

Realising Ainu Indigenous Rights: A commentary on Hiroshi Maruyama's '*Japan's post-war Ainu policy. Why the Japanese Government has not recognised Ainu indigenous rights?*'

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Abstract

This commentary critically reviews Hiroshi Maruyama's article 'Japan's post-war Ainu policy: Why the Japanese Government has not recognised Ainu indigenous rights?' (Maruyama 2013a), published in *Polar Record*. Maruyama criticises the government for its reluctance to enact a new Ainu law to guarantee Indigenous rights, even after Japan's ratification of the United Nations Declaration on the Rights of Indigenous Peoples. However, in actuality, the government is searching for the foundation of new Ainu policies in the existing legal frameworks and trying to guarantee some elements of Indigenous rights. Japan's case suggests possibility of realising Indigenous rights without the enactment of a specific law. It is not constructive to simply criticise the government from a one-sided perspective.

Introduction

This commentary critically reviews Hiroshi Maruyama's article 'Japan's post-war Ainu policy: Why the Japanese Government has not recognised Ainu indigenous rights?' (Maruyama 2013a), recently published in *Polar Record*, referring to his other two articles (Maruyama 2012; Maruyama 2013b). As someone who is interested in Ainu issues, it is my pleasure to see several articles on the subject in English. This article will be especially beneficial for those who are interested in the Ainu but who do not read the Japanese language. Even though Maruyama's article was published as a note, not as an original research article, the author's article would have been appreciated more if it had been constructed with a greater logical organisation. As it is presented, I am wary that his article might cause misunderstanding and confusion about Japan's Ainu policies. In particular, he discusses several ways in which 'the Japanese government has not recognised Ainu Indigenous rights', but does not attempt to explain the reasons. He also tends to miss some of the legal, political, and social factors behind the Ainu issues, which gives his discussion a somewhat one-sided perspective. Specifically, he blames the national government for lacking strong leadership to enact a new Ainu law that would guarantee Indigenous rights. At times, his discussion gives the impression that legislating Indigenous rights will solve all Indigenous issues. Unfortunately, his article lacks a nuanced and insightful treatment of the subject matter. From my perspective, the approaches to Indigenous policies are often seen as either black or white (if a law recognises Indigenous rights, it is a utopia, and without a law, it is hell for Indigenous peoples). In the case of Indigenous rights, however, many grey areas exist between.

Why has the Japanese Government not recognised Ainu Indigenous rights?

The title of Maruyama's article asks an important question. Nevertheless, the reader is left to wonder about the answer. The author gives an overview about several relevant historical events, including: 1) the Japanese government's lack of recognition of the existence of Indigenous peoples in Japan; 2) the Japanese government's reluctance to ratify the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), because it lacked a clear definition of the term 'Indigenous people'; 3) the Ainu Culture Promotion Act of 1997 (that he calls the New Ainu Law), which excluded any aspects of Indigenous rights, and was weaker than the decision of the Nibutani Dam lawsuit in the same year; 4) two other court decisions that rejected appeals by Ainu plaintiffs; and 5) the final report of 2009 by the Advisory Council for Future Ainu Policy (ACFAP), which deferred a decision to enact a law directed at the Indigenous rights of the Ainu. In the end, Maruyama simply repeats the latest recommendations of the Human Rights Committee (2008: 10) and of the Committee on the Elimination of Racial Discrimination (2010: 6), stating that the Japanese government should immediately accept them. His opinions seem to be without a strong theoretical foundation, and do not answer the question raised in the title of the article.

On page 206, Maruyama writes:

In the case of indigenous peoples, their human rights are protected by the guarantee of collective rights such as the right to self-determination, land, culture and language because their identity and life are closely associated with those

collective rights. The Constitution of Japan has individualism and liberalism at its core.

In fact, this seems to be the only answer offered for the central question of the article. Again, Maruyama mostly discusses *how* the Japanese government has failed to recognise Ainu Indigenous rights, by discussing a few pivotal events. Naturally, authors should be free to criticise the Japanese government, but as responsible academics, the issues should be analysed in a wider context, using sound reasoning and logic, with constructive suggestions whenever possible. Maruyama simply blames the government.

In regards to the Ainu Indigenous rights, one must consider the Japanese legal, political, and social contexts and examine how the UNDRIP articles can be realised in those contexts. In the annex of the UNDRIP (2007: 4) the country's context is specifically mentioned:

The situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.

Maruyama's article; however, lacks this perspective, which makes his argument somewhat naïve.

Can the UNDRIP be realised in the Japanese context?

What then are the Japanese legal, political, and social contexts that need to be considered to discuss Indigenous rights? I refer to some of the key factors. To begin, the Japanese Constitution Article 98 states:

This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. 2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Generally, the Japanese constitution is considered to be superior to international law, including United Nations declarations. Thus, when international law disagrees with the constitution, the constitution will be observed (Ejima 2012: 20).

Constitution Article 14 states that all of the people are equal under the law. Indigenous rights are considered to privilege a particular group of people, which is against Article 14. Furthermore, as Maruyama identifies, the fundamental philosophy of the Japanese constitution is to guarantee individual rights, and it does not always agree with the recognition of collective rights, such as language, land, and resource use. Furthermore, the constitution itself does not assume the existence of ethnic minority groups in Japan.

Even if individual and collective rights are not mutually exclusive under the Japanese constitution, as implied by the decision of the Nibutani Dam lawsuit (Levine 2001; Porter 2008), an important issue must be addressed. Currently, the Ainu have no

legal power or special political status as an Indigenous people of Japan. They are merely Japanese citizens. The Ainu also do not have an institution of representation (for example, the Ainu Association of Hokkaido is the largest Ainu organisation, but membership is voluntary and less than half of the total Ainu population are members). The District of Nibutani, which is mentioned in the Nibutani Dam lawsuit, is considered merely as a district in the town of Biratori, Hidaka subprefecture (it is not located in Iburi subprefecture as Maruyama states). Although most of the Nibutani residents are of Ainu ethnicity, Ainu residents of Nibutani do not have any authority to limit access to outsiders or to ensure that land and resources are specifically used for the Ainu. Nibutani is not a reservation governed by an Indigenous organisation. The local government of Biratori is responsible for offering services equally to all residents, regardless of their ethnicity. Under such circumstances, who will hold the collective Indigenous rights? (see Tsunemoto 2011) Although Maruyama (2012: 79) argues that the society should work with Koichi Kaizawa, who was one of the plaintiffs in the Nibutani Dam lawsuit and who is now leading a national trust movement to plant trees, he is not a representative of the Ainu, nor even a representative of the Nibutani Ainu.

These points demonstrate that the ratification of the UNDRIP does not suggest any immediate realisation of the Indigenous rights of the Ainu. Policy planners must first address all of the issues, while Maruyama identifies just one of them: collective rights and individual rights are not exclusive, by citing Porter (2008).

In his other article, Maruyama (2013b) compares Japan to the Nordic states, in particular Finland, to review their progress in realising Indigenous acts and rights. While it seems fair to criticise the Japanese government for its reluctance to contribute to

improving the draft of the UNDRIP at the international stage, Maruyama's article indicates that the Finnish constitution is in agreement with Sámi self-government and cultural autonomy (at least, Finland has somehow resolved the conflicts between the constitution and Indigenous rights). The Sámi also seem to have their own organisations that can function as holders of collective Indigenous rights. To arrive at feasible solutions and contribute to the realisation of Indigenous rights of the Ainu, one should critically examine the case of the Sámi with reference to the Japanese context. Simply blaming the government based on the comparison between countries that have different philosophies and constitutions is not constructive.

Some resolutions for the issues have been suggested. For example, as discussed later, Tsunemoto (2011) suggests a resolution to the conflict between prioritising Indigenous people and Constitution Article 14 for the equal treatment of all people. Uemura (2009) argued that the UNDRIP is equivalent to an established law of nations, which shall be faithfully observed, as stated in Constitution Article 98. Ichikawa's (2013) statement in the Ainu human remains lawsuit can serve as a strong foundation for Ainu collective rights.

Challenges to the enactment of a new Ainu law

In September 2007, Japan ratified the UNDRIP and the national government recognised the Ainu as an Indigenous people of Japan in June 2008. After these events, the Chief Cabinet Secretary organised *Ainu Seisaku no Arikata ni taisuru Yushikisha Kondankai* (the Advisory Council for Future Ainu Policy, ACFAP). Nevertheless, the ACFAP did

not move forward to enact a new Ainu law to guarantee Indigenous rights. An examination of the politics behind the enactment of the Ainu Culture Promotion Act of 1997 may reveal the reasons for the ACFAP's inertia.

Maruyama does not significantly acknowledge the contribution of Shigeru Kayano as the first Ainu member of the Diet to the Ainu Culture Promotion Act, or even to the Nibutani Dam lawsuit. Nevertheless, Kayano (1998) discusses his struggle at the time. The draft of the Ainu New Law, adopted by the Ainu Association of Hokkaido in 1984, included guaranteed political participation, and economic benefits in the form of a self-reliance fund based on the principle of compensation for historical dispossession, which would be administrated by Ainu themselves. The Ainu Culture Promotion Act, however, explicitly rejected the concept of Indigenous rights (Siddle 2003: 455-6), 'leaving only the thinnest crescent of cultural promotion and dissemination of information about the Ainu to [the Japanese]' (Levin 2001: 467). The Act was criticised by specialists and Ainu activists. In terms of Ainu cultural promotion, negative aspects were also identified at the time. For example, the Ainu Culture Promotion Act was said to benefit those ethnic Japanese who researched Ainu culture or who were interested in cultural exchange with the Ainu (statement of Masahiro Nomoto, in Kayano 1998: 33; statement of Ryoko Tahara, in Kayano 1998: 164-5).

Indeed, Kayano and the Ainu Association of Hokkaido were dissatisfied with the draft of the Act but Kayano also heard several politicians implying that the Ainu Culture Promotion Act would be withdrawn if the Ainu did not acknowledge the draft. Considering the circumstances, Kayano assumed that the Ainu would totally lose any chance to enact a new Ainu ethnic law if they did not accept the unsatisfactory draft that

was submitted by the government. Thus, he accepted it as a first step towards the future, and the issues of Indigenesness were formed as a supplementary resolution (Kayano 1998: 167-8).

Tsunemoto and Yoshikawa provide informative perspectives. The Act was created for a minority group, and under democracy, the majority generally has the right to make decisions, suggesting that the legal guarantee of minority rights would rely on the majority. The Act excluded the concept of Indigenous rights and focused only on cultural aspects to win the majority's sympathy, understanding, and consensus (statement of Teruki Tsunemoto, in Kayano 1997: 157-8; statement of Kazuhiro Yoshikawa, in Kayano 1998: 150). The Act's lack of inclusion of the concept of Indigenous rights is not simply explained by the Japanese constitution's disagreement with collective rights or the prioritisation of a particular group.

The lack of understanding of Ainu issues among the general public (and politicians, in particular) is serious and the situation has not changed since 1984, when the Ainu Association of Hokkaido submitted a draft of the New Ainu Law. The Japanese population is generally ignorant about ethnic minority groups, and many are unaware of the existence of some groups. This is the result of a lack of education, the ideology of an ethnically homogeneous Japanese nation that is strongly rooted in contemporary Japanese society, only minor differences in the facial appearance of the ethnic Japanese and other ethnic minorities, the highly Japanese lifestyle of ethnic minorities, and the small populations of ethnic groups (more than 98 per cent of Japan's population is of Japanese ethnicity).

After the formal recognition of the Ainu as an Indigenous people of Japan in 2008, several nationalist politicians, writers, and cartoonists have attacked the Ainu for their ‘deceptive Indigeneity’ and for the ‘privileges’ they enjoy, including welfare policies for enhancing their quality of life by the Hokkaido Prefectural Government (e.g., Kobayashi 2009; Matoba 2009). Some argue that the ‘ethnic Ainu’ people do not exist, because the contemporary Ainu do not live as they used to. At the same time, they ignore the history of colonisation and the fact that even the contemporary ethnic Japanese do not live as they used to. For the enactment of a new Ainu law, the Ainu must have the support of the majority of Japanese citizens; however, this is a difficult feat in the current intolerant environment that sides against ethnic minorities. Many Ainu simply conceal their ethnicity, even to their family members, for fear of discrimination (Onai 2010). An Ainu activist stated that it was difficult to find support for their activities from those who do not ‘come out’ (statement of Hideo Akibe, in a panel discussion, Ainu Association of Hokkaido memorial event on the International Day of the World's Indigenous People, Sapporo, 6 August 2011). In the 2008 Hokkaido Ainu Living Conditions Survey, conducted by Hokkaido University, a gap was found between activists and other individuals in their ethnic identity and general interest in Ainu issues (Onai 2010). The activists who are requesting the enactment of a new Ainu law do not always represent those who tend to conceal their ethnicity and live as mainstream Japanese citizens. Can one really require the Ainu to ‘further their presence on the international stage’ to ‘attain levels of equality’ like other Indigenous peoples? (Maruyama 2013b, 84)

Realising Indigenous rights in the Japanese context

The ACFAP has searched for the foundation of new Ainu policies in the existing legal framework. Teruki Tsunemoto, a member of the ACFAP, maintains that the legal base of the new Ainu policies is provided in Constitution Article 13, which states:

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

If an individual chooses to live as an Ainu, that choice should be respected and the national government must assume responsibility for providing a social environment to protect the choice. Former ‘inappropriate’ assimilation policies by the national government have caused difficulties for the Ainu to live as they were, and the Ainu were forced to become an ethnic minority without their consent. In addition, the choice to be an Ainu person has been rejected. The socioeconomic hardships of the contemporary Ainu are derived from these historical factors. Under such circumstances, the national government must assume responsibility for recovering the dignity of the Ainu and for restoring their previous social prosperity (ACAFP 2009: 22; Tsunemoto 2011: 46-8). Therefore, the new Ainu policies will be implemented not to recognise special rights of the Ainu but to fill the gap between the Ainu and other Japanese citizens that had been

caused by the previous government's policies. The 'reasonable' distinction between the Ainu and other Japanese citizens is recognised in Article 14, in its aim for the equal treatment of all individuals under the law (Tsunemoto 2011: 50).

According to such philosophies, some UNDRIP articles may be realised in the Japanese context. In 2010, the national government conducted a nation-wide survey on the socioeconomic status of the Ainu to identify necessary welfare measures, including scholarships, life and employment consultations, and life protection funds. These policies are considered as the realisation of UNDRIP Articles 20 and 21. Also, the ACFAP has discussed and polished a plan to establish a park, called the Symbolic Space for Ethnic Harmony (ACFAP 2009: 26-7), which will realise Articles 11, 12, 13, and 14.

Furthermore, the Cultural Impact Assessment project for the Biratori Dam construction, which is funded by the national government and developed in the town of Biratori, can be considered as the realisation of Articles 28, 29, 31, and 32 (Nakamura 2008; 2013).

Some slow progress has been seen in implementing new Ainu policies since the ratification of the UNDRIP in 2007. In regards to the Biratori Dam construction, Koichi Kaizawa correctly states that tree planting would be more efficient for flood control and more environmental-friendly than constructing a dam. Furthermore, unlike the case-by-case policies and projects, the enactment of a new Ainu law will establish the strong framework of the government's responsibility (Uemura 2009). Nevertheless, all of the above-mentioned policies and projects can be realised without the enactment of a new Ainu law, and some Ainu have benefited or will benefit from the policies. Thus, the existing legal framework can make some progress for Indigenous rights. In addition, the Ainu do not need to have a consensus of the majority.

Concluding comments

Is it still reasonable to say that the Japanese government has not recognised Ainu Indigenous rights? Certainly, a grey zone exists between the realisation of Indigenous rights and the enactment of an Indigenous act. In fact, the enactment of a new Ainu law is not the only way to guarantee their Indigenous rights. As several specialists have indicated, Indigenous legal issues have not been widely discussed in Japan (Uemura 2009; Tsunemoto 2011). In the post-war era, Japanese citizens have also lacked a meaningful co-existence with Indigenous peoples. The government needs to assume its responsibility to educate the general public and promptly implement Ainu policies. Consequently, the policy planners and the general public would benefit from making constructive and practical suggestions, rather than to further the one-sided critiques.

References

- ACFAP, 2009. Final report, Advisory Council for Future Ainu Policy. URL:
http://www.kantei.go.jp/jp/singi/ainu/dai10/siryou1_en.pdf
- Ejima, A. 2012. Keizai chitsujo to 'kenpo/kokusaiho' [Economic stability and 'the constitution/international law']. *Kikan Kigyō to Hosozo [The Quarterly Review of Corporation Law and Society]*, 31: 16-29.
- Ichikawa, M. 2013. *Iken chinjutsu yoshi [Statement summary]*. Hokudai kaiji bunsho kenkyukai. URL: <http://hmjk.world.coocan.jp/trial/trial003.html> (accessed 27 March 2013).
- Kayano, S. (editor) 1997. *Ainu-go ga kokkai ni hibiku [The Ainu language is heard in the Diet]*. Tokyo: Sofukan.
- Kayano, S. (editor) 1998. *Ainu bunka wo densho suru [Passing down Ainu culture]*. Tokyo: Sofukan.
- Kobayashi, Y. 2009. *Okinawa to Ainu no shinjitsu: Kobayashi Yoshinori sanjo! Nihon minzoku toha nanika? [The truth of Okinawa and the Ainu: Kobayashi Yoshinori shows up! What is the ethnic Japanese?]*. Tokyo: Okura Shuppan.
- Levin, M. A. 2001. Essential commodities and racial justice: using constitutional protection of Japan's indigenous Ainu people to inform understandings of the United States and Japan. *Journal of International Law and Politics* 33: 419-526.
- Maruyama, H. 2012. Ainu landowners' struggle for justice and the illegitimacy of the Nibutani Dam project in Hokkaido Japan. *International Community Law Review* 14: 63-80.
- Maruyama, H. 2013a. Japan's post-war Ainu policy. Why the Japanese Government has not recognised Ainu indigenous rights? *Polar Record* 49 (249): 204-207.

- Maruyama, H. 2013b. Disregard for the conservation of Ainu culture and the environment: The Biratori Dam project and Japan's current policy toward the Ainu. *Alternative: An International Journal of Indigenous Peoples* 9 (1): 74-86.
- Matoba, M. 2009. 'Ainu senju minzoku' sono shinjitsu: Gimon darakeno kokkai ketsugi to rekishi no netsuzo [*The Indigenous Ainu', its truth: Too many doubts on the formal recognition and fabricated history*]. Tokyo: Tenden sha.
- Nakamura, N. 2008. An 'effective' involvement of Indigenous people in environmental impact assessment: The cultural impact assessment of the Saru River Region, Japan. *Australian Geographer* 39 (4): 427-444.
- Nakamura, N. 2013. Towards a culturally sustainable environmental impact assessment (EIA): The protection of Ainu cultural heritage in the Saru River Cultural Impact Assessment, Japan. *Geographical Research* 51 (1): 26-36.
- Onai, T. 2010. Problem awareness and survey outline. In: Center for Ainu & Indigenous Studies (editor). *Living conditions and consciousness of present-day Ainu*. Sapporo: Center for Ainu & Indigenous Studies, Hokkaido University: 1-7.
- Porter, C. 2008. After the Ainu shinpo: The United Nations and the indigenous people of Japan. *New Voices: A Journal for Emerging Scholars of Japanese Studies in Australia* 2: 201-219.
- Siddle, R. 2003. The limits to citizenship in Japan: Multiculturalism, Indigenous rights and the Ainu. *Citizenship Studies* 7 (4): 447-462.
- Tsunemoto, T. 2011. *Ainu minzoku to kyoiku seisaku: Atarashii Ainu seisaku no nagare no nakade [The Ainu and education policies: In the trend of new Ainu policies]*. Sapporo: Sapporo daigaku huzoku sogo kenkyujo.
- Uemura, H. 2009. 'Ainu seidaku no arikata ni kansuru yushikisha kondankai' heno ikensho [*Suggestions to 'Advisory Council for Future Ainu Policy'*]. Tokyo:

Shimin gaiko senta. URL: <http://www005.upp.so-net.ne.jp/peacetax/20090518.doc>

UN, 2007. United Nations Declaration on the Rights of Indigenous Peoples. URL: <http://www.un.org/esa/socdev/unpfii/en/drip.html>

UN Human Rights Committee, 2008. Concluding observations of the Human Rights Committee in Japan. (UN Document CCPR /C/JPN/CO/5/1812/2008) URL: <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G09/401/08/PDF/G0940108.pdf?OpenElement> (accessed 27 March 2013).

UN Committee on the Elimination of Racial Discrimination, 2010. Concluding observations of the Committee on the Elimination of Racial Discrimination in Japan. (UN Document. CERD/C/JPN/CO/3-6/0604/2010) URL: <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G10/415/82/PDF/G1041582.pdf?OpenElement> (accessed 27 March 2013).