

## Repatriation of Ainu Ancestral Remains and Its Deadlock in Japan

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### 1. Preface: Ainu Property Disputes in General

Underneath all the recent controversial Ainu issues, the Ainu property disputes remain. The terra nullius doctrine (the discovery doctrine) applied in the past to Ainu Indigenous property, still continues as the basis of the present Ainu policy: The Japanese government still rejects the reparations approach of the UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples in 2007). The government's past injustice stays hidden. Japan would be the worst nation among developed countries regarding Indigenous issues, located far behind the world standards. Even though Japan signed the UNDRIP, it still denies its core concepts such as the right of self-determination and collective right notion.



(Sakushu-Kotoni River at Hokkaido University)

For example, Hokkaido University, one of the most spacious and the most beautiful campuses in Japan, has been a popular tourists' destination, but very few people know that the campus used to be an Ainu village or that the university was established after the conquest of the Ainu people there. The university still plays a negative role in ongoing colonialism even nowadays. The name of the Sakushu-Kotoni River running through the Central Lawn of Hokkaido University, comes from the Ainu family who originally lived in our campus before their conquest by the Meiji government of Japan. A ceremony for the international repatriation of the ancestral remains of one Ainu individual was held at the Japanese Embassy

in Berlin in 2017, 138 years after they had been disinterred from the Ainu tomb in the campus by a German traveler, but Hokkaido University still rejects the proposal to return these remains to the Ainu relatives.<sup>1</sup>

## 2. Repatriation of Ainu Ancestral Remains as One Recent Controversial Issue

Recent controversial Indigenous issues in Hokkaido include the repatriation of stolen Ainu ancestral remains and treasures, environmental injustice such as the construction of the Nibutani Dam and Monbetsu industrial waste sites, and the need for protection of indigenous knowledge. All of these issues reflect Ainu property discrimination in its broader sense.

First in order is an examination of the first issue. Ainu ancestral remains and cultural artifacts were stolen from almost all Ainu burial sites across Hokkaido by numerous anthropologists, most prominently, or notoriously, by Hokkaido University Professor Sakuzaemon Kodama.<sup>2</sup> In those days, surprisingly, the Hokkaido Prefectural Regulation regarding the “discovery of remains”, established in 1934 (Hokkaido Gov. Reg. No.83), enabled scholars to steal Ainu ancestral remains legally by obtaining the permission of the Hokkaido Governor. In the case that submission of related documents had been made to the police, the Hokkaido Government considered Ainu burial sites to be outside the category of ordinary tombs and the governor could issue permission for their excavation (Art.1, 3).

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<sup>1</sup> In August 2017, I met with Prof. Wolfram Schier of the Department of Prehistoric Archaeology at Berlin Free University, a previous president of the Berlin Association for Anthropology, Ethnology, and Prehistory, which had held Ainu remains for more than a century. Prof Schier remarked that the association should make an apology for this past injustice, and that he would feel ashamed in the case that the present Association President didn't apologize at the international repatriation at the Japanese Embassy in Berlin at the end of July 2017. Professor Schier contrasted the July repatriation to another international repatriation ceremony for Australian aborigine descendants that he had organized in March 2017. On this issue, see, Kunihiro Yoshida, *Why Can Ainu Ancestral Remains Not Be Returned to the Ainu People: From the German Repatriation Case*, 908 HUMAN RIGHTS & BURAKU ISSUES 14(2018).

<sup>2</sup> Prof. Sakuzaemon Kodama (1895-1970)'s office in Hokkaido Univ. was lined with Ainu remains and cultural artifacts. The Ainu remains amassed by him had been kept at the repository house in the campus since 1984, and then were controversially consolidated in Shiraoi in November 2019, but the cultural artifacts collected by him have been kept in the Northern Ethnic Materials Museum in Hakodate as the “Kodama Collection,” without any notice about their provenance having been made.

Many years have passed without any noteworthy progress since the “Grave Injustice” disputes over the repatriation of Ainu ancestral remains started in 1980. More than a thousand Ainu ancestral remains had been kept in a repository house on the Hokkaido University campus since 1984, and then controversially have been consolidated at the ceremonial site of the Ainu Symbolic Space for Ethnic Harmony that will open in the Hokkaido town of Shiraoi in April 2020.

Several repatriation lawsuits against Hokkaido University have been filed since September 2012, initially by Urakawa Ainu descendants. However, the university has rejected their position by taking an individualistic property owner notion of ‘next of kin’, which does not match with the indigenous Ainu collective/communal notion of property. Eventually, the university inconsistently started accepting repatriation settlements one after another. The first repatriation settlement was made in March 2016, and similar settlements followed suit. In this way, actual reburials at Ainu communities have been actualized in several places.<sup>3</sup>



(Stolen Ainu Ancestral Remains in the Hokkaido Univ. Repository Room)

At the time of consolidation to the Ainu park in Shiraoi named the Symbolic Space for Ethnic Harmony in November 2019, 1,676 Ainu ancestral remains being kept there in 382 boxes from 11 universities across Japan<sup>4</sup>. Moreover, 74 stolen Ainu ancestral remains have been found at 13 facilities such as the Japan National Museum in Ueno, Tokyo. Incidentally,

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<sup>3</sup> Ainu litigants attained reburials for 11 remains in Kineusu, 4 remains in Monbetsu, 63 remains in Urahoro, and 3 remains in Asahikawa.

<sup>4</sup> Allegedly some Ainu remains are still in the repository room at Hokkaido University campus for inquiries about their identification.

only 38 remains out of 1676 have been individually identified.



(Recent Repatriation to Urakawa Kineusu Ainu Community after Litigation (July 2016) )

### 3. The Deadlock of Ainu repatriation

During the process of leading up to the consolidation, the Japanese government has prepared two guidelines regarding future repatriation: First, the guideline for those remains individually identifiable, issued in June 2014; and second, the guideline for those remains kept by universities generally, issued in December 2018. In the first case, remains should be repatriated only to the “next of kin”, and in the second case, remains could be repatriated to the residents of the Ainu local community where they were originally “discovered”. In any event, despite these guidelines, repatriation movements have stagnated after a series of settlements occurred.



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(Sumiyoshi Shrine in Otaru and its Exterior) (Prof. Koganei stole Ainu ancestral remains from near the shrine at Suminoe 7 Chome in July 1888)

The collective notion of the latter guideline seems to have overcome the individualistic concept of the former. However, what will happen in the case of Ainu communities which have disappeared? For example, in the case of the Otarunai Ainu, i.e., the Ainu people of Otaru, a historic city to the west of Sapporo, their descendants are now gone. Already in the 1880's, they had been displaced to Hamamasu, a remote northern harbor town, due to urbanization. Shortly after their being conquered, Professor Yoshikiyo Koganei (1859~1944) of Tokyo University, another anthropological giant, visited there with his wife in 1888 and 1889 and stole 166 Ainu ancestral remains from a location near the Sumiyoshi Shrine<sup>5</sup>. His collection has also been consolidated in Shiraoi lately, because there are no Ainu residents in Otaru nowadays.

In response to these guidelines, a non-profit organization consisting of critical Ainu members named the Group Reconsidering Anthropological Research of Ainu Remains, made a request in January 2020, for the future vision of repatriation by the Japanese government: (i) correct historical recognition of past injustice; (ii) sincere apology and reburials by the Japanese government, at its own expense, at sited from which the remains had been disinterred; (iii) sincere apologies by the related universities and local governments; (iv) maintenance by the related local governments of Ainu reburial sites after repatriation.

However, the repatriation deadlock has continued. Next in order is the consideration of the background to this stalemate: First, the dominance of the individualistic notion of property in relation to Ainu ancestral remains, second, more importantly, the vulnerability of decentralized local Ainu communities which lack the capability for maintenance of Ainu Indigenous tombs and reburial sites, and third, and much more powerfully, the resilient request by anthropologists for academic reuse of Ainu ancestral remains now housed in Shiraoi.

For example, in relation to repatriation lawsuits against Kyoto University by the Ryukyu people in Okinawa, another indigenous people despite the Japanese government's outdated denial of their indigeneity<sup>6</sup>, Professor Ken'ichi Shinoda sent President Juichi Yamagiwa of

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<sup>5</sup> See, YOSHIKIYO KOGANEI, MY MEMORIES OF THE ANTHROPOLOGICAL VISIT AT AINO'S LAND: 48 YEARS AGO (Oka Pub. Co., 1935).

<sup>6</sup> The assimilation policy towards the Ryukyu people started from the colonization of the Ryukyu Kingdom by the Meiji Government in 1872, known in Japanese as the "Transfer of the Ryukyu Islands" in Japan. See also, the negative comments of the Japanese Government issued in August 2016, with regard to the Recommendation of the Committee on the

Kyoto University a controversial letter in July 2019, stating that Ainu and other indigenous peoples' ancestral remains are public property and that they should be made available for anthropological research.

This request for academic reuse by anthropologists and archaeologists might be a substantial reason why Hokkaido University rejected repatriation by taking an individualistic view of property, demanding DNA tests and imposing the tough hurdle of “next of kin”. Taking account of the longstanding legal principle of the Japanese traditional commons known as ‘Iriai’, which the late Professor Eleanor Ostrom, an interdisciplinary empirical new institutionalist,<sup>7</sup> also spotlighted, Hokkaido University’s individualistic property assertions regarding the ownership rights of the Ainu people, do not align with the mainstream argument of collective property by Japanese civil law scholars, even in regard to Ainu ancestral remains.<sup>8</sup> The judiciary itself took such a collective notion at the level of settlements and suggested repatriation to Ainu communities.<sup>9</sup> We should take note that all Indigenous hunting and gathering people across the globe, including the Ainu, held such communal property notion for generations before the legal transplant of the modern individualistic notion of private property.

For the Ainu people in quest of overall repatriation to their local communities, their substantial challenge should be the institutional establishment of stronger local communities, for the reburials of repatriated remains and the maintenance of their local Ainu tombs/burial sites, all of which will require financial assistance to the Ainu people.<sup>10</sup> In this sense, the

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Elimination of Racial Discrimination (CERD) on September 26<sup>th</sup>, 2014 (CERD/C/JPN/CO/7-9). Not many Japanese know that the United Nations, especially its Committee on the Elimination of Racial Discrimination (CERD), has requested that the Japanese government should admit the Ryukyu people as a separate indigenous people since October 2008, and that the CERD issued its last decision and statement to Japan in September 2014. The Japanese government has been constantly inactive, even though Senator Keiko Itokazu herself made an appeal at the UN shortly before the committee’s conclusion, for the right of Ryukyuan political participation under UNDRIP art.18.

<sup>7</sup> See, ELEANOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (Cambridge U.P., 1995)65-, 88-.

<sup>8</sup> For example, see, KUNIHICO YOSHIDA, *THE LECTURE BOOK ON PROPERTY AND SECURED TRANSACTION* (Shinzan Pub. Co., 2010) 162-.

<sup>9</sup> See, MORIHIRO ICHIKAWA, *LEGAL STATUS OF THE AINU PEOPLE AND THE GOVERNMENT’S INJUSTICE* (Juro Pub. Co., 2019) 31-.

<sup>10</sup> Incidentally, I paid a visit to the traditional Ainu burial site in Kaminukibetsu, a

system of grants for the promotion of Ainu culture might be one of the limited outstanding financial institutions introduced anew by the new Ainu statute, the Ainu Policies Promotion Act, established in April 2019. These grants should at least be expanded to the Ainu people to respond to their imminent needs on this score.



(Ainu Traditional Burial Site Tomb in Kaminukibetsu in Biratori)



(with the late Ms. Aiko Hatozawa) (in September 2012)

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mountainous Ainu community in Biratori, which is exactly the place to which the Anesaru Ainu people in Hidaka residing adjacent to the Imperial ranch walked after their displacement in the 1910s. The late Aiko Hatozawa, at the age of 85, who experienced the tragic displacement, i.e., the Japanese version of the 50 kilometer “Trail of Tears”, showed me around their Indigenous community burial site in September 2012. She frugally maintained care for the traditional Ainu burial site there. I wonder who will take care of it after her death.

#### 4. Addendum: Problems of the Recent Ainu New Statute

Lastly, an explanation of some features of the new Ainu statute that was enacted in April 2019, the Ainu Policies Promotion Act of 2019, of which I am critical of. One main function of the act is provision of legal ground for the establishment of an Ainu Park in Shiraoi named the Symbolic Space for Ethnic Harmony,<sup>11</sup> which will open on April 24<sup>th</sup>, 2020<sup>12</sup>, and includes a ceremonial facility for stolen Ainu ancestral remains. Thus, first, the statute includes some articles about the management organization for the Ainu park (Art.7, 8, 9, 10), but no articles about the consolidated ancestral remains nor repatriation. Ironically, tourists at the Ainu park in Shiraoi might be limited due to the recent outbreak of coronavirus.



(Indigenous Salmon Fishing by Mr. Hatakeyama) (September 2019)

Second, regarding the revival movement of Ainu Indigenous hunting and fishing rights, 150 years after the Meiji government's establishment and its subsequent denial of their Indigenous rights, some Ainu people, most notably Mr. Satoshi Hatakeyama, have made controversial demands for the return of Indigenous Ainu salmon fishing rights for ceremonial purposes, even though the level would be limited and would be far behind

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<sup>11</sup> It is also called "Upopoy," meaning to sing together, in the Ainu language.

<sup>12</sup> The opening date has been postponed for another month due to coronavirus problems.



amount of fish harvestable according to world standards such as the Boldt Decision(1974) in the U.S.<sup>13</sup> The recent statute contains one new clause related to Ainu fish harvesting (Art. 17) in response to his controversial activities, but there's no fundamental change in the Japanese Central and Local Hokkaido governments' restrictive stance toward Ainu Indigenous fishing rights. Mr. Hatakeyama himself was criminally charged after his Indigenous fishing activities in September 2019.<sup>14</sup>

Third, the statute contains some clauses about the enhancement of Ainu tourism, including a system of grants/financial subsidies for Ainu tourism (Art.15). However, unlike the situation in Sweden<sup>15</sup>, there could be no genuine Ainu Indigenous tourism as a result of this statute. Rather, the statute is overwhelmed by superficial commercialism. What makes matters worse, grants will be provided to local governments rather than to the Ainu people themselves.

Fourth and lastly, there are clauses at the beginning of the Act regarding respect for the Ainu people which prohibit discrimination against them generally (Art.1, 3, 4). However, these clauses are not effective, because the Japanese government still denies the UNDRIP's reparations approach<sup>16</sup> and it still hides its past injustice towards the Ainu people, including most infamously the conquest of Ainu land: i.e., Hokkaido, according to the terra nullius doctrine. Thus, the Japanese government continues to apply a welfare approach rather than a reparations approach for the many indigent and vulnerable Ainu

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<sup>13</sup> United States v. Washington, 384 F. Supp. 312, aff'd, 520 F.2d 676. On this issue, see, Kunihiko Yoshida, *The Fishing and Water Rights of the Yurok People in the U.S.: Their Adversity and Future Prospect Compared with the Ainu People*, 780 HOGAKU SEMINAR 51(2020).

<sup>14</sup> See, Satoshi Hatakeyama, *The Revival of Ainu indigenous fishing right in the Sea of Okhotsk*, 932 HUMAN RIGHTS AND BURAKU ISSUES 23 (2020).

<sup>15</sup> Incidentally, I once (in the summer of 2016) visited the Sami reindeer herding village, named Jukkasjarvi Sami village, in the suburbs of Kirna, a northern mining town in Sweden, and talked with its Sami village master about his indigenous life and his struggle with the steel mining industry. That type of indigenous tourism is ideal for me.

<sup>16</sup> This is the position of the Prominent Scholars' Committee Report issued in 2009, which might have constituted the starting point for the subsequent recent Ainu policies. Professor Teruki Tsunemoto of Hokkaido University, a director of the Ainu Indigenous Research Center of Hokkaido University, drafted this report.

people. As a result, reverse discrimination arguments loom large and related discriminatory hate speech never ceases.

In conclusion, there has been no important change regarding Ainu policies through establishment of the recent statute, either at the level of principle or of concrete policies. Instead, I am rather worried about the biased shallow Ainu commercialism expanding due to new budgets because of this statute.<sup>17</sup>



(Ainu Snow Exhibit at the Sapporo Snow Festival, 2020) (70 million JPY (636,363 US Dollars) was granted to the Ainu-related private event entrepreneurs, not to the Ainu people, at the Snow Festival in February 2020.)

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<sup>17</sup> For the details of my critical analysis of the recent Ainu statute, see, Kunihiro Yoshida, *Problems of the Recent Ainu Statute Debates (Part 1) (Part 2): How It is Distant from the World Standards*, 44 MODERN THEORY (GENDAI NO RIRON) 142, 45 *id.* 150(2019).