



Regarding the "JUDICIAL RECONCILIATION: Challenges and Opportunities" Discussion

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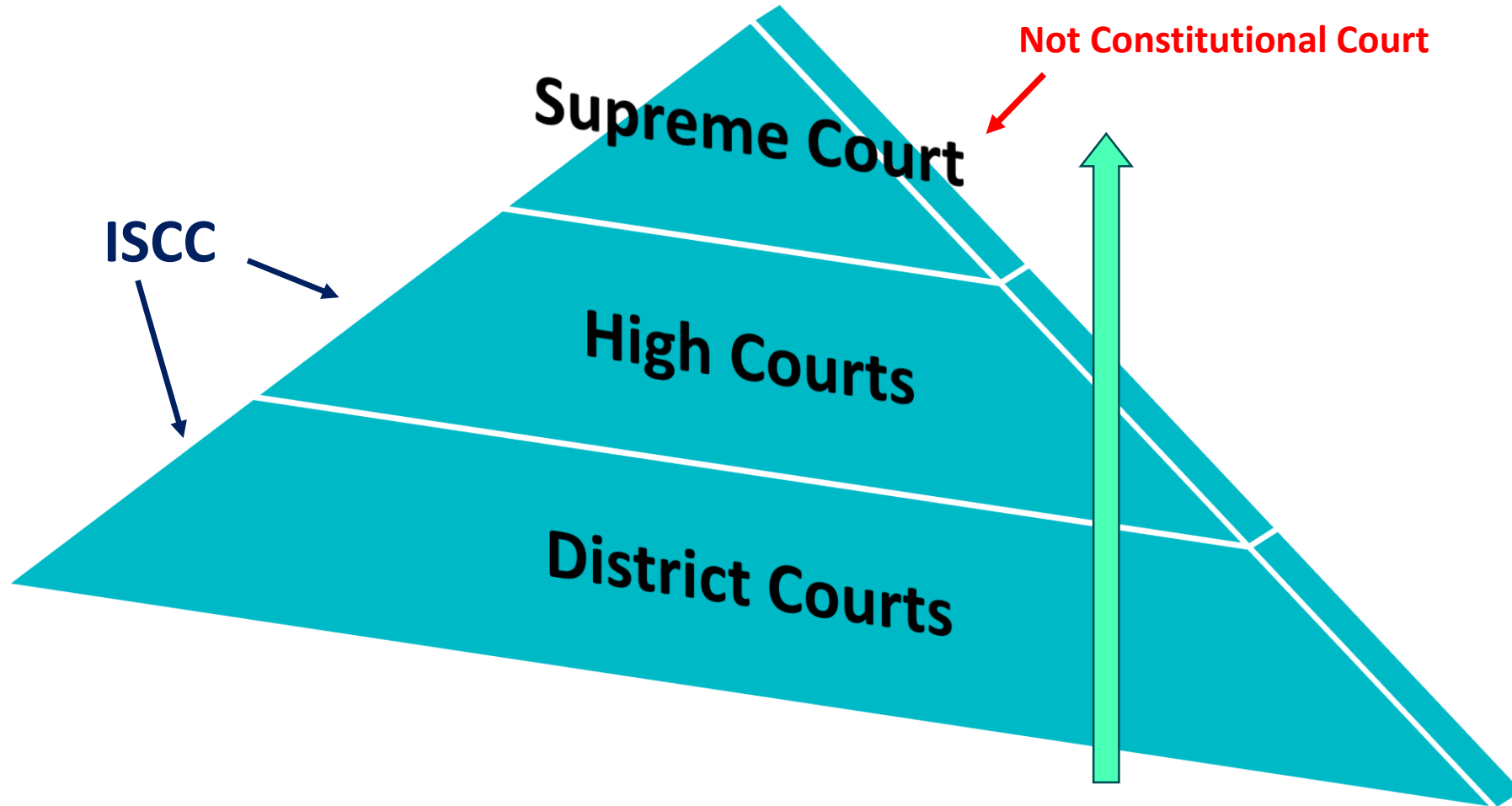
The differences between the court systems of Manitoba and Taiwan

Unlike Manitoba's approach of **judicial reconciliation**, Taiwan's court system, despite having established the **Indigenous Specialized Criminal Court (ISCC)** in 2013, primarily emphasizes **respecting indigenous cultures**.

1. **Reconciliation** ⇒ a relationship of equality between the state and indigenous peoples (IP)
2. **Respecting indigenous cultures** ⇒
 - adherence to the dominant Han and ROC frameworks, with exceptions made for indigenous traditions.
 - even though the Indigenous Historical Justice and Transitional Justice Committee, established in 2016 at the presidential office, emphasized the spirit of ethnic reconciliation, Taiwan's court system has not declared a commitment to judicial reform based on reconciliation.

Taiwan's court system and the specific jurisdictional area of my focus

■ The hierarchical structure of Taiwan's courts



Taiwan's court system and the specific jurisdictional area of my focus

- **concentrate on the Hualien District Court and High Court branch in Hualien County (= Hualien High Court)**

I believe the courts in Hualien County are the most appropriate to observe the interaction between indigenous peoples and the criminal justice system.

1. Hualien County has **the highest population of indigenous peoples in Taiwan**
2. The entire area of Hualien County is designated as an "**Indigenous Area**," noted for its **historical and cultural significance to indigenous peoples**.



Background of the Discussion

The backdrop for Taiwan's court system's handling of indigenous criminal cases is shaped by **legal norms enacted by the legislators to respect indigenous cultural practices.**

- ***Firearms, Ammunition, and Knives Control Act, Article 20 (2001)***
 - ➡ decriminalized the possession of homemade firearms by indigenous peoples
- ***Act on Wildlife Conservation, Article 21-1 (2004)***
- ***Forestry Act, Article 15, Section 4 (2004)***
 - ➡ decriminalize indigenous hunting of wildlife and the gathering of forest products
- ***The Indigenous Peoples Basic Law, Article 19 (2005)***
 - ➡ recognized the protection of non-commercial natural resource utilization by indigenous peoples

Preliminary conclusions of my discussion

1. **The courts tend to respect indigenous culture only in cases involving natural resource utilization that might apply decriminalization rules.**
Conversely, for natural resource utilization that does not qualify for these rules and other traditional indigenous customs not involving resource utilization, the courts do not show a tendency to respect indigenous culture.
2. Regarding decriminalizable natural resource utilization(i.e. hunting wildlife), **the court system begins to form a pattern recognizing cultural behaviors deemed to have "indigeneity" worthy of respect.**
3. **the behavioral model of the court system may lead to "cultural convergence,"** where only specific cultural forms are respected. Traditional indigenous customs not recognized by the court system are oppressed and may gradually disappear.

The court system’s partial respect for indigenous cultural practices

I will examine whether the court system respects indigenous culture by analyzing how it handles "**cultural defense (CD)**"

Table 1
Distribution of cases where cultural defense is asserted in trial court’s ISCC judgments (Hualien District Court, 2017-2023)

CASE TYPE	AMOUNT	PERCENTAGE
Drunk driving	71	56.35
Gathering forest production	15	11.90
Possessing hunting firearms	11	8.73
Gathering rocks, soil, minerals	11	8.73
Hunting wildlife	10	7.94
Bribery in elections	4	3.17
Using the lands Reserved for Indigenous People	4	3.17
SUM	126	

Table 1: the types of CD asserted in the Hualien District Court

1. XXX ➡ relate to natural resource utilization

2. XXX ➡ unrelated to natural resource utilization

■ The CD for Drunk Driving

→ socioeconomic disadvantages / inadequate public transportation infrastructure in indigenous areas

■ The CD for Bribery in Elections

→ traditional practices within indigenous tribes (i.e. offering betel nuts)

3. potentially eligible for decriminalization rules?

➡ XXX (Yes) / XXX (No)



Table 2

80.16% of the CD presented at the Hualien District Court were accepted by the judges.

Table 2
Distribution of cases with cultural defense applied in trial court’s ISC judgments
(Hualien District Court & Hualien High Court, 2017-2023)

CASE TYPE	AMOUNT	PERCENTAGE	APPELLATE UPHOLD RATE*
Drunk driving	71	70.30	0%
Gathering rocks, soil, minerals	8	7.92	38%
Hunting wildlife	7	6.93	100%
Possessing hunting firearms	6	5.94	100%
Gathering forest production	5	4.95	100%
Bribery in elections	2	1.98	0%
Using the lands Reserved for Indigenous People	2	1.98	100%
SUM	101		

*APPELLATE UPHOLD RATE: the percentage of cases in which the appellate court upholds the initial judgment that has been appealed.

- XXX ➡ the appellate uphold rate for district court decisions accepting CD is 0%.
- XXX ➡ the appellate uphold rate for district court decisions accepting CD is 100%.
- XXX ➡ 38% = the type of gathering activity could apply for decriminalization rules under the “Mineral Collection Regulations”

Table 3: three types of judgments within the Hualien court system

Table 3
Types of Verdicts in the Criminal Court System (Hualien District Court & Hualien High Court, 2017-2023)

	Natural Resource Utilization	Decriminalization Rule	Final Application of Cultural Defense
type1	Yes	Yes	Yes
type2	Yes	No	No
type3	No	No	No

- 1. Type1: the Hualien courts only accept CD when **the behavior of the indigenous defendant falls under the category of natural resource utilization and there is a legal decriminalization rule established for that category.**
- 2. Type2: even if the indigenous defendant's behavior is a type of natural resource utilization, **if no legal decriminalization rule is established for that behavior, the courts do not accept the CD.**
- 3. Type 3: when the behavior of the indigenous defendant does **not fall under the category of natural resource utilization**, the courts also **do not accept the CD.**

Finding and Implications ①

1. Although the establishment of the ISCC aims to respect indigenous culture, **the court system's respect for indigenous culture is evidently influenced by legislators** and shows only limited respect.
2. As Ruti Teitel has argued, **law serve as effective tools for driving transitional justice (TJ)**. In the pursuit of TJ within Taiwan's court system, this assertion may hold true and suggests a direction for policy development in Taiwan.
3. when the actions of an indigenous defendant are not related to natural resource utilization but **potentially conflict with the current national political system** (i.e. gift-giving customs conflicting with the electoral system), **the court system does not exhibit a respectful attitude towards such cultural practices.**

How the court system shapes forms of indigenous culture

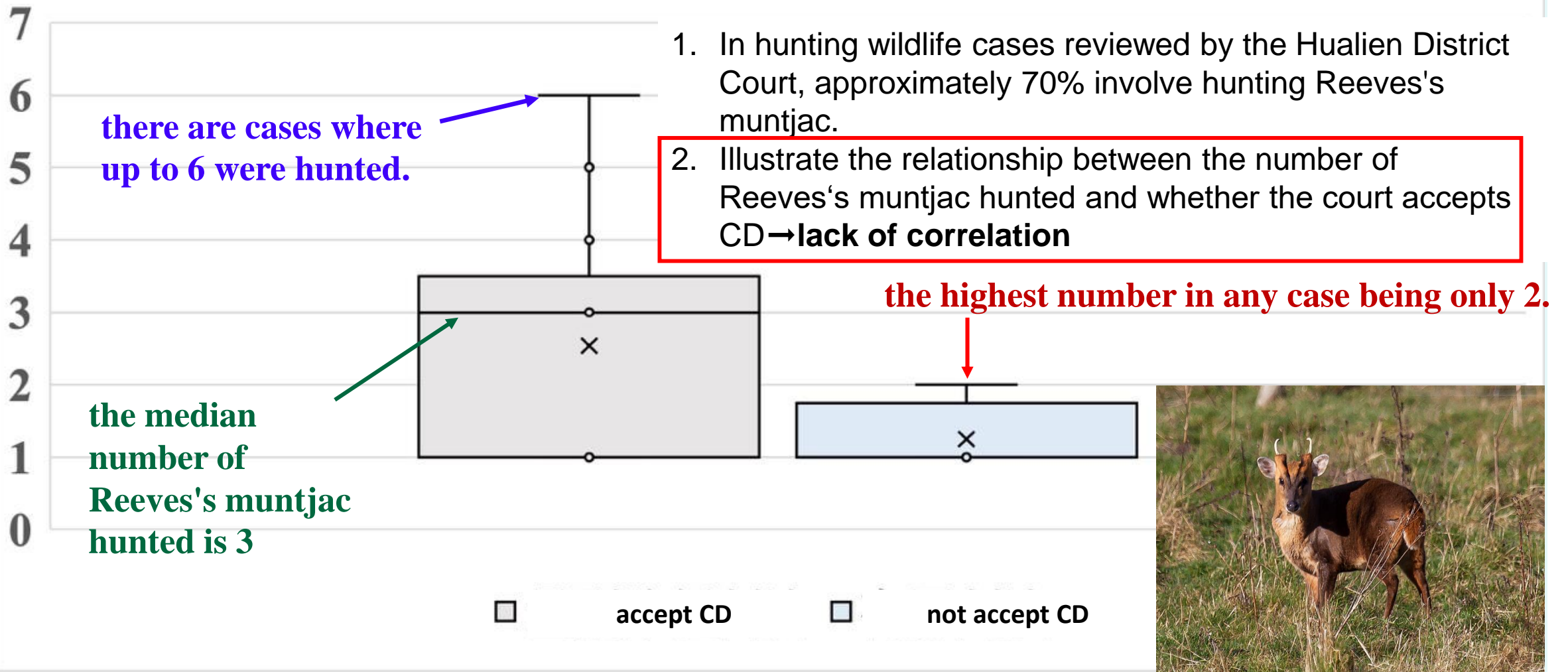
How the court system attempts to shape forms of indigenous culture that are recognized by the courts as having a “**indigeneity**” within the scope where decriminalization rules may apply.

1. *Act on Wildlife Conservation, Article 21-1*

When Taiwanese indigenous peoples hunt wildlife based on their **traditional culture** or for **ceremony** purposes, such hunting actions can be exempt from criminal liability.

2. What the court system considers hunting that conforms to “traditional culture”
 - ➡ the court system adopts two possible standards:
 - A. **types and quantities of wildlife hunted**
 - B. **purposes of the hunting**

Figure 1: Number of Reeves's muntjac hunted



Which factors can be considered key influences on the court's acceptance of CD ?

Both the type and quantity of wildlife hunted lack a statistically significant correlation with whether the court accepts CD.

III➡(= observations from Figure 1)
The court system does not base its decisions on the type and number of wildlife hunted when determining whether hunting activities are rooted in traditional culture and exhibit indigeneity.

Table 4: logistic regression model

Dependent variable: Judicial Application of CD (1 = Applied, 0 = Not Applied)	
Dependent Variable Name	Basic Logistic Regression Model
Target of Hunting(Reeves's muntjac)	-2.572 (1.959)
Target of Hunting(Other types of wildlife)	-2.115 (1.320)
Quantity of Hunted Wildlife	0.172 (0.467)
Hunting for Consumption	-2.840* (1.474)
Con.	4.212* (2.059)
Pseudo R ²	0.2107
N	25
Numbers without parentheses represent coefficients, while numbers in parentheses represent standard errors.	
*** p<0.001, ** p<0.01, * p<0.05, + p<0.1	

Which factors can be considered key influences on the court's acceptance of CD ?

"hunting for consumption" has a statistically significant association with the court's acceptance of CD.

⇒ judges are likely basing their decisions on whether the purpose of the indigenous defendant's hunting activity is for consumption, in determining whether to accept the defendant's CD.

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Finding and Implications ②

The court system views the indigenous practice of hunting wildlife for consumption as **an expression of traditional culture that embodies indigeneity.**

1. The court system shapes **a cultural construct where hunting for consumption is considered an authentic indigenous cultural practice**, while traditional indigenous customs that do not fit this construct are not respected by the court system (i.e. hunting for teade).
2. The court system shapes an **“accepted form of indigenous culture” that may differ from “the actual traditional customs of the indigenous peoples.”**

Conclusion

1. As the court system gradually shapes its understanding of indigenous culture, it actually reflects the phenomenon of **“cultural convergence.”**

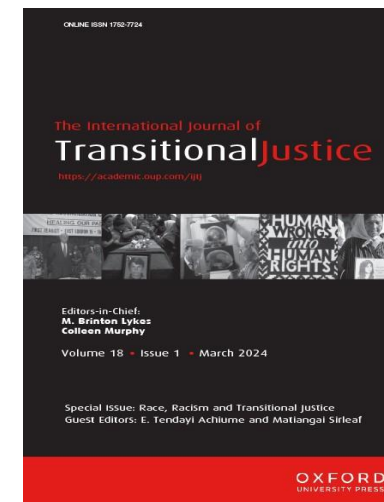
➡ the court system generally recognizes the applicability of CD in cases involving hunting wildlife for ritual or consumption purposes. Conversely, in cases outside of this type, such as hunting wildlife for trade, the court firmly rejects the assertion of CD.

➡ **even traditional customs that exist in reality may be criminalized if they are not understood by the courts as part of indigenous culture.**

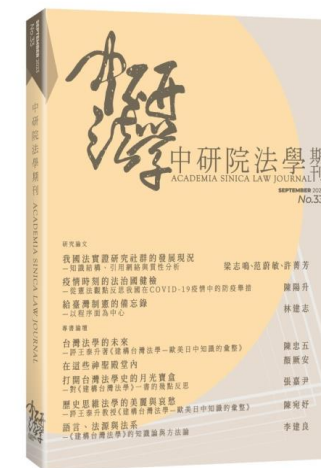
2. indigenous traditions not recognized and respected by the court may **disappear under the pressure of state criminal sanctions.**

➡ a problem arising from the Taiwanese court system not aiming for "reconciliation," but merely "respecting indigenous culture" in **exceptional cases.**

- Fan, Keng-Wei & Lin, Jin-Ru, **Eliminate Structural Injustices or Perpetuate Them: Indigenous Peoples and Transitional Justice in the Criminal Court System of Taiwan**, International Journal of Transitional Justice, ijae017 (2024, May)



- Fan, Keng-Wei & Lin, Jin-Ru, **A Preliminary Exploration of the Application and Significance of Cultural Defenses in Taiwan's Indigenous Criminal Cases: Empirical Legal Research in Hualien District Court**, Academia Sinica Law Journal (華語) (forthcoming)



Thank you for listening

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