

Free, Prior and Informed Consent in Japan: A brief history of Ainu Indigenous Policies

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On June 6, 2008, both the lower and upper houses of the Japanese Diet unanimously adopted a resolution that urged the government to officially recognize the Ainu as an indigenous people. In response, the Chief Cabinet Secretary expressed the government's position in statement, saying: "The government will not only enhance the Ainu policies taken so far, but will also make efforts to establish comprehensive policy measures in recognition of the fact that the Ainu are an indigenous people with a unique language as well as religious and cultural distinctiveness".

But what is an indigenous people in the first place, and what legal implications are there for their official recognition? These questions were answered neither in the Diet resolution nor in the Secretary's statement. He established the Advisory Council for Future Ainu Policy in August 2008 to discuss related issues and develop a comprehensive policy framework. The Council's members included two constitutional scholars, an international law expert, a cultural anthropologist, a historian, a former Minister of Education, the Governor of the Hokkaido Prefecture and the Executive Director of the Ainu Association of Hokkaido, the largest organization of Ainu people.

Based on my experience following and studying this Council, today I would like to look back on the basic issues discussed by the group over one-year period. I would also like to share my thoughts on possible indigenous policies that will truly reflect the situations of the Ainu and Japan as a whole.

According to a recent survey conducted by the Hokkaido Prefectural Government in 2006, at least 24,000 Ainu people live in Hokkaido. Another few thousand may live outside Hokkaido, mainly in Tokyo. However, nowadays we do not see Ainu people speaking the Ainu language on a day-to-day basis or living traditional lifestyles even in Hokkaido. No Ainu settlements exist, and Ainu and other Japanese people generally live the same areas.

In terms of living conditions, the survey showed that the ratio of Ainu households receiving public assistance was about 1.5 times the average in Hokkaido and 2.5 times the national average. The college entrance rate among Ainu people under 30 was about half the national average. These results show that there are obviously more financial difficulties among the Ainu than among other Japanese people even nowadays. There are no known Ainu lawyers or medical doctors, so it is fair to say that the social advancement of the Ainu is clearly lagging behind.

In this way, Ainu people today live lifestyles similar to those of other Japanese people, but in harsher living conditions. However, they maintain their ethnic identity as Ainu despite the discrimination and assimilation policies of the modern era. We should note that lots of Ainu individuals and groups make efforts based on ethnic pride and dignity to preserve and develop their language and other aspects of their traditional culture.

The history of Hokkaido's development clearly shows that the Ainu lost the previous environment that allowed them to maintain their ethnic identity. In other words, they lost surroundings in which they could speak the Ainu language and embrace Ainu culture, not because they wanted to, but as a result of Japanese government policy. The government therefore has a duty to restore environments in which Ainu descendants can once again learn about their ethnic culture and live with their ethnic identity. From an Ainu viewpoint, it can be said that as an indigenous people who have lived for so long around the northern part of Japan, especially in Hokkaido, they are entitled to ask the government to revive an environment in which they can enjoy their culture and live with their Ainu identity, and that the government has an obligation to meet this request.

This was the basic concept behind the final report submitted to the Chief Cabinet Secretary by the Advisory Council in July 2009. To quote from the report, "The national government has a great responsibility to take sufficient measures to

ensure the revival of indigenous Ainu culture, taking into consideration historical context of how the modernization of Japan under national policy seriously damaged their culture".

In this way, when a state implements a policy that forces an indigenous people into a minority status against or regardless of their will, it is responsible for restoring their lost interests at a later stage. By defining such minorities as indigenous people, the Advisory Council report illustrated the state's obligation of special consideration for the Ainu as an indigenous people, as specified in the resolution adopted by the Diet and the statement issued by the Chief Cabinet Secretary. The report also highlighted the necessity of policies based on this obligation.

The concept of indigenous peoples adopted in the final report has characteristics that support Japan-specific indigenous policies.

In the international community, the term indigenous peoples often refers to ethnic groups that enjoy quasi-sovereign status and related rights, such as the right to self-determination and to the land they have traditionally owned or occupied, as outlined in the UNDRIP. We may call this as the substantive concept of indigenous people.

However, this concept of indigenous peoples based on special indigenous rights faces some difficulties to fit the present situation of the Ainu and the Japanese society. For one thing, there is the issue of rights owners. That is, who are the Ainu as rights owners? Who decides who owns rights, and what standards are used for these decisions? These are difficult issues to resolve. As an example, in providing Ainu people with benefits to let them enjoy their rights, it is impossible to know whether people are eligible or not based solely on their subjective claims. This might be possible in countries that have experienced long history of recognized coexistence with their indigenous populations, but in Japan, where public understanding of the Ainu is still very limited, decisions based only on self-recognition are hardly acceptable. Since the Ainu do not have any autonomous and representative organization or tribe as American Indians do, it is also not possible to let an autonomous ethnic body to judge whether people are actually Ainu. Another issue relates to collective rights. The inherent rights of indigenous peoples included in the UNDRIP include a variety of considerations such as rights

to land and languages, which are held collectively by indigenous people. However, in the United States and Europe as well as in Japan, whose legal system was imported from the West, rights owners in principle are individuals. It is difficult for them to acknowledge ethnic and other groups as rights owners unless it is expressly affirmed in constitutions or treaties like it is in countries in America and Oceania. Japan does not have this kind of constitution or treaties. The third issue involves the contents of rights. Sovereign rights unique to indigenous people in America and Oceania include the right to political self-determination, but this seems difficult for the Ainu, who have no tribes or other autonomous bodies possess and collectively exercise this right.

To address this issue, the Advisory Council adopted the concept that the indigenous people should refer to a minority people who were the first to settle certain part of a country, and deemed that if the state enters their territory without free, prior and informed consent and adversely affects their culture under a national policy, then it has a grave responsibility to provide reparations for related damage. This concept focuses not directly on the sovereignty or the rights of the ethnic group but on the process by which they were forced into minority status as a result of national policy against their will and suffered serious damage to their interests as a result. It views this process as the reason why the national government's obligation of policy consideration should be weightier for indigenous minority than for other minorities. This can be referred to as the procedural concept of indigenous people, in that the process serves as a weighted reason. More than a third of the Advisory Council report is taken up with descriptions of Ainu history in order to clarify this process.

If such a procedural concept is adopted, what Ainu interests does the government have a duty to restore? The final report supposes that Ainu culture must be revived.

Some people think that culture is limited to things like language, songs, dance and craftwork. In fact, the Ainu Culture Promotion Act enacted in 1997 is designed to promote such aspects of culture in a narrow sense for the time being. However, culture intrinsically has a broad significance that embraces all aspects of people's lives and lifestyles, such as technology, study, arts and morals in addition to food, clothing and shelter. We should note that the culture recommended for restoration in the final report refers to this wider definition.

Another important point about the foundation of policies recommended by the Advisory Council is that they are based on the Japanese Constitution, which founded on individualism and lacks provisions premised on the existence of the Ainu or indigenous people. The Advisory Council agreed that Article 13 of the Constitution, which stipulates that "all people shall be respected as individuals" could play a major role. That is, such respect for individuals means respect for their choice of lifestyles. If Ainu people choose to maintain their ethnic identity, this must be respected. The term respect has the passive meaning of refraining from intruding upon a choice, but it also includes a positive meaning in relation to which the national government should develop environments that enable Ainu people to keep their ethnic identity. This is what the final report maintains.

As is well known, the formation of ethnic identity is strongly influenced by external factors. As living environments from childhood affect the development identity, including ethnic aspects, the ethnic identity of Ainu people can be handed down only if their unique language, traditional epics, lifestyles and other resources are handed down and preserved well. This means that the Japanese government should create an environment in which the Ainu language and lifestyle will be handed down so that Ainu descendants can maintain their ethnic identity. It is also difficult to actively express ethnic identity in a society where there is discrimination against indigenous people, so the government has a duty to eliminate this kind of prejudice.

In this way, the Advisory Council concluded that if the basic principle of creating a society in which the Ainu can maintain their ethnic identity and pride can be established based on Article 13 of the Constitution, many of the policies requested by the Ainu can be implemented.

In December 2009, the new Ainu Policy Promotion Council was established under the Chief Cabinet Secretary to oversee the government's implementation of specific policies recommended in the final report of the Advisory Council and establish working groups for in-depth consideration of pressing issues.

One such organization is the Working Group for the Symbolic Space for Ethnic Harmony. The concept of a space of this kind was at the heart of the final report's policy recommendations. After a year or so of deliberations, institution recommended that such a space should be set up to create a national institution

where Ainu and other Japanese people can learn together about the history and culture of the Ainu so that related information can be passed on to future generations. It was also recommended that the space should have a range of facilities, including a national museum, traditional houses and modern handicraft studios; that it should be based on a vast area of land with a beautiful natural environment and include functions to foster practitioners of Ainu language and cultural activities such as traditional crafts and dance; and that it should promote exchanges with indigenous peoples around the world. The space will be set near Lake Poroto, in the Hokkaido town of Shiraoi.

Under the supervision of the Council, a range of initiatives have been implemented to introduce new policy measures and improve existing ones, including the establishment of a scholarship system for Ainu students, a subsidy program for universities and other institutions where the history and culture of the Ainu are studied, and a counseling system to provide support on a range of issues including livelihoods and employment. Efforts are also under way to incorporate program relating to the history and culture of the Ainu in school education, promote activities to spread Ainu culture in Japan and elsewhere, implement a project to foster practitioners of Ainu cultural elements such as the language and traditional crafts, establish a system to protect traditional knowledge, create facilities for Ainu people to interact, and return the human remains of Ainu people held by universities and other institutions. All these initiatives include measures that require the certification of Ainu ethnicity, related consideration is under way.

In concluding my brief report, let me summarize the basic framework of Ainu and Japan specific indigenous policy suggested by the Advisory Council. It is a three step approach. At first, the government should develop environments that enable Ainu people, as an ethnic minority, to keep their ethnic identity as ordained by the Article 13 of the Japanese constitution which reads: "All people shall be respected as individuals", but this rationale applies not only to Ainu people but every other ethnic minority including Koreans and Chinese residing in Japan. The second step is the consideration based on the procedural concept of indigenous people. This concept views that the national government's obligation of policy consideration should be weightier for indigenous minority than for other minorities

because of the historical fact that the state entered the minority's territory without consent and adversely affected their culture under a national policy. Accordingly the government has a much heavier obligation to revive the culture of indigenous Ainu people.

If Japan's first set of indigenous policies based on the procedural concept of indigenous people results in an increase in the number of Ainu who embrace their ethnic identity and the promotion of public understanding for the Ainu, I think the future generation of the Ainu and majority of Japanese society will have choice of choosing next step of Ainu policy which may include the substantive concept of indigenous peoples.