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A COMPARISON OF AMERICAN INDIGENOUS TRIBES AND CHINESE INDIGENOUS TRIBES WITH RESPECT TO RECOGNITION AND LEGAL POLICY

*Ziyu Shi**

I.	Introduction	112
II.	Background	113
A.	Indigenous Tribes in the United States	113
B.	Chinese Indiengous Tribes	113
III.	Legal Recognition	115
A.	Doctrine of Discovery	115
1.	A U.S. Case: <i>Johnson v. M'Intosh</i>	115
B.	China: Ethnic Equality	116
1.	A Chinese Case: <i>Yuhua Liu (Hui) v. Ningxia Hui Autonomous Region Government</i>	117
IV.	Comparative Analysis	118
V.	Conclusion	118

I. Introduction

Property rights are some of the most basic rights in human society. The ownership of the land is important in establishing sovereignty. Land disputes between native inhabitants and foreign outsider has always been a major issue throughout history. This comment is aimed at comparing American Indigenous

* BA Law, Class of 2019. I am international student who is fortunate to get the chance of being exposed to both Chinese and US legal systems and experiencing two different cultures. I want to sincerely thank Professor Robert A. Williams, Jr. who encouraged and inspired me to employ my international perspective to compare Chinese Indigenous tribes and U.S. Indigenous tribes. Thank you to Professor Williams, my amazing advisor and mentor through the process. Thank you for your constructive critiques, inspiring words, and kind support. Thank you to Alexis Zendejas and Logan Cooper for helping edit this comment and polishing the language. Thank you to Christina Ann Rinnert for teaching me how to do bluebook citations. Thank you to everyone who helped me in writing this comment.

tribes and Chinese Indigenous tribes with a focus on recognition and legal policy. This comment will first give a brief historical overview of U.S. Indigenous tribes and Chinese Indigenous tribes. Then, this comment will discuss the Western “doctrine of discovery” and Chinese Ethnic Equality Principle by analyzing typical cases. In the Comparative Analysis Section, this comment will analyze the difference between American and Chinese legal policies on Indigenous tribes from a property perspective. The diversion of private land ownership and public land ownership is a main reason causing the difference between U.S. Indigenous tribes and Chinese Indigenous tribes with respect to recognition and legal policies.

II. Background

A. Indigenous Tribes in the United States

Indigenous tribes in the U.S. have certain autonomous rights subject to limits by Congressional legislation and the changing federal policies. Laws such as the Indian Appropriation Act, the Indian Removal Act, and the General Allotment Act were passed to regulate and assimilate Native Americans. Federal Indian Policy is the general policy, the evolving process of which is summarized into six stages by many scholars: coexistence, removal and reservations, assimilation, reorganization, termination, and self-determination.¹

B. Chinese Indigenous Tribes

“Indigenous tribe” is not an exclusive concept of the U.S. In China, there are 56 ethnic groups in general.² Han is the majority ethnic group in the country.³ In Chinese history, there were many wars between the Han regime and other native tribes such as Mongolians, Uyghurs, and Koreans.⁴ Most tribes in the Chinese National Ethnic Autonomous Zone were small countries around the border of powerful Ancient China.⁵ When the small countries lost the wars with China, they became subsidiary countries of Ancient China or a province of Ancient China.⁶

Throughout history, some minority ethnic groups became so powerful and intruded Ancient China. For example, Jing Dynasty, Yuan Dynasty, and Qing

¹ Baogang He, *The Idea of Democratic Governance*, Governing Taiwan and Tibet 83–106 (2015).

² COLIN MACKERRAS, CHINAS ETHNIC MINORITIES AND GLOBALISATION 1 (2006).

³ Hai-Guo Zhang et al., *Dermatoglyphics from All Chinese Ethnic Groups Reveal Geographic Patterning*, 5 PLOS ONE (2010).

⁴ TIMELINE OF CHINESE HISTORY AND DYNASTIES | ASIA FOR EDUCATORS | COLUMBIA UNIVERSITY, http://afe.easia.columbia.edu/timelines/china_timeline.htm (last visited Mar 15, 2019).

⁵ LI DALONG, “THE CENTRAL KINGDOM” AND “THE REALM UNDER HEAVEN” COMING TO MEAN THE SAME: THE PROCESS OF THE FORMATION OF TERRITORY IN ANCIENT CHINA 323-352 (2008).

⁶ *Id*

Dynasty.⁷ During these periods, Xianbei, Mongolia, and Man colonized the Han people.⁸ They established their authority on land originally inhabited by Han.⁹ Because Han culture was the most advanced culture at that time, the minority ethnic group government implemented a series of policies to get rid of their nomadic culture and pursue the advanced Han culture.¹⁰ The alternation of dynasty established by different political power is a characteristic of Chinese history¹¹. However, Han culture is always the mainstream¹². The inevitable trend is ethnic integration¹³.

After 1945, the new Chinese government established Ethnic Autonomous Zones for the 55 minority ethnic groups.¹⁴ Both national laws and local laws are imposed upon autonomous zones.¹⁵ Chinese Constitution¹⁶ and Chinese Ethnic Autonomous Region Law¹⁷ are the main legal authority at the national level.¹⁸ The Chinese political system is different from the U.S. political system, where the rights not listed in the constitution are reserved by the state. However, Chinese local governments follow the instructions of federal government.¹⁹ They are the sub-branches of the national government in the same system.²⁰ Unlike the U.S., where each state has their own legal systems, national law is the main authority to refer to in each province of China.²¹ Local legislations function as a supplement.²² The clauses in national legislations are usually thoroughly provided. Therefore, it does not leave much room for the legislative branch at a local level. However, the

⁷ COLUMBIA UNIVERSITY, *Timeline of Chinese History and Dynasties* (last visited Mar 15, 2019), http://afe.easia.columbia.edu/timelines/china_timeline.htm.

⁸ ZHENG QIAN, CHINA'S ETHNIC GROUPS AND RELIGIONS 24-25 (2011).

⁹ *Id.*

¹⁰ Valentin C. Golovachev, *Matricide among the Tuoba-Xianbei and its Transformation during the Northern Wei*, 2002 EARLY MEDIEVAL CHINA 1-41 (2002)

¹¹ ZHENG QIAN, CHINA'S ETHNIC GROUPS AND RELIGIONS 24-25 (2011).

¹² *Id.*

¹³ *Id.*

¹⁴ III. Regional Autonomy for Ethnic Minorities, GOVT. WHITE PAPERS, <http://www.china.org.cn/e-white/4/4.3.htm> (last visited Mar 15, 2019).

¹⁵ VI. The Local Administrative System, VI. THE LOCAL ADMINISTRATIVE SYSTEM, <http://www.china.org.cn/english/Political/28842.htm> (last visited Mar 15, 2019).

¹⁶ THE U.S. CONSTITUTION ONLINE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA - THE U.S. CONSTITUTION ONLINE - USCONSTITUTION.NET, <https://www.usconstitution.net/china.html> (last visited Mar 15, 2019)

¹⁷ REGIONAL ETHNIC AUTONOMY LAW OF THE PEOPLE'S REPUBLIC OF CHINA (CHINESE AND ENGLISH TEXT) | CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, <https://www.cecc.gov/resources/legal-provisions/regional-ethnic-autonomy-law-of-the-peoples-republic-of-china-amended> (last visited Mar 15, 2019)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Local Legislation in China, LOCAL LEGISLATION IN CHINA, <http://www.china.org.cn/english/kuaixun/76344.htm> (last visited Mar 15, 2019).

²² *Id.*

legislative branch in each autonomous zone has much flexibility in passing acts that are consistent with minority ethnic groups' own culture and customs.²³

III. Legal Recognition

A. Doctrine of Discovery

The U.S. government uses the Doctrine of Discovery to justify and legalize their occupancy of the land. The Doctrine of Discovery is the idea that the discovery of the land gives the government exclusive title against all other European governments and Native tribes²⁴. The westerners believed they brought enlightenment to the "fierce savage" and helped develop the wilderness.²⁵ The racist language can be clearly seen in *Johnson v. M'Intosh*, an important Supreme Court decision in 1823. The Court held that individuals cannot purchase parcels from native tribes.²⁶ The holding effectively legalized their colonization and perpetuated racist settler notions of Natives' inferiority and savagery.²⁷

1. A U.S. Case: *Johnson v. M'Intosh*

Johnson v. M'Intosh is a United States Supreme Court case in which the Court denied certain Indian tribes, constituting the Illinois and the Piankeshaw nations, the right to convey their land.²⁸ The issue in this case was whether the plaintiffs, the lessees of Thomas Johnson's decedents, can purchase land by the grants from the chiefs of Indian tribes.²⁹ The ultimate question was whether Indians have legal title to their land.³⁰ Allowing bidding for Indian lands is dangerous because the federal government will not be able to expropriate the Indian lands at lowest cost.³¹ The recognition of Indians' legal title to the land would have invoked a large number of compensations to Indians and impose a risk to the sufficiency of title to already-acquired land by the United States.³² Thus, the Court had to carefully decide this case to save money for the government and sustain the certainty of property law.³³

²³ *Id.*

²⁴ *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543 (1832).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 LAW AND HISTORY REVIEW 113-114 (2001).

³² *Id.*

³³ *Id.*

In this case, the Court applied the Doctrine of Discovery, which states that the discovery gives the colonizer an exclusive right to extinguish the Indian title of possession. Since the Indians are “fierce savages,” to leave the mass continent in occupancy of the Indians, was to leave the land a wildland.³⁴ Thus, the Court ruled that Indians are incapable of transferring the title to others.³⁵

Johnson v. M'Intosh has had a far-reaching impact. In this decision, the Marshall Court designated Native Americans as inferior people and denied “their rights to complete sovereignty, as independent nations. . .and their power to dispose of the soil at their own will, to whomsoever they pleased.”³⁶

This decision not only lays the foundation for the U.S. government’s occupancy over Native American land, but also influences other Western countries’ domestic laws and policies with respect to Indigenous tribes. “Australia adopted an even more extreme version of the doctrine as the foundation of its laws for defining the rights of its indigenous tribal people in their traditional lands”.³⁷ Australian law does not recognize any Indigenous rights in their traditional land.³⁸ Even in the 21st century, many Western countries still rely on the doctrine of discovery dating back to the 15th century.³⁹

B. China: Ethnic Equality

Support from ethnic minority groups play an important role in the Chinese Communist Party’s success in the Chinese Civil War.⁴⁰ Ethnic policy to safeguard such political united front was important to strengthen new Chinese government’s power.⁴¹ Thus, the Constitution enacted by the new Chinese government explicitly stipulates Ethnic Common Prosperity Principle, Ethnicity United Principle and Ethnic Equality Principle.⁴² The government also enacted laws against any form of racial discrimination or activity undermining ethnic solidarity.⁴³

The Chinese government relies on political policy to justify the occupancy of Indigenous people’s land. The logic of Chinese government’s justification is similar to the justification of communism and public ownership. According to the

³⁴ *Id.*

³⁵ *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. 543 (1832).

³⁶ *Id.*

³⁷ ROBERT A. WILLIAMS, *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* 226 (2012).

³⁸ *Id.* at 227.

³⁹ *Id.* at 231.

⁴⁰ CHINA’S ETHNIC POLICY AND COMMON PROSPERITY AND DEVELOPMENT OF ALL ETHNIC GROUPS, <http://www.china-un.ch/eng/rqrd/jblc/t954506.htm> (last visited Mar 15, 2019)

⁴¹ *Id.*

⁴² THE U.S. CONSTITUTION ONLINE, CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA - THE U.S. CONSTITUTION ONLINE - USCONSTITUTION.NET, <https://www.usconstitution.net/china.html> (last visited Mar 15, 2019)

⁴³ CHINA’S ETHNIC POLICY AND COMMON PROSPERITY AND DEVELOPMENT OF ALL ETHNIC GROUPS, <http://www.china-un.ch/eng/rqrd/jblc/t954506.htm> (last visited Mar 15, 2019)

government, Chinese people, including minority ethnic groups, have been oppressed by feudalism for thousands of years.⁴⁴ During that time, people did not have human rights, the legal system did not function well, and the emperor's will was the supreme "law" of the land.⁴⁵ To some degree, Chinese government's justification is like the American justification without racist language. The minority ethnic groups are a part of the people being oppressed and the new Chinese government brings enlightenment and better life.⁴⁶

1. A Chinese Case: *Yuhua Liu (Hui) v. Ningxia Hui Autonomous Region Government*

Yuhua Liu (Hui) v. Ningxia Hui Autonomous Region Government is a recent Chinese case where the petitioner, whose ethnic identity is Hui, built a house on land for national construction purpose.⁴⁷ The local government recognized the house as an illegal building and took down the petitioner's house.⁴⁸ The issue is whether the government has the lawful authority to take down the house.⁴⁹ The Chinese Supreme Court reasoned that illegal buildings are one of the stubborn problems faced by urban planning and construction management.⁵⁰ The illegal buildings negatively affect the urbanization process.⁵¹ Since the implementation of the National Urban and Rural Planning Law, especially the Regulations on the Expropriation and Compensation of Housing on State-owned Land, many individuals intentionally ignored the restrictions on constructing new houses on land for public use to get compensation.⁵² In this case, the local government enacted an administrative regulation to enforce the National Law.⁵³ The petitioner built the house after the implementation of local government's administrative regulation.⁵⁴ The administrative regulation determined the land in dispute as land for public use before the construction of the house, thus, the house in the case is an illegal building.⁵⁵ The Supreme Court held that the government has the right to take down the illegal building and the government followed a legal process.⁵⁶

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ (2016) 最高法行申391号, (2016), Chinese Supreme Court administrative review No. 391.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

In this case, the Court did not focus on the plaintiff's indigenous identity. The Court treated this case as an ordinary administrative review case. The omission of the discussion of the indigenous elements reflects the traits of Chinese property system. Because of public ownership of the land, no individual can own the land, neither people from ethnic minority group nor ethnic majority group. Public property interest is superior. No matter the ethnic identity, individual has to yield to the public interest. Therefore, the ethnicity factor is dropped off in this case. The Court regards the plaintiff as one of the "people" in the Republic but not a member of ethnic minority group.

IV. Comparative Analysis

The difference of property system plays an important role in the diversion of Indigenous tribes' recognition in United States and China. The United States is founded on private ownership of land system, while the Chinese establishment is based on public ownership of land. Therefore, the U.S. government focuses more on private parcel distribution and justification of taking away indigenous people's land, while Chinese government focuses more on the regulation and the development of autonomous zones. This is because the lands are nation owned and the development harvest will be distributed to people all over the country.

Rather than paying attention to the parcel distribution, the central government pays more attention to the development of the autonomous zones to create more benefits for the whole country. The Chinese government did not spare efforts to justify the parcel distribution because "all the people" own the land of the country together, neither a particular person or a particular group can own the parcel. Nobody has ownership over the land; not the people from ethnic minority group nor the ethnic majority group. This is consistent with the ethnic equality clause in the Chinese constitution.

V. Conclusion

The United States applies the Doctrine of Discovery to recognize Indigenous people's rights to the land. Private parcel distribution is a great concern in solving the land disputes where Indigenous tribes get involved. China recognizes Indigenous people's status by Ethnic Equality Clause and Ethnicities United and Prosperous Principle. Chinese courts do not bother to distribute private parcels because of the public ownership of the land. Public property interest in China is superior. The Chinese government's Indigenous policy focuses more on how to develop public land to create more benefits for the society, which is called Ethnicities United and Prosperous Principle.

Property is the foundation of human society. Property system as a basic system significantly affects Indigenous tribes with respect to legal policies. Nowadays, the world is more and more globalized. Future decision makers should keep an open mind when making decisions. It is important to learn from other countries to better serve the people living in the domestic territory.