WHEN WOULD THE INDIGENOUS BE INDIGENOUS?
A Self-Defining, Interest-Isolated, Multiculturalistic Approach to
Facilitate Recognition of the Taiwanese Ping-Pu

MING-HSI SUNG*

I. INTRODUCTION

II. OFFICIAL HESITATION IN THE ETHNIC RECOGNITION OF AN
UNIDENTIFIABLE ETHNICITY—THE PING-PU

III. GARNERING SUPPORT FOR ETHNIC RECOGNITION OF THE PING-PU:
A REVIEW OF INTERNATIONAL CASE STUDIES
A. The Mashpee Case—The Absurdity of Adopting
Objectivism
B. Ethnic Identification/Recognition in China: The Abuse of
a Subjectivistic Approach
C. The Métis Case—Political Compromise in Recognizing a
Mix-blood Ethnic Group by Treating Status Recognition
and Affirmative Benefits Separately
D. Lessons from International Experiences

IV. A SELF-DEFINING, INTEREST-ISOLATED, MULTICULTURALISTIC
APPROACH FOR ETHNIC RECOGNITION OF THE PING-PU

V. CONCLUSION

I. INTRODUCTION

Objective traits are the most easily identifiable criteria to
distinguish indigenous people from other nationals within a state.¹
Though widely adopted, the Objectivistic approach may be criticized for
its oversight of subjective identity and for the changeable and mutable
nature of objective criteria. For Taiwan’s indigenous peoples, the

* JSD Candidate, New York University School of Law; LLM, New York
University School of Law, 2001; LLM, National Chengchi University (Taiwan), 1994;
LLB, National Taiwan University, 1992. The author would like to express his
grateful to Professor Benedict Kingsbury of NYU, Professor Xiu-Che Lin of
Chengchi University, and Professors Ren-Kui Li and Chia-Yu Hu of Taiwan
University for their assistance in this paper. The author would also like to thank Paul
Easton (JD, WSRSL 2001), Kirsty Gover, NYU JSD Colloquium, James Yao and
editorial members of the Asian-Pacific Law & Policy Journal for their insightful
suggestions. For more background information about the Ping-Pu, please refer to
“The Hidden Reason for the Deadlock in the Achievement of Ethnic Recognition for
the Ping-Pu in Taiwan” in the International Journal of Minority and Group Rights,
Volume 11 (forthcoming).

¹ See infra Part III.A & IV for more detailed discussion of the different
theoretical approaches to ethnic identification.
Objectivist approach appears to be an official excuse employed by the government to prevent ethnic tension or conflict that might arise if an increased amount of Taiwan’s population suddenly qualified for indigenous affirmative programs and benefits.\textsuperscript{2} As a result of these restraints, ethnic recognition for the Ping-Pu—a culturally sinicized and genealogically hybridized ethnic group with relatively populous self-proclaimed members—has yet to become a reality. This is largely due to the difficulty of objectively identifying and distinguishing the Ping-Pu from non-indigenous peoples in Taiwan.\textsuperscript{3}

This paper argues in favor of ethnic recognition of the Ping-Pu using a self-defining, interest-isolated, multiculturalistic approach. By unraveling the underlying reasons for the government’s hesitation to recognize the Ping-Pu, this paper criticizes the unnecessary official obstacles facing the Ping-Pu’s efforts to achieve ethnic recognition. Selected international case studies evidence the practicability of recognition and justify an alternative approach to recognize the Ping-Pu.

Part II examines the underlying reasons for the government’s hesitation to recognize the Ping-Pu, namely its concern regarding potential interest-conflict and ethnic tension. The government’s emphasis on the difficulty of identifying those belonging to the Ping-Pu supports this reasoning, and suggests that the current Taiwanese government (as of May 2000) is facing further conflict between its political assertion of native Taiwanese identity and the risk of an ethnic conflict fueled by resource competition. Part III reviews three selected, relevant international case studies to decode several myths of indigenous policy making embraced by the Taiwanese government. Part IV advocates an alternative approach for necessary systematic reform to facilitate ethnic recognition of the Ping-Pu. Part V concludes with a look into recent developments in Taiwanese indigenous affairs and expects that the recent advance is just the first step toward recognizing the Ping-Pu.

II. OFFICIAL HESITATION IN THE ETHNIC RECOGNITION OF AN UNIDENTIFIABLE ETHNICITY—THE PING-PU

The question of precisely who constitutes the Ping-Pu has remained unanswered for centuries with only the vague and commonly

\textsuperscript{2} See infra Part II.

\textsuperscript{3} Because of historical and political complexities, it is difficult to find any distinct cultural trait among the Ping-Pu individuals. Moreover, due to long-term hybridization with the Han Chinese and lack of genetic research, a precise accounting of the Ping-Pu population is presently impossible. Conservative estimates indicate that there are more than three million Ping-Pu people in Taiwan. For more discussion of the complexity and ambiguity surrounding the Ping-Pu ethnicity see infra Part II.
accepted notion that members of the Ping-Pu are of Malayan origin, different from the Mongolian Han Chinese. The Ping-Pu are said to have lived in the coastal and plain areas of Taiwan and were the first to make contact with the Dutch in 1628. “Ping-pu” literally means “plain” in Chinese as well as in Taiwanese, though it has been disputed whether all Ping-Pu groups originated from the plains areas. At present Ping-Pu may denote aborigines living throughout Taiwan and does not refer to any specific or distinct indigenous group in Taiwan; it is merely a broad classification with no specialized ethnic meaning, similar to how the label of “Indian” has been used to categorize Native Americans. Nevertheless, the indigenous origin of the Ping-Pu is beyond doubt.

According to anthropological studies, there are around ten (sub-)ethnic groups categorized as Ping-Pu. An administrative estimate and definition of the Ping-Pu group, derived from a census registration, was established in 1935 by the Japanese colonial government to affect control in Taiwan. This has sometimes been mistaken as evidence of the existence and official recognition of the Ping-Pu. Rather the Chinese Nationalist (KMT) government, which succeeded the Japanese colonial establishment, unexpectedly deprived the Ping-Pu of their indigenous status in Taiwan when claiming their extinction due to

---


6 See DAVIDSON, supra note 4, at 580; MCGOVERN, supra note 4, at 103; MACKAY, supra note 4, at 93, 103. This is, however, a rough classification; not every ethnic group categorized as Ping-Pu lives in the plains of Taiwan. Id.


cultural assimilation and hybridization. Nevertheless, very few of the Ping-pu who migrated to other areas could still retain their indigenous status just because they had been miscategorized as members of officially recognized indigenous ethnic groups. It is said that the Ping-Pu’s tacit acceptance of the status quo can be inferred from their long held silence regarding this issue, though formal opposition would have been unimaginable under KMT governmental control.

Previous discourse under the KMT regime asserted that because most Ping-Pu ethnic groups had been culturally ‘trait-less’ and highly hybridized with the dominant Han people in Taiwan for hundreds of years, the Ping-Pu were indistinct and unidentifiable. This provided the Nationalist government with a means of thwarting Ping-Pu claims for ethnic recognition, using the Objectivism-based ethnic element approach, which requires certain objective ethnic traits to constitute an identifiable ethnic group. It would be undesirable for the current Taiwanese government to employ an Objectivistic approach concerning ethnic recognition. Rather the new government has been quite flexible already when interpreting the criteria for ethnic recognition.

The present Taiwan government favors the recognition of indigenous identity to distinguish and enhance “Taiwanese identity” for its own political objectives, claiming to support indigenous self-determination and respect for the indigenous ethnic will.

---


11 For example, it is widely recognized that very few cultural traits remain in the Thao, who are also widely hybridized. See LIN, supra note 10, at 40, 63.

12 During the Nationalist government period (1949-2000), there were 9 officially recognized indigenous ethnic groups in Taiwan: the Ami, Atayal, Bunun, Paiwan, Puyuma, Rukai, Saisiyat, Tao (Yami), and Tsou. From May 20, 2000, until present (as of March 23, 2004), the new Taiwan government, under the leadership of Chen-Shui Bian of the Democratic Progressive Party (DPP), has recognized three additional indigenous ethnic groups: the Thao, the Kavalan, and the Truku. For background information on Taiwan’s aborigines see http://www.nationmaster.com/encyclopedia/Taiwan-aborigine (last visited Mar. 23, 2004).
Regardless of the government’s motivations, under Taiwan’s present indigenous affirmative system, indigenous status and affirmative benefits are inalienable. Affirmative benefits are applied almost equally and without discretion provided the individual possesses a genealogically provable indigenous status—this standard has been adopted for nearly all relevant regulations.\(^{13}\) Enticed by indigenous affirmative interests, some Taiwanese try hard to reclaim their indigenous status.

Ethnic recognition of the Ping-Pu under the present legal system in Taiwan,\(^ {14}\) however, would grant indigenous status to a potentially huge number of people. These people would naturally be qualified to receive indigenous affirmative benefits. Sudden admittance of a sizable number of indigenous individuals, all intending to share these benefits, could lead to ethnic tension and conflict. Political concerns to this effect have, thus far, prevented the new Taiwan government from recognizing the Ping-Pu as an indigenous ethnic group.\(^ {15}\)

Even those who identify themselves as Ping-Pu comprehend this issue. In order to eliminate concerns of interest conflict, the Taiwan Ping-Pu Indigenous People Association (TPIPA), a group promoting the official recognition of the Ping-Pu in Taiwan, has declared that the


\(^{14}\) The Regulation for Identifying Indigenous People’s Ethnicity (Yuanzhumin Minzubie Rending Banfa), Article 4, states that indigenous people should register their ethnicities; and each of them can only register for one “officially recognized” ethnicity. As to ethnicity, Article 2 provides, “The term ethnicity herein refers to: Amis, Atayal, Paiwan, Bunun, Puyuma, Rukai, Tsou, Saisiat, Yami, Thao and other ethnicities certified by the Executive Yuan.” See EXECUTIVE YUAN, ORDINANCE NO. TAI-JIANG-TSU-TI 091002612 (June 12, 2002). Thus, official recognition of the Ping-Pu as an ethnic group could only be considered if individuals identifying themselves as Ping-Pu receive indigenous status under the present ethnic recognition system. This premise is insisted by the government in the draft of the Amended Regulation for Identifying Indigenous People’s Ethnicities (Article 4, Section 2). See draft available at http://www.apc.gov.tw (last visited Apr. 5, 2004).

\(^{15}\) The officially recognized registered indigenous population of Taiwan was calculated as 443,917, on January 30, 2004, by the Council of Indigenous Peoples of Taiwan’s Executive Yuan. See http://www.apc.gov.tw/upload/govinfo/aps/9301/aprp5123.htm (last visited Mar. 22, 2004). Sheng-Yi Lin, President of the Alliance of Taiwan Indigenous Cultures has estimated that 1.5 million people in Taiwan could claim to be of Ping-Pu origin. See Monique Chu, Pingpu People Want Recognition, TAIPEI TIMES, Mar. 16, 2000, at 2, available at http://www.taipeitimes.com/News/local/archives/2000/03/16/28003 (last visited Mar. 23, 2004). But unofficially some scholars estimate there could be at least three million people of Ping-Pu ethnicity in Taiwan among a total population of approximately 23 million.
Ping-Pu would give up their rights to affirmative benefits, which would otherwise be conferred to them upon official recognition of their indigenous status. This proclamation, however, is impractical under an indigenous affirmative system that inalienably grants indigenous benefits to those persons possessing official indigenous status. This mythical linkage between status and benefit inevitably leads to concerns about the crowd-out effect in affirmative benefits. Thus opposition from currently-recognized indigenous peoples of Taiwan would also be an awkward issue that the current government may not want to confront.

Inquiry into reasons for granting indigenous affirmative benefits will be necessary to support introduction of any reform to the present affirmative system in Taiwan as well as in resolving the issue of ethnic recognition of the Ping-Pu.

III. GARNERING SUPPORT FOR ETHNIC RECOGNITION OF THE PING-PU: A REVIEW OF INTERNATIONAL CASE STUDIES

Under present circumstances, given that the Ping-Pu are not objectively distinctive and due to concern over potential ethnic tension, recognition of the Ping-Pu should rely on a Subjectivistic approach accompanied by reform of the current indigenous laws and affirmative system. Should the new Taiwanese government come to embrace the Subjectivistic approach, three premises are necessary to discuss in advance to disconnect the granting of benefits from the recognition of indigenous status: the absurdity of Objectivism; the possibility of the abuse of Subjectivism if the present compulsory-indiscriminative system is still adopted; and the fact that the issue of indigenous affirmative


The Constitution of Taiwan does provide articles that emphasize indigenous “protection” relating to indigenous affirmative action. See generally TAIWAN CONST. available at http://www.oefre.unibe.ch/law/icl/tw00000_.html (last visited Mar. 13, 2004). In particular, Article 168 of the Constitution provides that: “The State shall accord to the various ethnic groups in the frontier regions legal protection of their status and shall give special assistance to their work in local self-government.” Id. Article 10 of the Additional Articles of the Constitution, amended in 2000, also provides that “[t]he State affirms cultural pluralism and shall actively preserve and foster the development of Indigenous languages and cultures.” In addition, “[t]he State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the aborigines.” TAIWAN CONST. (Additional Articles, amended 2000) art. 10, § 11-12. Moreover, according to Article 10, the State shall also guarantee and provide assistance and encouragement for Indigenous education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare, measures for which shall be established by law. Id. However, there is no article addressing the reason for those special benefits.
benefits could be disposed of separately from the granting of indigenous status. The following discussion will elucidate these arguments via investigation of three comparative cases: the tribal acknowledgement of the Mashpee in the United States; the experience of the abuse of the Subjectivistic practice in China; and the special treatment of the Métis in Canada.  

A. The Mashpee Case—The Absurdity of Adopting Objectivism

Due to the lack of an established, single consensus as to what constitutes an ethnicity this issue has been delineated into a tripartite system of theoretical approaches: Subjectivism, Objectivism, and Eclecticism. Subjectivism stresses the importance of the subjective factor, i.e. ethnic identity, in the formation of an ethnicity. In contrast, Objectivism equates ethnicity with shared cultural traits that are regarded as inalienably associated with a particular ethnic group of people, and

---

18 There are many background similarities between the ethnic recognition of the Ping-Pu and the tribal acknowledgement of Native Americans in the U.S. as well as the recognition of the Métis as an official indigenous people in Canada. More importantly, both Ping-Pu and Native American cultures are declining and the blood purity of these peoples is reducing. The number of Native American populations who know and use Native American languages has been drastically declining; and with a rate of one-in-three Native Americans marrying non-Native Americans, assimilation proceeds rapidly. See J. Milton Yinger, Ethnicity—Source of Strength? Source of Conflict? 42 (1994).

19 Max Weber, the first Western scholar claiming the dominance of subjective elements in the formation of an ethnicity, argued, “[W]e shall call ‘ethnic groups’ those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization and migration. It does not matter whether or not an objective blood relationship exists.” See Stephen Cornell & Douglas Hartmann, Ethnicity and Race: Making Identities in a Changing World 16 (1998). Fredrik Barth, following Weber’s theory, asserted that ethnicity is a subjective process of status identification. See Leo Despres, Toward a Theory of Ethnic Phenomena, in Ethnicity and Resource Competition in Plural Societies 190-191 (Leo Despres ed., 1975). See also Richard Jenkins, Rethinking Ethnicity—Arguments and Explorations 17-18 (1997). Jenkins argues ethnic identity is the most important factor in ethnic formation. It is the main criterion to distinguish ethnic members from others. Most important of all, he further indicated the common error in misconceiving ethnic traits which are enclosed in an ethnic group as the ethnic group itself. Jenkins asserts: “I urge us to focus the investigation on ‘the ethnic boundary that defines the group, not the cultural stuff that it encloses.’” Id. This approach has been the most powerful attack toward Objectivism. See generally Fredrik Barth, Introduction to Ethnic Groups and Boundaries: The Social Organization of Culture Difference 9, 13-16 (Fredrik Barth ed., Waveland Press 1998).

20 See generally Charles Keyes, Ethnic Change 3, 4-28 (1981) (proposing an Objectivistic theoretical approach to the study of ethnic change that takes into
thus, makes that group of people distinguishable from the society under which they have become subordinated. Eclecticism, however, argues that both objective elements and subjective ethnic identity are criteria to define an ethnicity, asserting that actual cultural distinction is irrelevant to the final conclusion—an approach closer to Subjectivism than Objectivism.  

The main defect of the Objectivistic approach is that it might include many non-ethnic groups who also share different extents of cultures. This mistake results from the misconception of treating cultural traits, the reflection of an ethnicity, as the ethnicity itself. With no concurrent criterion in selecting objective elements—and in interpreting those elements—Objectivism is criticized as an inconsistent theory, and a perpetuation of subjective bias. In spite of these critical comments, Objectivism has been a prevalent theory and is widely adopted in indigenous administration. The following discussion of account both the cultural interpretation of ethnicity as a primordial characteristic of identity and the social manipulation of ethnicity in the pursuit of objective interests).

21 Richard Schermerhorn adopts an eclectic approach and argues that an ethnic group is a “collectivity within a larger society having real or putative common ancestry, memories of shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood.” See RICHARD SCHERMERHORN, COMPARATIVE ETHNIC RELATIONS—A FRAMEWORK FOR THEORY AND RESEARCH 12 (1978). The symbolic elements that Schermerhorn provides are kinship patterns, geographical concentration, religious affiliation, language, and physical differences. But besides these symbolic elements, Schermerhorn also emphasizes the importance of the subjective factor, self-consciousness. He regards that ethnic groups are self-conscious populations who see themselves as a distinct group that varies from the majority society. However, unlike Objectivism, Eclecticism argues that actual cultural distinction is irrelevant. Though some cultural features might be regarded as the epitome of their peoplehood, it just means that such features frequently have more symbolic power than practical effect on group behaviors. The members of the ethnic group are not necessarily practitioners of distinct cultures. As a result, the cultural practices of an ethnic group may vary little from those prevalent in the society of which it is a part. Id. See also CORNELL & HARTMANN, supra note 19, at 19.

22 Fredrik Barth, thus, criticized Objectivism because “[D]ifferences between groups become differences in trait inventories; the attention is drawn to the analysis of cultures, not of ethnic organization.” He argued that “[T]he features that are taken into account are not the sum of ‘objective’ differences, but only those which the actors themselves regard as significant.” See BARTH, supra note 19, at 12.

23 See id. at 14.

24 For example, the Harvard Encyclopedia of American Ethnic Groups defines an ethnic group in effect as a group sharing cultural attributes. See CORNELL & HARTMANN, supra note 19, at 18. Some countries may also adopt this approach in their administration of ethnic/tribal recognition/acknowledgement. See also Guyora Binder & Robert Weisberg, The Critical Use of History: Cultural Criticism of Law, 49 STAN. L. REV. 1149, 1183 (1997).
the case of the Mashpee, a highly hybridized and culturally indistinctive Native American ethnic group similar to the Ping-Pu, focuses on this debate.

In *Mashpee Tribe v. Town of Mashpee*,\(^{25}\) the Native American community at Mashpee brought a suit to recover possession of tribal lands alienated from them in violation of the Indian Non-Intercourse Act,\(^{26}\) which prohibits the transfer of Native American tribal land to non-Native Americans without approval of the federal government. The Tribe claimed its lands had been taken without the required federal consent, while the defendant argued that since the plaintiffs were not a “tribe,” they were outside the protection of the Act and without standing to sue.\(^{27}\) The Mashpee were required by the Court to demonstrate their tribal existence in accordance with the narrow definition adopted by the U.S. Supreme Court in *Montoya v. United States* holding that: “By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”\(^{28}\) The Mashpee were, therefore, forced to define themselves according to what federal law stipulated, rather than what they actually were.

This Objectivistic Element Approach adopted by the Court brought great difficulty to the Mashpee’s quest for tribal acknowledgement. Based on their historical interaction with non-Native Americans, the Mashpee were comprised of dissident Native Americans, freed colored slaves, and some European ancestry.\(^{29}\) Because the Mashpee recognized that their survival depended upon conformity to the ways of the majority, they assimilated into and adopted many cultural patterns of the dominant American culture.\(^{30}\) Consequently, the Mashpee are a people of mixed lineages and cultures, against which the defendant argued the Mashpee’s lack of tribal status.\(^{31}\)


\(^{29}\) See **Vine Deloria, Jr.**, *Mashpee: The Story of Cape Cod’s Indian Town*, 74 AM. POL. SCI. REV. 1084, 1084 (1980).

\(^{30}\) *Id.*

\(^{31}\) The defendant argued to the all-white jury that, first, in claiming blood as a measure of identity, black intermarriage made the Mashpees’ proper racial identification black instead of Indian. Second, the trial court instructed the jury that
These factors attributed to the Mashpee’s failure in acquiring recognition as an Indian Tribe under the examination of the Objectivistic Element Approach.\(^{32}\)

The *Mashpee* judgment aroused much criticism, especially in two aspects: “a tribe defined by the court”\(^ {33}\) and the adoption of the Objectivistic Element Approach. Despite the fact that some scholars agree with the judgment,\(^ {34}\) even more regard this case as a miscarriage of justice and argue that many Native Americans interacted and intermarried with outsiders yet were able to preserve the core of their identity and culture,\(^ {35}\) thus criticizing the holdings in this case for the unwelcome persistence of the Objectivistic Element Approach that perceives the definition of a tribe imprecisely, and with the possible outcome of cultural imperialism.\(^ {36}\)

The court, therefore, interpreted Mashpee’s adaptation to the dominant culture, which was necessary for their survival as an independent people, as the proof that the Tribe had surrendered its identity. *See* Torres & Milun, *supra* note 28, at 650-51.

\(^{32}\) The difficulties which the Mashpee met under the Objectivistic Element Approach are listed as follows: (1) they had to show they were made up of a distinct race, problematic because there had been intermarriage over the years; (2) they had to show that they had a distinct political leadership, problematic because the tribal and town government had been intertwined for over a century; (3) they had to show they were socially and culturally distinct, problematic since the Mashpees had adopted substantial aspects of American material culture; and (4) they had to show that the Mashpees inhabited a particular territory, problematic as the Mashpees had first acquired title to their land with the help of an English missionary. *See* Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 Rutgers L. Rev. 91, 93 n.3 (2000) (citing Jo Carrillo, *Identity as Idiom: Mashpee Reconsidered*, 28 Ind. L. Rev. 511, 522 (1995)).


\(^{34}\) For example, Francis Hutchins adopts the position claiming that in deciding that the Mashpees were so assimilated as to fall outside the federal trust responsibility, the jury and the judges reached the proper conclusion. *See* Deloria, *supra* note 29, at 1084.

\(^{35}\) *See* Calloway, *supra* note 33, at 740.

\(^{36}\) Among them, James Clifford’s argument is representative. Clifford criticizes the Objectivistic Element Approach arguing that tribal identity should have no sine qua non or prerequisite. What the Native Americans conceived as a culture is only the “contingent mix of elements.” A group can lose “a central organ” and remain alive. Language, land, blood, leadership, religion, any of these specific elements can be replaced. *See* James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art* 338 (1988).
The indexes adopted by the Court, the so-called Montoya requirements, were abundant with exteriorly defined concepts that were entirely foreign to the Mashpee—and ignored the importance of interior notions reflecting the validity of tribal existence. The Court’s holding would inevitably force the Mashpee to demonstrate a ridiculous fact that they have an exotic (European) sense of tribal identity in order to obtain tribal acknowledgement, regardless of the well-documented fact that the Mashpee tribe has been occupying an identifiable territory for hundreds of years. The term “tribe” indicates a group of indigenous people who have structured their existence in a way that outsiders would recognize this group to be a “tribe.” Such limited interpretation of a tribe is less advantageous and ethnically meaningless for within-group people claiming tribal status. Consequently, scholars claim that a set of exteriorly imposed criteria could be applied only when it carries the same meaning as the insiders’ concepts do. However, when there is conflict between externally-imposed criteria and within-group concepts, the latter should prevail.

Moreover, adopting a set of exteriorly imposed criteria in

Accordingly, the definition of a tribe is a work of cultural relativism. Mutual respect and certain flexibility are necessary, although these traits are devoid in the present system of Indian tribal acknowledgement. For Clifford, through the Objectivistic Element Approach official recognition is just a process to create or imagine group identity, tradition, and history; however, it should not be the tribe itself. See Binder & Weisberg, supra note 24, at 1180. Moreover, Clifford also criticizes the exteriorly imposed criteria in defining a tribe. He condemns that the fetish over tribal purity was only European Caucasian discrimination. See id. at 1185.

Hence, it was unreasonable to deny the Mashpee’s tribal status despite the racial mixing since the Mashpee did not measure tribal membership according to “blood,” and their Indian identity remained paramount. The belief that any indigenous culture is discrete only when it remains “uncontaminated” by other cultures has been strongly attacked by James Clifford. See Torres & Milun, supra note 28, at 638. Some scholars following Clifford’s reasoning thus criticize the Objectivistic Element Approach as it is difficult to reflect the real tribal identity via this system. See e.g., Dan Gunter, The Technology of Tribalism: The Lehm Indians, Federal Recognition, and the Creation of Tribal Identity, 35 IDAHO L. REV. 85, 122-23 (1998).

37 See Torres & Milun, supra note 28, at 634.

38 See Gunter, supra note 36, at 108.

39 Under this reasoning a tribe would be incapable of self-definition. On the contrary, it must behave according to the criteria imposed by outsiders and request them to declare the tribe is indeed what it is claimed to be. It is unreasonable since what are tribally meaningful to the outsiders might be meaningless to the insiders, and vice versa. See Torres & Milun, supra note 28, at 655.

40 Thus if a set of exteriorly imposed criteria of definition will be adopted, “an observer must ask not only what categories are used to describe it, but also whether the categories adopted by the observer carry the same meaning to the observed.” Id. at 637.
defining a tribe may invariably lead to criticism of cultural hegemony at work. The axiom behind the Objectivistic Element Approach is the forced imposition of a conception of indigenous culture as conceived by non-Native Americans without paying consideration to the perspectives of Native Americans. Without due review of within-group perspectives, however, the elements of this approach are merely a generalization of manifold Native American cultures, and cannot adequately or justly reflect the diversity in Native American tribes. Thus, the Objectivistic Element Approach fails to recognize the verity of vast diverse Native American experiences. Assuming that there is “a pan-Indian culture by stressing the common elements among highly diverse tribes” is absurd—there is no single, prototypical notion of a “pan-Indian culture” that could adequately represent an array of diverse Native American peoples and experiences. The Court should not claim that the Mashpee can only be Native Americans via the current limited model. By claiming that cultural adaptation led to ethnic extinction, the Court unreasonably suggested that the Mashpee could not change nor develop, which not only would deprive the Mashpee of their right to develop and survive, but also, their access to all previous historical experiences of this group. As such, a definition and recognition undertaken by a hegemonic government through the application of an Objectivistic Element Approach inevitably results in a gap between the identity de jure and the ethnographic identity. Cultural hegemony is thus criticized as a form of disciplinary power imposed on Native Americans and goes against the fundamental guideline of self-determination.

On account of the “untranslatability” of within-tribally and ethnically meaningful indexes and the scrupulosity of cultural hegemonism, some scholars argue for the within-group interpretation and

---

41 See Gunter, supra note 36, at 96.
42 YINGER, supra note 18, at 43.
43 See Gunter, supra note 36, at 103.
44 See Torres & Milun, supra note 28, at 651-52.
45 See Binder & Weisberg, supra note 24, at 1181.
46 See Gunter, supra note 36, at 89-90.
47 Nevertheless, the Objectivistic Element Approach and exteriorly imposed criteria have been widely adopted in most countries, if not all, and the conception of a tribe as a stable sovereign nation is a Western concept required by Western lawmakers, among which the United States is no exception. See Binder & Weisberg, supra note 24, at 1183.
48 See Torres & Milun, supra note 28, at 658.
criticize the application of an Objectivistic Element Approach. Hence, scholars argue that internal tribal consciousness, which could only be meaningfully sensed by members, rather than the elements interpreted by outsiders, should be the reasonable criterion to define a tribe, though the official approach adopted in the United States still follows the Mashpee holdings.

49 See e.g., Gunter, supra note 36, at 97 (arguing that Indian tribal identity is innate and a tribe takes its shape from internal forces rather than from external forces). See also George A. Martinez, Symposium: Fourth Annual Mid-Atlantic People of Color Legal Scholarship Conference: Law and Literature: Examining the Limited Legal Imagination in the Traditional Legal Canon: Philosophical Considerations and the Use of Narrative in Law, 30 RUTGERS L. J. 683, 686 (Spring 1999) (arguing that the one to define what the term “tribe” means should be those who are within the group rather than the lay legal system).

Based on the within-group approach, scholars argue for a Subjectivistic or Eclecticistic definition of ethnicity to underscore the importance of ethnic identity. For example, Campisi argues: “Those asserted by the objectivism were and are cultural veneers; the tribal core remains the closeness of family ties, the sense of a common history and heritage, the attachment to ancestral land, even though it is no longer theirs to control, the closed nature of tribal membership, the intimacy of social relations, the differential treatment accorded members and non-members, and above all, the sense of themselves as a unique social and political entity.” See Jack Campisi, The Mashpee Indians: Tribe on Trial 158 (1991).

But there still are alternative theories to the preceding two positions. Martha Minow has suggested an alternative approach, regarding that binary questions requiring “yes/no” answers also imply that there is a single answer and that answers are not affected “by who answered it or whose perceptions counted.” See Iijima, supra note 32, at n.4 (citing Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 354 (1990)). Minow prefers to approach the Mashpee issue without deciding definitional questions in “either/or categories,” and instead in an objective-oriented approach through proposing a line of inquiry “whether the plaintiff, given its history, ought to receive protection from land sales under federal law.” Id. at n.4. According to Minow, a better way to resolve complex issues of tribal identity would be to look to the substance of the underlying problem and to restructure the question in more fluid terms such as “for the purpose of protection against unscrupulous property transactions, should [the Mashpee] be a tribe?” See Iijima, supra note 32, at n.4 (citing Martha Minow, Not Only for Myself: Identity, Politics, and the Law 74 (1997)). Ultimately, this approach would mitigate the law’s tendency to make identities “seem fixed, innate, and clearly bounded” by acknowledging that they are “complex and negotiated interactions.” Id. at n.4.

50 See Bureau of Indian Affairs Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 CFR § 83.7 (2004).
B. Ethnic Identification/Recognition\textsuperscript{51} in China.\textsuperscript{52}

The Abuse of a Subjectivistic Approach

The abuse of the Subjectivistic approach for ethnic identification in China stems from its adoption of a “status-equals-to-benefit-granting” indigenous affirmative system, which grants indigenous benefits to individuals so long as they possess indigenous status.\textsuperscript{53} The battle between the Subjectivistic approach and the human nature of greed is illustrated by the evolution of the ethnic identification systems in mainland China.

According to official PRC proclamations, ethnic identification in China is instructed by Marxism and with Stalin’s theory—“four ethnic characteristics of a modern ethnicity”\textsuperscript{54}—as the official guideline for the

\textsuperscript{51} The Chinese government adopts the term identification (\textit{shibie}), rather than recognition (\textit{rending}). This is problem in Chinese ethnological terminology as identification is viewed as the investigative stage before official recognition. Most Chinese materials adopt identification while they do not exclude the meaning of recognition. Thus, this paper does not want to make a distinction between these two terms. Moreover, the present Chinese system tries to resolve the recognition of indigenous status and the ethnic identification at the same time.

\textsuperscript{52} The Chinese do not have a concept of indigenous people and ethnicity (\textit{minzu}) in their traditional understanding. To the Chinese, there has been only one ethnicity in China, namely, the Chinese ethnicity (\textit{zhonghua minzu}). The Western-originated concept of “indigenous people,” which is termed as ethnicity, is called “minorities” (or minority nationalities) by the Chinese administration. For Chinese scholars, they usually use “nationality” in their articles to express the meaning of ethnicity (\textit{minzu}). The term “ethnicity” has been totally alien to China for thousands of years, and there was no academic ethnological research in China until the end of the 20\textsuperscript{th} century. In Chinese history, territorial identity, which results from nationalism, has overridden ethnic identity. Even today, despite the fact that ethnologic research and policies have been undertaken, the terminology of ethnological studies has not yet been officially adopted. As a result, under these circumstances, the answer to what an ethnicity is must be collaged from case studies and the multiple meanings of the Chinese term \textit{minzu} must also be noted for its possibility to mislead. See Xiaotong Fei, \textit{China’s National Minorities—An Introductory Survey}, in \textit{Toward a People’s Anthropology} 20-35 (1981); Lucian Pye, \textit{China: Ethnic Minorities and National Security, in Ethnicity: Theory and Experience} 489 (Nathan Glazer & Daniel Moynihan eds., 1975); Yaohua Lin, \textit{New China’s Ethnology: Research and Prospects, in Anthropology in China} 141, 142 (Gregory Eliyu Guldin ed., 1990). But it seems that Yaohua Lin regards that “New China” (beginning in 1949) has adopted the term of “ethnicity” already. Id.

\textsuperscript{53} Affirmative benefits in China are applied to all individuals categorized as “minorities.” For more information on the indigenous affirmative system in China, see http://202.100.218.58/gov/stongzha/zcfg3.htm (last visited Mar. 21, 2004).

\textsuperscript{54} Shenmo Shi Minzu Shibie? Woguo Minzu Shibie de Jiben Yuanze Shi Shemo [What is Ethnic Identification? What is the Basic Principle of Ethnic Identification in Our Country?], \textit{available at
reification of ethnic recognition. According to Stalin, “A nation [or ethnicity] is a historically formed stable community of people arising on the basis of common language, common territory, common economic life, and a typical cast of mind manifested in a common culture.” This statement, however, resembles an Objectivistic-oriented approach. Yet, both in theory and in practice, Stalin’s definition has not been dogmatically applied. What the Chinese government adopts is the so-called “Synthetic Method,” which claims to trace the origin of an ethnicity according to its “practical ethnic characteristics” and to examine the commonness of the people at issue via historical investigation. Pursuant to the Synthetic Method, the Chinese government employs a Stalinist theory with “flexibility,” and emphasizes the last element of self-consciousness, which entails that an ethnic group regards itself as a specific ethnicity. The Chinese government argues that this element exists “objectively” and could be conceived through everyone’s experience. Especially, the ethnic will of minority peoples shall be respected to the highest possible extent in the ethnic identification process if the will is premised on science. Through this flexible position, which seems simply to advocate Subjectivism, the Chinese government officially recognized 55 ethnic minorities during the “Period of Identification,” from 1954 to 1979.

In practice, the Synthetic Method had been employed even more flexibly during the period of identification. Some ethnic groups had lost many of their ethnic traits, but through the Synthetic approach they


56 See supra note 54.


58 For example, it was proclaimed that minority people are the lords of their ethnic names. See supra note 55.

59 Id.

60 Generally speaking, language was claimed as the first criterion employed in identification, but it was not the only criterion. Historical investigation and analyses were also said to be important instruments. For case studies, see Fei, supra note 52, at 65-77; see also Hieber, supra note 55, at 35-37.
were regarded as still distinguishable. In some cases, ethnic identity, or “self-consciousness,” was the main or only criterion. This flexibility, however, did not last long after the period of identification when abuse of the Subjectivistic policy was prevalent and concern over a drastic increase in those qualifying for indigenous affirmative benefits emerged. This fact is evidenced by the evolution of ethnic regulations.

On November 28, 1981, the Chinese government issued the “Circular of Deciding Principles Concerning Restoration or Rectification of Ethnic Elements,” which re-asserted that the will of minority peoples should be taken into account when there are applications for restoration or rectification of “ethnic elements” (minzu chengfen). “Minority people’s will,” or in other words, self-determination, was claimed as the main criterion for ethnic identification. This Circular also pointed out that minority people could make their applications for changing ethnic elements at “any time” merely through simple administrative procedures in the local governments. But only applications for the registration of officially identified ethnicities could be accepted, while those for registration of ethnicities that have not been

---

61 See Fei, supra note 52, at 62.


63 Id. preface.

64 See Circular Concerning Ethnic Elements, supra note 62, art. 1.

65 Those applications made by individuals would be processed by the Census Administration Departments with the proofs issued by the “units” to which the applicants belong. See id. art. 7. The proofs that should be provided in an application are: (1) the report of application; (2) the Book of Household Record, identification card; (3) certified proofs issued by the ethnic affairs departments of which level is higher than the prefecture. Id. Individuals, who are workers of departments, organizations, schools, enterprises, and so on, should also provide the permission issued by the personnel sections of their “units.” Id. An application would be processed by the police station to which the applicant’s census registration belongs. Collective applications made by residents of a village or a region should be investigated by the people’s government at the level higher than the prefecture before being processed. Id. art. 8. See also Hukou Xiangmu Biangeng/Biangeng Minzu Chengfen (Change of Census Item/Change of Ethnic Element), available at http://www.huai-hua.com/new_page_15.htm (last visited, n.d., on file with author). But applicants should apply for certification and permission from the ethnic affairs department before their applications. See Baoji City Public Security Bureau, Ruhe Banli Hukou [How to Deal with Census Affairs], at http://gaj.baoji.gov.cn/banshizhixinan/ruhebanhukou.htm (last visited, n.d., on file with author). This affair was claimed as the official responsibility of the Ethnic Religious Department, see http://www.bijie.gov.cn/zj.htm (last visited Mar. 21, 2004).
identified would be restored or rectified after the identifications at issue have been completed. 66

This self-defining system was soon abused. On February 8, 1986, the National Ethnic Affairs Commission issued a new regulation—the “Supplemental Circular Concerning Problems of Restoration or Rectification of Ethnic Elements” 67 indicating in its preface that amendments were necessary because some applications were without the required ethnic characteristics, and were merely based on pedigrees, family names, and so on, with some applicants even forging proof of ethnic standing. The Chinese government condemned the abuse saying “these scenarios are not good for practicing the [Chinese Communist] Party’s ethnic policies and would do harm to inter-ethnic solidarity.” 68 Some disposals were adopted to prevent those bad scenarios as the affairs concerning ethnic elements were transferred to higher-level agencies. 69 Individuals whose parents and grandparents had passed away would not be allowed to change their ethnic elements. 70 Certain definitions of ethnic characteristics, which were elements for an ethnic group as prescribed under Stalin’s theory, re-emerged within this Supplemental Circulation. 71 As a result, within only five years, the Chinese government has retreated to its primitive theoretical stage and re-proclaimed the importance of primordial factors, with the purpose of preventing people from abusing its self-defining policy. The importance of the will of the people—namely, self-definition—therefore, has declined, if not totally lost its place on the Chinese government’s

66 See Circular Concerning Ethnic Elements, supra note 62, art. 9.


68 Id. preface.

69 Id. art. 1. A private application would be certified by the prefecture level; a collective application would be certified by the district (city of autonomous region) level; an application from a wider range of individuals would be certified by relative departments in the provincial or autonomous-region level. Census Administration Departments could only process this affair according to those proofs issued by the ethnic affairs departments at the level higher than the prefecture. Id.

70 See id. art. 2.

71 The Supplemental Circular reemphasized that those applications made by a group of people (with the nature of collectivity) should be based on certain obvious ethnic characteristics like languages, cultures, customs, and so on. Application would not be permitted when those characteristics have disappeared. See id. art. 3.
agenda for ethnic policy.\textsuperscript{72}

The trend of forging ethnic elements to acquire indigenous status did not come to an end with that amendment. The Chinese government was obliged to issue the “Circular Concerning Temporary Suspension of the Work of Change of Ethnic Elements” to suspend the processing of ethnic element change on November 15, 1989.\textsuperscript{73} On May 1, 1990, the Chinese government even issued the “Regulation Concerning Recognition of Chinese Citizen’s Ethnic Elements,” which stresses, under Article 9, that cases using forged proof to change ethnic elements of one’s identity will be corrected, once fraudulences are discovered, and those accompanied benefits from these forgeries would be cancelled thereafter.\textsuperscript{74} The Chinese government obviously understood that this abuse would lead to political crises and started addressing the epidemic of greed and interest-oriented motivation that had distorted the goal of the self-identification principle.

Hence, in order to control the growth of the indigenous population, to reduce ethnic as well as political tension, and to enhance national solidarity, the Chinese government could not help but make a

---

\textsuperscript{72} Along with the Supplemental Circular was the “Circular Concerning Using Ethnic Letter in Residential Identification Card and Filling-In of Ethnic Element” which was issued on February 1, 1986. See Gonganbu, Guoqianminwe Guanyu Zhumin Shenfenzheng Shiyong Minzu Wenzhi he Minzu Chengfen Tianxie Wenti de Tongzhi [Public Security Bureau, Circular Concerning Using Ethnic Letter in Residential Identification Card and the Filling-In of Ethnic Element], available at http://news.xinhuanet.com/zhengfu/20010516/565801.htm (last visited Mar. 21, 2004). This Circular stressed that one’s ethnicity in the Residential Identification Card should only be filled in with ethnic names from those nationally and officially recognized ethnicities. Thus, those who have different viewpoints toward nationally and officially recognized ethnic names, but still insist their positions after governmental persuasion, could only annotate those ethnic names. Ultimately, this Circular places the scope of ethnicity under the state’s control and further compromises respect toward the self-identification principle and indigenous wills. Id.


\textsuperscript{74} See Guojianminwei, Guowuyuan Disici Renkou Pucha Lingdao Xiaozu [National Ethnic Affairs Commission & State Council’s 4th Population Census Leading Committee], Gonganbu Guanyu Zhongguo Gongmin Jueding Minzu Chengfen de Guiding [Public Security Bureau’s Regulation Concerning Recognition of Chinese Citizen’s Ethnic Elements], available at http://www.seac.gov.cn/publish/policy/policy03.htm (last visited n.d., on file with author). There were more restrictions in this new regulation. For example, all individuals should only be identified according to those nationally and officially recognized ethnic names. See id. art. 1. Moreover, individuals could only be identified according to their parents’ ethnic elements; this additionally narrowed the scope of the Circular Concerning Ethnic Elements that allowed individuals to trace their origins up to their grandparents. See id. art. 2.
compromise to its respect for the ethnic will by rejecting applicants without ethnic characteristics. Except for those recognized ethnicities like the Manchu, who have fit well into historical categorization, an ethnic group with no ethnic characteristic will be very difficult, if not impossible, to be recognized as a specific ethnicity under the present legal system in China. It is no exaggeration to say that the reduction of possible ethnic tension brought by a potential resource rivalry between the indigenous and the non-indigenous has become the new guideline affecting ethnic recognition in China. \footnote{Nevertheless, China has yet to face any widespread problem from its ethnic recognition. This is attributed to two policies: the above-mentioned control in ethnic element change and the success over regulating birth control. On December 1982, the 5\textsuperscript{th} National People’s Commission declared that the birth control policy should also be executed in regions resided by ethnic minorities. From 1982 to 1990, the population of indigenous people climbed at a rate of a mere 3.5 percent, which was relatively low in comparison to the average of more than 10 percent in China. See Tian-Lu Zhang, Zhongguo Shaoshuminzu Wenti Yanjiu [Research on the Demographic Problem of Minority Peoples in China], available at http://www.byl.sh.cn/10-pop/forum/paper1.htm (last visited n.d., on file with author). Moreover, it is noteworthy that, from 1982 to 1990, the proportion of social shift (e.g. change of ethnic elements, intermarriage, etc.) in indigenous population amounted to 57 percent, while natural increase was only 43 percent. \textit{Id.} This additionally proved the success of China’s birth control policy in limiting the increase of the indigenous population. See also Renkou [Population], at http://www.uschinabusiness.com/China/population.htm (last visited n.d., on file with author). Though the population of indigenous people has amounted to 111,238,000, almost 8 percent of the Chinese population in 1990, the expected ethnic tension was not so serious for the following three reasons: the absolute numbers of the Chinese population were too huge; the Chinese territory was broad enough to dilute this tension; and most indigenous people lived in remote regions, thus making it relatively difficult for the non-privileged to perceive the tension. See Zhongguo de Minzu Jiqi Fenbu [Ethnicities and their Distribution in China], available at http://www.uschinabusiness.com/china/peoples.htm (last visited n.d., on file with author).} After all, the self-definition principle, which is adoptable in ideal, would be challenged by abuse out of human greed and would very possibly result in political crises, whereas official ethnic recognition would absolutely lead to the increase of a privileged population.

\footnote{However, there are more complaints on the benefits granted to the indigenous people now. For instance, the special treatment on admissions to schools has been seriously criticized. See Xiang-Zi Nan, Xueshu he Xuewei Bugai Yonglai Chongdang Minzu Zhengce de Gongju [Scholarship and Degrees Should Not be Employed as the Instrument of Ethnic Policy]. DUOWEI NEWS, Oct. 5, 2001, available at http://www6.chinesenewsnet.com (last visited n.d., on file with author). As a result, whether the Chinese government could control the tension as before is doubtful and needs further investigation.}
C. The Métis Case—Political Compromise in Recognizing a Mix-blood Ethnic Group by Treating Status Recognition and Affirmative Benefits Separately

The case of the Métis, the only people of mixed ancestry to be officially recognized as a separate and identifiable indigenous people in Canada, is an example of successfully recognizing the indigenousness of a people of no blood purity through the exercise of political compromise. This case not only breaks the myth of indigenous blood purity to show the possibility of establishing an ethnic grouping through political deliberation, but also proves the widely adopted linkage between status/ethnic recognition with the granting of affirmative benefits as wholly unnecessary, thus bearing provocatively on the future of international indigenous administration.

Identifiability is not an obstacle in the ethnic recognition of the Métis when a self-defining approach is adopted. Although the concept of who the Métis are has been vague and the numbers of the Métis population are unconfirmed, it is widely accepted that the Métis are the descendants of French immigrants and Native Americans possessing a distinctive culture different from other Native Americans. Because there is no quantum requirement of minimum indigenous blood in Canadian law, the identity of the Métis, rather than resolved immediately through genealogy, has been developed step-by-step through a self-identification approach, after the official recognition of the Métis as an indigenous group. The Métis National Council first set

---


out relatively relaxed criteria in 1983,\textsuperscript{80} which emphasized the ethnic identity, or Métis nationalism,\textsuperscript{81} to establish a primary ethnic boundary. In 1992, a further detailed identity in which the issue of affirmative action and its legal bases, as well as the rule of self-identification, was supplemented in a draft Métis Nation Accord.\textsuperscript{82} Adopted in September 2002, the present definition of the Métis affixes new requirements on distinction and acceptance of the Nation.\textsuperscript{83} Overall, the identity of the Métis is still developing. Meanwhile, in order to have accurate population numbers, the Métis National Council set up an enumeration and a self-reported registry in 1983. Though the Métis has been recognized, the numbers of the Métis population have yet to be determined.\textsuperscript{84}

\textsuperscript{80} The criteria state:

“\textbf{The Métis are:} an Aboriginal people distinct from Indian and Inuit; descendants of the historic Métis who evolved in what is now western Canada as a people with a common political will; descendants of those Aboriginal Peoples who have been absorbed by the historic Métis. The Métis community comprises members of the above who shares a common cultural identity and political will.”

Chartier, supra note 76, at 114-115.

\textsuperscript{81} See Chartier, supra note 76, at 114. “The essence of Métis existence can best be described as Métis nationalism, which embodies the political consciousness of that newly emerged community of aboriginal people.” Id. (quoting MÉTIS NATIONAL COUNCIL, THE MÉTIS: A WESTERN CANADIAN PHENOMENON (1983b)).

\textsuperscript{82} More specifically, “Métis” means an Aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit and is a descendant of those Métis who received or were entitled to receive land grants and/or script under the provisions of the Manitoba Act, 1870, or the Dominion Lands Acts, as enacted from time to time. Furthermore, “Métis Nation” means the community of Métis persons in subsection (a) and persons of Aboriginal descent who are accepted by that community. See Chartier, supra note 76, at 115 (explaining that the foregoing criteria was negotiated by the Métis National Council, in October 1992, in a draft Métis Nation Accord).

\textsuperscript{83} This national definition was adopted at the Métis National Council’s 18th AGA in Edmonton, Alberta, September 27 - 28, 2002. It provides that “Métis means a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of Historic Métis Nation ancestry, and is accepted by the Métis Nation.” See http://www.metisnation.ca/MNA/defining1.html (last visited Mar. 22, 2004).

The basis for the recognition of the Métis, widely upheld by international law, was a political compromise. According to historical investigation, the reason for the official recognition of the Métis as an indigenous people was for an exchange of the Métis’ support toward the legislation of 1982 Constitution. This political compromise does not bring too many problems to Canada’s indigenous administration since the Canadian government adopts a discriminative system in applying indigenous affirmative programs. Although Section 35 of the 1982 Constitution Act clearly enacted that Canada’s Aboriginal Peoples include “the Indian, Inuit and Métis peoples of Canada,” there is key distinction between “status Indians” and those who are without have not yet determined the exact numbers of its people. See Chartier, supra note 76, at 115.

Whether a minority community exists is a question of fact rather than a question of law according to an opinion of the Permanent Court of International Justice: “[A] community is a group of persons living in a given country or locality, having a race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other…Communities are of a character exclusively minority and racial,…[and their] existence…is a question of fact: it is not a question of law.” Advisory Opinion on Greco-Bulgarian Communities, 1930 P.C.I.J. (ser. B.) No. 17, at 22-30 (July 31). See also Chartier, supra note 76, at 113. Moreover, they also claim that the Métis fit the requirements of being a specific people defined by the International Commission of Jurists. See id. at 113-114 (citing INDIAN LAW RESOURCE CENTER, INDIAN RIGHTS—HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURES 14 (1984)). The requirements are: a common history, racial or ethnic ties, cultural or linguistic ties, religious or ideological ties, a common territory or geographical location, a common economic base, and lastly a sufficient number of people. Id.

Because of substantial opposition by eight of ten provinces, the federal government sought direct support for patriation [sic] from the Canadian public. The government also sought support from the Aboriginal peoples. The government felt that Aboriginal support was necessary to enhance its position because of the special political, legal, and constitutional relationships that had developed through the colonization process.
Chartier, supra note 76, at 115.

In January 1981, the federal government received support from the Aboriginal peoples when it agreed to entrench the Aboriginal and treaty rights of the Aboriginal peoples in the Constitution. In exchange for Métis support, the government agreed to include a definition of Aboriginal peoples that included the Métis, along with the Inuit and Indian peoples.
Chartier, supra note 76, at 115.

CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), § 35.
such status—namely, the Métis and other non-status Indians—influencing their equal enjoyment to indigenous rights, self-government, and especially government financial support. However, inequality is a major defect in Canada’s discriminative approach. Taking status as the only criterion to grant affirmative benefits has been challenged by the Métis who claim this discriminative disposal infringes the Métis’ right to equal protection under Section 15 of the Canadian Charter of Rights and Freedoms. This issue has brought a great challenge for the present discriminative system.

D. Lessons from International Experiences

The foregoing international experiences provide solutions to some of the problems facing the Taiwanese government concerning ethnic recognition of the Ping-Pu. First, the exteriously imposed definition of an ethnic group and the Objectivistic approach, though officially adopted in the Mashpee case and by the Bureau of Indian Affairs, has been severely attacked for resulting in an unreasonable and unfair conclusion. With the promotion of “self-identification” in the United Nation’s Draft Declaration on the Rights of Indigenous Peoples, the within-group definition approach could be the trend for the future. Secondly, from scholastic opinions of the Mashpee case and the

88 See Franks, supra note 84, at 103-104. See also C.E.S. Franks, Indian Policy: Canada and the United States Compared, in ABORIGINAL RIGHTS AND SELF-GOVERNMENT, supra note 84, at 221, 225 (explaining that to be status Indian confers a special legal relationship with the government and confers access to a number of government programs). In other words, the legal term Indian in Canada has different meanings. See Chartier, supra note 76, at 125-127.

89 CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15. For further examination of the constitutional rights guaranteed via the Charter by the Canadian state with the Aboriginal peoples of Canada, see PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA 194-233 (2001).

Moreover, the Métis National Council claims “[T]he denial of constitutionally protected Métis rights by federal and provincial governments is shameful and unacceptable. Métis people and communities want to be able to exercise their rights as Aboriginal people without fear of prosecution and harassment.” See http://www.metisnation.ca/mna/rights1.html (last visited Mar. 22, 2004). See also Clifford Krauss, Canadian Court Hears Two Cases on Rights, N.Y. TIMES, Apr. 6, 2003, at 12 (for a report on two interesting cases in Canadian court concerning the assertion of Métis rights).

90 For further discussion on the rights of the Métis in Canada, see also SHIN IMAI, ABORIGINAL LAW HANDBOOK 86-89 (2D ED. 1999).

91 See supra Part III.A.

92 See U.N. DRAFT DECLARATION, supra note 79, art. 8.
recognition of the Métis, we may perceive the tendency that the requirement of blood purity required by Objectivism has been gradually replaced by Subjectivism, an approach that emphasizes the subjective identity. Thirdly, ethnic recognition may be disposed of separately from the issue of granting rights to affirmative benefits and official ethnic recognition does not necessarily lead to the conferment of special benefits. Thus, it is possible to deal with the recognition of an ethnic group on the one hand, while confer indigenous benefits according to another set of criterion, such as, practical circumstances or principles of substantive justice.

If the Taiwan government employs a discriminative system in granting indigenous benefits, the potential number of the indigenous people at issue will be less of an obstacle for the process of ethnic recognition. More importantly, a Subjectivistic, self-defining approach could thus obviate cases of abuse arising out of human greed. And since ethnic recognition can be acquired through political compromise as demonstrated through the Métis case, for Taiwan’s Ping-Pu—similar to the Métis in terms of cultural hybridization and lack of identifiability—political adjustment and compromise from an already accommodating and sympathetic Taiwan government is entirely possible in the Ping-Pu’s quest for official recognition.

IV. A SELF-DEFINING, INTEREST-ISOLATED, MULTICULTURALISTIC APPROACH FOR ETHNIC RECOGNITION OF THE PING-PU

From the foregoing comparative case analyses, this author offers that the Subjectivistic definition of an ethnicity, namely, the ethnic identity-centered approach, is more adoptable for the situation of Taiwan’s Ping-Pu. As some scholars argue, “[E]thnicity is a subjective matter; the crucial issue is how we [the members] see ourselves [themselves].” What is determinant and ethnically meaningful in an ethnic formation is interior self-definition through which insiders identify themselves in an ethnically particular way, rather than through exteriorly imposed criteria. The criterion of defining an ethnicity should lie in the ethnic identity itself as the identity is the core substance, while any outside categorization is a mere exterior definition, in spite of the fact that the way in which outsiders treat insiders has been viewed

93 See supra Part III.A & C.
94 See CORNELL & HARTMANN, supra note 19, at 17.
95 “The ethnic category is externally defined, but the ethnic group is internally defined.” Id. at 20.
as a socially meaningful symbol in constructing ethnic definition.\textsuperscript{96}

Ultimately, what should be most crucial and meaningful in recognition of an ethnicity is not how one is observed to be, but what one feels about oneself. Yet it is unarguable that outsiders are influential in this definitive process of ethnic identity—the identification of an ethnic identity often originates from outsiders and when there are outsiders the formation of an ethnicity is socially meaningful.\textsuperscript{97} In this perspective, exterior imposition is ethnically functional. Adopting a Subjectivistic approach in defining an ethnicity, however, by no means asserts that objective elements are useless in identifying an ethnicity. Moreover, a self-defining approach empowers the notion that even devoid of any exteriorly identifiable objective elements an ethnic group can still seek recognition of its rights if its members have other means to build their concurrent and collective ethnic consciousness.\textsuperscript{98}

Although ascription has been asserted by social scientists as the key characteristic that distinguishes ethnicity from other voluntary affiliation,\textsuperscript{99} this position unnecessarily limits the scope and means available to an individual’s legal right to official ethnic recognition. Moreover, asking for an uncontaminated primordial identity to be the sine qua non of any standard for recognition of an individual’s de jure ethnicity is absolutely unreasonable.\textsuperscript{100} Such a request is, furthermore,

\textsuperscript{96} Thus, many scholars affirm the importance of outsiders’ perspective in different extents. Richard Jenkins regards ethnic identity as two-way process: it is the “world of personal identity collectively ratified and publicly expressed” and it is the “socially ratified personal identity.” See Jenkins, supra note 19, at 13. J. Milton Yinger posits an ethnic group should have three ingredients: (1) the group is perceived by others in the society to be different in some combination of the following traits: language, religion, race, and ancestral homeland with its related culture; (2) the members also perceive themselves as different; and (3) they participate in shared activities built around their (real or mythical) common origin and culture. Yinger stresses the mutual perspectives of people within and outside the ethnicity. Thus he asserts that there are three phases in ethnic identity: self-perception, the perception of others, and associational involvement. See Yinger, supra note 18, at 3-4.

\textsuperscript{97} See Cornell & Hartmann, supra note 19, at 20.

\textsuperscript{98} Ethnicity is also intimately related to the individual need for collective continuity. Ethnicity in its deepest psychological level is a sense of survival. If one’s group survives, one is assured of survival, even if not in a personal sense. See George DeVos, Ethnic Pluralism: Conflict and Accommodation, in Ethnicity: Cultural Communities and Change 5, 17 (George DeVos & Lola Romanucci-Ross eds., 1975).

\textsuperscript{99} See Donald Horowitz, Ethnic Identity, in Ethnicity: Theory and Experience, supra note 52, at 113-114. Ethnic identity is generally acquired at birth and is different from secondary identities people acquire later in one’s lifetime. Id.

\textsuperscript{100} Donald Horowitz criticizes: “[M]ost research in ethnic relations has tended to take the groups as it finds them, as if they all existed in their present form since time out of mind.” See Horowitz, supra note 99, at 113.
impossible because an ethnic identity that changes along with circumstantial transitions is contextual.\textsuperscript{101}

Since ethnic identity is a fluid concept, ethnic boundaries are changeable with time.\textsuperscript{102} Objective elements in practice play an important role in acknowledging ethnic boundary changes,\textsuperscript{103} but the objective transformation is merely the appearance reflecting the subjective change. In other words, “[C]ultural change may follow or accompany, rather than precede, identity change.”\textsuperscript{104} Although subjective ethnic identity and objective elements in most circumstances are intertwined, a change in ethnic boundary is simply the reflection of identity transformation.\textsuperscript{105} With the changeability of ethnic identity and its boundary, any request for primordial ethnic elements would unreasonably limit the “insider’s” right to have an ethnicity.\textsuperscript{106} An ethnicity, thus, should be recognized regardless of how long the identity has existed.

Self-definition, a practice of self-determination that can fully respect and reflect the will of insiders, therefore, is an available means to complement the Subjectivistic approach. Under a self-defining approach, objective features are only the indicia or symbols of ethnic identity. The importance of a symbol could be drastically different among various ethnic groups. A symbol that is crucial in one society may be ignored or interpreted quite differently in others, and an index

\textsuperscript{101} Id. at 118.

\textsuperscript{102} Ethnic identity is a fluid concept—being contextual, situational and relational—and is generated, confirmed or transformed in the course of interaction and transaction between decision-making, strategizing individuals, thus being flexible, rather than fixed over time. See Bjorn Hettne, \textit{Ethnicity and Development: an Elusive Relationship, in ETHNICITY AND DEVELOPMENT: GEOGRAPHICAL PERSPECTIVES} 15, 17 (Denis Dwyer & David Drakakis-Smith eds., 1996); Jenkins, supra note 19, at 12. Charles Keyes also provides an “Ethnic Change Theory” in his article that well explains this process. See Keyes, supra note 20, at 14-15, 18, 28.

\textsuperscript{103} Even Weber remarks “that ‘any cultural trait, no matter how superficial’ can function as an ethnic boundary.” See Hans Vermeulen & Cora Govers, \textit{From Political Mobilization to the Politics of Consciousness, in THE POLITICS OF ETHNIC CONSCIOUSNESS} 1, 5 (Cora Govers & Hans Vermeulen eds., 1997).

\textsuperscript{104} See Horowitz, supra note 99, at 124.

\textsuperscript{105} The purpose for Subjectivism is to define ethnicity in terms of a subjective consciousness that differs from definitions that also include objective elements without denying the relevance of objective features. Thus, Subjectivism tries to distinguish objective features from their “ideological representation” since what is ethnically meaningful is the ideology underlying those features. See Govers & Vermeulen, supra note 103, at 5.

\textsuperscript{106} See Ivan Light, \textit{Ethnic Succession, in ETHNIC CHANGE, supra note 20, at} 54.
that is ethnically meaningless in one ethnic group may be indicative to another. The inappropriateness of adopting a “one-size-fits-all” evaluation system to those symbols is clear.\(^\text{107}\)

In light of the preceding discussion, the Ping-Pu should be officially recognized as an ethnic group when there is a Ping-Pu identity, even after their history of sinicization. Yet the Ping-Pu’s sinicized past should not serve as a legitimate obstacle to deny the Ping-Pu’s qualification of being an ethnicity recognized under the law; and, more pressing, official recognition is an obligation of the Taiwanese government.\(^\text{108}\) If an unrestricted Subjectivistic approach is adopted, however, there runs the risk of abuse by those people who falsely proclaim belonging out of greed or out of their own interest-driven motivations.\(^\text{109}\) Scholars even criticize that an interest may be taken as one of the characteristics in defining an ethnic group, especially an indigenous ethnicity.\(^\text{110}\) Patterns of recent ethnic conflicts are said to

\(^{107}\) See Horowitz, supra note 99, at 121.

\(^{108}\) If the Subjectivistic approach is applied, how could we distinguish indigenous groups from non-indigenous ones? The answer would lie in self-definition. If the self-defining identity is based on indigenousness, it is an indigenous group. Thus “indigenousness” here should also be interpreted in a self-defining way, because indigenousness is a relative concept and the validity of the assertion should not diminish according to exteriorly imposed criteria. Michael Levin adopts a similar position asserting: “Aboriginality is a more refined claim to distinction based on historical experience. It emphasizes status as the original occupants of a place, adding depth to the idea of cultural differences.” See Michael Levin, Introduction, in ETHNICITY AND ABORIGINALITY: CASE STUDIES IN ETHNONATIONALISM 3, 4 (Michael Levin ed., 1993) [hereinafter ETHNICITY AND ABORIGINALITY].

\(^{109}\) The phenomenon of asserting indigenousness simply for the enjoyment of indigenous benefits has long been noticed as Weber suggests collective interests do not simply reflect or follow from similarities and differences between people; the pursuit of collective interests does, however, encourage ethnic identification. See Jenkins, supra note 19, at 10. Cf. Judith Nagata, From Indigene to International: The Many Faces of Malay Identity, in ETHNICITY AND ABORIGINALITY, supra note 108, at 97, 98 (discussing the multiple motivations behind claims of ethnic communities vis-à-vis the pursuit of political status or privilege within the state coupled with an overall objective of recognition and credibility among an international audience).

\(^{110}\) See Nathan Glazer & Daniel Moynihan, Introduction to Ethnicity: Theory and Experience, supra note 52, at 7. See also Light, supra note 106, at 54-56 (arguing “[E]thnic groups . . . are not just sentimental associations of persons sharing a primordial tie. They are also interest groups.” Id. at 55. “The emerging interest-group conception of ethnicity is difficult to define. Obviously, it need not exclude any sentimental and primordial component.” Id. “Interest needs to be a part of our conception of ethnicity because interest is empirically a part and because, without acknowledgement of interest, observed changes in ethnic boundaries or intensity are impossible to explain.” Id. at 55-56.).
have shifted from dispute over traditional, cultural traits to those over interests.\footnote{See Glazer & Moynihan, supra note 110, at 8.} When ethnic status determines how many benefits one can have, social and ethnic tension waged over interests will be inevitable, especially for a multiethnic state like Taiwan which adopts a compulsory benefit-granting system but has limited state resources;\footnote{“Ethnic conflicts, like class conflicts, result from the unequal distribution of, and competition for, scarce resources.” Pierre van den Berghe, Ethnicity and Class in Highland Peru, in Ethnicity and Resource Competition in Plural Societies 71, 72 (Leo Despres ed., 1975).} with the corollary that the gains of one ethnicity would certainly be at the expense of others.\footnote{See Glazer & Moynihan, supra note 110, at 9-15.}

Unraveling the reason and basis for conferring ethnic benefits to indigenous people and breaking down the myth of the imperative linkage between indigenous status and interest conferment is the key to resolving the risk of abuse.\footnote{For example, Patrick Macklem provides two possibilities: Does the interest conferment intend to promote indigenous identity, or it is just an excuse to legitimatize and perpetuate the ethnic privilege? See Patrick Macklem, Ethnonationalism, Aboriginal Identities, and the Law, in Ethnicity and Aboriginality, supra note 108, at 11.} Ideally, “ethnicity” should not be used merely as a means for advancing interest;\footnote{See Glazer & Moynihan, supra note 110, at 19.} rather, ethnic recognition should be viewed within an atmosphere of the promotion of pluralistic values and culture. Thus, an interest-isolated, multiculturalistic approach is a suitable model to attain this ideal. Under this approach, the rationale for protecting indigenousness from assimilation into the dominating group is the belief that indigenousness is worthy of protection.\footnote{See Macklem, supra note 114, at 9-10.} This indigenousness would provide indigenous people access to their social culture within a meaningful context of choice without limiting their ability to question and revise particular values or beliefs.\footnote{Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 82-84, 92-93 (1995). See also Lawrence Rosenn, The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory, 107 YALE L. J. 227, 228-29 (Oct. 1997) (reviewing Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (1995) and James Anaya, Indigenous Peoples in International Law (1996)).} Such a multiculturalistic approach does not oppose granting affirmative benefits to the indigenous since the existence of group-differentiated rights is necessary for providing justice between the members of different...
groups.118

Arguable is whether the Ping-Pu are qualified to fulfill the demand of cultural diversity in Taiwan. Opponents would argue that the Ping-Pu have been extinct due to sinicization, and thus can no longer serve any function of promoting cultural and social plurality. However, such an Objectivistic claim of Ping-Pu extinction is unfounded and a view of the Ping-Pu culture from a Subjectivistic, self-defining manner should be taken as the better policy. In particular, the culture of an ethnicity can only be defined by members within that ethnic group—and only a within-group definition of culture is ethnically meaningful, both for the members of that ethnic group and the policy of multiculturalism. Assimilation, therefore, is not a legitimate cause to deny the ethnic recognition of the Ping-Pu. Assimilation may co-exist with pluralism as they are mutually limiting, but not mutually contradictory.119

A systematic revision of the indigenous affirmative system would be advisable if the Multiculturalistic approach is embraced in Taiwan. The discriminative treatment of the Métis in Canada may serve as a valuable model for Taiwan’s revision. Treating ethnic/status recognition and indigenous benefit conferment with two different sets of considerations based on Multiculturalism is the blueprint for the Taiwanese government to design a new indigenous affirmative system. Ultimately, it is the Taiwanese government’s obligation to recognize the Ping-Pu ethnic group’s status of indigenousness and to help them set up access to their cultural diversity. The issue of who is qualified for special benefits should be decided case-by-case according to whether there is a degree of social unfairness necessary to be rectified in order to fulfill the aims of Multiculturalism. Moreover, the subject of affirmative action should not be limited to individuals; systems could also be the subject if conferring benefits to systems is a more suitable way to rectify social unfairness.

V. CONCLUSION

Official recognition is the Taiwan government’s obligation through which the demand of providing adequate access for the Ping-Pu to a multicultural society could be met. Earlier this year there was a noticeable breakthrough in Taiwan’s ethnic situation. On January 15, 2004, following the recognition of the Thao and the Kavalan (a sub-tribe of the Ping-pu whose members mostly still possess indigenous status), the Taiwanese government declared recognition of the Truku, an Atayal sub-tribe, designating the Truku as the twelfth officially-recognized

118 See Kymlicka, supra note 117, at 26-33, 47-48.

119 See Yinger, supra note 18, at 41.
indigenous ethnic group of Taiwan. What is noteworthy is that it was the first time the Taiwanese government publicly supported a Subjectivistic approach, as its endorsement fully relies on respect for the ethnic will of the Truku. The government’s recognition of the Truku was claimed as premised by Article 10 of the Additional Articles of the Constitution of the Republic of China, which pronounces the government’s commitment to respecting indigenous will and affording the livelihood of Taiwan’s aborigines.

Moreover, though highly disputed, some view the recent recognition of the Truku as evidence of the Taiwan government’s adoption of a Subjectivistic approach, complying with the Draft Declaration on the Rights of Indigenous Peoples, and paving the way for ethnic recognition of the Ping-Pu. Complementing the adoption of Subjectivism, a discriminative and multiculturalistic affirmative benefit system has been promoted as well. The government might even adopt a conditional affirmative benefit system in school admission examinations whereby an indigenous student could have affirmative benefits applied only if he or she has passes “probation of ethnic

---


121 The Truku’s will was evidenced by a petition signed by more than thirteen thousand Truku people out of a total population estimated around thirty thousand. See Council of Indigenous Peoples, Saidekeyazu Tailuge deng Sanzhiqun Zhengming Zuotanhui [Sedeq Sub-Tribes’ Tribal Name Rectification Conference], available at http://www.apc.gov.tw/official/news/newsdetail.aspx?no=178 (last visited Apr. 5, 2004).


124 See generally U.N. DRAFT DECLARATION, supra note 79.

125 See LIN, supra note 10, at 111-128.
languages (zuyu renzheng).” It seems that a discriminative affirmative system based on multiculturalism might be adopted.

In brief, recent events and political momentum reveals that the Taiwanese government appears bound toward the direction of continued support for the ethnic recognition of Taiwan’s indigenous peoples. However, beyond the government’s obligation of ethnic recognition of the Ping-Pu, it must also strive to ensure that the affirmative benefit system adequately reaches those who it intends to qualify and serve. And whether or not this occurs may be a test of the current Taiwan government’s commitment toward recognition of the rights of the Ping-Pu.

---