Subject, Object and Active Participant:
The Ainu, Law, and Legal Mobilization

GEORGINA STEVENS*

I INTRODUCTION 129

Historical Background 132

II AINU LEGAL MOBILIZATION: DOMESTIC ACTIVISM 134

The 1980s to mid-1990s—The Domestic Legislative Movement 134

The Effect of Legislative Activism on Ainu Unity and Mobilization 135

Legislative Activism and Non-Ainu Actors 136

The Concrete Outcomes of Legislative Activism 137

Legislative Activism and Participatory Rights 140

The 1990s to 2007—Domestic Litigation 141

The Nibutani Dam Case: 1993 to 1997 141

The Ainu Communal Property Case: 1999 to 2006 144

* Georgina Stevens graduated from Law and Japanese Studies at Murdoch University in Perth, Western Australia, in 2000 and was admitted as a barrister and solicitor of the Supreme Court of Western Australia in 2002. A member of the Editorial Board of the Asia Pacific Journal on Human Rights and the Law in 1999 and 2000, she went on to complete a Master’s in International Law at the Graduate School of Law, Hokkaido University, Japan, in 2005. There her research focused on Indigenous rights and the Ainu of Japan in particular, and she monitored various Ainu domestic and international legal and quasi-legal processes. Georgina has worked with the UN ECOSOC accredited non-governmental organization International Movement Against All Forms of Discrimination and Racism (IMADR) in various capacities since 2003. Most recently Georgina was IMADR’s Program Assistant/Human Rights Council Monitor in Geneva, monitoring developments such as the establishment of the Expert Mechanism on the Rights of Indigenous Peoples, reports by the new Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, and preparations for the 2001 World Conference Against Racism’s review conference in 2009. Georgina has published a number of articles on legal developments concerning the Ainu, and is the author of Minority Rights Group’s upcoming briefing paper on the protection of minority rights under domestic and international law in post-independence Kosovo. Georgina currently works as a foreign qualified solicitor in Tokyo, Japan.

Indigenous Law Journal/Volume 7/Issue 1/2008 127
This paper draws upon previous literature on legal mobilization to assess the outcomes, both legal and non-legal, of Ainu legal mobilization from the early 1980s until 2008. After describing the historical context of Ainu cultural destruction, assimilation and portrayal as a “dying race” by the Japanese authorities in the period from the 1590s to the 1960s, the paper goes on to examine Ainu legal activism from the 1980s to 2007 in the domestic context, in Part II, and in the international context, in Part III. In Part II, Ainu legislative activism with the Ainu New Law movement and judicial activism in the Nibutani Dam, Ainu Communal Property and Group Defamation cases are described, together with their concrete legal outcomes, the influence of and on non-Ainu actors, and the effect on Ainu unity and mobilization. Part III discusses the use of coordinated lobbying with non-governmental organizations and other Japanese minority groups at United Nations human rights fora to bring about change in Ainu legal status through mobilization of gaïatsu or outside pressure. Part IV examines the convergence of both domestic and international legal activism in the fight
for recognition of Indigenous rights and gives the outcomes up to 2008. Finally, the paper concludes by considering the achievements, significance, weaknesses and limitations of Ainu legal activism to date, including the impact on Ainu peoples themselves and their mobilization structures, and the work that remains to be done.

I INTRODUCTION

The law of the Japanese state has played a central role in shaping the experiences, struggles and activism of Ainu people ever since they came into contact with so-called Wajin (the term used to describe the dominant ethnic group of Japan), and continues to do so today. The relationship between the Ainu and the law has sometimes been portrayed as a passive one, in which the Ainu are the victim or unwitting object of a legal system and legal policy “based on values that unilaterally set wa-jin [Wajin] culture as preeminent,” forcing it upon Ainu who “suffered as a result.” Although the Ainu did not choose to come under the control of the Japanese state or its legal system, which has not been particularly sympathetic to Ainu issues, it would be an injustice to the Ainu to adopt without question this interpretation of their role as passive vis-à-vis the law. Ainu activists have played an active role, both in their academic writings and through various forms of legal mobili-

1 The definition of Ainu culture in the Act for the Promotion of Ainu Culture, the spread of Knowledge Relevant to Ainu Traditions and Education Campaign (Law No. 52, 1997) [Cultural Promotion Act] or “CPA.” For example, directly affects the types of cultural activities planned, and the way Ainu people may carry them out whenever external funding, which is provided in accordance with the provisions of this Act, is required. For an unofficial English translation of the Act, online: Foundation for Research and Promotion of Ainu Culture <http://www.frpac.or.jp/eng_e_prf/profile06.html> or University of Hawaii (trans. M. Yoshida-Hitchingham) <http://www.hawaii.edu/aplj/pdfs/11-masako.pdf>.


3 See for example the discussion below of the Sapporo District and High Court decisions in the Communal Property Case, where the Ainu plaintiffs’ claims were dismissed outright at first instance, a finding upheld on appeal. Discussed in English in M. Levin and T. Tsunemoto, “A Comment on The Ainu Trust Assets Litigation in Japan” (2003) 39 Tulsa L. Rev. 399, and in G. Stevens, “Ogawa v. Hokkaido (Governor), the Ainu Communal Property (Trust Assets) Litigation”, (Fall 2005) 4 Indigenous L.J. 223.

zation, in challenging and critiquing Japanese law and policy as it affects Ainu people.

This paper will seek to consider the relationship between Ainu activism and the creation of Japanese law and policy concerning the Ainu people. In doing so, it will examine how Ainu legal mobilization has affected Ainu domestic legal status, influenced legal practitioners, legal scholars, other activists and the Japanese state, and how it has affected Ainu unity, social cohesion and further legal mobilization. The discussion will focus mainly on legal activism from the 1980s through to 2008, looking at domestic and international campaigns for the realization of Ainu rights. This legal mobilization has included: organized lobbying of policy makers and elected representatives regarding recognition of Ainu existence, difference and Indigenous status; movements seeking legislative reform; domestic litigation; and application of pressure on the Japanese government through the strategic use of international human rights bodies. The main aims of the various groups involved have included repeal of the paternalistic Hokkaido Former Aborigines Protection Act 1899, establishment of laws and measures to address Ainu discrimination, and recognition of Ainu minority, and later Indigenous, status and rights.

In considering the outcomes of Ainu legal mobilization, this paper attempts to build on other literature that has demonstrated the effects that legal mobilization can have, aside from the specific legal outcomes sought. Judicial decisions, for instance, are important not only for their resolution of specific legal disputes, but also for the “knowledge and signals,” or messaging, that courts send out to non-judicial actors.5 Judgments and legal activism may have a marked influence on specific communities or elements of society, even where they do not result in large-scale policy changes.6 Jurisprudence is important too, in “reshaping perceptions of when and how particular values are realistically actionable as claims of legal right” and may as a result inspire further legal mobilization, or provide the framework for dialogue between actors in a non-litigious setting.7

Legislative activism and litigation can also be important vehicles for social mobilization and group unification.8 The rhetoric of human and

---

6 See McCann, ibid at 736 and 742.
7 Ibid, at 732 and 734.
8 Campbell and Connolly, supra note 5 at 943; McCann, supra note 5 at 738; and M.W. McCann and H. Silverstein “Rethinking Law’s ‘Allurements’: A Relational Analysis of Social Move-
Indigenous rights, when used as a framework for activism, can offer “shared understandings of the world and of themselves that legitimate and motivate collective action” for activists, thus providing a unifying language with which to articulate their issues and demands. Through these means, Ainu legal mobilization has influenced Ainu legal status and policy, third parties and the Ainu themselves in numerous ways, despite rarely achieving all of its original legal aims. Legislation has been passed recognizing Ainu culture as distinct and worthy of protection and promotion, and a centre established for Ainu activities in Tokyo. Arrangements have been made, with Ainu participation, to create traditional living spaces (Iwar) where Ainu people will be able to hunt, fish, access natural resources and perform traditional cultural activities. The courts have recognized the Ainu as an Indigenous minority with a guaranteed right under Japanese law to enjoy their minority culture. This resulted in the establishment of a local Ainu cultural impact assessment committee in order to meet government’s obligation to assess and minimize the effect of public works on the enjoyment of Ainu culture.

Ainu activism, however, has not led to political rights or domestic recognition of the Ainu right to effective participation in political decisions that affect them. Arguments based on these rights were rejected by courts in the Communal Property litigation and Ainu were consulted but not represented on the Expert Meeting Concerning Ainu Affairs in 1995. There is, however, increasing regional and national government recognition of the need to allow the Ainu to participate in decisions that affect their interests. Yet their involvement is at times tokenistic or non-representative, and often seen not as a right, but more a voluntary concession the state can choose to make as a sign of goodwill.

Participation in international Indigenous fora has exposed Ainu activists to the powerful language of Indigenous rights with which to reconceptualize and argue their claims. The term “Indigenous people” provided a new source of identity, pride and strength to Ainu whose only previous reference point for self-description had been the state’s rhetoric of a weak, uncivilized “dying race” requiring assimilation and government protection. Recently, the Japanese government supported adoption of the Declaration on the Rights of Indigenous Peoples (DRIP) at the United Nations and, on a momentous occasion in 2008, recognized the Ainu as an Indigenous people. The government has agreed to consider Indigenous rights in the Japanese domestic context, signalling a crucial shift in its position. This was brought

---

9 D. McAdam, J.D. McCarthy & M.N. Zald, Comparative Perspectives on Social Movements: Political Opportunities, Mobilising Structures, and Cultural Framings (Cambridge: Cambridge University Press, 1996) at 6.
about by both increasing international pressure (gaiatsu) and sustained, focused lobbying by Ainu and their supporters over many years. It is still unclear, however, to what extent the government will recognize Indigenous rights in the domestic context under the DRIP.

**Historical Background**

For the above results of Ainu legal mobilization to be properly appreciated, it is necessary to provide some historical background on the Ainu people. Ainu groups originally lived not only on the northern island of Ezochi (Hokkaido), but also on the island of Sakhalin and in the northern reaches of the Japanese mainland now known as Honshu. In the fifteenth century, Ainu groups in Ezochi consisted of a number of regional communities or chiefdoms, each distinct, with its own social hierarchy and patrilineal leader. Each community had its own subsistence practices dictated by local ecology and its own homelands, known as Iwor, where the hunting, fishing and gathering of the resources needed for daily survival were carried out.

Increasing trade and interaction with the Japanese between 1590 and 1800 gradually weakened Ainu subsistence culture and independence. It also led to fighting between neighbouring chiefdoms, as they each vied for better access to increasingly limited animals and resources used to trade with Japanese. In a story familiar to many Indigenous groups, increasing Japanese encroachment in Ezochi brought conflict, resource exploitation and disease, and irrevocably altered both trade and human-animal relations. The effect transformed the Ainu people from a fierce, independent and self-sufficient people in the 1590s, to a small group of allegedly docile and submissive “former aborigines,” a “dying race” requiring the patronage and paternalistic support of colonizing Japanese state authorities in the 1800s.

Although the state of the Ainu people in the 1860s was “the ecological and cultural result of centuries of interaction between Ainu and Japanese,” Shogunal authorities painted the Ainu condition as “an intrinsic condition of Ainu society, as a product of their primitive lifestyle.” Such racist dehistoricization served to justify policies of paternalism and assimilation under the provisions of the *Hokkaido Former Aborigines Protection Act* (FAPA)

---

11 See Walker, *ibid.*, e.g. discussing various regional Ainu chiefdoms and groups in the seventeenth century at 53-54.
14 These were the terms used by the Japanese state and Japanese society to describe and refer to Ainu in the late 1800s and for many years subsequently.
passed in 1899. Modelled on the *Dawes Act* 1887 used to regulate and assimilate Native Americans in the United States, the FAPA attempted to provide basic welfare measures to Ainu, and convert them into farmers and educate them in Japanese ways. Strategies included the provision of farmland, tools and supplies, and basic education in special schools for “former aborigines.” As is relevant to the Communal Property litigation discussed below, it was under the provisions of this law that Ainu communal property came under the bureaucratic control of the new Hokkaido colonial authorities.

From 1899 until at least the 1960s, many Ainu acceded to the Japanese government’s assimilation-based welfare policies, believing integration and learning Japanese language and customs were the best means to ensure their well-being and minimize discrimination against their people. The turbulent political atmosphere of the 1960s and 1970s saw the emergence of a small group of more militant Ainu activists who rebelled violently against the Japanese state and its paternalistic policies of assimilation. Nonetheless, on the whole, state policies of assimilation had been so successful and widely accepted as the Japanese discourse on Ainu affairs, that in 1980 the government openly declared that national minority groups requiring protection of their right to practise their own culture and speak their own language “do not exist in Japan.”

By this time, assimilationist policies in Hokkaido had been successful enough that some Ainu were unaware of their Indigenous heritage, while others chose to deny or hide it. Ravaged by disease and displaced by the influx of Wajin settlers hungry for resources and fertile land, many traditional Ainu communities and systems no longer existed. Ainu had subsequently integrated with Wajin society through intermarriage and cultural assimilation and were dispersed among the Wajin population in Wajin villages, towns and cities throughout Hokkaido and mainland Japan. Pockets of Ainu settlement and culture nonetheless remained in areas such as Nibutani/Biratori (the *Sarunkur* Ainu group), Shiraoi and Akan, where “Ainu tourism” was practised as a means to a livelihood.

---


18 See Siddle, *supra* note 16.


Many Ainu were content to be integrated into Wajin society, and had no particular interest in engaging in Utari or Ainu affairs, aside from perhaps seeking welfare assistance under Hokkaido Utari welfare measures. But throughout Hokkaido, a smaller number of Ainu individuals were still engaged in Ainu cultural activities such as traditional arts and ceremonies, and in Nibutani, the collection of Ainu artifacts and recording Ainu language. Some men, in particular, also remained politically engaged in the central and branch offices of the Ainu Association of Hokkaido (Utari Kyōkai) that formed a local focal point for cultural and political activities, and the distribution point for Ainu regional welfare measures. The 1970s and 1980s also saw increasing interaction between Ainu leaders and other ethnic minorities and Indigenous groups overseas. A number of smaller cultural and political groups also existed. These groups were often formed by Ainu dissatisfied with what they saw as the conservative, cautious and government-friendly stance of the partially government-funded Utari Kyōkai, and they advocated more radical views on Ainu affairs.

II AINU LEGAL MOBILIZATION: DOMESTIC ACTIVISM

The 1980s to mid-1990s—The Domestic Legislative Movement

The 1980s to early 1990s was an era of Ainu legislative activism. It was characterized by the mobilization of Ainu leaders and activists, grouped loosely under the Utari Kyōkai, to seek enactment of a comprehensive bill to address the needs of Ainu people. This legislative vision was reflected in the Proposed New Law Concerning the Ainu People (ainu minzoku ni kansuru hōritsu(an)) (the “Ainu New Law” or “New Law”) adopted by the Annual General Meeting of the Utari Kyōkai in 1984. The draft included provisions for eliminating discrimination, special representative seats in national and local legislative assemblies, fishing rights, employment opportunities, a permanent fund for Ainu people, and cultural and educational assistance programs.

21 Levin, supra note 17 at 442-444.
23 Ainu minzoku ni kansuru hōritsu(an) [(proposed) Law Regarding the Ainu people], shiryō 3 [Appendix 3] in Tsunemoto, ibid. at 60-66. For an English translation see Siddle, supra note 16 at Appendix 2.
The Effect of Legislative Activism on Ainu Unity and Mobilization

The New Law movement brought some unity of cause to the work of disparate Ainu activists from the early 1980s until enactment of the Act for the Promotion of Ainu Culture, the Spread of Knowledge Relevant to Ainu Traditions and Education Campaign (“Cultural Promotion Act” or “CPA”) in 1997.24 Lobbying for enactment of the Ainu New Law and repeal of the paternalistic FAPA was supported by Ainu activists from all sides of the political spectrum, despite some internal disagreement regarding means and content. Supporters ranged from Utari Kyōkai Director, Giichī Nomura, a conservative elder from Shiraori, through to the more radical and generally critical Tomoko Keira and her husband, Mitsunori Keira, of Yay Yukar Park,25 and Ainu diaspora activist groups in Tokyo.26

The need to speak with a unified voice in negotiations with the central government regarding the Tokyo Ainu Culture Centre established at the time (discussed below) also brought the four previously antagonistic Ainu organizations in Tokyo (Rera no Kai, Kantō Utari Kai, Peure Utari no Kai and the newly formed Tokyō Ainu Kyōkai) together for the first time under the umbrella of a network contact group (renrakukai) with Osamu Hasegawa as its chief liaison representative.27

Enactment of the CPA in 1997, however, took away this unifying cause. By effectively removing the common goal of a new law on Ainu policy, the government was successful in ending the Ainu coalition, and once again dispersing the energies of the Ainu movement.28 The composition of the movement returned to various smaller splinter groups based upon political leaning, alliances and region of origin in Hokkaido, and would remain that way until adoption of the Declaration on the Rights of Indigenous Peoples in 2007. In gaining a law to promote culture, Ainu activists had lost an important vehicle of social mobilization and solidarity. The CPA was also criticized by some activists as being an effective means for government to silence the debate regarding what Ainu people sought, before that debate had even really begun.29

Enactment of the CPA, however, led to repeal of the FAPA, and the return of Ainu communal property, thus indirectly creating

24 For an unofficial English translation of this law see online at supra note 1.
25 Yai Yukara no Mori, homepage and newsletter back issues online, in Japanese: <http://www13.plala.or.jp/yayyukar/bno/backn0.html>.
27 Ibid.
28 It has been noted that “Coalitions frequently form around short-term threats and opportunities, but when the occasion for collaboration passes, many disperse …” in this manner; S. Tarrow, The New Transnational Activism (New York: Cambridge University Press, 2005) at 165.
29 M. Keira, “Ainunōminzoku ni totte senjūminzoku no jūnen ha nan data no ka?” [“What was the ‘Decade of the World’s Indigenous People’ to the Ainu people?”] (2004) 140 Impaciton 38 at 40.
the circumstances for further Ainu legal mobilization in the Ainu Communal Property litigation, discussed below.

**Legislative Activism and Non-Ainu Actors**

Ainu legislative activism and its outcomes also had considerable influence on the study and profile of Ainu legal issues, and influenced domestic policy makers and legal academics. Two expert governmental advisory bodies were established in response to Ainu lobbying, and produced recommendations for a new law and legal policy for the Ainu people. The first was the Utari Affairs Council, established by the Governor of Hokkaido to advise him on the suitability of the provisions in the Utari Kyōkai’s proposed draft law. The second was the Expert Meeting Concerning Ainu Affairs (“Expert Meeting”), a consultative body established under the national coalition cabinet of Japan Socialist Party Prime Minister Murayama. This body reported to the Chief Cabinet Secretary, and sat for one year from March 1995; it considered the Utari Affairs Council’s recommendations, the Utari Kyōkai’s proposed New Law, and the UN debate regarding Indigenous rights as it stood in the mid-1990s.

Interestingly, while the draft New Law adopted by the Utari Kyōkai drew on legal provisions for Indigenous groups in other countries, it was not originally conceived as a bill of Indigenous rights. The Utari Kyōkai Special Committee’s draft intended to address contemporary issues faced by Ainu, such as discrimination and lack of education, and to restore rights originally lost upon colonialization of Ainu Moshir, within the existing Japanese constitutional framework. Yet by drawing inspiration from the provisions of Indigenous policies in New Zealand, Alaska and elsewhere, Ainu authors of the draft New Law in many ways compelled the scholars examining their law to consider Indigenous policy in these countries. In order to examine the Ainu proposed law, the Utari Affairs Council established a sub-committee on legal issues. This sub-committee spent three years (1985 to 1988) undertaking an in-depth examination of Indigenous legal policy in New

---

30 *Utari taisaku no arikata ni kansuru yūshikisha kondankai*. This body is translated by the national government in its reports to the United Nations Committee on the Elimination of Racial Discrimination as “Round Table on the Policy for the Ainu People”, online: <http://www.mofa.go.jp/policy/human/race_rep1/index.html>.

31 It was the report of the Expert Meeting and its recommendations that led to enactment of the CPA in 1997. See supra note 1.

32 For example, the provision on Ainu special representative seats in local and national assemblies was borrowed from New Zealand’s provision for reserved special seats for Maori representatives in its national parliament. Mention of an Ainu fund was likewise based upon the Alaska Native Fund established for Inuit in Alaska under the *Alaska Native Claims Settlement Act 1971*. 
Zealand, the Unites States and Australia. In this way Ainu initiatives brought about comparative Indigenous legal scholarship with a particular focus on the situation of the Ainu in Japan. Further, the Council’s support for the enactment of almost all the provisions of the Utari Kyōkai draft law was also based upon the jurisprudence of Indigenous rights drawn from this comparative study. This move by the Utari Affairs Council was important, and signalled to Ainu activists that their claims could be legitimized by reformulating them under the increasingly recognized legal framework of Indigenous rights.

**The Concrete Outcomes of Legislative Activism**

**The Ainu Cultural Promotion Act (CPA)**

Legally, the Ainu New Law movement did not bring about the comprehensive bill the Utari Kyōkai sought, or the recognition of Indigenous rights. Instead, it resulted in an Act to promote Ainu culture based upon recommendations in the Expert Meeting’s final report. The CPA has since been criticized as not being far-reaching enough, for failing to recognize either Ainu communal rights or Indigenous rights, and as being narrow and complex in application. On the positive side however, this law was the first within Japan to recognize and promote an ethnic culture distinct from the Wajin majority, thus debunking the myth propagated by Japanese politicians of Japan as a “mono-racial nation”. Rather than see no new law at all, the Utari Kyōkai gave its qualified support for the CPA. The CPA was also endorsed by upper-house statesman and Ainu elder Shigeru Kayano, who stated that he believed the law was a seed that, once planted, would blossom into a tree of rights for Ainu people.

---

33 Report of the Utari Mondai Konwakai [the Utari Affairs Council], Aiu Minzoku ni kansuru Shinpō Mondai ni tsuite [On the New Law Concerning the Ainu People], March 1988 at 8-10. A summary of this examination is reproduced in Utari Mondai Konwakai [the Utari Affairs Council], Aiu Minzoku ni kansuru Shinpō Mondai ni tsuite, shiryōhen [On the New Law Concerning the Ainu People, Compilation of Documents], March 1988.

34 For these final conclusions and recommendations, see Utari taisaku no arikata ni kansuru yōshiki kōda kondankai hōkokusho [Report of the Expert Meeting Concerning Ainu Affairs], shiryō 5 [Appendix 5] in Tsunemoto, supra note 22 at 73 [Expert Meeting’s report].

35 See Y. Abe, supra note 4 at 46-47 and the comments of Sasamura Jirō, then Executive Director of the Aina Association of Hokkaido in the Hokkaido Shim bun [Hokkaido Newspaper], March 23, 1997, and Hokkaido Shim bun April 2, 1996.


38 Siddle, supra note 36.
The Tokyo Ainu Culture Centre

After lobbying by the *Utari Kyōkai* \(^{39}\) the outcome of Expert Meeting deliberations also resulted in an Ainu Culture Centre in Tokyo, which forms an important focal point for activities of the various groups in this diaspora community. \(^{40}\) The centre currently hosts Ainu language classes, traditional crafts and embroidery classes, lecture series on Ainu history, culture and human rights, and Ainu study groups and activist meetings.

Traditional Living Spaces (Iwor)

The Ainu New Law movement also led to a proposal from the Expert Meeting for the recreation of Ainu traditional living spaces (Iwor). \(^{41}\) Meaning “place” or “space” in Ainu, traditionally the word *Iwor* was applied to the territory around a settlement where members of that settlement hunted, fished, gathered the materials for daily life such as food, clothing, fuel and building materials, and in so doing, liberated the spirits of the plant and animal gods who lived there. \(^{42}\) Today, the word *Iwor* is used to refer to spaces where Ainu can, under certain established guidelines, hunt, practice cultural activities, and have access to the natural resources necessary for many of their traditional arts, in accordance with the aims of the CPA to promote Ainu culture and its practice.

In the context of the Expert Meeting and enactment of the CPA, the concept of *Iwor* helped to overcome administrative and legal red tape that restricted Ainu access to natural resources necessary for traditional practices and arts. Both hunting and inland salmon catching, for example, were regulated by license systems, \(^{43}\) with some limited provision of exceptional one-

---

\(^{39}\) See Statement of Executive Director of the Ainu Association, supra note 37.

\(^{40}\) On the foundation established to administer the Ainu Cultural Promotio Act, its activities and the Ainu Culture Centre in Tokyo, see the Foundation for the Research and Promotion of Ainu Culture (FRPAC) homepage in English, online: <www.frpac.or.jp/eng/e_prf/>.

\(^{41}\) See Expert Meeting’s report, supra note 34 at 83.

\(^{42}\) See O. Okada, “Ainushi kenkyū to Ainugo—toku ni ‘ior’ wo megutte” [The Research of Ainu history and Ainu language—particularly regarding “ior”] in Tōhokushi Kenkyūkai [Society for the Study of North-Eastern (Japanese) History], ed., *Basho Ukeiši to Ainu—Kinese ezochishi no kōchiku wo mezashite* [The basho contracting system and Ainu—toward the construction of a modern history of Ezo] (Sapporo: Hokkaido Shuppan Kitaku Center, 1998) 236 at 236-241. The concept of *Iwor* is also discussed in the Nibutani Dam decision in the context of the Sarankur Ainu of the Biratori region; see discussion below in text and Nibutani Dam decision, (trans.) Levin, supra note 2 at 411. Note that in this translation of the Nibutani Dam decision, *Iwor* is spelled “tara”, following the Japanese phonetic spelling of the word.

\(^{43}\) Chūryū no hogo oyobi shūryō no teki seika ni kan suru hōritsu (heisei 14 nen hōritsu dai 88 gō [Law on the Protection of Wildlife and Hunting Regulation (Law No. 88, 2002)], Article 9 [hereafter “Wildlife Law”], and Hokkaidō naisumen gyozyō chōsei kisoku (shōwa 39 nen 11 gatsu 12nikchi kisoku dai 133 gō [Hokkaido Inland Fisheries Adjustment Regulation (Regulation No.133, 12 November 1964)] [hereafter “Fisheries Regulation”].
off permits for traditional deer-hunting or ceremonial salmon-harvesting by people of Ainu descent.\textsuperscript{44} The exceptional licenses are, however, granted entirely at the Hokkaido Governor’s discretion.\textsuperscript{45} An application and permit is also required under the Forestry Law (\textit{shinrinhō}) in order to gather the wood used to create \textit{mukkuri} and \textit{tonkori} instruments, create Ainu wood carvings, and weave the Ainu traditional dress \textit{atush} (from the bark of the \textit{ohyō} elm tree) in national or local forests.

The concept of \textit{Iwor} was therefore a solution to get around these regulatory hurdles by making plots of government-owned land available for Ainu to carry out traditional activities free from regulation. Notably, \textit{Iwor} do not involve the transfer of ownership of the land in question to the Ainu people, in line with the Expert Meeting’s findings that self-determination and “the return of and compensation for the land and resources of Hokkaido, cannot be regarded as the basis for new measures for the Ainu in Japan.”\textsuperscript{46} \textit{Iwor} are also seen as spaces where Ainu culture can be shared with Japanese and foreigners, through cultural performances and educational activities, to promote and increase understanding of Ainu culture in accordance with the aims of the CPA. Proposals envisage the creation of a network of \textit{Iwor} sites around Hokkaido, with each site having its own function, to be decided taking into consideration existing facilities and resources.\textsuperscript{47} An education-oriented \textit{Iwor} has been established in Shiraot\textsuperscript{48}, and an activity-orientated \textit{Iwor} in Biratori, as the re-creation of \textit{Iwor} now finally enters the implementation phase.

\begin{footnotes}
\textsuperscript{44} For example, for the \textit{asir chep nomi} or “first fish ceremony” giving thanks to the gods for the first salmon that swim upstream to spawn eggs.
\textsuperscript{45} Wildlife Law and Fisheries Regulation, supra note 43.
\textsuperscript{46} Expert Meeting’s report, supra note 34, English translation by FRPAC, previously found online: <www.fpac.or.jp/english/Report>, under “3. Trends of Discussions in the UN and other organizations.”
\end{footnotes}
Legislative Activism and Participatory Rights

Ainu activists sought recognition of their right, as an ethnic minority, to participate in Japanese cultural, religious, social, economic and political life. In the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, this right is described as the right to “participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live.”\(^\text{49}\) This right to effective participation in public life,\(^\text{50}\) and in decision-making on matters that directly affect minorities in particular, has been widely recognized by numerous international and regional human rights mechanisms.\(^\text{51}\)

In regard to the political aspect of this right, the Utari Kyōkai draft New Law called for Ainu special representative seats in local and national assemblies, and the Utari Affairs Council examined the constitutionality of this arrangement. The Council concluded that special seats in the national Diet were likely to contravene numerous Japanese constitutional provisions, including Article 15(1) and (3) which provide for the inalienable and universal right of the people to elect and dismiss public officials, the proviso to Article 44 which prohibits discrimination in the electoral process for representatives of the Diet, and Article 43(1) which requires Diet members to represent all of the people. The Council indicated this provision of the draft New Law could not be supported because it might infringe on these Articles, and therefore Ainu attempts to secure more effective political participation through special representation were unsuccessful. Recognition of Ainu participatory rights has thus far been strictly limited to the type of situation that arose in the Nibutani Dam Case and subsequent Biratori Dam cultural impact assessment, both of which are discussed below.


The 1990s to 2007—Domestic Litigation

Beginning in the 1990s, Ainu activists began using the court system to push for social and legal recognition of their group rights. The following sections examine three instances of this litigation-based legal mobilization: the Nibutani Dam Case, the Ainu Communal Property Case, and the Ainu Group Defamation Case.

The Nibutani Dam Case: 1993 to 1997

The Nibutani Dam Case\(^5\) was brought by two Ainu plaintiffs, Tadashi Kaizawa (succeeded following his death by his son Koichi) and Kayano Shigeru, to oppose the forcible expropriation of their land to be used to build a dam on the Saru River without any measures to ameliorate or compensate for the impact on local Ainu culture. Kaizawa and Kayano spent 10 years opposing and appealing the expropriation before launching their legal action in 1993.\(^5\)

Legal Outcomes and the Results of Judicial Messaging

A number of important legal findings were made in the Sapporo District Court’s Nibutani Dam judgment which lead to changes in government practice. First, the Court found the decision to approve the Nibutani dam construction and forcibly expropriate the plaintiffs’ land to be illegal.\(^4\) In making this finding, the Court held that the Ainu, who had been recognized by the Japanese government as a minority, have the right under both Article 13 of the Japanese Constitution\(^5\) and Article 27 of the International Covenant on Civil and Political Rights (ICCPR)\(^6\) (discussed below) to enjoy their own minority culture. This was the first time minority rights had ever been recognized in Japanese domestic law, either under the constitution or international human rights provisions.

Second, the Court found that the Ainu were an Indigenous people (senjyū minzoku)\(^7\) whose culture thus required greater consideration by the

---

52 See Nibutani Dam decision, supra note 2.  
53 See Levin, supra note 17 at 451-455.  
54 Nibutani Dam decision, supra note 2 at 48, 49 (Japanese version) at 427 of the English translation.  
55 Article 13 of the Japanese Constitution reads: “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”  
56 Article 27 provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”  
57 Nibutani Dam decision, supra note 2 in Levin translation at 422.
state than other non-Indigenous minorities. When it made this finding, the Court was the first government institution to recognize Ainu as an Indigenous people. However, the policy implications of the judgment were not as far reaching as they might have been. The Court explicitly limited the implications of its finding regarding Ainu Indigenousness “to the extent necessary for the present litigation,” “leaving aside the question of whether or not this goes so far as to recognize so-called [I]ndigenous rights, meaning [I]ndigenous peoples’ right to self determination with regard to land, resources, political control etc.” That is, the Nibutani Dam decision did not infer recognition of Ainu entitlement to substantive Indigenous rights. While symbolically important, what Ainu were given by the Court was, in effect, an “empty shell”—the designation “Indigenous people”, but stripped bare of any of the usual substantive legal implications that this term entails. The judgment also failed to stop construction of the Nibutani Dam or to return the Ainu plaintiffs’ land to them. The Court used provisions of Japan’s Administrative Litigation Law to hold that although approval of the dam’s construction was illegal, considerations of public interest dictated that the dam, which was largely completed by the time of judgment, should remain.

Third, the Court’s reasoning in the Nibutani Dam judgment contributed to the creation of a cultural impact assessment process for the Biratori Dam. When a second planned dam was to be built on the same Saru River system in the new millennium, the central government’s Hokkaido Development Bureau (HDB) felt bound by the Nibutani Dam judgment’s finding that the government has a duty to weigh and attempt to minimize the impact of public works on the enjoyment of Ainu culture. In this way, the Nibutani Dam judgment provided the framework that defined negotiations and bargaining positions in the Nibutani/Biratori region in this subsequent non-litigious context. As a result, practice changed and the HDB established an Ainu cultural and environmental impact assessment committee. The government requested that the committee assess the effect of the proposed dam on local Ainu culture and ensure that any negative impact from its con-

58 Ibid. at 419.
59 Nibutani Dam decision, supra note 2 at 45 (Japanese judgment, translation by the author) and 419 (Levin translation).
60 Ibid. at 429 of the Levin translation.
61 Ibid. at 418 of the Levin translation. See also the discussion at 426-427.
62 On the “endowments” or “bargaining chips” that judgments provide to disputing parties in subsequent non-litigious interactions, see McCann, supra note 5 at 734.
63 For more on this committee and its background, see G. Stevens, “More Than Paper, Protecting Ainu Culture and Influencing Japanese Dam Development” (Winter 2005) Cultural Survival Quarterly 44.
struction was minimized; this work was commissioned to the local government who involved the community and the two Ainu plaintiffs from the Nibutani Dam Case.

The Ainu cultural and environmental impact assessment committee’s work had important effects on the society, culture and economy of the local community. It provided both employment and the opportunity for local Ainu youth to learn more about their Indigenous culture. It also led to the documentation of local Ainu culture, based on oral histories taken from Ainu elders, thus contributing to existing efforts to preserve and promote Ainu culture in the region. This work also tied in with the region’s bid to become one of the seven designated Iwor sites proposed in the 1996 Expert Meeting’s report and discussed above.

The Nibutani Dam Case and Non-Ainu Actors

The plaintiffs had a broad base of supportive Wajin allies, including their largely pro-bono legal team, and numerous academics who gave evidence on their behalf, such as Politics Professor Toshikazu Aiuchi, a long-time supporter of Ainu legal causes. Aiuchi’s expert evidence on the ICCPR and the findings of the United Nations Human Rights Committee in the 1980s and 1990s (discussed below) influenced the Court and were reflected in its findings regarding Ainu rights under Article 27 of the ICCPR.

The Court’s decision and innovative legal arguments under the Constitution and ICCPR also resulted in a flurry of academic interest in both the judgment and Ainu Indigenous legal issues. The decision was translated into English, and articles were written on the Ainu and comparative Indigenous issues raised by the judgment, the judgment’s implications for the domestic application of international human rights law within Japan, and the Court’s constitutional arguments in support of minority cultural enjoyment rights under Article 13.

64 The Nibutani Dam plaintiffs remained opposed to construction of the Biratori dam, but collaborated so as to minimize the negative effect of the inevitable construction on Ainu culture, and Kaizawa acted as an independent consultant for the impact assessment fieldwork.

65 See Levin, supra note 2.


Despite failing to stop or reverse the dam construction, the Court’s signals in relation to Ainu Indigenous minority status and rights influenced both the legislative and administrative arms of government. The effect on the administrative arm was such that it established the Biratori Dam Ainu cultural and environmental impact assessment committee. In the legislature, the Court’s decision prompted the unanimous adoption, by both houses of the Diet, of a supplementary resolution on the enactment of the CPA. This supplementary resolution recognized the “Indigenous nature” (senjyūsei) of the Ainu, which was also in line with the findings in the Expert Meeting’s report.69

The Effect of the Nibutani Dam Case on Ainu Unity and Mobilization

The two plaintiffs were not always encouraged in their actions by the local Nibutani Ainu community. In a rural area with high unemployment, many local Ainu depended on the economic benefits brought by the dam’s construction and, therefore, opposed the litigation. The plaintiffs were supported, however, by other Ainu outside their own community. But for Ainu activists, the result of this seemingly unwinnable case instilled hope in the Japanese judicial system, and two important cases were brought in the years immediately following the Nibutani Dam Case. Both cases cited the jurisprudence from that judgment and sought recognition of international human rights law or Indigenous rights law in support of the Ainu plaintiffs’ claims.

The Ainu Communal Property Case: 1999 to 2006

The Ainu Communal Property (Trust Assets) Litigation70 was commenced by 24 Ainu plaintiffs in May 1999, and challenged the legality of the procedure to return Ainu communal property managed by the Hokkaido Governor under the FAPA.71 When the CPA was enacted in 1997 the FAPA was repealed, and the government sought to return communal property to

---

69 Japanese National Diet, Supplementary Resolution to the Legislative Bill for the Promotion of the Ainu Culture and for the Dissemination and Advocacy of Ainu Traditions and Culture, 24 December 2005, online: <http://www.frpac.or.jp/eng/e_prf/profile06.html>.

70 Judgment of the Sapporo District Court July 15, 1999, Heisei 11 (Gyou U) No.13, and on appeal, Judgment of the Sapporo High Court May 27, 2004, Heisei 14 (Gyou Ko) No.6. The case is generally known as the Ainu Communal Property Litigation (Ainu kyōkai zaisan sosho) in Japanese. The case has also been referred to as the Ainu Trust Assets litigation: see Levin & Tsunemoto, supra note 3.

71 For the full title of the Hokkaido Former Aborigines Protect Act (FAPA) see supra note 16.
descendants of the original Ainu owners using the restitution procedures set out in the CPA’s supplemental provisions.\textsuperscript{72} In total, the government offered some 26 cash payments, valued at 1,468,338 yen or approximately US$13,600 in total, by way of restitution.\textsuperscript{73}

Ainu activists suspected that the sum offered by the government was unduly low and sought information regarding the government management of Ainu communal property. Requests and freedom of information applications were made to the Hokkaido government seeking disclosure of documents on the management of Ainu communal property since enactment of the FAPA, and on the circumstances of creation, place of creation and changes in value of the items of property which had been converted into cash and were advertised for restitution in 1997.\textsuperscript{74}

These requests did not bring the disclosure of enough evidence either to prove Ainu suspicions of mismanagement, or to bring a case based upon violation of Ainu property rights. With time running out, Ainu activists were therefore forced to apply for restitution of the cash sums as advertised, and then bring an action challenging the restitution procedure itself. If they had not applied for restitution within the set one-year time limit, unclaimed communal property would vest in the foundation established to administer the CPA.\textsuperscript{75} This would then have effectively ended the government’s responsibility for this property and left Ainu with no legal basis to challenge the sum advertised for restitution or seek further information about past management of their property. With activities spearheaded by Ryukichi Ogawa, Ainu activists felt it was important to bring the case despite technical difficulties. Failure to do so would close the door on 100 years of history surrounding state management of Ainu assets, without any examination of whether the state had fulfilled its duties to Ainu communal owners.

The plaintiffs challenged the restitution procedure by arguing that it violated Article 29 (property rights), Article 31 (due procedure) and Article 13 of the Constitution (respect for the individual). The Article 13 pleadings, based on the Nibutani Dam Case, argued that the government was required to show respect for Ainu Indigenous minority culture and their ethnic pride as an Indigenous people when it was returning their property to them by, for example, taking into account culturally appropriate methods of restitution, such as communal ownership. The Article 31 due procedure pleadings included the assertion that, as a minority, the Ainu had a right to participate in decision-making regarding the return of their own property, in accordance

\textsuperscript{72} For the full title of the Cultural Promotion Act (CPA) see supra note 1.
\textsuperscript{73} For the details and background on this procedure see Stevens, supra note 3 at 225-228.
\textsuperscript{75} Article 3(5), supplemental provisions of the Ainu Cultural Promotion Act 1997, supra note 1.
with the right of minorities to effective participation in matters affecting their own interests.\textsuperscript{76}

\textit{Direct Outcomes of the Ainu Communal Property Case}

The plaintiffs’ arguments met with little success in court. The Sapporo District Court found that Ainu plaintiffs had been given the property they applied for under the restitution procedure, and for those who had not, this was because they had not adequately proven their entitlement. On this basis, their case was held to be unfounded and was therefore dismissed. On appeal, it was found that the Hokkaido government did not know the whereabouts of some of the communal property that it had managed in the past. Nonetheless, the Court found that Article 3(1) of the supplemental provisions of the CPA only required the government to return the property that it held in 1997 and that it had fulfilled this duty.\textsuperscript{77} Thus, the restitution procedure was legal, and plaintiffs’ demands that it be held procedurally void or invalid were without merit. These findings were upheld on appeal to the Supreme Court.\textsuperscript{78}

There was, however, some validation of Ainu activists’ initial concerns regarding government management of Ainu property. On appeal, the High Court found that, as suspected, the sum advertised in 1997 did not include the proceeds of all the communal property originally managed by government. The Sapporo High Court acknowledged that the government had not included the proceeds of sale of five pieces of real property that it had managed, nor was it even cognizant of how, when and to whom this property had been transferred, as no documentation existed.\textsuperscript{79}

The litigation also led to the uncovering of historical documentation on state management of Ainu communal property, which would otherwise have remained buried. Documents released by the Hokkaido government under freedom of information and other applications by Ainu activists and supporters were the first documents many of the Ainu plaintiffs ever saw regarding their ancestors’ communal property.\textsuperscript{80}

\textsuperscript{76} On the right to effective participation see ICCPR and ICERD, supra note 50. For the plaintiffs’ case as argued and for further factual details, see Stevens, supra note 3 at 223-243.

\textsuperscript{77} Judgment of the Sapporo High Court May 27, 2004, Heisei 14 (Gyou Ko) No.6 at 10 [Ainu Communal Property (Sapporo High Court decision)]. See also Stevens, supra note 3 at 239-241.

\textsuperscript{78} “Ainu minzoku no haiso kakei; Kyōyūzaissen soshō saikōsai yōkoku kikyakai” [Ainu peoples lose case; Supreme Court dismisses Communal Property litigation appeal] in Hokkaido Shim bun chōkan, [Hokkaido Newspaper morning edition], March 25, 2006 at 29.

\textsuperscript{79} Ainu Communal Property (Sapporo High Court decision), supra note 77.

\textsuperscript{80} Ainu minzoku kyōyūzaissen saiban wo shien suru zenkoku renrakukai [National Network in Support of the Ainu Communal Property Case], Ainu minzoku kyōyūzaissen kankei shiryōshū [Compilation of Documents Related to Ainu Communal Property], 1998 (copy on file with author).
work was also able to uncover documents proving that the government’s management of Ainu communal property was flawed. When government communal property records were compared, it became clear that the government had “lost” some items of communal property between 1935 and 1942. That is, property included in 1935 records no longer existed in government ledgers in 1942. And yet there was nothing to document the property’s sale or disposal in the intervening years.\textsuperscript{81}

\textit{The Ainu Communal Property Case and Non-Ainu Actors}

Although unsuccessful in convincing domestic courts to uphold Ainu group and human rights claims, this litigation succeeded in bringing scholarly and legal attention to Ainu and broader Indigenous legal issues in Japan. The case generated a number of legal articles on the significance of the Court’s findings and the plaintiffs’ claims,\textsuperscript{82} and a book on the litigation.\textsuperscript{83} It exposed many from the team of pro-bono lawyers to Ainu and Indigenous legal issues for the first time—a positive development. The legal team included Kiyoshi Fusagawa, who had acted for Ainu plaintiffs in the Nibutani Dam litigation.

\textit{The Effect of the Communal Property Case on Ainu Mobilization and Unity}

The Communal Property Case was not originally supported by the \textit{Utari Kyōkai}, who felt they could not legitimately challenge provisions of the CPA after having supported its enactment. This position changed, however; due to its profile, perceived importance and the level of support from within the Ainu community, the case eventually gained the support of the association’s executive and members. It has also enjoyed support from various disparate Ainu activist groups. At the High Court appeal hearings the 18 Ainu appellants were often in traditional dress and were buoyed by the support of a courtroom full of fellow Ainu and non-Ainu supporters.

\textit{The Ainu Group Defamation Case: 1998 to 2007}

The second action subsequent to the Nibutani Dam Case was a group defamation case known in Japanese as the Collection of Ainu Historical Documents litigation\textsuperscript{84} (“Ainu Group Defamation Case”).\textsuperscript{85} In the case,

\begin{itemize}
\item \textsuperscript{81} See Stevens \textit{supra} note 3 at 238.
\item \textsuperscript{82} See e.g. Tsunemoto and Levin, \textit{supra} note 3; Stevens, \textit{supra} note 3; S. Kawashima, “The Right to Effective Participation and the Ainu People” (2004) 11:1-2 International Journal on Minority and Group Rights 21; Y. Hasegawa, \textit{supra} note 4.
\item \textsuperscript{83} Ogasawara, \textit{supra} note 74.
\item \textsuperscript{84} In Japanese, “aimushi shiryōshū jiken.”
\item \textsuperscript{85} Judgment of the Sapporo District Court, June 27, 2002, Heisei 10 (Wa) No. 2328 and Heisei 13 (Wa) No. 1746 (Yamamoto et al. v. Kono and Chikku v. Kono).
\end{itemize}
which was brought against Ainu anthropologist Motomichi Kōno, the plaintiffs cited provisions of the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD)\(^{86}\) to support their argument that medical documents reproduced in Kōno’s *Collection of Ainu Historical Documents* series slandered the Ainu people as a group and the plaintiffs as Ainu individuals. At issue in the case were Ainu individuals’ medical records from 1896 and 1916. The documents listed personal information, such as the names, addresses, occupations, and ages of some 500 Ainu individuals whose medical histories were revealed, including whether they had contracted syphilis and/or other contagious diseases. Commentary in the documents suggested that the Ainu were a savage race with little chance of survival, whose cultural and racial inferiority predisposed them to such conditions.\(^{87}\)

Like the Communal Property Case and the Nibutani Dam Case, this action had a long history of activism prior to litigation. The plaintiffs had written to Kōno demanding an apology and withdrawal of his book, complained to the Human Rights Protection Committee of the Sapporo Bar Association, who in turn recommended that the book be withdrawn,\(^{88}\) and picketed and interrupted public lectures by Kōno. Kōno, however, refused to apologize or withdraw the book from circulation.\(^{89}\) The plaintiffs decided to litigate after Kōno brought a successful action against two Ainu activists for damages caused by their obstruction of his lecture in 1997.\(^{90}\)

The four Ainu plaintiffs argued that publishing medical documentation in full with personal identifying information, together with derogatory and racist references to the Ainu, without any explanatory notation of the historical context, was racist and defamed the Ainu as a people. The plaintiffs’ legal team argued that the object, purpose and provisions of ICERD, which prohibits racial discrimination, should inform the Court’s interpretation of

---

86 ICERD, supra note 50.


89 Kōno argued that the medical records would be read in context by academics using the volume as it was part of a collection of historical documents and that in any event the medical records had already been made public. They had been published in a local police document on Ainu hygiene around the time of their creation some 80 years before.

90 See supra note 88. The activists were Kazuaki Yamamoto and Shimako Kitagawa.
what constitutes an illegal act by a private individual under Article 1 of the Japanese Civil Code.\footnote{Article 1 of the Japanese Civil Code provides that: 
1. All private rights shall conform to the public welfare. 
2. All rights shall be exercised and all duties shall be performed in good faith. 
3. No abuse of rights shall be permitted. 
The principles in this provision are understood to be general legal restrictions on the principle of private autonomy. Where one individual’s actions risk violating or actually violate another individual’s fundamental freedom and equality, and the violation is outside the socially permissible range, those acts will be nullified and found illegal under this Article (as a contravention of the obligation to act in good faith, or as an abuse of that right). Where an act is found to be illegal, this may result in an obligation to pay compensation to other individuals whose rights are infringed as a result. See e.g. \textit{Otaru Nyūyōku kyōhi jiken} [The Otaru Denial of Bathing Entry Case], Judgment of the Sapporo District Court, November 11, 2002, 1806 Hanrei Jihō 84.} That is, that racial defamation by one individual of another should be seen as prohibited by the Civil Code Article 1 requirement to exercise all individual rights (such as the right to publish) in good faith.\footnote{The legal argument that ICERD provisions on racial discrimination should be used to interpret provisions of the Japanese Civil Code was a way of ensuring that the standards in ICERD, which normally only apply to member states (member countries who ratify the convention) could be applied to conduct occurring between two private individuals in Japan—the defendant Kōno and the Ainu plaintiffs.} The plaintiffs’ solicitors led expert evidence arguing that ICERD guaranteed the rights of both individuals \textit{and groups} against violation due to racial discrimination. This argument was based upon the provisions of ICERD which refer to the adequate protection of “certain racial groups” (Article 2(2)) and the receipt of communications regarding violations of the convention from “individuals \textit{or groups of individuals}” (emphasis added).\footnote{For arguments under ICERD and based on the Nibutani Dam decision see Hideshima, \textit{supra} note 87 at 122-123.} It was argued that, as a result, not only individuals but also certain groups, such as the Ainu, were protected from racial discrimination or defamation under ICERD. When this group right was violated, they argued, the rights of individuals of that group (that is, the Ainu plaintiffs) were also directly violated.

The Ainu plaintiffs’ pleadings, both at first instance and on appeal, drew on the findings of the Nibutani Dam decision regarding the need to give special consideration to the minority cultural values of the Ainu people. The plaintiffs argued that because of their Ainu culture, they held strong ties to all Ainu ancestors and so suffered greater than usual shock and insult from the publication of the book. By way of relief, the plaintiffs sought withdrawal of the book, a public apology and damages of 600,000 yen (approximately US$ 6,000) each, from Kōno and the publishers.

\textit{The Legal Outcome}

Like the Communal Property Case, the group rights aspects of the Ainu Group Defamation Case proved difficult to argue in the Japanese legal
context. Under Japanese law, the individual is understood to be the subject of legal rights and obligations.\textsuperscript{94} While the trial Court recognized that the references in Kōno’s book may defame Ainu people as a group, it rejected the argument that such defamation could result in direct damage to Ainu individuals. The recognition of an individual right to damages for every member of a group every time that group is defamed would mean granting standing to a huge and often unquantifiable class of potential plaintiffs. The lack of legal certainty that such a principle would introduce, the absence of proximity between defendant and plaintiff, and the potential effect on freedom of speech guarantees under the Japanese Constitution made this unattractive as a general legal principle.

The Court, therefore, found the three Ainu plaintiffs without blood ties to persons listed in the offending medical records had not suffered any violation of their rights. The fourth plaintiff, Shimako Kitagawa, was the paternal granddaughter of a woman whose personal details were published in the document in question. The Court found that as Ms. Kitagawa had never lived in the same house as her grandmother, the relationship was too remote to warrant damages for emotional distress, which had previously only been recognized for relationships such as husband and wife, or parent and child.\textsuperscript{95} The appeal against this decision was also dismissed by the Sapporo High Court.\textsuperscript{96}

\textit{The Ainu Group Defamation Case and Non-Ainu Actors}

Despite its lack of success, the Ainu Group Defamation Case did generate some legal analysis,\textsuperscript{97} assistance from human rights lawyers,\textsuperscript{98} and the support of 26 \textit{Wajin} solicitors on the appeal. It was also supported by other minority groups, and Christian organizations.\textsuperscript{99}

\textsuperscript{94} In Japanese constitutional law theory and jurisprudence for example, the individual is understood as being the subject of the human rights guarantees contained in Chapter 3 of the Japanese Constitution; See \textit{e.g.} N. Ashibe and K. Takahashi, \textit{Kenpō, dai 3 han} [Constitutional Law, 3rd ed.] (Japan: Iwanami Shōten, 2002) at 78-80, 87.

\textsuperscript{95} Judgment of the Sapporo District Court, June 27, 2002, Heisei 10 (Wa) No. 2328.


\textsuperscript{97} See Hideshima, \textit{supra} note 87.

\textsuperscript{98} See \textit{e.g.} the lecture by Attorney Yasushi Higashizawa, \textit{supra} note 88.

\textsuperscript{99} See \textit{e.g.} the Buraku Liberation League, Tokyo Ainu organization \textit{Reva no kai}, Eastern Tokyo Organisation of Action to Oppose Discrimination Against Ainu Peoples, and the United Church of Christ in Japan’s Sapporo Tomioka Church. See online: <http://www011.upp.so-net.ne.jp/tomioka-eh/katudoujouhou.html>. 
There was, however, less public academic support of the case than there had been for previous Ainu litigation. A number of legal scholars, including many who had written on aspects of the Nibutani Dam decision, were approached to give evidence on Indigenous and international human rights law aspects of the plaintiffs’ case, but all declined for various reasons. The case was a sensitive one for academics, being brought against one of their academic peers, and raising issues of freedom of academic speech.

The Effect of the Group Defamation Case on Ainu Mobilization and Unity

The case did not enjoy the same general level of support from the Utari Kyōkai and other Ainu activists as the Nibutani Dam Case or the Communal Property Case. The defendant had previously devoted time and energy to producing publications on Ainu history in collaboration with the Utari Kyōkai. As a result, although sympathetic to the Ainu plaintiffs’ indignation, the Association chose not to get involved in the case. Also, fewer supporters attended the court hearings than during the earlier two cases.

Ainu Domestic Activism—Conclusion

Both the Communal Property Case and the Ainu Group Defamation Case were heard by courts that were unsympathetic to the Indigenous and international human rights aspects of the Ainu plaintiffs’ claims. In reaching their decisions, these courts chose not to rely upon the recent international developments in Indigenous rights or the international conventions cited by the Ainu plaintiffs. Neither did they build on the jurisprudence of the Nibutani Dam decision. Courts in some countries have drawn upon Indigenous legal precedent from other jurisdictions in order to introduce Indigenous legal concepts into their national jurisdiction. But Japanese courts also chose not to pursue this option. Instead, they stayed within the bounds of

---

100 On appeal, Civil Law Professor Nobuhisa Segawa provided expert evidence for the plaintiffs on the civil law aspects of their group libel claim, but there was no expert legal evidence on international human or Indigenous rights issues. Kōdai 189 gōshō, Ikensho, Segawa Nobuhisa, [Appellant Evidence Item No. 189, Written Opinion of Nobuhisa Segawa] October 1, 2003.

101 See e.g. Mabo v. Queensland [No 2] (1992) 175 CLR 1, where the court referred to the jurisprudence on Indigenous land title from New Zealand, Canada, the United States and other countries to support the finding that native title survived in Australian law, despite not having been legally recognized up to that date.

102 Japanese courts could have referred, for example, to the North American concept of a fiduciary duty owed by the state to Indigenous peoples when they were interpreting the FAPA in the Communal Property case, in order to find that the provisions should be interpreted in the manner most protective of the rights of Ainu people. Use of this concept could be explained as flowing from the fact the FAPA was modelled on the American Dawes Act of 1887, and that such Acts have been interpreted using this concept within the United States. See Constitutional Law Professor Teruki Tsunemoto’s comments in this regard in Stevens, supra note 3 at 241-242.
existing domestic legal precedents, using them to dispose of the Ainu plaintiffs’ claims without engaging with jurisprudence on Indigenous rights.

It is also significant that neither of these cases had been chosen strategically. Rather, they had arisen incidentally to other activism and were litigated only as an afterthought due to failure of alternative methods, Ainu indignation and the hope that courts might offer a better outcome. This method of *ad hoc* litigation increased the inherent difficulties in bringing these cases. It decreased the chances of successfully arguing the international law and Indigenous aspects as the cases were not chosen so as to maximize the chances of establishing a claim to collective or Indigenous rights in the Japanese context. By citing arguments based on the Nibutani Dam judgment in these unsuccessful cases, Ainu activists possibly also lowered the strategic and precedent value of the findings in the Nibutani Dam Case. As higher, more authoritative courts found that the legal principles in the Nibutani Dam judgment did not apply to a number of other situations involving Ainu plaintiffs, much of the Nibutani Dam judgment’s authority and usefulness as a bargaining chip and implicit starting point for negotiations on Ainu rights between Ainu activists and government institutions was lost. These later judgments confirmed the Nibutani Dam decision as an aberration—an exception rather than the beginning of a new jurisprudence on Indigenous and minority rights by courts in Japan.

III INTERNATIONAL ACTIVISM

The 1980s to 1990s—International Activism at UN Human Rights Fora

While domestic lobbying was focused on legislative reform, Ainu activism at the international level focused on applying pressure on the Japanese government through human rights bodies. This was initially used to secure recognition of the Ainu as a minority and later in an attempt to secure recognition of the Ainu as an Indigenous people with Indigenous rights. Even by generous estimates, the Ainu form less than half a percent of the Japanese population. International legal mobilization, which made use of *gaiatsu* or “outside pressure,” therefore represented an opportunity for the Ainu to escape the restrictions their numbers placed on their ability to achieve change through the lobbying and political processes of a democracy.

Having United Nations bodies reformulate Ainu claims as Japanese violations of international human rights obligations and cloak them with the legitimacy of the United Nations was, at least initially, an effective means to rapidly bring about change in the Japanese government’s position on these issues. As Peek has explained: “As a respected third party, the U.N. has
provided increased legitimacy to the demands of the disadvantaged in Japanese society ... and held the Japanese government somewhat accountable for decisions not to comply with international standards."103

United Nations human rights fora have performed an important ‘certification’ function in this regard for the Ainu and other Indigenous groups, providing the “validation of actors, their performances and their claims by authorities.”104 Certification and the taking up of Ainu concerns by UN bodies has arguably been more effective in the case of Japan due to the Japanese government’s sensitivity to its reputation and how it is perceived in the international community.105 Although the Japanese government generally views human rights as a matter of national sovereignty and is reluctant to engage with international human rights bodies,106 it is concerned that it meet what it perceives to be the minimum acceptable norms of Western developed states in order to demonstrate its integration into international society and its equal stature with such states. Adoption of these norms is “seen as the necessary price of existence in the outside world”107 or as “necessary for the country to maintain its place in the international system.”108 Thus, outside pressure can be used by domestic lobby groups like the Ainu to leverage their domestic agitation for change.109 The potential result is the alteration of domestic policy to ensure that minimum internationally accepted norms are adopted. This dynamic has resulted in international human rights norms having a significant effect on domestic laws and government policy in various areas within Japan.110 The sphere of Ainu rights is no exception.

107 Gurowitz, ibid. at 422.
108 Ibid. at 424.
Recognition of Ainu as a Distinct Minority and Ainu Minority Rights

The Japanese government’s official stance in respect of the Ainu changed rapidly and fairly dramatically between the 1980s and the 1990s as a result of UN scrutiny and Ainu lobbying\textsuperscript{111} under Article 27 of the ICCPR.\textsuperscript{112} Article 27 of the ICCPR indicates that persons belonging ethnic, linguistic and religious minorities shall not be denied the right to practise their own religion, use their own language or enjoy their own culture.\textsuperscript{113} In its initial periodic report under the Covenant in 1980, the Japanese government took the position that it did not have any obligations under this Article as “minority groups of the kind mentioned in the Covenant do not exist in Japan.”\textsuperscript{114} The government stated that Article 27 was not relevant to the Ainu, as “the difference in their [Utari] way of life is indiscernible from that of non-Ainu Yamato Japanese. The Utari were ... treated equally with Japanese.”\textsuperscript{115} In 1986, prior to the second periodic report being submitted, the Utari Kyōkai, opposition parties and domestic groups began to question the government regarding its position on the Ainu with reference to the ICCPR.\textsuperscript{116} Spurred on by Prime Minister Nakasone’s assertion that Japan was a “mono-racial nation” (tan’itsu minzoku kokka), Ainu began to lobby for change both at the United Nations\textsuperscript{117} and within Japan where they made official inquiries to the national Diet.\textsuperscript{118} A number of Ainu, supported by the Japanese non-government organization (NGO) Shimin Gaikō Centre


\textsuperscript{112} ICCPR, supra note 50.

\textsuperscript{113} See supra note 56.

\textsuperscript{114} U.N. Doc. CCPR/C/10/Add.1, 14 November 1980.

\textsuperscript{115} U.N. Doc. CCPR/C/87, 10 November 1981.

\textsuperscript{116} See Uemura, supra note 111.


\textsuperscript{118} See “A Letter of Interpellation regarding the Description of Ethnic Minorities in the Second Human Rights Report to be Submitted in Accordance with the International Covenant on Civil and Political Rights, Question 24” submitted to Mr. Kenzaburo Hara, Speaker of the House of Representatives by Mr. Kozo Igarashi, March 27, 1987, in Ainu Assn. of Hokkaido, Compilation, ibid. at 29-34. See also Uemura, supra note 111 at 32-33 for government responses during parliamentary debate.
(SGC), discussed were able to refute the government’s position through their participation in the Working Group on Indigenous Populations, which was the first time Ainu representatives attended the United Nations to lobby human rights bodies regarding their rights. This increased scrutiny from human rights bodies that this lobbying produced led the government to acknowledge in its 1987 report, with reference to Article 27 of the ICCPR, that Ainu people “preserve their own religion and language and maintain their own culture.” It was argued, however, that “they are not denied enjoyment” of these rights as, like all other Japanese nationals, they are “guaranteed equality under the Japanese Constitution.”

This statement represented a clear shift by the government. As Utari Kyōkai Executive Director Giichi Nomura stated following the report consideration: “This report recognized the existence of us Ainu … I would assess it as a significant step forward.” The government had not only officially recognized the existence of the Ainu as a distinct minority, they also recognized that the Ainu “preserve their own religion and language and maintain their own culture.” This was a far cry from the assertion in 1981 that there was no minority in Japan that could be clearly differentiated socially and culturally from the rest of the population. By the time of the Human Rights Committee’s (HRC) consideration of Japan’s third periodic report in 1991, the government had begun to refer, in its reporting under Article 27 of the ICCPR, to measures taken to assist the realization of Ainu human rights, such as the Hokkaido government’s Utari Welfare Measures. By its fourth periodic report in 1998, the Japanese government was referring to “policies relating to the Ainu people,” including the conclusions of the Expert Meeting (referred to as the Round Table on the Policy for the Ainu People) that recommended a new policy and legislation to support the enjoyment of Ainu cultural rights.

119 On the Shimin Gaikō Centre and its current activities, see their homepage, online: <http://www05.snu.ohi.ne.jp/peaceca/English/).
122 Hokkaido Shinbun [Hokkaido Newspaper], 25 December 1987, quoted in Uemura, supra note 111 at 37 (translation from Japanese by the author).
123 This position was also reiterated in government statements in the Diet; see government responses to questioning in the 96th session of the upper house, April 23, 1982, quoted in Uemura, supra note 111 at 32-33.
Official recognition of Ainu minority status by the United Nations’ Human Rights Committee (HRC) and the Japanese government—as a result of Ainu lobbying both domestically and at the United Nations—had an important influence on the outcome of the Nibutani Dam Case. The Court referred to the HRC’s documents and reports submitted to them by Japan before finding that the Ainu were an Indigenous minority with the right to enjoy their own culture as guaranteed under Article 27 of the ICCPR.126

It should be noted, however, that while acknowledging Ainu minority status under Article 27 of the ICCPR, the government strategically continued to refer to Ainu no hitobito, or “Ainu persons”, rather than Ainu minzoku or “the Ainu people”, in Japanese translations of their third and fourth periodic under the ICCPR reports. It was suggested this careful wording was to avoid any possibility of inferring the Ainu might be a “people” who were thus entitled to the rights of a people, such as self-determination and Indigenous group rights.127 The use of the Japanese term Ainu no hitobito as the collective term for the Ainu was seen in the wording of both the Expert Meeting’s reports and the resulting CPA, both of which recognized Article 27 minority cultural enjoyment rights, but failed to recognize Ainu Indigenous group rights.

In bringing about this incremental but significant change in the Japanese government’s position, the assistance of Wajin activist supporters was instrumental. Takemasa Teshima and Hideaki Uemura, academics and Wajin allies from the SGC, informed Ainu activists about UN mechanisms and facilitated Ainu activists’ submissions to UN human rights bodies by providing indispensable translation and interpretation support.128 The SGC has proven an to be important vehicle through which Takeshima, Uemura and various other Japanese academics involved in the study of international human rights law have been able to provide ongoing support for Ainu legal mobilization, both domestically and at UN fora.129

126 Nibutani Dam decision, supra note 2.
127 Uemura, supra note 111 at 38.
128 For articles by these activist academics on Ainu and indigenous rights in general, see e.g. T. Teshima, senjyūminzoku no keiei to jiketsuken hitei no ronpō [Indigenous Rights and the Argument Against Self Determination] (2005) 16.3 Ritsumeikan Gengobunka kenkyū 57; Uemura, supra note 110; M. Fujioka, K. Nakano & H. Uemura, eds., Gurōbaru jidai no senjyūminzoku: “senjyūminzoku no jūnen” to ha nan data noka [Indigenous Peoples in a Global Age—What was “The Decade of the World’s Indigenous People” all about?] (Japan: Hōritsu bunkasha, 2004).
129 Other SGC members include international law professor Toshiaki Sonohara and political scientist Toshikazu Aiuchi, who linked these international gains to domestic legal mobilization when he gave evidence on the Human Rights Committee’s findings before the Sapporo District court in the Nibutani Dam Case.
The Fight for Recognition as an Indigenous People

In the later 1980s and early 1990s, Ainu activists had begun to participate in United Nations fora established for Indigenous peoples. Supported by the Shimin Gaikō Centre, Ainu elders from the Utari Kyōkai began attending annual sessions of the United Nations Working Group on Indigenous Populations (WGIP) in 1987. Here Ainu activists built networks with other Indigenous peoples and presented annual updates on Ainu human rights issues, including the progress of the domestic Ainu New Law movement.\(^\text{130}\)

The WGIP provided a means to use gaiatsu by ‘naming and shaming’ the Japanese government, which is sensitive to its perception and reputation in international fora. The Japanese government began sending observers to the WGIP to monitor submissions made by Ainu delegates about the situation in Japan. Participation at the WGIP also served the strategic purpose of having the international community and UN bodies recognize the Ainu as an Indigenous people. This recognition was confirmed by the visit of the Working Group’s chairperson Ms. Erika Irene Daes to Ainu communities in 1991, and by the invitation extended to Utari Kyōkai Executive Director Giichi Nomura to address the UN General Assembly at the launch of the 1993 International Year of the World’s Indigenous People in December 1992.\(^\text{131}\) Further recognition of Ainu as an Indigenous people by other UN human rights bodies followed, including the Committee on the Elimination of Racial Discrimination (CERD),\(^\text{132}\) the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,\(^\text{133}\) and the HRC.\(^\text{134}\)

For many years the main work of the WGIP—the Declaration on the Rights of Indigenous Peoples—remained in draft form and therefore of little lobbying use to Ainu people. For gaiatsu to bring about domestic change, the norm in question must be viewed by the Japanese government as a required minimum standard of respectable industrialized democracies. Japan can easily ignore developing international norms it finds domestically prob-

\(^{130}\) For the statements submitted to various sessions of the Working Group on Indigenous Populations by the Ainu Association of Hokkaido from 1987–2000 in both Japanese and English, see Hokkaido Assn. of Hokkaido, Compilation, supra note 117.

\(^{131}\) For his address, made on December 10, 1992, see Ainu Association of Hokkaido, Brochure on the Ainu People at 9-10 or Ainu Assn. of Hokkaido, Compilation, supra note 117 at 221-226.


lematic because non-compliance is not seen as threatening its international stature. As a result, for the 20 years during which the draft DRIP was not adopted by any of the UN’s political organs, Japan denied the relevance of Indigenous rights norms to the Ainu people, arguing that no agreed international definition of the term “Indigenous people” existed. In 1995, the Expert Meeting concluded that as the debate on Indigenous rights at the UN was yet to be finalized, its provisions on land rights, control of natural resources and self-determination could not form the basis of a new policy for Ainu people within Japan. This situation remained unchanged until the UN General Assembly adopted the DRIP in 2007, as is discussed below.

The 1990s to 2005—Ongoing Use of UN Human Rights Forums, CERD and CEDAW Committee

Ainu activists and supporters at the international level began, during this period, to employ increasingly sophisticated methods to lobby diversified UN human rights bodies regarding their rights.

International Convention on the Elimination of All Forms of Racial Discrimination

Ainu activists and the Shimin Gaikō Centre began to utilize the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to apply pressure on the Japanese government to improve the Ainu domestic human rights situation, following Japan’s ratification of this convention in 1996. By them more adept at lobbying, Ainu activists joined forces with other Japanese minority groups, such as the Buraku, Okinawans, and Zainichi Koreans to compile a comprehensive joint counter-

135 Expert Meeting’s report, supra note 34 at 78.
136 See UN Doc. CERD/C/60/Rev.3 at 8.
137 The Buraku community, while ethnically Japanese, is a caste-like minority that has suffered discrimination for generations as descendants of outcaste populations assigned the social function of slaughtering animals and executing criminals in the pre-1868 feudal class system. Because of this work, deemed to be “polluting” under Buddhist and Shintoist beliefs, these people were considered dirty or sub-human. Discrimination against Buraku people has persisted despite official abolition of this class system in 1868, creating a vicious cycle of poverty, high school drop-out rates and high rates of irregular employment.
138 Okinawans or Uchinanchu (“people of Okinawa”) are an ethnically and linguistically distinct people who originally possessed their own independent country, the Kingdom of Ryukyu on the Ryukyu islands to the south-east of Japan. Following years of de facto control from 1609–1879 by the Satsuma clan from Kagoshima, Japan abolished the Ryukyu Kingdom, renaming it Okinawa and taking control of this island in 1879 following the Meiji Restoration.
139 The term Zainichi Korean is generally used to refer to individuals who trace their roots to the Korean Peninsula and who came to live in Japan as a result of its historical colonial domination
report covering overall institutional concerns and the concerns of each specific minority group regarding racial discrimination. This joint report was submitted to the Committee on the Elimination of Racial Discrimination (CERD) which was established to oversee implementation of the Convention; Ainu submissions calling for an anti-discrimination law, the guarantee of Ainu property rights, and educational opportunities.\textsuperscript{140}

This lobbying resulted in CERD referring to the Ainu as Indigenous, drawing the Japanese government’s attention to its general recommendation on the rights of Indigenous peoples,\textsuperscript{141} and asking the Japanese government to consider recognizing Ainu land rights.\textsuperscript{142} As with other aspects of claims based on Indigenous rights, however, until recently, this request was completely ignored by the Japanese government.\textsuperscript{143} This is another example of where gaiatsu was not entirely successful in changing Japan’s domestic position. By the 1990s, Japan had become accustomed to the reporting system under the international human rights conventions. Japan also had time to observe that some other established industrialized states refuted or failed to abide by the ‘soft law’ recommendations of human rights treaty bodies. As a result, the perceived international pressure to accept the recommendations of these treaty bodies, and thus their gaiatsu value, had declined.

The need to report back to CERD on steps to realize Ainu land and other Indigenous rights in accordance with their recommendations may, however, have contributed in part to the national government’s willingness to move forward with re-creation of Iwor.\textsuperscript{144} In a resolution recently adopted by the national Diet in June 2008, the recommendations of UN treaty bodies such as CERD and the HRC were also cited as international sources that justified Japan’s policy change toward recognizing Ainu Indigenous rights (see below). This shows that given the right domestic climate, these recommen-

---


\textsuperscript{142} \textit{Concluding Observations, supra} note 134.

\textsuperscript{143} The Japanese government’s “rebuttal” to various suggestions and assertions by CERD in its Concluding Observations did not even directly address the Committee’s comments on Ainu indigenous status or land rights. See \textit{Comments (summary) of the Japanese Government on the Concluding Observations of the CERD on its initial and 2nd periodic reports}, U.N. Doc. A/56/18, Annex VIIA, 10 August 2001.

\textsuperscript{144} See \textit{supra} note 47 regarding the Committee established by the national government to consider this issue, and their 2005 report.
dations by UN treaty bodies do still hold gaiatsu and external ‘certification’ value for Ainu claims to Indigenous rights, and thus remain of value as a legal mobilization strategy.

**The Convention on the Elimination of Discrimination Against Women**

In the new millennium, UN human rights fora were used to fight for recognition of the special needs and rights of minority Ainu women under the [Convention on the Elimination of Discrimination Against Women (CEDAW)](https://www.cedaw.org). Ainu women were supported and encouraged by the Japanese minority rights NGO International Movement Against All Forms of Racial Discrimination (IMADR). The lobbying of the CEDAW Committee in 2003 was part of a wider campaign to ensure Japanese gender policy finally addressed the particular needs of minority women arising out of the multiple discrimination they face as both women and members of a minority. Lobbying efforts were coordinated with those of women from the national minority Buraku community and the Zainichi Korean community.

Ryoko Tahara, a councillor with the [Utari Kyōkai](https://www.utari.or.jp), prepared a report on the situation of Ainu women for the CEDAW Committee and, together with women representatives from the Buraku and Korean communities, was involved in lobbying the Committee in New York. These efforts were also coordinated with other Japanese women’s NGOs under the umbrella of the Japan NGO Network for CEDAW (JNNC).

These efforts saw some success. In its concluding comments the CEDAW Committee expressed concern about the current situation and lack of information on minority women in Japan, and issued a recommendation that the government include disaggregated data on the education, employment, health, social welfare and exposure to violence of minority women in

---

145 For more information on this NGO and its activities see their homepage, online: <www.imadr.org>.


148 For reports and information submitted by this network, and their activities in New York in July 2003 see online: <www.jaiwr.org/jnn/english/index.html>.
its next report.\textsuperscript{149} The Committee’s failure to specifically mention the Ainu, Korean or Buraku communities by name, as sought by these groups, weakened the impact and domestic political leverage that these recommendations provided.

To increase societal awareness of the issues faced by minority women in Japan, the CEDAW lobbying and its results were compiled in a book,\textsuperscript{150} and presented at IMADR’s human rights seminar in 2005.\textsuperscript{151} Rather than wait passively for the government to collate statistics on the situation of minority women, Ainu women, together with women from the Buraku and Zainichi Korean minority communities, conducted their own survey on the actual situation of minority women in Japan.\textsuperscript{152} This survey included 41 questions which were used in the surveys of all three minority communities, and which covered the abovementioned five areas CEDAW had highlighted as requiring disaggregated data. The Ainu survey was carried out under the auspices of branch offices of the \textit{Utari Kyōkai}, despite some male member opposition.\textsuperscript{153} The survey data and resulting policy proposals were presented to a meeting of seven different ministries, including the national Gender Equality Bureau, in September 2007. They are also included, together with analysis and commentary, in a jointly edited book.\textsuperscript{154}

This lobbying at the UN has yet to bring about remedial action from the Japanese government. The most recent report submitted under CEDAW by the Japanese government in 2008 does not include any disaggregated data on the situation of minority women. Rather it contains only the disclaimer that all women, including members of national minorities who are Japanese nationals, and foreign nationals who reside in Japan by analogy (unless special circumstances dictate otherwise) are guaranteed equality in law under Article 14 of the Japanese Constitution. The government adds that human

\textsuperscript{150} IMADR-JC MD Project Team, ed., \textit{supra} note 147.
\textsuperscript{153} The decision by the Utari Kyōkai Hidaka branch office not to become involved in this survey was made mainly by male members of the branch: see Sapporo Branch of the Aina Association of Hokkaido, Buraku Liberation League Central Women’s Policy Unit, Apro Women’s Survey Project, IMADR-JC, eds., \textit{Tachiagari Tsunagaru Mairōtai Josei} [Minority Women Join Forces and Speak Up] (Tokyo: IMADR-JC, 2007) at 12.
\textsuperscript{154} \textit{Ibid}. 
rights education and tolerance promotion activities have been carried out in an attempt to combat societal prejudice against minority communities.  

This legal mobilization has nonetheless been an important process for Ainu women. Both lobbying and the validation of their concerns by the CEDAW Committee have been empowering for the Ainu women involved, as has their movement from passive “human rights victims”, at the mercy of government willingness to implement the necessary policies, to pro-active agitator. Carrying out their own survey on the situation of women in their communities has empowered Ainu women and raised awareness of issues of multiple discrimination at a grassroots level. Ainu women have learned that they do not need to wait for government action to achieve outcomes.

Collaboration by Ainu, Buraku and Zainichi Korean women with the coalition of women’s rights NGOs (known as JNNC) when both minority women and the coalition were lobbying the CEDAW Committee, also raised awareness of minority women’s human rights issues in the mainstream women’s movement in Japan. This was the first time a minority women’s perspective had been incorporated in the Japanese women’s rights lobby.

These activities were also important in giving Ainu women a voice in their own communities. By carrying out this survey under the auspices of the Utari Kyōkai, minority women challenged some of the Utari Kyōkai’s patriarchal decision-making processes and its male members. The resulting data can also be used to engage this male-dominated organization in discussions regarding the measures needed to address Ainu women’s issues. Another benefit is the solidarity and strength Ainu women have gained from links formed between Ainu and other minority women. Ainu women’s activism has gained from the experience of these other minority women and the strength in numbers. The results of the survey will also form an important basis for ongoing lobbying of the CEDAW Committee when it reviews Japan’s sixth periodic report in 2009. Minority women have already begun coordinating their lobbying of both the Committee and the Japanese government in the lead-up to the review.

156 For discussion of some of the collaborative activism by minority women subsequent to forging these links, see e.g. H. Nakamura, “Overcoming the Contradiction of Tradition and Patriarchy: Activists for Minority Women’s Rights in Academic Conference” (2005) 9:5 Connect (IMADR Quarterly Newsletter) at 9-10; and the inaugural Minority Women’s Forum, reported at “Ainu minzoku, zainichi chōsenjūra köyū Sapporo de mainórītei fōrāmu” [Ainu, Zainichi Koreans etc. network at Minority Forum, Sapporo], Hokkaido Shinbun [The Hokkaido Newspaper], October 22, 2000, online: <www.hokkaido-np.co.jp/news/sapporo/56359.html>.
IV  CONVERGING DOMESTIC AND INTERNATIONAL LOBBYING—RECOGNITION OF INDIGENOUS RIGHTS?

After over 20 years of international and domestic legal mobilization, the one thing that continued to elude Ainu activists was domestic recognition of Indigenous rights. In the Nibutani Dam Case the Sapporo District Court recognized Ainu as Indigenous, but stopped short of recognizing any Indigenous rights outside the right of all minorities to enjoy their distinct culture. Other Japanese courts had not been open to building on this jurisprudence or recognizing the Indigenous aspects of Ainu legal claims. The legislature and its advisory bodies had been more reticent. They recognized the “Indigenous nature” of the Ainu and the fact their settlement of Hokkaido preceded the Yamato Japanese race, but insisted that the land they occupied had always been “Japan’s inherent state territory.”157 The government’s failure to recognize the Ainu as an Indigenous people with Indigenous rights was justified by referring to the unfinished international debate on the rights of Indigenous peoples. As long as the DRIP remained a draft document, lobbying at the WGIP and attempts to use gaiatsu to change the domestic legal status of the Ainu would remain unsuccessful.

The situation changed with adoption of the DRIP by an overwhelming majority of states, including Japan, in the UN General Assembly in September 2007. Indigenous rights now had the political endorsement of the international community, and this new international momentum was, as SGC founder Hideaki Uemura described it, “the magic to break the spell of inertia cast” upon Ainu activism by adoption of the CPA in 1997.158 The Utari Kyōkai, which had not taken up any major campaign since enactment of the CPA, began almost immediately to lobby the government to establish a national committee to consider Ainu peoples’ legal status. Other Ainu groups and supporters had already begun planning an Indigenous Peoples’ Summit in Biratori and Sapporo, Hokkaido, to coincide with the July 2008 G8 Summit in Hokkaido. The Utari Kyōkai was approached to co-sponsor the event. They demanded that the DRIP be the Summit’s main topic, but a consensus could not be reached and they declined to co-host. Nonetheless, the lead-up to the Indigenous Peoples’ Summit included a sustained program of domestic activities and press conferences from December 2007 onwards,159 which effectively harnessed international attention on Japan and the G8 in order to raise awareness of Ainu and Indigenous issues.

157 Expert Meeting’s report, supra note 34 at 74.
159 For a list of some of the many activities in the lead-up to the Indigenous Peoples Summit from 1–4 July 2008, see the Summit homepage, online: <www.ainumosi2008.com>.
Ainu calls for a committee on their legal status were supported by mainly Hokkaido-based national politicians who established a non-partisan Meeting of Diet Parliamentarians to Consider the Establishment of Ainu Peoples’ Rights in March 2008. Working in close consultation with the government behind the scenes, this meeting began drafting a resolution calling upon the government to recognize the Ainu as an Indigenous people and to reconsider Ainu policy in light of the DRIP. As a result of these combined efforts, the parliamentarians came up with a resolution which was unanimously adopted by both houses of the Japanese Diet on 6 June 2008. The resolution called upon the government to “recognize Ainu persons as an indigenous people, first inhabitants … with their own unique language, religion and unique culture” and “seize the opportunity presented by adoption of the Declaration on the Rights of Indigenous Peoples and seeking the views of high level experts, make reference to the provisions of that Declaration to work towards establishing a comprehensive Ainu policy.” Immediately following this resolution, Chief Cabinet Secretary Nobutaka Machimura declared for the first time ever in the parliament plenary that the Japanese government recognized the Ainu as an Indigenous people. However, his statement contained an implied proviso: he added in a press conference that he understood that the Utari Kyôkai would not be demanding land rights or special reserved seats in the national Diet because of these developments.

The results of this shift by the Japanese government will become apparent only when the government decides on a new Indigenous rights policy, after hearing the recommendations of the Expert Meeting on Ainu Policy, which began its year-long deliberations in August 2008.

What is clear is that the government’s previously steadfast position of refusing to recognize the Ainu people as Indigenous or to even consider any aspect of international standards on Indigenous rights in the Ainu context


162 Mainichi Shim bun, supra note 159.


has changed. This shift is the result of effective use of fortuitous circumstances and the convergence of many years of patient and sustained Ainu lobbying both domestically and internationally. The wording of the Diet’s resolution puts the influence of international pressure beyond doubt; it refers to the adoption of the DRIP, the convening of the G8 Summit in Hokkaido “land of the Ainu people,” and the “growing trend of international society” to enable Indigenous peoples “to maintain honour and dignity and transmit their culture” to the next generation. The resolution adds: “It is also essential that Japan share these international values, if it is to take a lead in the international community in the twenty-first century.”

Like negotiations on the New Law and subsequent CPA, the Diet’s resolution and call for a new Ainu policy helped bring Ainu together in an effort to bargain collectively with the government. One month after adoption of the government’s resolution, the Utari Kyōkai, four Ainu organizations from the greater Tokyo area, and Sakhalin Ainu decided at an Ainu Peoples’ Summit to form the first-ever national network of Ainu organizations. At the same time, the failure to breach long-standing differences between the conservative Utari Kyōkai and more radical elements of the Ainu movement were also highlighted. At the G8 Indigenous Peoples Summit in Ainu Moshir, which was held in the days immediately preceding the Ainu Peoples’ Summit, Ainu representatives, together with other Indigenous people from around the world, appealed to government for the more radical agenda of over 50 per cent representation of Ainu on the Expert Meeting on Ainu Policy, legislation to “promptly implement” the DRIP in full, and the recovery of rights to self-determination and natural resources.

V CONCLUSION: AINU LEGAL ACTIVISM, ITS SIGNIFICANCE AND LIMITATIONS

Ainu legal mobilization over the last two-and-a-half decades has brought Ainu legal status a long way from the early 1980s when the applicable law was the FAPA and the Japanese government denied their separate existence. Today Ainu culture is promoted under a national law, and the Japanese state recognizes and protects the link between enjoyment of Ainu culture and access to natural resources and use of the land with Iwors re-creation. Ainu have been recognized not only as a separate minority but as Indigenous peoples, warranting a new comprehensive policy in light of the DRIP.

---

165 Resolution of June 6, 2008, supra note 161 (translation by the author).
Through their activism, Ainu legal activists have left the indelible mark of Ainu existence and difference on the pages of the statute books, court judgments and parliamentary records of the Japanese state. This has finally put beyond question the reality that Prime Minister Nakasone and his peers were loathe to admit—that Japan is multicultural and that the Ainu continue to exist within the Japanese state as an independent minority with their own culture, language and customs.

In their international advocacy, Ainu activists have found strength and solidarity for their claims through links with the international Indigenous peoples’ movement and domestic minority groups, facilitated by “brokers” such as the third-party non-governmental organizations IMADR and SGC.168 Ainu legal activism has in turn influenced the legal scholars and legal practitioners who get involved in their claims, as well as the other minority, Wajin and international activists who support and assist them. This activism has created opportunities for comparative Indigenous legal analysis and resulted in court judgments that have formed the basis of numerous writings on Ainu legal status and Indigenous issues.

In fighting for common goals, such as the enactment of an Ainu New Law, negotiations on a comprehensive Indigenous Ainu policy and the establishment of an Ainu centre in Tokyo, legal activism forced various disparate Ainu groups to form coalitions amongst themselves. However, these have proved short-lived, and even the imperative to fight for common goals has not been enough to unify the radical elements of the Ainu movement with the more cautious Utari Kyōkai. Like all Indigenous and social groups, the Ainu are not a homogenous monolith, but a people with diverse political views and agendas. But particularly because of their small numbers, in-fighting and the decision of various groups to pursue their own political agenda and to pursue legal mobilization without overarching strategic planning has compromised the effectiveness of Ainu legal mobilization.

One of Ainu legal mobilization’s most effective tools has been the use of gaiatsu or outside pressure as leverage to bring about change in their domestic legal situation. This has always relied to a degree on the concurrence of developments in the international arena with Ainu activism and the support of domestic Wajin allies, such as politicians, international activists and broker organizations. The adoption by the UN General Assembly of the DRIP is one such example. After decades of being lobbied, the Japanese government has finally recognized the Ainu as an Indigenous people and agreed to the establishment of an expert body to consider new policy measures for the Ainu people. It is too early, however, to assess the extent to

168 On the role of “brokers” in facilitating transnational activism see Tarrow, supra note 104.
which this new development indicates a true commitment by the Japanese
government to the recognition of a new domestic legal status for the Ainu
that is based upon recognition of substantive Indigenous rights.\textsuperscript{169} It is quite
clear already that issues such as control over land and resources and self-
determination are highly unlikely to be possibilities that the Japanese
government is willing to entertain. It remains to be seen whether other rights
such as cultural autonomy, free, prior and informed consent in matters
affecting their interests and effective political participation will be
recognized. On these issues, the composition of the 2008 Expert Meeting on
Ainu Policy set up to consider these issues does not set a promising pre-
cedent. Although an improvement on the 1995 Expert Meeting which
involved no Ainu representatives, the fact that there is only one Ainu repre-
sentative among eight members suggests the government still does not see
the Ainu people as entitled to an equal role in decisions concerning their
rights. One thing therefore remains clear: while Ainu legal mobilization has
led to legal and social developments and recognition of Ainu Indigenous
status, this work is not over. The Ainu will need to continue to use legal
mobilization in its many forms, both domestically and internationally, as
well as individually and as a collective, in their ongoing fight for realization
of their remaining human rights goals.

\textsuperscript{169} Long-time writer on Ainu issues Richard Siddle noted for example that the resolution’s signifi-
cance is primarily symbolic and that “[t]he admission puts no obligation on the government.
Very little will change for the Ainu because of this. It’s a step forward, but not an epoch-
making step,” quoted in P. Fogarty, “Recognition at last for Japan’s Ainu”, BBC News online: