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Legal Frameworks for the Protection of Ainu Language and Culture in Japan: International and European Perspectives

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The process of internationalisation is exerting pressure on governments around the world to recognise the rights of their indigenous peoples. This article investigates the current legal framework for minority language protection in Japan, where a history of assimilation has threatened the ancestral language and culture of the Ainu minority. The situation in Japan is contextualised within a broader discussion of minority language protection at global and European level in order to better understand the political environment in which a shift in policy for the protection of minority languages has begun. Although the implementation of a new law to promote Ainu culture has led to limited benefits for the Ainu, the fact that Japan continues to deny that the Ainu were colonised and dispossessed of resources acts as a barrier to reconciliation and a way forward. Findings indicate that the processes of internationalisation are conducive to increased international cooperation to promote consensus, greater social inclusion and more opportunity for minorities to participate in political structures. A further significant finding is that an acceptance of diversity and local autonomy can lead to an assurance of human rights.

Introduction

The world's languages are declining at a rapid rate as a result of changing political, economic and social conditions across the globe. Many scholars predict that by the turn of the next century at least 40 per cent of the world's estimated 6,800 languages will have disappeared.¹ UNESCO noted as long ago as 1972 that the world's natural and cultural properties are threatened. They recognise linguistic diversity as an intangible resource and have taken action to raise awareness among policy-makers, speaker communities and the general public about language endangerment.² Reasons for protecting endangered languages are many, and include the rationale that the disappearance of a language entails the loss of thousands of years of knowledge about a particular environment and survival within it. Notions of group identity and self-

¹See, for instance, Harrison, *When Languages Die*; 'Terralingua, Unity in Biocultural Diversity'; and Crystal, *The Cambridge Encyclopedia of Language*.

²Moseley, *UNESCO Atlas of the World's Languages in Danger n*.

esteem,³ as well as the benefits of preserving rich oral histories, are also compelling arguments. The protection of minority languages also involves recognition of linguistic heritage as a way for indigenous groups to attain empowerment and basic human rights.⁴

Minority language rights are becoming increasingly internationalised as part of an evolving universal human rights system, in which states are encouraged to adopt universal standards in the form of international treaties and other legal instruments. The protection of minority languages has international, national and sub-national dimensions in that human rights protection necessarily entails the implementation of international norms within the domestic legal space. The protection of minority language rights is ultimately the responsibility of state institutions, and global pressure on national governments to protect them reflects the fact that acceptance of universal standards has risen to the status of an international political imperative. Political pressure channelled through the economic, legal and diplomatic mechanisms of internationalisation has created a setting for real institutional change in many countries around the world.

In the European Union (EU), minority language rights are being strengthened through legislation in support of the traditional languages of a region. In the past, for example, France has officially denied the existence of minorities, an enduring legacy of the

³Fishman, *Handbook of Language and Ethnic Identity*.

⁴For empowerment, see Theiberger, 'Extinction in Whose Terms?' 'Minority language' refers here to the languages of traditionally excluded groups who coexist in an unequal power relationship with a dominant majority in a nation state.

Jacobin doctrine of state centralisation and the indivisibility of the nation.⁵ However, through the processes of internationalisation and regionalisation, manifested predominantly as European integration, the viability of French cultural monism is being challenged.

In a similar way, the rights and claims of the Ainu minority in Japan have been historically ignored, but the process of internationalisation seems to be challenging dominant Japanese views regarding national homogeneity and solidarity. This article investigates the current legal framework for minority language protection in Japan. There, colonisation of the Ainu's territory led to an extended diglossic language situation⁶ in which Ainu existed alongside Japanese, gradually falling out of use over time. Today, the Ainu language is considered to be moribund although there is evidence of a revitalisation movement.⁷

In many countries that were former colonies or colonial powers, including Japan, France, Australia, New Zealand, USA, and Canada, activists have begun language revitalisation movements. These movements need support of government policies along with a groundswell of grassroots activism if they are to reverse the tide of

⁵Hazareesingh, *The Jacobin Legacy in Modern France*; Safran, 'Ethnonational minority identities in France'. Feagin and Feagin's *Racial and Ethnic Relations* refers to 'minority' as categories of persons who hold little power relative to other groups within a society.

⁶Extended diglossia exists in places where the domains of linguistic behavior are ranked into a hierarchy from 'high' to 'low'. The language associated with the more powerful group of the society or the one that has greater international prestige dominates the 'high' domains of language usage. The 'low' variety is thought to be most at risk of falling out of use because people who can operate only in this domain are at a relative disadvantage in such speech communities. See Schiffman, 'Diglossia as a Sociolinguistic Situation', 205-16; Wardaugh, *An Introduction to Sociolinguistics*.

⁷Anderson and Iwasaki Goodman, 'Language and Culture Revitalisation in a Hokkaido Ainu Community'. 'Revitalisation' is used in the present article to refer to restoring vitality to a language by transmitting it to the younger generation.

language loss after years of proscription and peripheralisation.⁸ The internationalisation of law is providing the framework within which language revitalisation can take hold⁹.

A shift of focus from historical antecedents in Japanese policies regarding minority languages to recent changes in policy draws attention to international norms that contribute to reshaping values and attitudes at the domestic level. To further examine the political conditions that have caused policy shifts, the Japanese position is situated here within a broader discussion of minority language protection at the global level, drawing particularly on developments in Europe.

It may not be evident that the EU experience of minority language protection holds relevance for Japan. However, both systems are increasingly oriented to the processes of internationalisation, which are shaping their values towards a greater acceptance of diversity and local autonomy. These values constitute the cornerstone of the human rights movement. While the persisting universalist-relativist debate presents cultural relativism and ideas of the universality of human rights as mutually exclusive,¹⁰ we depart in this article from the premise that notions of universal human, civil and political rights are necessarily interpreted through an East-West cultural dichotomy.¹¹

⁸ Fishman, 'What is reversing language shift (RLS) and how can it succeed?'; May, 'Language and Education Rights for Indigenous People'..

⁹ Watts, 'The Importance of International Law'.

¹⁰ Whether human rights are seen as having universal application, or as being inherently contingent on socio-cultural contexts, underpins persistent tensions in Human Rights Law. It is argued by relativists that human rights are moral constructs necessarily rooted in cultural contexts. In this view, human rights represent an ideology of Western individualism and operate as an instrument of post-colonial domination, an illustration of Western chauvinism. The alternative, Universalist view sees international human rights as springing from a recognition and respect for the dignity of every human person – human rights are and must be the same everywhere. See Steiner, Alston and Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy'.

¹¹ See Rodan, 'Political accountability and human rights in Singapore', 70.

We seek to avoid a neo-imperialist ontology of universality and accept the idea that human rights have ‘multiple and diverse foundations’, supporting the thesis that the practice of human rights ‘arose not from any deep Western cultural roots but from the social, economic and political transformations of modernity’.¹² The condition of modernity and the spread of modern markets have globalised the same threats to human dignity as initially experienced in European societies dominated by market economies and bureaucratic states. The focus of human rights on pluralism and diversity thus represents an effective response to these threats.¹³ Moreover, while significant disparities in political, institutional and cultural realities between Europe and Japan are evident, and home-grown pressures for reform in Japan have recently been surfacing, nevertheless, the process of internationalisation is having a positive influence in reshaping Japanese policies on minority protection, just as it has had in Europe.

This article maps and contextualises Ainu language revitalisation efforts in Japan within a framework of internationalisation, a process through which international human rights norms are transformed into domestic law. If human rights remain ‘the only proven effective means to assure human dignity in societies dominated by markets and states’,¹⁴ we contend that Japanese national interests will be advanced through internationalisation. The process of internationalisation itself reflects a dynamic interaction between international and domestic law, which can promote a widespread transformation of attitudes towards the protection of minorities. Such a transformation assumes the complementarity of international and national law, and

¹² Donnelly, ‘The Relative Universality of Human Rights’, 292, 287.

¹³ Ibid., 287–8.

¹⁴ Ibid.

views law in general, and international law specifically, as asserting a declaratory and socialising force. In other words, we argue that legally codifying a community's right to use their traditional language in a variety of domains removes social hurdles that have been difficult for minority groups to overcome and fosters a society that is more tolerant of diversity.

Internationalisation

Internationalisation identifies a trend in which nations find themselves negotiating with each other on a range of matters going beyond international relations, trade and treaties in order to engender trust between nations. It is a process that requires legal instruments to be put in place, often resulting in change occurring on a domestic level. The response to internationalisation through international and domestic law is reflected in the increasing regulation of economic, social, cultural and legal life through international treaties, model laws and recommendations. The growth in influence of international bodies, multilateral treaties and other legal instruments on human rights testifies to the emergence of an international rule of law, comprising 'the existence of a comprehensive system of law, certainty as to what the rules are, predictability as to the legal consequences of conduct, equality before the law, the absence of arbitrary power, and effective and impartial application of the law'.¹⁵ Few states have been immune from these developments, which have had a profound effect on domestic law. Petersmann notes that the legal protection of international human rights values serves 'constitutional functions [...] at home and abroad'.¹⁶ There is no doubt that constitutional law and international law are converging in western

¹⁵ Watts, 'The importance of international law', 7.

¹⁶ Petersmann, 'Time for integrating human rights into the law of worldwide organizations', 16-17.

democracies, as constitutional courts are interpreting national constitutions in conformity with international law to the benefit of citizens.

Others have highlighted the power of commercial relationships across borders to extend the rule of law internationally including effective human rights protection. The EU, for instance, has since 1995 required that all association, trade and cooperation agreements with third countries contain a ‘human rights clause’ requiring third countries to respect human rights.¹⁷ Furthermore, a growing politicisation to protect national minorities is occurring. Numerous international legal instruments have been developed to protect minority interests, culture and language in order to foster a more trustful environment in commercial situations, where, for example, people with mainstream business knowledge may be deterred from taking advantage of more vulnerable people such as indigenous peoples.

When a treaty obligation is naturalised within domestic law, an international rule can be invoked before a national court. By investing legal enforceability to international laws within domestic legislation, national courts ensure that international law is complied with in the domestic sphere. It is evident that the fulfilment of human rights obligations commonly requires constitutional and statutory adjustments within the process of giving domestic effect to international obligations; Japan is no exception. Since Japan joined the international community after 1868, the Japanese practice of international law has covered a wide range of fields and stances.¹⁸ There is general agreement that Japan today seeks to engage constructively with international law and to enhance its status domestically. While Japan is generally responsive to international

¹⁷ Harvey and Longo, *European Union Law*, 221.

¹⁸ Andō, *Japan and International Law*.

law, there is sometimes disjuncture between practice and rhetoric. Thus Japan's position on minorities has tested its credibility on the international stage. The lack of effective enforcement mechanisms under international law may have encouraged a cavalier attitude on its part with respect to compliance with international human rights laws. Moreover, the Japanese government has not shown a preparedness to comply with international laws on matters they consider to be domestic issues.

Global Framework for Minority Language Rights

The global phenomena of invasion and colonisation have invariably entailed the subjugation of peoples and the creation of minorities. Increasingly, these processes have been recognised as violating certain economic, social and human rights, prompting the formulation of international legal instruments to protect minority groups. With the promulgation of the International Covenant on Civil and Political Rights (ICCPR) on 16 December 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the same date, a worldwide movement to improve the rights of minority people began in earnest.

Japan ratified the ICCPR and the ICESCR on 21 June 1979. More recently, in 1995, Japan acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). International laws of particular relevance to the revitalisation of the Ainu language are Article 27 of the ICCPR and Article 2(2) of the ICESCR.¹⁹ Presuming an entitlement to cultural survival, Article 27 of the ICCPR provides that persons belonging to minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to

¹⁹Stevens, 'The Ainu and human rights', 196□7.

profess and practise their own religion, or to use their own language'. The right to education is recognised in Article 13(1) of the ICESCR. Article 2(2) guarantees that this and other rights enunciated in the ICESCR 'will be exercised without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

These principles have since been taken further by the United Nations. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly on 18 December 1992, was inspired by Article 27 of the ICCPR. It is explicitly focused on furthering the protections afforded by Article 27 concerning the rights of persons belonging to ethnic, religious and linguistic minorities. Article 4(3) of the Declaration provides that 'States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue', or receive instruction in it.

There are also international laws and a UN resolution devoted specifically to indigenous peoples. The International Labour Organisation's (ILO) Indigenous and Tribal Peoples Convention 1989 (C169) adopted new international standards in respect of indigenous and tribal peoples in all regions of the world with a view to removing the assimilationist orientation of its earlier standards,²⁰ while the UN Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007 by 129 states, including Japan, reaffirmed that indigenous peoples, in the exercise of their

²⁰ The earlier standards can be found in the superseded C107 Indigenous and Tribal Populations Convention 1957.

rights, should be free from discrimination of any kind.²¹ Although it is not legally binding, this resolution represents development of international legal norms and shows a commitment of the signatories to move in the direction of setting standards for the treatment of the world's indigenous peoples. This resolution has the potential to become an important tool for eliminating human rights violations against indigenous peoples, which is a significant commitment for the Japanese government in regards to their relationship with the Ainu. Article 13 is the most noteworthy for our argument in that it ensures the right of the Ainu to revitalise their language and obligates the state to ensure that this right is protected.²² Although Japan voted in favour of this Declaration, they have not ratified or acceded either ILO convention C169 or its predecessor, indicating that while they are agreeable to a set of guidelines about the treatment of its indigenous people, the government does not wish to be legally bound at this stage.

To prevent language endangerment, the Universal Declaration of Linguistic Rights (UDLR) was adopted in Barcelona, Spain in 1996 by educational bodies such as the International Association of Applied Linguists and the International Federation of Modern Language Teachers, along with several other organisations that advocate for linguistic rights. Since 1996, many more non-government organisations and academic groups have signed it. A Follow-up Committee was established to add moral weight to the UDLR, to spread the ideas of the Declaration and to get it into UNESCO. The Scientific Council of Experts in linguistics was also established to keep the community contributing to the cause. The UDLR proposes the creation of watchdog groups within the UN, the Council of Languages, and World Commission on

²¹ UN Declaration on the Rights of Indigenous Peoples.

²² *Ibid.*, 7.

Linguistic Rights to look after language rights.²³ Institutions and non-governmental organisations that authored the UDLR are petitioning for the Council of Languages to be given power to protect language communities. They aim to create an international law body with power to uphold the rights declared in the UDLR on a global basis.

The UDLR's stated purpose is to ensure maintenance of social harmony throughout the world by correcting linguistic imbalances. Although the objective of social harmony may be difficult to achieve, the UDLR is an attempt to gain respect and rights for the speakers of all the world's languages to develop their respective language without prejudice or fear of political or economic interference or reprisals.²⁴ The document notes that the majority of the world's endangered languages belong to non-sovereign peoples, which explicitly politicises their plight. The view of the UDLR is that these groups are prevented from developing their languages as a result of state-imposed political and administrative structures and language.

Fishman argues that nations that foster linguistic diversity are stronger than ones that are monolingual.²⁵ He believes national culture and political foundations will be weakened if disenfranchised minority groups are discouraged from expressing behavioural patterns that are traditionally meaningful to them. States that support multilingualism demonstrate a fundamental acceptance of diversity and pluralism with a tolerance for minority groups.²⁶ There is recognition in many societies, states and organisations (including the UN) that diversity is empowering. At the core of human rights are values such as respect for diversity and local autonomy. Some polities, such

²³ UDLR, 'Universal Declaration of Linguistic Rights', 17.

²⁴ Ibid.

²⁵ Fishman, 'Planned reinforcement of language maintenance in the United States', 23.

²⁶ Frawley, *International Encyclopedia of Linguistics*, Vol. 1.

as the EU, have elevated the sentiment that diversity is empowering into the motto ‘unity in diversity’. There is abundant evidence in EU countries of mobilisations of local communities and groups towards the EU by which is meant the pursuit of political objectives through participation in formal and informal networks including membership of EU institutions such as the Committee of the Regions.²⁷ The EU level of governance is seen by sub-national and local groups as offering a means of bypassing national structures that stymie the expression of local interests and preferences.²⁸ The capacity to engage with this level has been demonstrated to be largely dependent on the extent to which the local community is able to assert a strong identity.²⁹

There is some correlation between effective mobilisation and strong cultural identity³⁰. Identity and other symbolic resources, including language, have recently been proven to constitute important economic resources.³¹ The retention of language and culture has been shown to strengthen political resources both materially and symbolically with benefits for the minority group and the polity generally. However, in situations in which the language has lost much of its instrumental value, as is the case for Ainu, it has been observed that only certain aspects of ‘traditional behaviour patterns’ that do not conflict with the dominant society are required for a nation to satisfy the ‘image of polyethnicity’.³² In other words, Japanese society is more welcoming of Ainu oral literature, embroidery, traditional hunting and fishing for example than it is of

²⁷ Longo, ‘European Integration: Between “Micro-regionalism” and Globalism’, 479-482.

²⁸ Marks and McAdam, ‘Social Movements and the Changing Structure of Political Opportunity in the European Union’.

²⁹ Marks, Neilsen, Ray and Salk, ‘Competencies, Cracks and Conflicts’, 60-1.

³⁰ Longo, ‘European Integration: Between “Micro-regionalism” and Globalism’, 479-482.

³¹ Surdej, ‘Time horizons and the institutional underpinnings of local development’, 35.

³² Theiberger, ‘Language maintenance’, 335.

iyomante ('Bear Sending Ceremony') in which a yearling cub is sacrificed. Yet language, like other cultural forms, is thought to retain a symbolic or affective value to help the minority group retain social cohesion.³³ Other studies support the view that group dynamics, resulting from political, social, or economic change, affect the choice to maintain or drop the use of a minority language.³⁴ Studies addressing ethnolinguistic vitality indicate that essential variables include language attitudes,³⁵ political, legal, and demographic factors,³⁶ identity construction,³⁷ socio-cultural, socio-psychological and political factors,³⁸ linguistic ecologies,³⁹ and individual thoughts and actions.⁴⁰

Ainu language environment and legal frameworks in Japan

The ancestral lands of the Ainu people are commonly understood to be in the northern part of Honshu, Hokkaido, Sakhalin and the Kuriles.⁴¹ Ainu activists worked from as early as the 1920s to raise awareness within the Ainu community as well as within mainstream Japan for legal recognition of their rights. Ainu political consciousness was affected by the US civil rights movement and by student activism within Japan during the 1960s.⁴² In the 1980s, the international Indigenous rights movement strengthened and interaction with indigenous groups worldwide led the Ainu to fight

³³ Ibid, 336.

³⁴ Giles, Leets and Coupland, 'Minority Language Group Status'.

³⁵ Bradley, 'Language Attitudes'.

³⁶ De Vries, 'Factors affecting the survival of linguistic minorities'.

³⁷ Fishman. *Handbook of Language and Ethnic Identity*.

³⁸ Giles, Leets and Coupland, 'Minority Language Group Status'; Harwood, Giles and Bourhis, 'The genesis of vitality theory'.

³⁹ Mühlhäusler, 'Why one cannot preserve languages'.

⁴⁰ Giles, Leets and Coupland, 'Minority language group status'.

⁴¹ Tamura, *The Ainu Language*, 1.

⁴² Morris-Suzuki, *The Ainu: Beyond the Politics of Cultural Coexistence*.

for their rights to resources and self-determination.⁴³ The significance of indigenous status has been established by the UN Human Rights Commission, which recognises the need for domestic laws to protect traditional activities and land use patterns of indigenous cultures.⁴⁴ A decision that helped strengthen the Ainu movement was the 1997 judgment in the Nibutani Dam case, which concerned the legality of the construction on Ainu land of a dam that resulted in the submersion of significant Ainu sites.⁴⁵ The Sapporo District Court found the Ainu to be an indigenous people with a distinct culture and identity and upheld their right to enjoy their culture under Article 27 of the ICCPR and Article 13 of the Japanese Constitution.⁴⁶ Ainu leaders did not know at that time how the Japanese government would respond to this ruling but, in July 1997, the Cultural Promotion Act (CPA) was enacted providing for the archiving, promotion and dissemination of Ainu traditional culture and language.⁴⁷ Although, the CPA has been criticised by Ainu activists as having many shortcomings for not offering any real support to the Ainu people, it was welcomed as being better than the continuation of the Former Aborigines' Protection Act of 1899 and the Asahikawa Former Aborigines Protection Land Disposition Act of 1934.⁴⁸ Nearly ten years later, on 6 June 2008, both houses of the Diet finally recognised the indigenous status of the Ainu people.⁴⁹ This non-binding resolution of the nation's legislators called on the government to take steps to advance the cause of Ainu people, and was undoubtedly made in the context of anticipated international attention on Hokkaido, where the G8

⁴³ Ibid.

⁴⁴ UN Doc ICCPR/C/21/Rev.1/Add.5 (26 April 1994) at Para 7, in Stevens, 'The Ainu and Human Rights', 196.

⁴⁵ *Kayano et al. v. Hokkaidō Expropriation Committee* Action seeking reversal of a ruling confiscating rights, etc. Judgment of the Sapporo District Court, Civil Division No. 3 issued 27 March 1997 (1598 Hanrei Jihō 33; 938 Hanrei Times 75, 38 International Legal Materials 394 (1999) Translated), in Stewart, 'Kayano v. Hokkaidō Expropriation Committee Revisited'.

⁴⁶ Stevens, 'The Ainu and Human Rights', 181.

⁴⁷ Roppozensho Heisei Jūninenhan; Henshall, *Dimensions of Japanese Society*.

⁴⁸ Savage, *The Effects of Commodification and Museumification of Ainu*, 17-24

⁴⁹ Lewallen, 'Indigenous at last', 4; Winchester, 'On the Dawn of a New National Ainu Policy', 4.

Summit was hosted in July of that year. Observers argue that the Diet adopted the resolution in order to avoid negative publicity before the world community from orchestrated protests in Sapporo or Tokyo during the G8 summit.⁵⁰ As yet, however, no government has brought forward new legislation in response reflecting the apparent reticence Japanese politicians have shown towards Ainu demands to address economic disadvantage and discrimination after the loss of their land and resources.

The Ainu language, was once also spoken in the Kurile Islands and Sakhalin (and possibly even as far north as the Kamchatka Peninsula),⁵¹ and now struggles to survive in Japan in the face of near-universal adoption by Ainu of Japanese. This has occurred over decades as a result of official assimilation policies combined with legal and social pressures to conform to mainstream society, economic deprivation, dispersion of family groups and prejudice. In contemporary Japan, there are very few people remaining who grew up speaking Ainu as a mother tongue and there are virtually none who spoke only Ainu as a child. This means that Ainu is critically endangered and members of the Ainu community need to act urgently if they wish to revitalise it.

Opinions of Ainu individuals regarding language use and cultural identity have been studied by a variety of scholars and bureaucrats. A 2008 Centre for Ainu and Indigenous Studies survey of 5,703 individual Ainu from 2,903 households in Hokkaido indicated that 581 (10 per cent) of respondents want to learn their traditional language⁵² and nearly 33 per cent of respondents indicate they want Ainu language and culture to be introduced into the schools.⁵³ Anderson and Iwasaki-Goodman note that linguistic awareness and cultural identity are correlated; they

⁵⁰ Lewallen, 'Indigenous at last', 4.

⁵¹ Ibid.

⁵² Sakurai, 'Ainu Religious Consciousness and Challenges of Cultural Preservation', 107-115,

⁵³ Tsunemoto, 'Requests for Ainu Policy Measures', 119.

assert that Ainu activists who desire to reverse the decline of their language also wish to promote Ainu cultural awareness.⁵⁴ Even though the majority of respondents were middle-aged and elderly, they indicated that they are interested in learning the language. Few of them, however, actually participated in the transmission of Ainu culture. The results show that 5.4 per cent participated in Ainu language, which is down from 12.7 per cent in the previous survey.⁵⁵ This is a predictable result given the increased ages of speakers of Ainu.

The Ainu movement has gained momentum since the 1990s as part of a growing trend to recognise multiculturalism and multilingualism in Japan.⁵⁶ This tendency has become so established that it has formed the conceptual base of several studies of Japan published during the period.⁵⁷ It would also appear that the improved status of Korean, the languages of Okinawa, and Japanese Sign Language (JSL) has helped and encouraged the Ainu to revitalise their language.⁵⁸

A sea change in official commitment to take initiatives on behalf of Ainu culture came with the enactment in July 1997 of the Law for the Promotion of the Ainu Culture and for the Dissemination and Advocacy for the Traditions of the Ainu and of Ainu Culture [Ainu bunka no shinkō narabi ni Ainu no dentō tō ni kansuru chishiki no fukyū oyobi keihatsu ni kansuru hōritsu], short title Ainu bunka shinkō-hō (the Ainu Cultural Promotion Act, referred to below as CPA). The Law establishes fundamental policy for measures to promote Ainu culture, and authorised the appointment of the

⁵⁴ Anderson and Iwasaki Goodman, 'Language and Culture Revitalisation in a Hokkaido Ainu Community,' 45.

⁵⁵ Sakurai, 'Ainu Religious Consciousness and Challenges of Cultural Preservation', 107-115,

⁵⁶ Maher, 'Language Policy for Multicultural Japan'.

⁵⁷ See for example Maher and Yashiro, *Nihon no bairingarizumu*; Maher and Honna, *Towards a New Order*; Maher and Macdonald, *Diversity in Japanese Culture and Language*; Denoon et al., *Multicultural Japan*; and Lie, *Multiethnic Japan*.

⁵⁸ Maher, 'Language policy for multicultural Japan'.

Foundation for Research and Promotion of Ainu Culture (FRPAC) as the sole corporation charged with carrying out a set of specified duties intended to implement those measures. In defining ‘the Ainu culture’, the Law specifies Ainu language first among its various elements.

FRPAC has been engaged in activities that relate to language preservation such as

1. Ainu language education;

- Training instructors
- Advanced language classes
- Parent-child study of the Ainu language
- Project for the development of Ainu language teaching materials

2. Dissemination of Ainu language

through radio, online courses and speech contests..⁵⁹

Elaborating on the second point, a weekly 15-minute beginners’ language course is broadcast on Sapporo Television Corporation’s radio channel (on Sunday mornings, repeated Saturday evenings); it is also available on-line. Textbooks are supplied by FRPAC free on request. It also stages an annual public speech contest (*benron taikai*) in which learners of Ainu can demonstrate what they have achieved; the most recent of these was scheduled to take place in Sapporo on 2 February 2013. The intended benefits of this project go beyond showcasing and rewarding the effort of existing students and are said to include ‘enhancing the desire of people to learn’ and ‘disseminating the language by providing the people in the venue with an opportunity to hear the language’.⁶⁰

⁵⁹ FRPAC, ‘Promotion of Ainu Language’.

⁶⁰ See FRPAC, ‘‘Ainu Bunka Shinkō Suishinkikō’ □□□□□□□□□□□□□□□□ and Promotion of the Ainu Language.

Since the CPA explicitly states that preservation and dissemination of Ainu culture is encouraged to uphold the ethnic pride of the Ainu and to make efforts to advocate for human rights for the Ainu people,⁶¹ Professor Tanimoto Kazuyuki, Director of FRPAC and Akino Shigeko, Head Curator and Director of the Museum of Northern Peoples began a policy of including as many Ainu as possible, particularly young Ainu, in research and cultural activities. Consequently, young Ainu are directly benefiting from the CPA and FRPAC programs through its associated training and employment, as curators or researchers in museums and other bodies dedicated to the preservation and dissemination of Ainu language and culture. Although a few Ainu have benefit from the surge of cultural activities organised through museums since the enactment of the CPA, it does not address the majority of the Ainu original demands. There is considerable dissatisfaction with it amongst Ainu activists. Some scholars criticise the law for the following reasons:

- failing to ensure political and human rights;
- failing to offer an apology for past or present injustices;⁶²
- failing to grant rights to use forests, fishing grounds or other natural resources;⁶³
- failing to allow the Ainu the right to distinct representation at local or national government levels;⁶⁴
- failing to address economic disadvantage and social discrimination;⁶⁵

⁶¹ Supplementary resolution to the CPA.

⁶² Morris-Suzuki, 'Roads to otherness'.

⁶³ Ibid., 56.

⁶⁴ Ibid.

⁶⁵ Ibid.

- failing to recognise the Ainu as being indigenous to Japan;
- stereotyping Ainu culture into a ‘traditional’ niche, which implicitly denies them a ‘contemporary existence’ within Japan;⁶⁶
- failing to guarantee readily accessible Ainu language classes to Ainu children in schools where there is a high concentration of Ainu people;⁶⁷
- failing to provide funds to assist Ainu people to improve their general level of education by providing university or other tertiary places for Ainu at state funded universities or colleges where the fees are much lower than the alternative privately run institutions.

Siddle claims that many Ainu believe the CPA merely allows funds to present Ainu language and culture in museums and at venues that will attract tourists, not as a source of funding for developing relevant, useful skills. Moreover, as a result of the lack of opportunity for Ainu to attain places in higher education, only a few Ainu people are equipped to take control of their own cultural and linguistic preservation, promotion and dissemination through employment in museums, research centres or institutes of higher learning. The implication is that many Ainu would prefer funding for programs that more directly improve their economic, social and political status, instead of the current provisions to support ‘traditional’ Ainu culture. As Morris-

⁶⁶Siddle, ‘An epoch-making event?’, 421.

⁶⁷Stevens, ‘The Ainu and Human Rights’, 196□7.

Suzuki highlights, the economic and social inequality of the Ainu are two aspects of life that have had the most profound effect on their existence.⁶⁸

Although FRPAC may be initiating some much needed work that will serve to improve the present linguistic and cultural situation, Siddle's analysis of the effectiveness of the CPA indicates that since its enactment, the Act 'has had a negative effect on the Ainu movement for political and human rights and has some disturbing implications for Ainu identity'.⁶⁹ These 'disturbing implications', according to Siddle, are that the CPA allows the Japanese government to slip out of its responsibility for a grant of compensation in the form of self-determination and land rights to the Ainu people by denying that the Ainu are the original inhabitants of Japan. In essence, the CPA denies that Japan colonised the Ainu people, thus denying the claim that they suffered dispossession of resources. These claims have formed the basis of Ainu demands for compensation and articulation of rights within the UN since the 1990s. Although the Japanese Diet acknowledged that the Ainu are indigenous to Japan in June 2008, the CPA has not been amended at this point in time.⁷⁰ This omission in the CPA is most offensive to Ainu activists as it denies affirmation of the identity that Ainu people adhere to today. Siddle asserts that the Ainu people were denied the right to directly participate in the drafting of the CPA, an indication to him that the CPA is a Japanese government strategy to maintain control over the future of the Ainu people.⁷¹

⁶⁸ Morris-Suzuki, 'Roads to otherness'.

⁶⁹ Siddle, 'An epoch-making event?', 405.

⁷⁰ Lewellen, 'Indigenous at last!'; Winchester, 'On the Dawn of a New National Ainu Policy'.

⁷¹ Siddle, 'An epoch-making event?', 407.

The CPA fails to provide help to encourage the Ainu to learn the language of their ancestors or to teach it to their children in the public school system. The law only allows funding for private language schools that meet infrequently. It fails to provide real support for the Ainu. It only provides funds for Ainu culture and does not address the social, political or economic issues that the Ainu have faced since colonisation took place. For example, Stevens⁷² found that the CPA is weak in protecting Ainu rights in comparison to those recognised in Article 27 of the ICCPR, which provide the right for ethnic, religious or linguistic minority communities to enjoy their own culture and religion or use their own language. Stevens deems that although the new law ‘provides for the nurturing and recording of Ainu language and customs and culture, it does not provide for non-interference in its physical practice’.⁷³ She asserts that the CPA does not legally require consultation with Ainu or even consideration of their cultural interests when development projects that may impact on them are undertaken by government agencies.

Deficiencies of the CPA to address serious issues other than cultural preservation, promotion, dissemination and research into it indicate a need to investigate more effective models for the protection of language rights. To this end the EU experience of language revitalisation within the broader context of minority rights protection will be instructive. Specifically, do these protections differ from those currently being developed in Japan in this era of internationalisation? How are member states of the EU responding to the legal demands of European Integration as it lays claim to policy areas such as culture and human rights and reprioritises the political relevance of

⁷² Stevens, ‘The Ainu and Human Rights’, 197□8.

⁷³ Ibid, 196.

national minorities? Moreover, are we likely to see any cross-fertilisation between systems?

Legal Frameworks for Minority Language Protection in Europe

Although the focus here is on the EU, it should be understood that the EU relies on international law, the regional European system characterised by instruments and standards adopted by the Council of Europe (CoE) and the Organisation for Security and Co-operation in Europe (OSCE).⁷⁴ Fundamental to any discussion of the protective framework for minorities in Europe is the CoE Framework Convention for the Protection of National Minorities (the Framework Convention)⁷⁵ and the European Charter for Regional or Minority Languages (the European Charter).⁷⁶ The CoE's Convention on Human Rights (ECHR) provides additional legal protection.⁷⁷ Article 14 prohibits discrimination on any grounds such as 'national or social origin, association with a national minority ... or other status'.⁷⁸ Importantly, contraventions of the ECHR may be challenged in the European Court of Human Rights, a supranational court established in 1959. This provides a last resort for individuals alleging violation of the civil and political rights set out in the Framework Convention.

Since 1998, individual applicants have had the right to apply to the European Court of Human Rights directly. As the Court's judgments are binding on the member

⁷⁴ The OSCE identifies and seeks early resolution of ethnic tensions that might endanger peace or stability. It promotes the rights of national minorities and pays particular attention to the situation of Roma and Sinti, www.osce.org/what.

⁷⁵ Opened for signature 1 February 1995, entered into force 1 February 1998.

⁷⁶ Adopted 5 November 1992, entered into force 1 March 1998.

⁷⁷ European Court of Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms signed 4 November 1950, entered into force 3 September 1953.

⁷⁸ Ibid.

countries, governments have been required to alter legislation and administrative practices in a wide range of areas.⁷⁹ A court's judgment is invested with the 'unique authority' of stating the law.⁸⁰ Law is by nature an imperative force.⁸¹ It operates as law by shifting expectations,⁸² thereby acquiring a dynamic function. Judges of the European Court of Human Rights play a pivotal role in constructing a social order through the enunciation of judge-made norms. As the Court states, its case law 'makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe'.⁸³ By supervising the member countries' compliance with the Convention, the Court is able to fill gaps in domestic human rights regimes by reading domestic law consistently with human rights treaties in cases brought before it, thereby giving normative force to human rights protections.⁸⁴ This process has been pivotal to the entrenchment of a rights oriented era in European law, which has effectively brought about change in the domestic legal orders of member countries. While international law does not generally operate according to the precepts of supranationalism⁸⁵, in its capacity to shift expectations it operates as a socialising force.

The Framework Convention features a suite of provisions aimed at equalising the rights of national minorities and those in the majority (Article 4). These include the promotion of conditions necessary for persons belonging to national minorities to

⁷⁹ Ibid.

⁸⁰ Dehousse, *The European Court of Justice*, 88.

⁸¹ Heimanson, *Dictionary of Political Science and Law*, 98.

⁸² Burley and Mattli, 'Europe before the court', 67.

⁸³ European Court of Human Rights, *Council of Europe: Office in Moldova*.

⁸⁴ Waters, 'Creeping monism', 672.

⁸⁵ Sharing features of a federation, supranational organisations provide a high degree of institutional oversight over the decisions they take, which are legally binding on all its members. As many decisions are taken by majority vote, it is possible for a member state to find itself in a position of having to implement a decision domestically of which it did not approve. Members of a supranational organisation agree to the pooling of authority in supranational institutions in *defined* areas.

maintain and develop their culture and preserve their language (Article 5) and the right of such persons to use freely and without interference their minority language in different contexts (Article 10). The main problem with the Framework Convention is that it does not comprehensively define the term ‘minority’ or provide guidance as to its scope. Moreover, it allows the states considerable flexibility in deciding which minority groups are entitled to benefit from the Convention. The provisions of the Convention do not have to apply to all minority groups within the national territory.

The European Charter was designed to protect and promote the use of specific regional and minority languages in private and public life, in legal and administrative contexts, in economic and social life, for cultural activities, in education and the media. Its overriding purpose is to protect Europe’s cultural heritage and traditions. It does not apply to languages connected with recent migratory movements or dialects of an official language. Far reaching protection is provided for regional or minority languages nominated by the member countries to the charter in a separate declaration (Article 3). The European Charter has been ratified by 25 of the 47 member countries of the CoE. France is a notable exception, particularly considering the precarious state of some of its minority languages. For instance, Breton is now listed by UNESCO as an endangered language. As noted, France’s traditions of centralisation and unity have been at odds with the protection of its minority languages.

Recent developments in France, however, suggest that a rethink may be imminent. The French Constitution was amended in 2008 by the addition of Article 75-1, stating that regional languages belong to the heritage of France. This is an important step in the recognition of France’s minority languages, a step ostensibly brought about by

international and European pressures for the acceptance of national minorities. Nonetheless, the lack of current support for minority languages in France undermines France's record on human rights and puts it on a potential collision course with EU institutions, whose credentials in human rights protection were augmented by the entry into force of the Lisbon Treaty in 2009, ratified by all EU member states, including France. The French position raises questions, similar to those in Japan, as to its ability to embrace multilingualism within its own borders. Political elites in Japan and France may be inching towards the realisation that further adaptation, institutional adjustment and modernisation will be necessary if they are to cope with the challenges of globalisation.

EU protective measures

The direct role of the EU in protecting national minorities is currently quite limited (as is its role in protecting human rights generally) but nevertheless continues to expand steadily. Indeed, the protection of human rights is increasingly regarded as a legitimate objective of the EU. With the ratification by all 27 member states of the Treaty of Lisbon and its coming into force in December 2009, the EU acceded to the ECHR. Accordingly, the EU and each of its member states are party to the Convention. The Lisbon Treaty also introduced provisions into primary EU law that recognise 'minorities' and 'national minorities' and prohibit discrimination against those minorities and minority languages. Article 2 of the Treaty on European Union now refers explicitly to the rights of persons belonging to minorities, while Article 3 enjoins the member states to respect cultural and linguistic diversity. The now attached and binding Charter of Fundamental Rights of the EU goes still further. It prohibits discrimination on any ground such as 'language' and 'membership of a national minority' (Article 21.1). Article 22 states that '[t]he Union shall respect

cultural, religious and linguistic diversity.’ By their incorporation in the constitutional treaties of the EU, these principles acquire binding force and their contravention is justiciable in the Court of Justice of the EU (CJ).

While the Treaty of Lisbon signals a positive impact on rights protection, policy instruments are required to put pro-minority principles into practice.⁸⁶ The absence of reinforcing policy instruments⁸⁷ means that the member states have a wide discretion in forming their minority rights policies, policies which may or may not be appropriately oriented to rights protection. However, despite its deficiencies, the system of supranational monitoring of human rights in the member states attests to a spirit of collaboration between EU and national institutions to uphold human rights at the national level. In keeping with the general spirit of cooperation, the CJ looks to the substantive obligations of the ECHR and pays considerable attention to the jurisprudence of that Court.⁸⁸ A memorandum of understanding signed by the EU and CoE in 2007 reinforced the cooperation between the CJ and the European Court of Human Rights. The CJ’s jurisdiction in the area of human rights has been consecutively and significantly enlarged by a string of cases commencing with *Stauder v Ulm* [1969] ECR 419, where it declared that ‘fundamental rights are enshrined in the general principles of Community law and protected by the Court’.

The collection of international conventions and charters, supranational, regional and national institutions, and the interplay between provisions designed to strengthen

⁸⁶ Hicks, ‘The Lisbon Treaty’.

⁸⁷ Ibid.

⁸⁸ Alston and Weiler, ‘An “Ever Closer Union” in Need of a Human Rights Policy’.

national protections of minority rights at the European level may be viewed as quite revolutionary for their potential to eradicate discrimination. Hicks notes that:

substantive political autonomy has developed as European best practice in national minority protection. For endangered languages ... language planners have all the tools to regenerate these languages, but need the political backing in order to counteract those member states that still have policies designed to eradicate their regional languages.⁸⁹

Lessons for Japan

The authors do not intend to suggest that Japan should (or can) follow the European model of rights protection; Japan's cultural heritage, geo-political realities and other features of its law and governance preclude any simple prescriptions. Harlow points out that law should be seen 'not merely as a toolkit of autonomous concepts readily transferable in time and space but as a cultural artefact embedded in the society in which it functions'.⁹⁰

However, it would be erroneous to imply that European experience has nothing to offer the rest of the world on the ground that it was Europe's troubled history and other endogenous factors that influenced the development of the EU polity towards cooperation, legal harmonisation and political integration of its members. Constitutional developments in the EU are derived from a mix of endogenous and exogenous factors. To the extent that internationalisation has complemented the process of Europeanisation, other societies subject to internationalisation may also benefit from studying the achievements of the EU. Thus, while there are political

⁸⁹ Cited in European Bureau for Lesser-Used Languages, 'Intergroup'.

⁹⁰ Harlow, 'Voices of Difference in a Plural Community', 341.

forces at play that promote legal harmonisation and rights protection as constitutional values in the EU, not all of them are confined to the EU.

So are there forces and factors that we can extrapolate from the European system of minority rights protection that can assist in evaluating the prospects of change in Japan? International instruments protecting minorities within a democratic framework can draw attention to the problem of discrimination, advance international cooperation and bring about material change. The components of the related processes of internationalisation and regionalisation can be disaggregated under the following headings: international cooperation and consensus seeking; democracy; and validation of minority claims.

International cooperation and consensus seeking – By the negotiation and drafting of conventions, charters, declarations and the like, international and regional institutions push their member states to accept standards that promote objectives such as minority rights. Cooperation between states promotes consensus. Japan, as part of the international system, is open to this process. There is already evidence of its impact in Japan with the mobilisation of the Ainu since the 1980s to influence the Japanese government through international diplomatic channels such as the UN and the ILO. Their efforts have resulted in a repeal of laws that confined the Ainu to an ambiguous status within the nation as ‘former aborigines’ whose language and culture were considered dead. Moreover, according to a recent study on Ainu political and cultural achievements, there is evidence indicating that the forces of globalisation have exerted pressure on the Japanese government to be more knowledgeable about

internationally accepted definitions of ‘indigeneity’ and acceptable treatment of such peoples.⁹¹

Democracy – Democratic states generally enable individuals to develop a rights consciousness and to advocate for the advancement of social objectives such as minority rights and social inclusion, both of which underpin many conceptions of democracy.⁹² Rights consciousness and advocacy for minority rights in turn push the state towards establishing better protection. Participation in political structures enables groups of individuals to influence policy and strike a better social and/or economic deal for those who are excluded from, or unrepresented in, social, political or economic life. It must be acknowledged that, despite significant activism from the Ainu community and their supporters, particularly since the 1980s, there has been considerable resistance to the idea of abandoning longstanding practices in dealing with people from marginalised groups in Japan, practices which have not countenanced Ainu autonomy or equality. Nonetheless, the enactment of the CPA in 1997 and the Diet’s passing of the ‘Resolution calling for the Recognition of the Ainu as an Indigenous people of Japan’ in 2008 shows that there has been a shift in attitude regarding the Ainu towards interaction between law and society in Japan.

EU constitutional values validate minority claims – The contemporary EU is founded on principles of diversity, pluralism, solidarity, equality, non-discrimination and respect for human rights, including the rights of minorities. Through law and policy,

⁹¹ Cotterill, ‘Ainu Success’.

⁹² On one interpretation, democracy is a system of government which accords power to persons elected by the majority conditional upon respect of the fundamental rights and dignity of minorities. According to Dworkin, human rights are ‘the majority’s promise to the minorities that their dignity and equality will be respected’ Dworkin, *Taking Rights Seriously*, 205.

the EU seeks to redress the intolerance and prejudice often displayed at national level. The EU's foundation on the above principles and its orientation to 'rights protection' make it a point of reference for many excluded groups and national minorities elsewhere in the world. EU perspectives challenge the notion that 'belonging to a pre-existing national family is what entitles a person to act as a democratic citizen'.⁹³ Indeed many of Europe's indigenous minorities (who account for about 8 per cent of the EU's population)⁹⁴ may identify as members of an EU polity framed by diversity. The EU has seen effective mobilisations by minorities, which have resulted in numerous improvements including representation in EU institutions; the EU Parliament, for example, has a National Minority Intergroup. The European Bureau for Lesser-Used Languages and the Agency for Fundamental Rights ensure effective advocacy for, and monitoring of rights for minority cultures and languages in the EU.⁹⁵ Japan is, of course, unaffected by the specific developments associated with the process of Europeanisation. Moreover, Japan's minorities of around 3 per cent of the total population currently have neither the ability to mobilise support nor the standing of their European counterparts. Nonetheless, Japan is subject to analogous processes of internationalisation, which can be expected to play a part in entrenching the values of respect for diversity and local autonomy – the mainstay of international human rights law.

Conclusion

⁹³ Davidson, *From Subject to Citizen*, 4.

⁹⁴ Justice and Home Affairs, 'Minority protection in Europe', 1.

⁹⁵ EBLUL is an NGO established in 1982 to promote linguistic diversity in Europe. It has close ties with the European Parliament and the CoE and is funded by the European Commission and by local and regional governments; see European Bureau for Lesser-used Languages, 'Intergroup'. The Agency for Fundamental Rights was established in 2007 to monitor the situation of fundamental rights in the EU and its 27 member states.

The purpose of this article has been to map the current legal frameworks for protection of Ainu culture and language in Japan and evaluate its performance in light of its EU counterparts. While the process of internationalisation has undoubtedly brought about legislative change, there has been insufficient improvement in the lot of the Ainu because the changes have not gone far enough. In particular, anti-discrimination laws are not part of the legal framework of Japan, although anti-discrimination norms are increasingly part of the international framework. The real question therefore is the extent to which Japanese political and legal systems and society generally are open to the processes that bring about fundamental change in the relationship between state and minority groups. In other words, what will the future look like?

Japanese official insistence on a model of control over revitalisation efforts and suppression of Ainu demands of sovereignty and claims for resources characterise the current managerial approach. A major barrier to reconciliation and progress is the continued denial that Japan colonised the Ainu people and dispossessed them of resources. A brief comparison with developments in the EU, which is rapidly institutionalising minority protection, suggests that fundamental change is afoot in a continent that has struggled with problems of co-existence for millennia. Despite the fact that these changes are peculiar to Europe, they illustrate the power of the twin processes of internationalisation and regionalisation to harmonise law. While the need to institutionalise anti-discrimination measures is itself recognition that discrimination is widespread, we observe that this is the first real step to recognising and dealing with the problem. Concessions to Ainu culture and identity outlined in recent legislation in the context of a general approach of denying historical wrongs suggests

that Japan is pursuing a policy of cosmetic improvement in its relations with the Ainu. The Japanese government appears to be retaining control over the Ainu and the revitalisation process while paying lip service to international pressures. How long it can continue to do so depends on the capacity of internationalisation to reshape entrenched values and bring about lasting change. If it is accepted that Japanese interests are advanced through internationalisation, and that internationalisation asserts a socialising force, it will not be difficult to envisage a Japan whose interests and preferences are gradually transformed in favour of minority protection.

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