhoon victims in Nangnisalu decided to relocate to the Da'ai Community on the plains out of safety concerns. The Nangnisalu villagers were frightened by their miserable experience of the disaster and eager for a place without disaster risk and harm.⁶¹ In addition, resettlement housing was given free of charge to eligible typhoon victims, so they could live in a safe place without spending much money. It was very important for the typhoon victims to settle down and recover their lives after suffering huge property losses from the disaster. Housing assistance might be especially helpful for the affected indigenous people when the average income of indigenous households was 39% lower than that of the general population in Taiwan.⁶²

The indigenous people interviewed in Namasia talked about other considerations and advantages of relocating to the Da'ai Community. The indigenous people were concerned that the mountainous Namasia District was quite remote and underdeveloped. There was only one

⁵⁹ See Sasala Taiban, *supra* note 53, at 65.

⁶⁰ See SASALA TAIBAN, *supra* note 56, at 253.

⁶¹ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28 and 31, 2017).

⁶² COUNCIL OF INDIGENOUS PEOPLES, 2006 ECONOMIC STATUS SURVEY OF INDIGENOUS PEOPLES IN TAIWAN (2007), available at: <https://www.apc.gov.tw/portal/getfile?source=79ADDD9195DB0E52610217BBF0B058FA9DAB2A97BBE1DD0E0C44C38ED9E0AD283AAC4AF94A196D3D4DDDF85752D5122BB1C09121B3612FD83B91B9DF71659F0C&filename=5DB821D38D0AC1F986638084F1FEC25B7455FECE356BA19145FB07016008F5525F893BA76524D685> (last visited: February 27, 2018); COUNCIL OF INDIGENOUS PEOPLES, 2014 ECONOMIC STATUS SURVEY OF INDIGENOUS PEOPLES IN TAIWAN (2015), available at: <https://www.apc.gov.tw/portal/getfile?source=2D838540F5D6F659FAFB9859EF31AC3B381A272F479D65D98D902DFAAFC2E154084F20DD5F0F37964575BA3D2CADEAE87E08C4C4F83F6C7D3B91B9DF71659F0C&filename=D0572478D51EFA60DD66604754BE10B807F619060818CEA0D0636733C6861689> (last visited: Feb. 27, 2018).

public health clinic in Namasia, and the roads to the district were usually blocked after heavy rainfalls. Moreover, the education resources in Namasia were limited. There are only elementary and middle schools in the district, no high schools or colleges. To pursue better medical care and educational resources, the indigenous people moved from the mountain villages to the much more accessible Da'ai Community on the plain.⁶³

Indeed, relocation could enhance the safety of disaster victims by moving them from risky sites to safer locations, but it might also bring problems associated with displacement. Relocation influenced not only the space but also the economic livelihoods, social structure, and cultural preservation of the indigenous peoples. As discussed in Chapter Two, in the early ROC-ruled period, the government adopted a policy of settled agriculture, promoted Chinese education, and used other methods to “develop mountain fellows” and improve their lives. From 1946 to 1975, seventy villages of more than 23,000 mountain fellows were relocated from remote mountains to more accessible locations.⁶⁴ Relocation, however, not brought only benefits to indigenous communities, such as more education resources, but also potentially affected or worsened some other issues in the tribes.

An early study showed that the mountain fellows did not always acquire a better life because of relocation. In 1976, three Atayal communities in Nanchuang Township, Miaoli County, were moved from remote mountain areas in eastern Nanchuang Township to the newly-established Sasasezeman village on lower lands near the Nanchuang Township Office and main roads.⁶⁵ Although the resettlement site was only twenty kilometers west of the old community sites, it greatly influenced the occupation and economic activities of the relocated indigenous

⁶³ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28–30, 2017).

⁶⁴ MING-LIN SHIEH (謝明霖), *THE ENVIRONMENTAL ADJUSTMENT AND MIGRATION OF THE ABORIGINES: A CASE STUDY IN MIGRATION PLAN OF MIAOLI COUNTY NANCHUANG TOWNSHIP* (山胞遷村與環境調適之研究: 以苗栗南莊鄉遷村計畫為個案研究) 4 (1986) (thesis).

⁶⁵ *Id.* at 22.

people. Before the relocation in 1976, only 26.25% of these Atayal community members left their homelands to work in other places. In the five years following relocation, the percentage of community members working outside drastically increased to 48.75%, and to 68.75% by 1980. It became easy and convenient for the indigenous people to go out to search for jobs through the roads near the resettlement site.⁶⁶ The problem lay in the jobs' low pay and instability. 87.18% of those indigenous community members usually changed jobs due to their low educational level, language barriers, and cultural differences.⁶⁷

In the case of disaster recovery, simply providing disaster victims with a safe place to live is insufficient. After leaving their homes and lands, indigenous people might face legal issues, economic difficulties, and cultural challenges at the resettlement sites. In the aftermath of Typhoon Morakot, the land zoning and relocation policy might have caused indigenous individuals and communities to leave their homelands, relocating separately to different places. Relocating the indigenous people was likely to make them lose connections with their old communities, unique livelihoods, cultural spirit, and identity.

For example, when Kucapungane community members moved to Rinari after Typhoon Morakot, it took one or two days to travel from Rinari to their Rukai traditional territory.⁶⁸ Having few arable lands at Rinari, few Kucapungane households still planted pigeon peas, millet, or other traditional crops, and the practice had more cultural meaning than economic benefit. On the one hand, lacking lands has made it much harder for the Kucapungane people to maintain their traditional subsistence.⁶⁹ On the other hand, they have tried to find new, possible means of

⁶⁶ *Id.* at 74.

⁶⁷ *Id.* at 77-78.

⁶⁸ Sasala Taiban, *supra* note 53, at 71.

⁶⁹ *Id.* at 72.

livelihood at the relocation site, such as developing a tourist business characteristic of Rukai tradition culture.⁷⁰

In addition to Kucapungane, other relocated indigenous people and communities have encountered various issues due to displacement. The following section introduces and discusses four major problems faced by the indigenous people in Namasia during and after their move from the mountain villages down to the Da'ai Community on the plains. Although only an hour's drive away separates the Da'ai Community from their original home, the relocation has greatly changed their life and land use in Namasia.

Household Registration Issues

One of the legal issues that the interviewees complained about was the restriction on household registration and limitation on freedom of residence.⁷¹ Although most Nangnisalu villagers moved to the Da'ai Community, Shanlin District, the relocated indigenous people hoped to keep their domicile in Namasia District because they wanted to maintain a connection with their homelands in the hope that they may return to their ancestral land one day.⁷² The Kaohsiung Municipal Government, however, has requested that relocated people change their domicile at the household registration office to conform with the Household Registration Act and the fact that they had already moved out of Namasia District and currently live in the Da'ai Community, Shanlin District.

The relocated people passively resisted the policy by avoiding any changes in their registered domicile, but many adults had no choice but to comply with the request in the interest

⁷⁰ See SASALA TAIBAN, *supra* note 56, at 288-290.

⁷¹ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29 and 30, 2017).

⁷² Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28 and 30, 2017).

of their children. Specifically, children had to be domiciled in the Shanlin District to enroll in and attend elementary and high schools at the resettlement site of the Da'ai Community. As people under the age of twenty were ineligible to be household heads, parents of school-age children had to move their domicile to the Shanlin District to create a new household and register their children there.⁷³ Parents of newborns also had to make such domicile changes to report their new family members to the household registration system.⁷⁴

The relocated indigenous people have faced issues of voting rights, social welfare, and health insurance after their compliance with the government order to change their domicile in the household registration system.⁷⁵ For example, if relocated people have their domicile in the Shanlin District but their lands in Namasia District, a different administrative zone, the inconsistency between the domicile and land address would make them unable to join the official Farmer Health Insurance Program, which provides assistance and benefits specifically designed to help people who engage in agricultural work and rely on agricultural production.⁷⁶

Economic Problems

After the indigenous people from Namasia District moved to the Da'ai Community, they immediately faced the problem of unemployment. Before the indigenous people left their homes in the mountains, they had lived close to their lands and practiced small-scale agriculture. Moving to the Da'ai Community meant living far from their farmlands. The relocated indigenous

⁷³ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28 and 30, 2017).

⁷⁴ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28–31, 2017).

⁷⁵ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28 and 30, 2017).

⁷⁶ Anonymous former Morakot Post-disaster Reconstruction Council official, interviewed by the author, in Taipei, Taiwan (Sep. 15, 2017).

people could hardly afford the cost and time of commuting this distance every day.⁷⁷ This has been a common problem for indigenous people who rely on agriculture but have resettled far from their lands after Typhoon Morakot.

Some indigenous people have tried to find new jobs near the resettlement site. For example, Foxconn Electronics Incorporated established the Yonglin Farm near the Da'ai Community to provide job opportunities to the relocated people. Through this farm, on the one hand, the indigenous people hired by the company could earn income to support their lives. On the other hand, however, the indigenous people who once farmed their own lands have now become workers who receive fixed salaries by following orders to manage the company's lands. These indigenous people were transformed from "farmers on lands" to "workers in factories" of large-scale production and capitalism. They work as employees and have become more dependent upon and vulnerable to fluctuations in the bigger market and monetary economics.⁷⁸

The situation is often worse for those indigenous people who cannot find jobs near the resettlement site. They cannot maintain their previous way of subsistence, but the government only granted a small amount of employment assistance. NGOs and companies that had promised to help have also provided limited job opportunities. Taking the Yonglin Farm as an example again, when compared to the Da'ai Community's population of 5,000, there were only about 100 positions on the farm, most of which were low-end jobs. These few positions could not effectively solve the general problem of unemployment in the Da'ai Community.⁷⁹

⁷⁷ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29 and 31, 2017).

⁷⁸ See INDEPENDENT NEWS NET OF MORAKOT, *supra* note 58, at 180-192.

⁷⁹ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 30, 2017); Anonymous former Morakot Post-disaster Reconstruction Council official, interviewed by the author, in Taipei, Taiwan (Sep. 15, 2017).

As a result, the relocated indigenous people might remain unemployed, leave their homes and families to seek jobs in cities, or return to farm their lands in Namasia—an action with possible legal consequences.⁸⁰ These relocated indigenous people would be in violation of the legal contract regarding resettlement housing because the contract states that house recipients “must not return to their previous residence” on the risky lands.

Cultural Challenges

Not only economic difficulties but cultural challenges as well were significant for the relocated Taiwanese indigenous people in the Da’ai Community. First, the Da’ai Community was built by the Tzu Chi Foundation, a Buddhist missionary organization with specific religious beliefs and practices, such as not killing livestock and not smoking. These norms conflict with the customs and rituals of some Taiwanese indigenous tribes. The Tzu Chi volunteers have tried to persuade the relocated indigenous people not to practice their traditional culture—for example, the Bunun tradition of killing pigs for wedding ceremonies and banquets—in the Da’ai Community, or to modify their habits to some extent to comply with the Da’ai Community regulations.⁸¹

Another cultural conflict has occurred among the residents of the Da’ai Community with a variety of backgrounds: different tribes of indigenous peoples and non-indigenous people of the Minnan and Hakka people groups. While indigenous people constitute the majority of Da’ai Community residents, the Minnan and Hakka people have also insisted on their own ideas about how to manage and regulate the neighborhood. Generally, the indigenous people tended to solve problems through their traditional ways, regarding family as a unit of expression and deciding

⁸⁰ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28–31, 2017).

⁸¹ INDEPENDENT NEWS NET OF MORAKOT, *supra* note 58, at 200; anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28, 2017).

issues through a consensus of tribal councils. By contrast, believing in the individualism of Western democracy institutions and the laws regulating neighborhood affairs, the Minnan people prefer to establish a formal management committee according to the Condominium Administration Act and deciding community issues by voting.⁸² These gaps have made it difficult for residents to reach consensus on the procedures for solving problems of the Da'ai Community, to say nothing of actually devising substantial solutions for them.

Conflicts among Community Members

Relocation led to conflicts and hostility between community members who thought differently about relocation. Since Typhoon Morakot impacted Namasia in 2009, eight years had passed by the time the interview was conducted in 2017. The interview results show that arguments about reconstruction resources and the relocation policy have caused the indigenous people in Namasia to be suspicious of and hostile to people within their own communities who have different views. The interviewees thought their friends and neighbors had become selfish, anxious, and insecure after the disaster.⁸³ The government, NGOs, and citizens donated money and resources to help typhoon victims who had suffered physical and property loss, but how to properly and fairly distribute the resources has provoked controversy and complaints among the affected indigenous people.⁸⁴

In addition to the short-term problem of emergency assistance, the disaster also led to long-term arguments and conflicts among tribal people in the disaster recovery process. While people relocating to the Da'ai Community thought that the government gave more reconstruction

⁸² INDEPENDENT NEWS NET OF MORAKOT, *supra* note 58, at 206-214.

⁸³ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29 and 31, 2017).

⁸⁴ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29, 2017).

resources to the old sites of Namasia District in the mountain areas, people staying in the mountain villages in Namasia complained that the government favored the relocation policy and was reluctant to provide assistance in reconstructing Namasia.⁸⁵ Moreover, the relocated people have gradually assimilated to the culture and lifestyle on the plains and faced difficulties in moving back to Namasia District, including hostility from the people who did not leave after the typhoon.⁸⁶

(2) Reconstruction at the Old Site

Although a large number of the typhoon victims living in the Special Zones and the Safety Doubtful Zones moved to the permanent resettlement houses, 39% of the typhoon victims insisted on staying in their homelands and tried to rebuild their houses on the original sites.⁸⁷ Without many resources or assistance from the government, the Taiwanese indigenous people who stayed in their homelands tried to recover economically by themselves through various means: small-scale agriculture, especially organic vegetable farming; small-scale business in unique handcrafts made by their traditional skills, and ecotourism that introduces and promotes indigenous culture and natural scenery to visitors.

In the case of Namasia, the indigenous interviewees noted some concerns and reasons they did not choose relocation. First, they thought that the quality of the resettlement housing units in the Da'ai Community was low. Not built with concrete, the houses were easily damaged.⁸⁸ The houses were also too small and not well soundproofed. The relocated families

⁸⁵ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28–29, 2017).

⁸⁶ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 30, 2017).

⁸⁷ TYPHOON MORAKOT POST-DISASTER RECONSTRUCTION COUNCIL, EXECUTIVE YUAN, *supra* note 44, at 210.

⁸⁸ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 30, 2017).

lived in crowded spaces and sometimes heard their neighbors' voices through walls.⁸⁹ Second, the indigenous people could not adapt to the life and environment of the plains once displaced from their homelands in the mountains.⁹⁰ The climate of the lowlands was too hot.⁹¹ Third, they had difficulty finding new jobs after relocation. To make things worse, the cost of living was more expensive in cities than in the remote areas of Namasia.⁹²

Fourth, the government did not provide accurate and sufficient information about relocation, such as the consequences of relocation or restrictions on moving to the resettlement houses in the Da'ai Community. For example, what restrictions would be imposed on their land use? Would they lose the property rights to their houses and land in Namasia District? These questions were not answered by government officials or NGO staff although the indigenous people were pushed to make decisions immediately after the disaster.⁹³ In addition, the interviewees were concerned about the consequences of violating the legal contract governing their resettlement housing, which stipulated that people who received the houses must not return to their previous residences.⁹⁴ Fifth, the interviewees worried that the government would stop reconstructing Namasia District if all residents left the place. The Namasia residents did not want to abandon their hometowns. It was possible that, if all residents moved away, the government and the relocated people would no longer pay attention or spend resources to reconstruct Namasia.⁹⁵

⁸⁹ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29 and 30, 2017).

⁹⁰ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 30, 2017).

⁹¹ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 30–31, 2017).

⁹² Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28–31, 2017).

⁹³ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 28 and 30, 2017).

⁹⁴ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29–30, 2017).

⁹⁵ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29, 2017).

Although most people from Nangnisalu village relocated to the Da'ai Community after Typhoon Morakot, a few families stayed in Namasia to repair and rebuild their homes. Due to the disaster, Namasia residents were evacuated from the villages and sheltered in temples, churches, and military camps for about six months, after which most Nangnisalu village members left their damaged houses and relocated to the permanent resettlement houses. There were about sixteen families who refused relocation and decided to reconstruct their communities at the original sites. Without much government support, this small group spent about two years clearing debris and restoring local facilities. Because human resources were so scarce, they cooked together and ate only two meals a day in order to use their manpower efficiently.⁹⁶

On the one hand, the life for those indigenous people staying in the Nangnisalu village damaged by Typhoon Morakot was very tough. On the other hand, they had close connections and shared personal experiences of the disaster, comforting and supporting one another. An interviewee who stayed in Nangnisalu emphasized the intimate relationship and support among indigenous individuals and their community.⁹⁷ In addition, through the experience of cooperation, they worked together to develop a few small-scale businesses in the form of restaurants and handicraft shops.

For example, with the help from NGOs like Taiwan Funds for Children and Families and private companies, the Nangnisalu village members constructed the "Dreams Come True Hall" to host visitors, exhibit traditional crafts, and sell local specialties. They also established workshops, such as the Maya Workshop and Rainbow Work Station, to provide training in traditional handicraft skills so that indigenous women could make and sell their handicrafts.⁹⁸

⁹⁶ YA-HSIANG WANG ET AL., *supra* note 49, at 120-123.

⁹⁷ Anonymous resident of Namasia District, interviewed by the author, in Kaohsiung, Taiwan (Aug. 29, 2017).

⁹⁸ YA-HSIANG WANG ET AL., *supra* note 49, at 124-127.

Since the disaster, the Nangisalu villagers have tried to adjust their lifestyle and ways of subsistence to cope with the different conditions changed by Typhoon Morakot.

(3) Return

In addition to the adaptive strategies of relocation and reconstruction, some Taiwanese indigenous people found a third way to adapt to the changed environment after Typhoon Morakot: return to their ancestral lands where they had lived before they were relocated by the government several decades prior. Throughout the history of Taiwan, many indigenous tribes were forcibly relocated for the purpose of government control, cultural assimilation, and economic development. For example, in the Japanese-ruled period, the colonial government relocated many indigenous communities from their homelands in the remote mountains to more accessible places near police stations to pacify and monitor the indigenous people.⁹⁹

After the ROC government took over Taiwan, three indigenous communities in the Pingtung County—Wutai Township, Tjvatjavang village of Sandimen Township, and Kuskus village of Mudan Township—were relocated by the government to more accessible sites in the 1970s, so the government could strengthen its control over the indigenous communities and improve their life conditions. The government, however, adopted this relocation policy recklessly and chose the resettlement sites without considering the specific social and environmental contexts of the indigenous community and opinions of community members. As a result, the relocation project seriously harmed the culture and subsistence of the tribal

⁹⁹ See Taiwan Sōtokufu Ribanka (台灣總督府警務局理蕃課), translated by Institute of Ethnology, Academic Sinica (中央研究院民族學研究所), GAOSHAZU DIAOCHASHU: FANSHE GAIKUANG (高砂族調查書：番社概況) [An Investigation of the Aborigines in Taiwan: The Overview of Indigenous] 129-131, 134, 143-144, 151-153, 161, 172-173 (2011).

members.¹⁰⁰ The relocated Kucapungane community in Wutai Township was struck by Typhoon Wutip in 2007 and completely obliterated by Typhoon Morakot in 2009.¹⁰¹

The Maya village in Namasia district is another example of Taiwanese indigenous peoples being forcibly relocated by authorities for the purpose of strengthening control and economic development. In the distant past, the Maya village was situated at the Min-quan Plateau, an area of upper land along the riverbank of Qishan River. In the late 1970s, the government relocated Maya villagers from the plateau to the current village site, near roads and convenient for traffic.¹⁰² However, when Typhoon Morakot struck, houses in the Maya village were flooded because their location was too close to the Qishan River.

The disaster of Typhoon Morakot exposed the wrong decision for relocation made by the previous government, which ignored the reason indigenous people had chosen the Min-quan Plateau for their village. Their ancestors lived on the upper land of the plateau because, based on their long-time experience and observation, it was a safe place to live. The traditional wisdom passed down from their ancestors taught the Maya people how to choose the safe place for settlement. After the disaster of Typhoon Morakot, residents of the Maya village wished to return to the Min-quan Plateau, their previous residence before they had been relocated in the 1970s (see Figure 5-3 and Figure 5-4).

¹⁰⁰ Sasala Taiban & Jie-Ming Chen (陳傑明), *The Relocation Project of Kuchapogan: A Social-anthropological View* (好茶遷村計畫——一個社會人類學的初步考察), 2(2) TAIWAN JOURNAL OF INDIGENOUS STUDIES (台灣原住民族研究季刊) 115 (2009).

¹⁰¹ INDEPENDENT NEWS NET OF MORAKOT, *supra* note 58, at 356-357.

¹⁰² YA-HSIANG WANG ET AL., *supra* note 49, at 114.

The tribal people first made large efforts to ask the government to loosen land-use regulations on the Min-quan Plateau, so it could pass environment assessment. The government officials and technicians did recognize that, compared to the lower land close to the Qishan River, the higher land of Min-quan Plateau was safer. Without much government assistance, the Maya people sought and received financial support from NGOs, such as the Red Cross and World Vision, as well as private companies like the Delta Electronics Foundation. After three years of efforts and struggles, the Maya village finally built new schools and a community center on the Min-quan Plateau and continued to construct more houses for shelter.¹⁰³ In this way, the tribal members have gradually begun moving back to their homeland.

5.3 Summary

This chapter uses the case study of Namasia to discuss the migration history of indigenous people, their thoughts of natural disaster, and their response to reconstruction laws and a new environment in the aftermath of a major disaster. The oldest indigenous tribe in Namasia, the Kanakanavu, have lived there for hundreds of years. Their lives and land rights were greatly influenced by the Japanese and ROC governments in the twentieth century. Under the group relocation policy in the Japanese-ruled period, a large number of Bunun people were relocated to Namasia and became the majority indigenous group in the area. Both tribes were forced to abandon their traditional livelihoods and turn to settled agriculture. Because they were confined to the area designated by the government, people of the two tribes competed for limited arable land and hunting grounds in Namasia. After 1945, the ROC government changed local

¹⁰³ YUNG-LUNG CHEN & YEN-LIANG CHIU, *supra* note 51, at 112-119.

communities in Namasia by assimilating indigenous people into Chinese culture and developing the indigenous villages by road construction and relocation to more accessible sites.

While the protection of indigenous rights has improved since the 1990s in a more democratic Taiwan, Namasia and many indigenous areas were seriously damaged by floods and mudslides in 2009 when Typhoon Morakot caused unprecedented precipitation in Taiwan. After the disaster, the government settled on relocation as the primary reconstruction measure before consulting the affected people. Unlike this monolithic official disaster recovery policy, the indigenous people in Namasia have adapted to the changed environment in various ways: relocation, reconstruction, and return. For safety concerns, some indigenous people accepted the resettlement housing and moved to the plains, but they have faced legal issues, economic difficulties, and cultural challenges associated with displacement. Other indigenous people rebuilt their houses on the original sites or returned to their ancestral lands. Although the latter two strategies might be slow and less attractive than the option of receiving a free resettlement house, the practices preserved and applied the traditional knowledge of the indigenous peoples.

After Typhoon Morakot, the Taiwanese government and the indigenous people have taken different approaches to cope with their new conditions. The greatest problem with the government reconstruction policy was that it did not provide sufficient information to people in the disaster areas and fully consult the typhoon victims before making decisions about land zoning and relocation. The single official reconstruction policy could not solve the specific needs and concerns of affected indigenous people in their specific surroundings. In contrast, the indigenous people have adopted multiple ways to adapt to the changed environment, and each adaptive method has pros and cons for disaster recovery.

The example of the indigenous people in Namasia District does not suggest one best adaptive strategy for all natural disasters. Instead, the situation in Namasia proves that it is important to consider disaster recovery according to specific environmental, social, historical, and cultural contexts. The legal framework should have space and flexibility for each indigenous community to apply and adjust its adaptive strategy to meet its actual needs. The final chapter will incorporate the above discussion on disaster adaptation with the observations of the previous chapters in order to give more comprehensive recommendations on how to improve disaster legal management in Taiwan, increase indigenous rights and self-determination on their land, and improve local resilience to disaster risks and effects.

Chapter 6 Conclusion

6.1 Summary of the Study

This dissertation discusses indigenous land rights, disaster management law, and disaster recovery problems after Typhoon Morakot in Taiwan, analyzing these issues from legal, historical, and cultural perspectives. Chapter Two traces the land history of Taiwanese indigenous peoples since they encountered settlers in the seventeenth century. Chapter Three reviews the development of disaster management laws in Taiwan since the Republic of China began to rule Taiwan in 1945. Based on the history, Chapters Four and Five take the post-Typhoon Morakot recovery as an example to examine the reconstruction laws, government policies, and indigenous adaptive strategies in response to natural disaster impacts in contemporary Taiwan.

The study indicates how indigenous land rights have been influenced by settlers and state power and what problems have existed in the disaster management legal framework in Taiwan. Moreover, this study not only points out the difficulties faced by the affected indigenous people during the recovery process, but it also suggests that indigenous knowledge and capacity can improve preparedness for, response to, and recovery from natural disasters. The disaster event of Typhoon Morakot and the reconstruction process provide an opportunity for Taiwanese society to consider indigenous land justice in its historical context and in the present-day world.

Taiwanese indigenous peoples, who have lived on the island for more than six thousand years, have a strong attachment to the land and have migrated autonomously because of disease, natural disaster, and conflict, as well as to seek fertile land. However, their lives have been

greatly influenced by external forces since the seventeenth century, when settlers arrived in Taiwan. The Dutch and Zheng authorities controlled southwestern Taiwan, loosely ruling indigenous communities on the coastal plains. When the Qing empire governed Taiwan, starting in 1683, an increasing number of Han Chinese migrated to Taiwan to encroach on and cultivate the land where indigenous people had lived. After over two hundred years of Qing rule, the indigenous people on the plains were significantly influenced by Chinese culture, and many Sinicized aborigines lost ownership or substantial control over their land to the Han settlers.

State power, laws, and policies on indigenous land have had greater impacts, and even harms, on Taiwanese indigenous peoples and their land rights since the late nineteenth century. In 1895, Japan took Taiwan and transplanted modern laws to claim all indigenous land as state-owned property to exploit forestry resources. Only a small portion of land was reserved for the indigenous population. The colonial government not only conquered the indigenous people deep in the mountains but also implemented group relocation and settled agriculture policies to uproot indigenous people to reduce the latter's power and strengthen their own control. In 1945, control of Taiwan shifted from Japan to the Republic of China, which continued to consider indigenous land as state-owned. In the name of development, the ROC government assimilated the indigenous people into the mainstream Chinese culture and moved indigenous villages to more accessible sites. The land reserved for indigenous peoples was widely utilized by the government and opened to non-indigenous private-sector organizations.

Only since the democratization of Taiwan in the 1990s have social movements gradually promoted the protection of indigenous land rights. Indigenous people can more easily register their rights to the indigenous reserved land, and the areas have been expanded. The legislature has amended the Constitution and passed laws, such as the Indigenous Peoples Basic Law, to

promote indigenous rights. The executive branch also established the Council of Indigenous Peoples in 1996 to specifically handle indigenous affairs and has recognized more tribes in the past few decades to acknowledge their distinct identities and cultures.

In addition to indigenous land rights, disaster management law is another theme in this dissertation. While natural disasters have frequently struck Taiwan, disaster laws and policies in Taiwan have developed slowly and failed to protect citizens well from disasters' harms. From 1945 to 1999, disaster effects were principally handled by executive power through local administrative regulations and presidential emergency decrees. In Taiwan Province, the regulations first established disaster management organizations in provincial and county/city governments, which were replaced by a three-level structure of province, county/city, and township in 1960. Despite this organizational adjustment, throughout the latter part of the twentieth century, the local regulations focused on the threat and damage of typhoons, and the organizations were temporary teams comprising officials from various departments and with no expertise in disaster management.

The local administrative regulations shared one serious limitation in disaster management with presidential emergency decrees issued to address the impacts of natural disasters: Their function was limited to handling an imminent disaster or a disaster that had occurred, ignoring the important task of preparing for and reducing the effects of disasters. At the local level, disaster management organizations were formed for each specific disaster. The temporary teams were unable to make comprehensive plans for all stages of a disaster, nor could they deal with large-scale disasters and the resulting problems. At the national level, presidential emergency decrees were issued after the 8/7 Flood in 1959 and the 9/21 Earthquakes in 1999 had caused huge life and property losses in Taiwan. The decrees covered a wide range of disaster response,

relief, and recovery work, which exceeded the constitutional system's design that an emergency decree should address only urgent needs in an exceptional situation.

Since the destructive 9/21 Earthquake, the legislature has assumed a key role in disaster management. In 2000, the Legislative Yuan not only actively passed a series of laws for post-earthquake reconstruction but also enacted the Disaster Prevention and Protection Act to establish a legal framework for disaster management. The law creates a three-level structure for disaster effects to be managed by national, municipality/county, and township governments. At each government level, there are temporary centers for emergent disaster response and permanent councils for long-term disaster management programs. The problem was that all these organizations consisted of officials from other departments. Members of the centers were temporarily summoned for a specific disaster, and councilors of the permanent councils focused on duties in their own agencies, not the additional mission of disaster management.

This problem was partially solved by the amendment of the Disaster Prevention and Protection Act in 2000, which added an office of full-time personnel to assist the councilors. Still, Taiwan lacked a comprehensive approach to disaster management. The functions are distributed among the Central Disaster Prevention and Protection Council, responsible for making and supervising overall plans, and a variety of ministries, each responsible for specific types of disaster. In addition, while the legal reforms aimed to reorganize disaster management at the national level, little attention has been paid to increasing local capacity for and involvement in disaster mitigation, preparedness, response, and recovery.

In recent years, extreme weather patterns and events have posed new challenges to not only disaster management law but also the land rights, cultures, and subsistence of indigenous peoples in Taiwan. In August 2009, Typhoon Morakot brought an unprecedented amount of

rainfall to Taiwan, causing floods and mudslides that overwhelmed many indigenous villages in mountainous areas. In response to the terrible disaster, stricter land regulation and environmental conservation became the major principles for recovering the affected areas. Twenty days after the disaster, the Legislative Yuan passed the Special Act, which created the Reconstruction Council to carry out disaster recovery policies and efforts, including land zoning and relocation projects that would restrict indigenous land rights and uses.

Issues arising in the post-Typhoon Morakot recovery show that, compared to local indigenous people, the government usually dominated the recovery work, but it was not held responsible for its poor performance in disaster management unless it was arbitrary. First, when assessing the disaster risk and safety of affected land, the agencies did not fully apply scientific methods to investigate the land's condition. It was also hard for local indigenous people to participate in the land examination and influence assessment results. Second, the Kaaaluwan and Kucapungane communities were moved to risky sites because of past government policies, but the community members could not receive compensation for their losses suffered in Typhoon Morakot. Third, the hurriedly passed Special Act had ambiguous requirement for zoning. As a result, even though Adiri indigenous people were not adequately informed of and consulted about the zoning proposal and its subsequent legal effects, the courts upheld the executive decision that Adiri was designated as a risky Special Zone because it was at the discretion of the executive agency.

Although the affected indigenous people were often excluded from the government's disaster recovery planning and decision-making, they have strived to adapt to the impact of construction laws and natural disasters. In the case of Namasia District, the livelihood and distribution of Kanakanavu and Bunun tribal people were altered by the Japanese colonial force

and the ROC's development policy. Still, the indigenous people retain their capacity for and flexibility in dealing with environmental changes. Since Typhoon Morakot, they have adopted multiple adaptive strategies. Among the three villages in Namasia, Nangnisalu was the most damaged. Almost all Nangnisalu residents relocated to the Da'ai Community to pursue a safer life on the plains, but they have also encountered legal restrictions, cultural conflicts, and economic difficulties associated with displacement. The other two villages, Maya and Takanua, suffered less damage in Typhoon Morakot, so most residents stayed to repair their homes and communities. Some indigenous people of the Maya village returned to the upper land of the plateau where the village had been before it moved to its current location in the late 1970s. This ancestral land has proven to be a safe place for government office, public health center, school, and emergency shelter for tribal people in disaster situations.

On the one hand, Taiwanese indigenous peoples have usually been excluded from government disaster management, and they need special assistance due to their long-term marginalization, socioeconomic vulnerability, and high dependence on natural resources. On the other hand, indigenous peoples are not helpless victims. As the Namasia case shows, they resettled, rebuilt at the original site, or returned to their ancestral land to recover from disaster effects and reduce future disaster risks. When facing pressures from the reconstruction laws and changed environment, indigenous peoples have a keen awareness of nature and implement diverse adaptive strategies according to their environmental, social, historical, and cultural contexts.

The momentous event of Typhoon Morakot has forced Taiwanese society to take seriously the plight of indigenous peoples affected by natural disasters. It also demands reexamination of the legitimacy of the laws and policies that have regulated their land. As the

previous chapters have already reviewed the history and presented issues regarding indigenous land rights and disaster management law in Taiwan, the next section proposes suggestions on how to enhance the land rights of Taiwanese indigenous peoples under natural disasters.

6.2 Suggestions

6.2.1 Enhancing Indigenous Land Rights and Determination

Since the seventeenth century, indigenous land has been greatly encroached on by the settlers and taken by the Japanese and ROC governments as state-owned property. Only a small portion of the land was reserved for indigenous people, to which indigenous people can register their rights in accordance with the law. In recent decades, indigenous peoples have engaged in social movements and legislative lobbying to advocate for tribal dignity and self-government. In response, the Constitution and legal reforms have gradually recognized the collective and individual rights of the indigenous population in Taiwan.

In 2005, the Legislative Yuan passed the Indigenous Peoples Basic Law, which acknowledges indigenous rights to land and natural resources.¹ The law requires that, when the government and private sector propose plans for land development, resource utilization, ecological conservation, and academic research on indigenous land, the government department and private parties shall consult and obtain consent from the indigenous people. Indigenous peoples have the right to participate in land management and share the benefits of the land's use. The government and law can restrict indigenous peoples' use of indigenous land and natural

¹ Article 20, Indigenous Peoples Basic Law (原住民族基本法) (2005).

resources only after the indigenous peoples have been consulted and given consent to the proposed legal regulation and restriction.²

This legal change represents the increasing protection of indigenous land rights, but, as the discussion in Chapter Two points out, there are still issues to be addressed. The area of land reserved for indigenous peoples is a small portion of the indigenous land taken by the Japanese and ROC governments. More than five decades have passed since 1966, when reserved land was opened for indigenous people to register their individual property rights. Yet, in 2015, less than half (45.90%) of the reserved parcels of land were registered by indigenous people, giving them formal land rights.

To allow more land to return to the indigenous peoples, the legislature may relax the current legal requirement for indigenous people to register ownership of and other rights to their parcels of reserved land. The executive agencies and local governments should more widely distribute information on the reserved land system, encouraging and helping eligible indigenous people follow the procedure to register their rights to the reserved land. Thus, the indigenous land practice and interest would be officially recorded and guaranteed by law. The indigenous people would be entitled to prevent interference in their exercise of land rights, and when a natural disaster occurred, indigenous landowners would have legitimate status to receive disaster relief and defend their rights.

In addition to the land reserved for indigenous peoples, as mentioned above and in Chapter Two, the Indigenous Peoples Basic Law states that free and informed consent from indigenous people is a required condition for developing indigenous land, which includes indigenous reserved land and traditional territory. As early as 2002, the Council of Indigenous Peoples started surveys to clarify where the traditional territories of indigenous tribes in Taiwan

² *Id.* Article 21.

are.³ In 2017, the Council of Indigenous Peoples promulgated the Regulation for Demarcating Indigenous Traditional Territory and Tribal Land to specify the criteria and procedure of designating traditional territory, based on which the council, local governments, and indigenous tribes can actually begin to designate areas of traditional territory.⁴

It has been more than a decade since the Indigenous Peoples Basic Law was passed in 2005. In the current stage, it is urged that the ongoing designation work be accelerated to recognize and protect indigenous peoples' rights to their traditional territory as soon as possible. For further legal reform, this study suggests that the Council of Indigenous Peoples expand its current definition of tribal land from only public land to also including private land because the Indigenous Peoples Basic Law itself does not explicitly set this condition. Designating traditional territory is a strict process that requires sufficient evidence and justification. Neither public nor private land will be arbitrarily designated as traditional territory.

Last but not least, if an area is designated as the traditional territory of an indigenous tribe, the designation will not deprive private landowners of their land titles but will require indigenous consent before development projects. Considering that past state force and policy have caused great harm to indigenous people and their land rights, this dissertation suggests a possible alternative to reconcile the long-term injustice to indigenous people and the property rights of private individuals: The government should purchase indigenous land from volunteer private landowners and restore tribal rights to that land.

³ Traditional Territory Investigation Results, COUNCIL OF INDIGENOUS PEOPLES, available at <https://www.apc.gov.tw/portal/docList.html?CID=5FC6DA1C91974642> (last visited Dec. 11, 2018).

⁴ According to Article 4, the Regulation for Demarcating Indigenous Traditional Territory and Tribal Land, the team to investigate and designate tradition territory consists of people on behalf of township office, people representing indigenous tribe, experts, scholars, and other people competent of assisting designation work. Besides, with government's approval, tribes may also form their designation team. In either type of the designation teams, more than half of the team members must be indigenous people to represent tribal opinion and protect tribal interest.

6.2.2 Reorganizing the Disaster Management Structure

The disaster management authorities in Taiwan are fragmented. Missions of disaster mitigation, preparedness planning, response, and recovery are assigned to a variety of organizations at the national, municipality/county, and township levels. There are temporary response centers for particular disasters and permanent agencies, including the Central Disaster Prevention and Protection Council, the National Fire Agency, and ministries responsible for specific types of disaster. In addition, after major disasters, such as the 9/21 Earthquake in 1999 and Typhoon Morakot in 2009, the government established special reconstruction councils to handle disaster recovery work. Each organization is responsible for certain aspects, stages, and causes of disaster. As a result, none of the organizations has adequate power and resources to effectively implement long-term disaster management programs, promptly respond to hazards of any causes, carefully coordinate and supervise recovery efforts, and contribute experience to future disaster mitigation and adaptation.

It is important to have an agency that is fully committed to and responsible for all aspects of disaster management. Taking the Federal Emergency Management Agency (FEMA) in the United States as an example, the agency was created in 1979 to forge a comprehensive, risk-based approach to emergency management of all hazards, assuming responsibility for functions that had been distributed to various departments. After the terrorist attacks of September 11, 2001, FEMA became one of the subdivisions of the Department of Homeland Security, whose first priority is preventing terrorist attacks. FEMA was thus distracted from its previous duty of

emergency management, and its power over disaster preparedness and planning was shared by other parts of the department.⁵

These changes were criticized for making the sprawling bureaucracy of FEMA unable to respond to Hurricane Katrina in 2005 and help disaster victims in a timely and effective manner. To address this and other issues, in 2006, the U.S. Congress passed the Post-Katrina Emergency Management Reform Act to transfer most preparedness functions back to FEMA, evaluate its status and power, guarantee its access to higher government authority, and prevent its assets from being unreasonably reduced and diverted.⁶ The reform reaffirmed that the primary mission of FEMA is to “reduce the loss of life and property and protect the Nation from all hazards . . . by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.”⁷

FEMA’s evolution suggests an all-hazard approach that aims at developing common capacities and plans that can be utilized in a wide range of disasters. Through this approach, it is likely to reduce duplication and conflicts in disaster management planning among different departments. The government can also promptly react to a disaster before identifying its cause and assigning the mission to the department responsible for that specific disaster type.⁸ Moreover, because the agency’s officials have worked on and are familiar with disaster management operation, they can deal with disaster effects according to established procedure and principles. When a large-scale disaster occurs and overwhelms local capacities, the agency takes responsibility for communication and coordination efforts in multiple jurisdictions and across government levels for swift disaster response and recovery.

⁵ DANIEL A. FARBER, JIM CHEN, ROBERT R.M. VERCHICK, LISA GROW SUN, *DISASTER LAW AND POLICY* 155-156 (Third Edition, 2015).

⁶ *Id.* at 156.

⁷ 6 U.S.C. §313(b)(1).

⁸ DANIEL A. FARBER ET AL., *supra* note 5, at 158.

For the case of Taiwan, two issues should be especially addressed in the reorganization of the disaster management structure. First, the Taiwanese government should pay more attention to proactive measures. According to Farber's theory, a disaster cycle includes mitigation, emergency response, insurance and liability compensation, and rebuilding disaster mitigation. All stages are closely interconnected and influence one another.⁹ The Taiwanese government has focused on retroactive measures of disaster response and recovery, neglecting the important tasks of disaster risk reduction and preparedness in advance of natural disasters.

In Taiwan, while the temporary disaster response centers and special reconstruction councils established after major disasters have considerable significance, the permanent councils have lacked the power, personnel, and resources to make and enforce long-term disaster management plans. To address this problem, the government should adopt more proactive measures, such as establishing an early warning system, providing training and education on disaster risk reduction and preparedness, regularly investigating land's condition, maintaining and renovating infrastructure, mapping risky areas, and helping local people avoid disaster threats and damage before a disaster occurs.

Second, the discussion in previous chapters proves that hasty legislation after a major disaster cannot effectively guide reconstruction work and limit executive power. Thus, before the next major disaster occurs, the legislature should reform the current Disaster Prevention and Protection Act, clarifying the power of the disaster management agency to regulate its exercise and limit its discretion. For specific issues like land zoning and taking, legislators should make laws in times of calm to determine how to balance various interests of land conservation, safety concerns, and property rights.

⁹ Daniel A. Farber, *Introduction: Legal Scholarship, the Disaster Cycle, and the Fukushima Accident*, 23 DUKE ENVIRONMENTAL LAW & POLICY FORUM 1, 4 (2012).

6.2.3 Increasing Local Capacity, Engagement, and Partnership

In the reorganized structure suggested above, the role of the disaster management authority is to establish a unified framework, set fundamental guidelines, and coordinate efforts across administrative zones, government levels, and departments with different functions. Yet, it is not a top-down system in which a dominant authority decides everything and gives orders to its subordinates. After reviewing the disaster legal practice in Taiwan, this dissertation recommends a bottom-up model that increases the capacity and engagement of local governments, tribes, communities, and individuals in disaster management. Such partnership and coalition-building require continual communication, mutual support, and shared awareness about disaster risks and situations among all local actors.

Including the local elements and actors in disaster management lets them develop programs that best mitigate disaster effects and adapt to environmental changes in the area. The locals directly face disaster effects, and they are the ones who best realize the strengths, weaknesses, needs, and possible solutions in their actual surroundings. This increased engagement and resilience are especially important for Taiwanese indigenous peoples, who have distinct social, economic, and cultural beliefs, customs, and practices. The indigenous peoples should be granted more rights and determination over how to prepare for, respond to, and recover from disaster effects.

Examples after the 9/21 Earthquake in 1999 demonstrate that the involvement of and partnership among local governments, communities, organizations, and people are likely to achieve successful disaster recovery. Taking the Alang Nakahara community discussed in Chapter Three as an example, after the indigenous community was hit by the destructive

earthquake, the area was unstable and subject to the threat of mudflow. Fifty-seven community members decided to relocate.¹⁰ The Seediq indigenous people, township officials, project design team, architecture firm, and contractors cooperated to develop a relocation plan. The indigenous people were advised by the design team, the Department of Architecture of Tamkang University, to discuss and choose the most desirable, feasible, and affordable resettlement housing program.¹¹ When the construction was temporarily paused because the villagers were unable to pay the contractors, the Ren'ai Township Office helped the villagers to apply for reconstruction funds from the 9/21 Earthquake Disaster Reconstruction Foundation, the largest non-government organization for post-earthquake recovery, to continue the project. In 2002, the resettlement houses were completed, and the indigenous people relocated to the new site.¹²

The relocation of the Alang Nakahara community proves that the local government, NGOs, experts, private parties like the contractors, and local people can cooperate to achieve successful relocation projects for disaster recovery and risk reduction. In fact, after the 9/21 Earthquake, seven indigenous communities in central Taiwan were assessed as risky and required relocation. However, five years after the earthquake, only the Alang Nakahara and M'ihu communities had relocated to safer sites. The other five communities still struggled with finding appropriate relocation sites, funding, land use permits, construction companies, and other issues. The resettlement housing program for the Masitoban community was finally completed in December 2011, when the community members moved back to their Atayal ancestral land.¹³

¹⁰ DEPARTMENT OF ARCHITECTURE, TAMKANG UNIVERSITY (淡江大學建築系), NANTOUXIAN RENAIXIANG HUZHU CUN ZHONGYUANKOU XINQIANZHUDI (南投縣仁愛鄉互助村中原口新遷住地) [RESETTLEMENT SITE AT ZHONGYUANKOU, HUZHU VILLAGE, REN'AI TOWNSHIP, NANTOU COUNTY] 7 (2001).

¹¹ *See id.*, at 6-18, 25, 30, 32-36, 39, 42-45.

¹² CHUN-TUNG WANG (王俊棟), THE MIGRATION POLICY OF TAIWANESE ABORIGINAL TRIBE OF JUI-YEN AND CHUNG-YUAN KOU TRIBES (原住民部落遷村政策之研究－以瑞岩和中原口兩部落為例) 107 (2005) (thesis).

¹³ Mei-ying Huang (黃美英), *Wei Ruiyan Buluo Liuxia Lishi Jiayi: Taiya Qiyuan Shengdi yu Ruiyan Buluo de Qianyi* (為瑞岩部落留下歷史記憶－泰雅起源聖地與瑞岩部落的遷移) [*Leaving Historical Memory of the Masitoban*]

6.2.4 Incorporating Indigenous Knowledge into Disaster Management

To strengthen local capacity and resilience, it is necessary to include the perspectives and experiences of indigenous peoples, who have keen awareness and understanding of nature. The example of Typhoon Morakot recovery shows that Taiwanese indigenous peoples have adopted diverse and flexible strategies to meet their actual needs and surroundings. The indigenous people in Namasia District migrated, rebuilt on the same site, or returned to the land where their ancestors had lived. Although each strategy has both positive and adverse effects, the complexity of the situation proves that disaster mitigation and adaptation have to consider the specific legal, historical, cultural, and environmental contexts. The traditional yet dynamic knowledge of the indigenous peoples suggests multiple ways to handle drastic environmental changes. Their opinions should be well consulted and included in disaster management law, policy, and decision-making to protect indigenous land rights and prevent involuntary displacement of indigenous peoples.

Migration from risky land to a safer site is one of the methods adopted by Taiwanese indigenous peoples to reduce disaster risk and damage. In the case of Namasia, the Nangnisalu interviewees moved to the Da'ai Community to live away from the landslide and flood that had destroyed their homes. After Typhoon Morakot, some indigenous communities quickly agreed to their land being designated as a Special Zone because they desperately needed assistance to start new lives in safer places. For example, the Kalapi community in Taitung County has been relocated by the Japanese and ROC governments to a total of nine times, eventually to a valley where a river went through the village. In Typhoon Morakot, the village was flooded by the

Community: Sacred Land of Atayal Tribal Origin and Migration of the Masitoban Community], 10 INDIGENOUS PEOPLES DOCUMENTS (原住民族文獻) 18, 23-24 (2013).

rising river water. To avoid further disaster damage, the Kalapi people were eager to relocate and soon reached an agreement on land zoning.¹⁴ On December 25, 2009, Kalapi and two other indigenous villages became the first group of areas designed as Special Zones after the typhoon.¹⁵

While many indigenous communities relocated after Typhoon Morakot, the examples indicate that relocation and other adaptive strategies should not be implemented in a hurry after a disaster has occurred and caused harm. In a disaster situation, the government usually pursues recovery achievement, limiting options and pressuring affected people to accept the speediest one. Indeed, the Kucapungane indigenous people had been seeking assistance and possible relocation sites, but they were only relocated to Rinari after Typhoon Morakot struck their village. If the community had been relocated earlier, the community members might not have suffered great losses in the disaster. To prevent reckless relocation projects and disaster damage, relocation, as well as other strategies for mitigation and adaption, should be implemented before a disaster has taken place.

In times of calm, the government should investigate land conditions, assess disaster risks, and adopt different management measures according to the specific context of each case. If an area is subject to low disaster risk, local infrastructure may require only regular inspection and maintenance. If an area of land is very vulnerable, the government should work with local people

¹⁴ INDEPENDENT NEWS NET OF MORAKOT (莫拉克獨立新聞網), MISSING HOMES IN PERMANENT HOUSES: STORIES ABOUT PEOPLE AND PERMANENT HOUSES, THREE YEARS SINCE THE DISASTER OF TYPHOON MORAKOT (在永久屋裡想家: 莫拉克災後三年, “永久屋”與人的故事) 300-301 (2013); Yang Nian-xiang (楊念湘), Diyige “Teding Quyu” de Huading: Fushan Bula (第一個「特定區域」的劃定—富山部落) [Designation of the First “Special Zone”: Kalapi Community], available at <http://museum02.digitalarchives.tw/teldap/2010/88news/www.88news.org/index1913.html?p=1233> (last visited Dec. 10, 2018).

¹⁵ See HANGZHENG YUAN GONGBAO (行政院公報) [EXECUTIVE YUAN GAZETTE], Vol. 15: 253, 37270-37276 (2009), available at http://morakotdatabase.nstm.gov.tw/download-88flood.www.gov.tw/special_list/981225 臺東縣大武鄉富山部落、屏東縣牡丹鄉中間路部落及高士村高士部落.pdf.

to find alternatives, including but not limited to relocation. During this process, indigenous people should have sufficient information about, involvement in, and determination over decisions about their land. The incorporation of both scientific methods and traditional knowledge is essential to properly evaluate disaster risk and consider strategies for mitigation and adaptation. Moreover, as relocation not only changes the physical space but also has huge economic, cultural, and social influence on the relocated people, the government should consider possible problems associated with displacement in advance and provide assistance to those who decide to relocate.

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Appendix 1 Indigenous Peoples Basic Law

(Enacted in 2005; amended in February, June, and December 2015, and 2018)

Article 1 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.

Article 2 Definitions:

1. Indigenous peoples: refer to the traditional peoples who have inhabited in Taiwan and are subject to the state's jurisdiction, including Amis tribe, Atayal tribe, Paiwan tribe, Bunun tribe, Puyuma tribe, Rukai tribe, Tsou tribe, Saisiyat tribe, Yami tribe, Tsao tribe, Kavalan tribe, Taroko tribe and any other tribes who regard themselves as indigenous peoples and obtain the approval of the central indigenous authority upon application.
2. Indigenous person: refers to any individual who is a member of any of indigenous peoples.
3. Indigenous peoples' regions: refer to areas approved by the Executive Yuan upon application made by the central indigenous authority where indigenous peoples have traditionally inhabited, featuring indigenous history and cultural characteristics.
4. Tribe: refers to a group of indigenous persons who form a community by living together in specific areas of the indigenous peoples' regions and following the traditional norms with the approval of the central indigenous authority.
5. Indigenous land: refers to the traditional territories and reservation land of indigenous peoples.

Article 2-1 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 a resolution and related matters of the Tribal Council.

- Article 3 For the purpose of reviewing and coordinating matters related to this Law, the Executive Yuan shall establish a promotion committee which shall be called by the Premier.
- Two thirds of the afore-mentioned promotion committee members shall comprise members of indigenous tribes in accordance with their respective proportions. The organization bylaws of the committee shall be made by the Executive Yuan.
- Article 4 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.
- Article 5 The state shall provide sufficient resources and allocate abundant 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 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 dispute.
- Article 7 The government shall protect indigenous peoples' rights to education by upholding the principles of versatility, equality, and reverence in accordance with the will of indigenous peoples. The relevant issues shall be stipulated by laws.
- Article 8 Governments of municipal cities and counties where indigenous peoples' regions are located shall establish specialized units in charge of indigenous affairs. Other county (city) governments may establish specialized units or have specialized personnel in charge of indigenous affairs.
- Heads of agencies in charge of indigenous affairs in the preceding paragraph shall be indigenous persons.
- Article 9 The government shall establish special unit responsible for indigenous language researches and indigenous language proficiency evaluation system in order to actively engage in the promotion of indigenous language development.

The government shall provide preferential measures for indigenous peoples or hold special civil service examinations designed for indigenous peoples where under the relevant laws and regulations may require beneficiaries or candidates to pass the afore-mentioned evaluation or have proficiency in indigenous language.

The development of indigenous language shall be stipulated by law.

Article 10 The government shall keep and maintain indigenous cultures, give guidance to the cultural industry and incubate professional talent.

Article 11 The government shall restore the traditional names of indigenous tribes, rivers and mountains in indigenous peoples' regions in accordance with the will of indigenous peoples.

Article 12 The government shall protect indigenous peoples' rights and access to broadcast and media, establish indigenous peoples' cultural affairs foundation and formulate plans to establish indigenous-language broadcast media and institutions exclusively for indigenous peoples.

Issues related to the establishment of the afore-mentioned foundation shall be stipulated by laws.

Article 13 The government shall protect indigenous peoples' traditional biological diversity knowledge and intellectual creations, and promote the development thereof. The related issues shall be provided for by the laws.

Article 14 The government shall formulate economic policies for indigenous peoples and give guidance on conservation and utilization of natural resources for the purpose of developing indigenous economy in accordance with the will of indigenous peoples and characteristics of environmental resources.

Article 15 The government shall generously allocate budget for indigenous peoples and supervise utilities providers to actively improve transportation, post, telecommunication, irrigation works, tourism and other public construction in indigenous peoples' region.

For the purpose of implementing the affairs as set out in the preceding paragraph, the government may establish construction funds of indigenous peoples' regions. The fund's utilization procedure shall be stipulated by laws.

Article 16 The government shall formulate indigenous housing policies, give guidance to indigenous persons to construct, purchase or lease dwellings, and actively promote the tribal renewal project.

Article 17 The government shall protect indigenous peoples' employment rights, provide vocational trainings which are suitable for the conditions and characteristics of indigenous society, give guidance to indigenous persons to obtain professional qualifications and technician certificates, build complete indigenous employment service network to protect their employment opportunities and fair remuneration and promotion.

The protection of indigenous peoples' employment rights shall be provided for bylaws.

Article 18 The government shall establish indigenous peoples' development fund for developing indigenous peoples' economy , assisting indigenous businesses, and planning, implementing, incentivizing, managing, leasing, selling, constructing, purchasing, and renovating dwellings. The sources of the fund shall include budget allocated by the central government in accordance with the budget procedure, revenues of leasing or selling dwellings and related matters, compensations made to indigenous peoples' land, reparation, revenues, funds distributed in accordance with other relevant laws and regulations as well as other revenues.

Article 19 Indigenous persons may undertake the following non-profit seeking activities in indigenous peoples' regions and the sea areas be promulgated by the central indigenous competent authority:

1. Hunting wild animals.
2. Collecting wild plants and fungus.
3. Collecting minerals, rocks and soils.
4. Utilizing water resources.

The central indigenous competent authority shall consult with the central relevant authority before promulgate the sea areas in the preceding paragraph.

The activities in Paragraph 1 can only be conducted for traditional culture, ritual or self-consumption.

Article 20 The government recognizes indigenous peoples' rights to land and natural resources. The government shall establish an indigenous peoples' land investigation and management committee 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.

Article 21 When governments or private parties engage in land development, resource utilization, ecology conservation and academic research in indigenous land, tribe and their adjoin-land which owned by governments, they shall consult and obtain consent by indigenous peoples or tribes, even their participation, and share benefits with indigenous people.

In the event that the governments, laws or regulations impose restrictions on indigenous peoples' utilization of the land in preceding paragraph and natural resources, the government shall consult with indigenous peoples, tribes or indigenous people and obtain their consent; the competent authority shall allocate ample funding in their budget to compensate their damage by restrictions. A fixed proportion of revenues generated in accordance with the preceding two paragraphs shall be allocated to the indigenous peoples' development fund to serve as returns or compensations.

The central indigenous competent authority shall stipulate the regulations for delimiting the area of indigenous land, tribe and their adjoin-land which owned by governments, procedures to consult, to obtain consent by indigenous peoples or tribes and to participate and compensation to their damage by restrictions in preceding three paragraph.

Article 22 The government shall obtain consent from the locally affected indigenous peoples and formulate a common management mechanism before establishing national parks, national scenery, forest district, ecological protection zone, recreation zone and other resource management institutions. The regulations shall be made by the central relevant authority jointly with the central indigenous affairs authority.

- Article 23 The government shall respect indigenous peoples' rights to choose their life style, customs, clothing, modes of social and economic institutions, methods of resource utilization and types of land ownership and management.
- Article 24 The government shall formulate public health and medical policies for indigenous peoples in accordance with the characteristics of indigenous peoples, incorporate indigenous peoples' regions into the national medical network, implement indigenous peoples' health care, establish comprehensive and long-term health care, emergency care and evacuation system, and protect indigenous peoples' health and physical safety.
- The government shall respect the traditional medicine and health methods of indigenous peoples and undertake researches and promotions.
- The government shall allocate ample funding in their budget to subsidize indigenous people who need medical care, emergency care and evacuation to the nearest hospital or social welfare institutions; the regulations for subsidy the traffic-cost for long-term health care, medical care or social welfare resource utilization shall be stipulated by the central competent authority.
- Article 25 The government shall establish a natural disaster prevention and relief system in indigenous peoples' regions and natural disaster prevention priority zones to protect physical and property safety of indigenous peoples.
- Article 26 The government shall actively implement social welfare for indigenous peoples, undertake planning to establish indigenous peoples' social security system and give special protection to the rights of indigenous children as well as women and mentally or physically disabled indigenous persons.
- The government may provide subsidies for those indigenous persons who lack resources to participate in the social insurance scheme or use medical and welfare resources.
- Article 27 The government shall actively promote savings and cooperative businesses by indigenous peoples, give guidance to the management thereof, and grant them with preferential tax measures.
- Article 28 The government shall provide protection and assistance for indigenous persons living outside indigenous peoples' regions in respect of their health,

accommodation, finance, education, caring, employment, medical care and adaptation to the society.

Article 29 In order to protect the dignity and fundamental human rights of indigenous peoples, the government shall provide for a separate chapter devoted to indigenous peoples' human rights in the national human rights legislations.

Article 30 The government shall respect tribal languages, traditional customs, cultures and values of indigenous peoples in dealing with indigenous affairs, making laws or implementing judicial and administration remedial procedures, notarization, mediation, arbitration or any other similar procedure for the purpose of protecting the lawful rights of indigenous peoples. In the event that an indigenous person does not understand the Chinese language, an interpreter who speaks the tribal language shall be provided.

For the purpose of protecting indigenous peoples' rights and access to the judiciary, indigenous peoples' court or tribunal may be established.

Article 31 The government may not store toxic materials in indigenous peoples' regions in contrary to the will of indigenous peoples.

Article 32 The government may not forcefully evict indigenous persons from their land, except in the case of imminent and obvious danger.

Indigenous persons shall be properly accommodated and compensated for losses suffered as a result of forced eviction as set out in the preceding paragraph.

Article 33 The government shall actively promote exchanges and cooperation between indigenous peoples and international indigenous peoples and ethnic minorities in economical, social, political, cultural, religious, academic and ecological issues.

Article 34 The relevant authority shall amend, make or repeal relevant regulations in accordance with the principles of this law within three years from its effectiveness. The central indigenous competent authority shall interpret and implement the relevant laws and regulations, which do not be amend, made or repealed in the preceding paragraph with the competent authority by the principle of this law.

Article 35 This law takes effect upon promulgation.

Appendix 2 Special Act For Post-Typhoon Morakot Disaster Reconstruction

(Enacted in August 2009; amended in December 2009 and 2011; abrogated in 2014)

- Article 1 This Special Act is duly enacted in an attempt to help proceed with Post-Typhoon Morakot (hereinafter referred to as the subject Typhoon) disaster reconstruction in a safe, effective and prompt manner.
- Any matters insufficiently provided for herein shall be subject to the Disaster Prevention and Protection Act and other laws and ordinances concerned. Where other laws and ordinances concerned prove more optimal than this Special Act in the post-Morakot disaster reconstruction, those optimal laws and regulations shall apply. In the event that a region under reconstruction lies in an area where aboriginal (indigenous) people reside, the reconstruction shall be, in addition to the aforementioned act, duly handled in accordance with provisions concerned as set forth under the Basic Law for Indigenous Peoples.
- Article 2 The post-Morakot disaster reconstruction shall be human-oriented, focusing on helping to restore normal lifestyles. The post-Morakot disaster reconstruction teams shall honor characteristics of diverse and multiple cultures, assure hands-on participation by the local communities and shall, meanwhile, carefully maintain the security of national territories and sound protection of environmental resources.
- Article 3 The term “affected areas” as set forth herein denotes the areas devastated by Morakot. The Executive Yuan (the Cabinet) shall issue official announcement concerning the scope of the affected areas.
- Article 4 To implement the post-Morakot disaster reconstruction, the Post-Morakot Disaster Reconstruction Council shall be duly established under the Executive Yuan to be responsible for coordination, review, policymaking, implementation and supervision of the post-Morakot disaster reconstruction issues. The Council has one convener and one deputy convener who shall be concurrently served by the Premier and Vice Premier. The Council has 33–37 Council members to be named by the Convener from among the Executive Yuan (Cabinet) ministers without portfolio, heads of the relevant authorities, municipal or county (city) governments, scholars and experts to serve the post either on a full-time or concurrent basis.

Among the Council members, the representatives appointed among victims and aboriginal people shall not be less than one-fifth.

The organizational chart of the reconstruction implementation committees at local government level shall be fixed by the local governments respectively.

For the Special Act, the implementing authorities at central government level shall be the competent authorities in charge of the target business in the Central Government. The local level implementing authorities shall be the municipal government, counties, and city government.

For implementation of this Special Act, the Disaster Prevention and Protection Act and other laws and ordinances concerned, the implementing authorities may consign or entrust other authorities (organizations) or juristic (corporate) persons to perform the task of implementation.

Article 5 The central competent authorities shall, after the Special Statute goes into effect, provide the Post-Morakot Disaster Reconstruction Plan. The contents of the Plan shall include the reconstruction of homelands, reconstruction of facilities, reconstruction of industries, restoring of lifestyle, and reconstruction of culture exactly in accordance with the principle of preservation and restoration of the national territory.

The funding required for the relevant reconstruction projects shall be budgeted by the Executive Yuan (the Cabinet) in the amounts as actually required.

Article 6 For implementation of this Special Act and Disaster Prevention and Protection Act, the Central Government shall obtain financial sources in accordance with the following principles:

1. The authorities concerned shall, within the scope of the aggregate budget, preferentially budget funds for victim rescue, emergency rescue and restoration programs under the principle of arranging funds from less urgent needs to urgent needs, exempt from the restrictions set forth under Articles 62 and 63 of the Budget Act.
2. Extra funds may be duly budgeted within the limit of NT\$120 billion. The required funds may be obtained by borrowing exempt from the restriction of

the maximum limit of annual borrowing, The term “” as set forth herein denotes Article IV, Paragraph V of The Public Debt Act.

3. The funds required for the unfulfilled projects upon expiry of implementation of the Special Act shall be duly provided under the annual general budget.

The extraordinary budget provided under Subparagraph II of the preceding paragraph is exempted from the restriction of Article 23 of the Budget Act which bans the use of the funds as routine expenditure, and also exempted from the restriction set forth under Articles 30, 37 of the Financial Revenues & Expenditure Division Act which bans the use of the funds to subsidize local issues and fund burdens, and is, as well, exempted from the restriction set forth under Article 76 of the Local Government Act in the procedures to act for others and the provision for fund burdens.

When a local level authority implements this Special Statute and matters under the Disaster Prevention and Protection Act, the Central Government may grant subsidy based on the actual need. The implementing authority in the Central Government may, as well, permit the subsidized local level authority to implement the tasks on the “payments or receipts on behalf of others” basis.

To meet emergency needs in such tasks in disaster rescue and reconstruction, the implementing authority in the Central Government may, after reporting to and obtaining approval from the Executive Yuan (the Cabinet), make a partial payment in advance until the statutory procedures for the extraordinary budget under Paragraph I, Subparagraph II are completed.

Article 7

In the event that an affected house is officially identified by the government to have been damaged to an unusable level and where the existing loaner bank takes over that house and the building lot, the Ministry of the Interior may take over the balance of the current loan for the remaining loan period and grant interest rate subsidy within the maximum of 2% per annum. If the land in that case has not been destroyed, the government will bear the balance of the loan and obtain the mortgage. The scope, method, procedures of interest subsidy, identification of the affected house and the determination of unusable mentioned in the preceding paragraph and

other rules to be complied with shall be duly fixed by the Ministry of the Interior in consultation with other government authorities.

Where a financial institution (bank) takes over and disposes of the house or land set forth under Paragraph I, it is exempt from the restrictions set forth under Articles 75, 76 of the Banking Act and Article 146~2 of the Insurance Act.

For various loans granted and credit cards used by victims before the Morakot disaster, the financial institutions may extend or postpone the time limits for principals and payable sums and may exempt the interest accruing during the extended period and which shall be subsidized by the government.

The scope of subsidy, period of extension, operating procedures and regulations for other issues to be complied with shall be fixed by the Financial Supervisory Commission, Executive Yuan in concert with relevant authorities.

In the event that the duration of a loan exceeds thirty years due to the extension mentioned in the preceding paragraph, that case is exempted from the restriction set forth under Article 38 of the Banking Act.

Article 8 For rescue of flood victims due to a flood disaster, the target beneficiaries for rescue shall be the number of households actually affected, free from the restriction of one doorplate (nameplate) for each household. The rescue grants shall be based on the flood disaster rescue criteria. A household subject to a flood over 50 cm shall be granted NT\$ 20,000. Additionally, the financial foundation established by the government will grant another NT \$20,000 rescue grant per household.

Article 9 The Central Government shall set up life reconstruction service centers in the affected areas (villages, townships, cities) to provide services in living, psychology, schooling, employment and other fringe benefits and welfare.
The Implementation Regulations mentioned in the preceding paragraph shall be enacted by the competent authority of the Central Government.

Article 10 In the event that a National Health Insurance Insured (Insurant) is affected by the Morakot typhoon, his or her insurance premium, deductible for medical expenses and ordinary meals and lodging fares incurred within the specified time limit shall be paid by the government. The qualification requirements, terms, duration and

other regulations to be complied with shall be enacted by the Department of Health, Executive Yuan.

Article 11 In the event that a Farmer Health Insurance Insured (Insurant) and/or National Annuity Insurance Insured (Insurant) is (are) affected by the Morakot typhoon, the insurance premium payable by him or her or them within the specified period after the typhoon shall be paid by the government. The qualification requirements, terms, duration and other regulations to be complied with shall be enacted by the Ministry of the Interior.

Article 12 In the event that a Labor Insurance Insured (Insurant) and/or Employment Insurance Insured (Insurant) is (are) affected by the Morakot typhoon, the insurance premium payable by him or her or them within the specified period after the typhoon shall be paid by the government.

In the event that a Labor Insurance Insured (Insurant) is injured or diseased due to the typhoon, he or she may apply for injury/disease insurance benefit. The fund so required shall be paid by the government.

The qualification requirements, terms for application for the insurance benefits, amounts of payment, duration of payment and other regulations to be complied with as mentioned in the two preceding paragraphs shall be enacted by the Council of Labor Affairs of the Executive Yuan.

Article 13 The competent authorities in charge of labor affairs in the municipalities and counties (cities) shall submit the information of the unemployed people in the affected areas to the local government employment service organizations as the grounds for recommendation for employment or arrangement of occupational educational & training programs.

The unemployed people in the affected areas shall duly register themselves with the government employment service organizations for employment solicitation. The unemployed people who are not recommended for employment or arranged for occupational educational & training programs after having completed employment registry with the government establishment employment service organizations may be recommended to engage in temporary employment in the government authorities (organizations) or nonprofit organizations (hereinafter collectively referred to as

employer units) and be paid with a temporary allowance. In such a case, the provisions set forth in the Labor Standards Law , Employment Insurance Act and Labor Pension Act are not applicable.

The qualification requirements for unemployed people, duration of temporary work, terms to apply for job allowance, duration, amount thereof and other regulations to be complied with as mentioned in the preceding paragraph shall be enacted by the Council of Labor Affairs of the Executive Yuan.

The eligibility of the unemployed people for social welfare and insurance shall remain unaffected by the application for a temporary working allowance.

Article 14 The employer units shall purchase labor insurance and national health insurance for the people hired in Paragraph II of the preceding Article for the hiring period. If such people are unqualified for labor insurance, the employer units shall purchase other safety insurance policies or accident risk institution for such people. The insurance premium for the insurance policies mentioned in the preceding paragraph shall be paid by the Central Government.

In the event that the people hired in accordance with Paragraph II of the preceding Article have been laid off in accordance with the Labor Insurance Act or have withdrawn from the insurance during the period of occupation-oriented calamity in accordance with the Labor Protection Act before the employer units purchase the said insurance for them and, through their initial willingness, intend to be continually insured for labor insurance, such people may be continually insured for labor insurance in the capacity of laid-off people or occupation-oriented calamity victims until they meet the qualification requirements for elderly pension.

Article 15 The contractors awarded the reconstruction projects for the post-typhoon Morakot disaster shall preferentially hire the unemployed people in the affected areas. The government should grant incentive awards to such contractors who preferentially hire such unemployed people.

In the event that a contractor awarded a reconstruction project for the post-typhoon Morakot disaster mentioned in the preceding paragraph refuses to preferentially hire the unemployed people in the affected areas without a justifiable reason, it shall forfeit the solicitation permit, hiring permit, employment extension permit for

its application for foreign workers under Article 46, Paragraph 1, Subparagraph 10 of the Employment Service Act based on the number of people it refuses to hire, or have its solicitation permit or hiring permit revoked or nullified either in whole or in part within five years starting from the date on which the contractor refuses to hire.

The qualification requirements of employers, period of incentive awards, terms, duration and the number set forth under Paragraph I as well as other regulations to be complied with shall be enacted by the Council of Labor Affairs, Executive Yuan.

Article 16 (Deleted)

Article 17 The various rescue aids, consolation fees or temporary working allowance received by the residents in the affected areas from the government or non-government authorities or organizations may not be counted as part of the aggregate individual income for levy of income tax.

The land and buildings in the affected areas consistent with specified requirements may be exempted from house tax and land value tax.

The specified requirements and other regulations concerned mentioned in the preceding paragraph shall be fixed by the Ministry of Finance.

The rescue aids, consolation fees or temporary working allowance mentioned in the first paragraph shall not be taken as a target for seizure, offset, collateral or compulsory enforcement.

Article 18 In the event that the farmland, fish ponds or other agriculture-related facilities used as the collateral to financial institutions for loans are damaged or destroyed either in whole or in part, such collateral may be taken over by the financial institution based on the remaining balance of the loan.

In the event that a financial institution takes over the collateral in accordance with the preceding paragraph, the government shall grant subsidy to such financial institution within the maximum limit of 80% of the amount so taken over. The scope, method, procedures of the subsidy for the collateral so taken over and other regulations to be complied with shall be enacted by the Council of Agriculture in consultation with the Financial Supervisory Commission, Executive Yuan.

Article 19 The implementing authorities of the Central Government level may bail out the industries or enterprises which run into difficulty in business operation due to the Morakot disaster.

For the identification of the industries or enterprises which run into difficulty in business operation mentioned in the preceding paragraph, the criteria of bailout measures and other regulations to be complied with shall be proposed by the implementing authorities of the Central Government and submitted to the Executive Yuan (the Cabinet) for approval.

In the event that an enterprise runs into difficulty in business operation due to the Morakot disaster, the principal and interest for the loans granted before the Morakot disaster may be, subject to consent by the financial institution, extended.

The duration of extension mentioned in the preceding paragraph shall have a maximum limit of one year in case of working capital and three years in case of capital financing loan.

For the loss in interest accruing during the period of accorded extension set forth under Paragraph III, the implementing authority of the Central Government shall subsidize the financial institution.

Where an enterprise obtains a loan from a financial institution within the scope of the restoration business operation plans in response to the Morakot disaster, the relevant credit guarantee fund may provide credit guarantee and may grant subsidy for the interest accruing out of the loan within the maximum limit of one year in case of working capital and three years in case of capital financing loan.

The credit guarantee mentioned in the preceding paragraph shall be 90% of the total. The affected enterprise may be exempted from the handling charge for the period of the said guarantee.

The scope of subsidy and operating procedures mentioned in the two preceding paragraphs shall be promulgated by the implementing authority of the Central Government.

A donation by a profit-seeking enterprise for rescue to the Morakot disaster victims and for reconstruction projects may be declared as expenses or losses of the year on

the income tax return, free from the restriction on amounts to which Article 36 of Income Tax Act is applicable.

Article 20

The contractors of reconstruction projects in an affected area shall duly respect the organization, culture and lifestyle of the local people and communities (tribes).

For the land in a affected area which is endangered or unlawfully used for construction, the Central Government, municipal or county (city) governments may, after reaching an accord with the original residents, classify such land as a special zone to restrict residences or may order that the local residents relocate their residences, or relocate entire villages, and may grant appropriate accommodation.

Where land is required to erect buildings to settle the affected people or for restriction of residences, or relocation of residences, villages may be expropriated and apply for appropriation of public land, free from the restriction set forth under Article 28 of the National Property Act, Article 25 of the Land Law and Regulations Governing Local Public Properties. In the event that the government has borne the balance of the loan in accordance with Article VII, such balance shall be deducted from the expropriated amount when the land is expropriated.

When the specific zone classified in an affected area under Paragraph II is subject to compulsory relocation of residences, or relocation of entire villages within the specified time limit, the land and land improvement buildings may be expropriated. In case of leasehold of public land, the lease agreement may be terminated and compensation shall be granted in accordance with the agreement or laws and ordinances concerned. In the event that the land proves to have borne residences or farming work but without leasehold, rescue aid may be granted for the above-ground improvements.

The land expropriated under Paragraph III may be exempted from the procedures for agreement and price haggling. If such land is obtained through purchase after negotiation, the right for preferential purchase is not applicable.

Upon implementation of expropriation, appropriation and purchase of land through accord under Paragraphs II, III and IV, the municipal or county (city) governments shall grant subsidy for rental, down payment for house purchase, interest for house loan, relocation fee and other fees necessary for settlement to the residents who

prove cooperative with the government policies within the specified time limit or the relocated residences.

The qualification requirements for subsidies, the amounts of subsidies, application procedures and other regulations to be complied with as mentioned in the preceding paragraph shall be enacted by the Ministry of the Interior.

The method to take charge of the measures, survey, change, utilization of the land required for settlement, pricing of houses relocated, allocation, payment and other regulations to be complied with shall be enacted by the Ministry of the Interior.

In the event that the owner of the land expropriated under Paragraph III has engaged in agriculture prior to expropriation, he may preferentially apply for leasehold when the land administration authority or a government corporation leases farmland.

Article 21

In the event that the land required to settle affected residents in the affected areas proves to be consistent with the environmental reservation policies in replacement of environmental impact statements, is within the specified scale and proves to be safe without any hazard as officially recognized by the authorities in charge of land utilization, ecology, environmental impact assessment, soil and water conservation engineering and water conservancy authorities in concerted surveys, the change and development of such land shall be free from restrictions of the Regional Plan Act, Urban Planning Act, National Park Law, Environmental Impact Assessment Act, Soil and Water Conservation Act and other laws and ordinances concerned. The qualification requirements for subsidies, the amounts of subsidies, application procedures and other regulations to be complied with as mentioned in the preceding paragraph shall be enacted by the Ministry of the Interior. The environmental reservation policies, the specified scale, principles to identify the safe conditions free of hazard, scope of exemption from legal restriction and other regulations to be complied with shall be enacted by the Ministry of the Interior.

In the event that the land mentioned in the preceding paragraph is owned by the government or a government owned corporation, the administration authority of the government land or the government owned corporation may provide the complimentary right to use the land to the government or the non-government units

accredited by the government to erect buildings to settle the affected people. The deed tax may be exempted from such land. The houses transferred to the affected people complimentary may be exempted from the individual income tax of the affected people.

Article 22 The government authorities of various levels, when implementing rebuilding or repair of the damaged water conservancy facilities which have been damaged by the Morakot disaster, may change the planned water channel lines, designed dike lines and set up facilities concerned, free from the restrictions set forth under Article 82 of the Water Act. The government authorities of various levels may duly amend and promulgate the regions of rivers based on the scope of the facilities mentioned in the preceding paragraph and may classify and promulgate the flood-hazard zones for the scope beyond the said river zones subject to flood hazard to restrict or prohibit use of the land within the flood-hazard zones. The matters of restriction, prohibition, level of control, removal or demolition, compensation of facilities and other regulations to be complied with shall be enacted by the Ministry of Economic Affairs.

Article 23 The government authorities of various levels, when implementing reconstruction of traffic, transportation and other public works in the affected areas, or reconstruction, construction, protection for electricity transmission circuits, may build cross-river makeshift bridges or makeshift roads, or rebuild, restore or remove existing buildings crossing a river channel or beneath water conservancy facilities, or dredge river channels, and may enjoy simplified administrative procedures to use the river regions as set forth under the Water Conservancy Act. The simplified procedures, review principles and other regulations to be complied with mentioned in the preceding paragraph shall be enacted by the Ministry of Economic Affairs in concert with the Ministry of Transportation & Communications.

Article 24 When the government authorities of various levels are in the process of restoring traffic and proceeding with reconstruction in the post-Morakot disaster period, such government authorities are free from the restrictions for land control and forest protection, and Article 12 of the Soil and Water Conservation Act for the water

resources, flood control engineering, water reservoir operation safety, river, wild stream dredging, clean-away, refill, temporary storage of the earthwork so used or incurred. The refill and temporary storage of the earthwork shall, nevertheless, still call for treatment of soil and water conservation and maintenance set forth under Article 8 of the Soil and Water Conservation Act. If such work involves river regions, approval from the competent authorities in charge of the target business shall be obtained. In the event that the spot where the earthwork is temporarily stored is within the area required for permanent storage after the typhoon disaster, the administrative procedures shall be duly completed afterward according to laws and ordinances concerned.

The soil and water conservation engineering for traffic restoration mentioned in the preceding paragraph shall be duly handled in accordance with Article XXV.

Article 25 Where the electricity transmission circuits or tap-water pipelines are built or installed and the traffic is rebuilt as the result of the Morakot disaster, the land may be used and reconstruction work based on the existing or projected routes undertaken in advance. In the event that the tower base, pipeline or road base has been washed away or could not be reconstructed within a short period of time, such facilities may be relocated for reconstruction, free from the restrictions set forth under Article 50 of the National Property Act, Articles 50, 51 of the Electricity Act. The acquisition of the land required for the projects is free from the restrictions set forth under Article 52 of the Urban Planning Act and Article 25 of the Land Act. In case of reconstruction work as mentioned in the preceding paragraph for which the Soil and Water Conservation Engineering Plan should be worked out beforehand in accordance with Articles 12 and 14 of the Soil and Water Conservation Act, a summary soil and water conservation declaration may be accepted as an alternative method of providing the soil and water conservation project. The competent authorities in charge of the subject enterprises shall be responsible for review and superintendence.

In the event that the authority needing to use land has an emergency need and use of public or private land or land improvements would inevitably delay and lead to critical damage to the public interest, such authority may first obtain consent from

the land owner for use before proceeding with the procedures supplementarily in accordance with the Land Compulsory Purchase Act, Land Act and National Property Act.

Article 26 When the government authorities of various levels proceed with an emergency reconstruction and an approved calamity prevention reconstruction project due to the Morakot disaster, emergency clean-away methods, facilities and spots for the planning or disposal of the calamity-related earthwork and river sludge shall remain free from the restrictions of the Environmental Impact Assessment Act.

In the event that the Morakot disaster leads to an inadequacy in storage, restoration, clean-away or disposal facilities which are likely to pollute or contaminate environment or human health, the Environmental Protection Authority of the Central Government level (i.e., Environmental Protection Administration (EPA)) may be exempt from the procedures of associating with other implementing authorities of the Central Government, other authorities concerned and reporting to the Executive Yuan (the Cabinet) for approval and may, instead, designate the waste clean-away method, facilities and locations in accordance with Article 8 of the Waste Disposal Act or may permit an increase in the monthly disposal volume as long as there is no increase in the equipment at the location and no increase in the previously approved volume.

In the event that pollution prevention facilities are damaged by the Morakot disaster which has made normal business operation impossible and led to inconsistency with environmental protection-related laws, an application may be lodged along with supporting certificates or corrective action (remedial measure) programs to the competent authority in charge of environmental protection within three months starting from enforcement of this Special Act. The competent authority in charge of environmental protection may grant a time limit for corrective action (remedial measure) within the maximum limit of six months which may, as necessary, be extended in response to an application. But an extension may be permitted only once. No penalty will be imposed during the period of corrective action (remedial measure).

During the period of corrective action (remedial measure) mentioned in the

preceding paragraph, the inspection declaration required under relevant environmental protection laws may be exempted. An enterprise designated and promulgated under Article 9 of the Soil and Groundwater Pollution Remediation Act which is shut down or suspended from business operation due to the Morakot disaster may be exempted from the measures under that Act.

Article 27 To prevent infectious pandemics in the affected areas, the Department of Health of the Executive Yuan (the Cabinet) will prepare vaccines, medicines, devices and other such vaccination and medical resources along with adequate medical professionals and may, as necessary, establish temporary medical service stations.

Article 28 For people missing amidst the Morakot disaster, the prosecution authorities may, in response to applications by inheritors, conduct investigation in detail and may issue death certificates if certain facts prove that such people have been dead without a body found. The application mentioned in the preceding paragraph shall be lodged within one year starting from enforcement of this Special Statute.

The missing people mentioned in Paragraph I are presumed to have been dead at the time as set forth in the death certificates.

In the event that a missing person proves to have survived, the prosecutor authority may revoke the death certificate in response to an application by the subject person himself or herself, the applicant mentioned in Paragraph I or his or her interested person, or upon the authority vested (*ex officio*).

In the event that the body of a missing person is found after the death certificate is issued, the prosecutor authority shall duly conduct examination of the body and issue an autopsy certificate and shall revoke the death certificate previously issued.

The provision set forth under Article 640 of the Code of Civil Procedure is applicable *mutatis mutandis* to the validity of the death certificate set forth in the two preceding paragraphs.

The provisions set forth in the four preceding paragraphs are applicable to any death certificate issued by the prosecutor authority under situations set forth in Paragraph I before this Article comes into enforcement.

Article 29 In the event that a reconstruction job proves unenforceable due to the requirements of various competent authorities in charge of the target business or local

government, the issue shall be duly handled according to the decision resolved by the Morakot Post-Disaster Reconstruction Council, Executive Yuan.

Article 30 This Special Act goes into effect on the date of promulgation and remains in effect for three years.

For the part not yet implemented upon expiry of the Special Act, the period of implementation may be extended as deemed appropriate by the Executive Yuan (the Cabinet). The period of extension shall not exceed the maximum limit of two years.