



Utaspano Uoupekare No. 26
Newsletter of Hokudai Kaiji Bunsyo
Kenkyukai
Issue 26, June 17, 2021

**Lawsuit for Declaratory Judgment on
Salmon fishing rights**

**Statement of Opinion of Mr. Kouki
Nagane** (Chairman, Raporo Ainu
Nation)(revised on 16 March, 2022))
Trial Record

3rd Oral Argument March 4, 2021
Thursday 2:00PM

I am currently the representative of the Raporo Ainu Nation. The Raporo Ainu Nation was originally named the Urahoru Ainu Association, and was represented by Mr. Masaki Sashima for many years.

In 2020, we changed our organization's name to the Raporo Ainu Nation, in order to strongly express our feelings as an organization seeking to implement the return of 102 of our ancestors' remains that were stolen from Urahoru town and carried away to Hokkaido University and Tokyo University, along with seeking the recognition of our right to catch salmon.

My father, Kiichirō, was a long-time member of the Urahoru Ainu Association—or the Urahoru Utari Association, as it used to be called.

My paternal grandmother, Kiyono, came from the *kotan* of Shiroto (or Chiroto in the Ainu language) in Makubetsu. My paternal grandfather, Genjirō, was Tokachibuto Ainu.

Although I have always known on some level that I am Ainu, that does not mean I have always lived with a particular consciousness of what it means to be Ainu.

When my grandmother Kiyono passed away more than ten years ago in Atsunai, she had many photographs among her belongings. These photographs depicted women with tattooing around their mouths, as was common among married Ainu women. Some of these photographs also had an Ainu word, "Fuci¹," written on the flip side.

While looking at Kiyono's photographs, my mother told me many things about my grandmother, and I gradually began to develop an interest in the Ainu.

I graduated high school, and spent the next few years working as a helper on a dairy farm in Sarabetsu. My uncle, who was a fisherman in Atsunai, asked "why don't you come help me?", so I returned to Atsunai and now I am a fisherman.

I work as a member of the fixed-net fishers' cooperative, led by Mr. Masaki Sashima, and I also work with my uncle catching crabs, shishamo (smelt), whelk, and the like.

When I became a fisherman, I learned that all fishermen carry a small knife at their lower back, called a makiri. A makiri's scabbard is usually carved, so I carved Ainu designs into my own and, even today, I use it and hang it on my belt whenever I go fishing.

¹ Ainu language word, used to refer to female elders.

It was through the process of repatriating our ancestors' remains that I came to be strongly conscious of being Ainu. When I learned the details of how our ancestor's remains were exhumed and taken away by university professors, my first response was a strong resentment of these heartless acts.

Their return secured, our ancestors' remains were welcomed home to the cemetery in Urahoro, and we all made the preparations for the reburial and the ceremonies together. As we felled thin willow trees to shave into *inau*² and practiced for the *kamuynomi* and *icarpa* ceremonies, I gradually came to reflect on the long history, culture, and traditions of the Ainu. As a result, I became more strongly self-aware that I am Ainu, and of how amazing it is to live as Ainu.

Last year, all of us members built a traditional Ainu dugout canoe and, using that canoe, caught more than 160 salmon from the Urahorotokachi River. As fishermen, we catch salmon from the ocean, but as Ainu, we catch salmon from the river as our ancestors did, which feels completely different.

Catching salmon in the river is the essence of Ainu culture itself, and I felt proud to catch salmon as an Ainu. Catching salmon, praying to the gods, and performing the *kamuynomi* ceremony as my ancestors did, my body trembled with the feeling that "I am Ainu."

In order to live with pride as Ainu—which is different than for Wajin—we absolutely need the right to catch salmon.

Lately, I have been thinking a lot about the conservation of salmon stocks. Some years

ago, there was a severe rainstorm. The increasing volume of the river during the storm caused almost all of the juvenile salmon fry that had been released into the river to be washed away. However, even after the heavy rain, naturally spawned salmon fry could still be seen in the river.

At a glance, you can tell the difference between a salmon fry that has been released and one that has spawned naturally, because of the difference in size. At that time, I also found that, as I predicted, the survival rate of naturally spawned fry was higher. From that point on, I began to wonder whether the proliferation of the commercial hatchery industry has really been good for salmon.

While I continue to study this, I would like to think about how Raporo Ainu Nation can promote the conservation of salmon stocks.



² Ainu language word, used to refer to shaved wooden sticks used in Ainu ceremonies

Gist of the claim by Raporo Ainu Nation in the suit demanding a declaratory judgment to confirm the right to fish salmon (August 17, 2020, excerpts)

Date of filing the suit: August 17, 2020
Plaintiff: Raporo Ainu Nation
Defendants: Government of Japan,
Hokkaido Prefectural Government

Request the judgment that:

- 1) Confirms that the plaintiff has the right to fishing as described in the attached list of fishing rights;
- 2) Determines that court costs shall be borne by the defendants

[Reason for the request]

This is a demand to seek confirmation that the plaintiff, the only Ainu group in Urahoro town, holds the right to fish salmon at the mouth of the Urahoro Tokachi River.

Until the beginning of the Meiji period, small groups of Ainu people (called kotans) living in Hokkaido, the Chishima (Kurile) Islands and Karafuto (Sakhalin) enjoyed a monopolistic and exclusive use of natural resources including salmon in their respective territory of control (called iwor). Among them, salmon was a major food source for the Ainu people and an important resource for economic activities which was traded with the Japanese. In 1873, the Meiji government banned the seine fishing of salmon in major rivers in the present City of Sapporo and enforced a total ban on the salmon and trout fishery in the Sapporo County in 1878. In 1897, catching salmon and trout for personal consumption was also prohibited. At present, salmon fishing in rivers is prohibited in principle by the central and Hokkaido governments for both the Japanese and Ainu, as described below. The plaintiff is prohibited from catching any

salmon in Tokachi River and Urahoro Tokachi River. The only exception for the Ainu is that they are allowed to catch a certain number of salmon with a permission from the governor of Hokkaido for the purpose of transmission of their cultural heritage.

However, no legal reason has been given for the Japanese government's ban on salmon fishing by Ainu groups ever since the Meiji period onward in the first place, which in itself is considered illegal. At least, no clear legal ground has been presented for specific laws prohibiting salmon fishing by Ainu groups.

The first case in which Ainu rights were recognized by the court was the case No. 9 (gyo u) of 1993 of the Sapporo District Court (so-called Nibutani Dam Case). The court recognized, in its study of the requirements under Article 20, Item 3 of the Land Expropriation Act, the right of the Ainu people to enjoy their culture as part of the interests and values lost due to the construction of the dam. According to the decision, the right of the Ainu to enjoy their own culture is guaranteed by Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the Japanese Constitution. However, this right to enjoy one's culture is interpreted to be an individuals' right in the letter of the ICCPR ("to all individuals" in Article 2, Paragraph 1, "all persons" in Article 26, "persons belonging to such minorities" in Article 27) and that Article 13 of the Japanese Constitution also stipulates the right of individual. In recent years, some scholars argue that Article 27 of ICCPR includes a group right to enjoy their own culture, but the right is stipulated as individual right in the language of Article 27.

In this case, the plaintiff is requesting the confirmation of the right to fish salmon not as individual Ainu persons comprising the group but as a group as such. These group rights are known as indigenous rights in academic terms. The plaintiff claims that the group inherited the right to fish salmon as a fishing right held by a multiple number of kotans that had existed in Urahoro Town from the Edo period on [the period preceded the Meiji Period between 1603 and 1868] in a monopolistic and exclusive manner in the territory of their control.

Excerpts from the report of the plaintiff's lawyers at the rally after the 3rd oral argument on March 4, 2021 (at Sapporo City Archival Center)

Morihiro Ichikawa, Lead Attorney,
Plaintiff's Lawyers

I will report on today's court proceedings. In the last (2nd) oral argument, the State, the defendant, responded to the plaintiff's complaint by saying that they would not either approve or disapprove the facts presented in the complaint. A lawsuit begins (in general) with the defendant either approving or disapproving the facts claimed by the plaintiff (to state whether or not the defendant approves the facts). There are only three ways to do this: approve the fact, disapprove the fact, or say they do not know. As for the facts which were approved by the defendant, court will not ask for further evidence. As for the facts which the defendant did not approve or said they were not aware of, the court will, as part of the court's trial management, ask the plaintiff to consider ways to prove that they are the facts. Usually, the points to be contested become clear when the defendant either approves or disapproves the facts. However, the defendants (the State and Hokkaido

Government) did not do so in the last oral argument. The plaintiff claimed in the complaint that "until the Edo period, Ainu groups had a monopolistic and exclusive rights of fishing in their own territory. If persons from other areas come in to fish without permission, that led to an issue of compensation, sometimes causing wars between kotans. Each area-based group had a strong fishing right for salmon." The response from the State to this claim was "not to either approve or disapprove." The plaintiff also claimed that such rights were gradually taken away from the Ainu people since the start of the Meiji period but, again, the State chose not to approve or disapprove it. The complaint claims that the Ainu people had such rights and demands the State to show the evidence or basis for their argument that Ainu did not have such rights, if that is what the State wants to argue. If the State cannot present evidence, then we can claim that such rights still exist today.

What the defendants asked in the brief presented last time was that the plaintiff should demonstrate the basis for claiming the existence of the salmon fishing rights of the Ainu people within existing law. In response, the plaintiff argued in the brief submitted this time that the right of Raporo Ainu Nation to fishing for salmon is not to be grounded in the Constitution or law. The fact that indigenous peoples have the inherent rights was confirmed by the international community through the United Nations Declaration of the Rights of Indigenous Peoples (2007). The plaintiff claims that whether or not the Japanese Constitution or law stipulates such rights for Ainu, the moment that the State recognizes Ainu as an indigenous people, Ainu have such inherent rights. But there are requirements for recognizing certain rights for fishing salmon to groups of Ainu depending on the historical background. The

UN Declaration states “the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies” (Paragraph 7, preamble). The fact that a certain group is an indigenous people does not automatically recognize their rights. In the brief we submitted this time, the plaintiff claims that “people belonging to the Raporo Ainu Nation can trace back their ancestry to the Edo period when Takeshiro Matsuura (Japanese explorer at the end of the Edo period) recorded the number of households and persons, and even names, of Ainu people in the area. Therefore people belonging to the Raporo Ainu Nation are undoubtedly descendants of the Ainu kotan that existed in the Tokachi River mouth area in those days at the latest. The plaintiff claims that they are the inheritors of the fishing rights their ancestors had. We do not know how the defendants will respond to this brief, but we should point out that in today’s oral argument the judge told the defendants to approve or disapprove the facts presented wherever they could. I think that the judge said so fearing that otherwise the court proceedings would not progress. Therefore we will prepare our responses in anticipation that the defendants will either approve or disapprove in the next hearing to a certain extent.

Question from the floor (Hokkaido Shimbun Newspaper)

I was listening to your report thinking that it is similar to the recent discussion on “new human rights.” I think that you could also argue that a constitutional basis exists for [the rights of indigenous people], citing the right to life derived from Article 13 of the Constitution. Do you not plan to adopt such an approach this time?

Morihiro Ichikawa, Lead Attorney,
Plaintiff’s Lawyers

No, we do not at this moment. The Japanese Constitution is a basic law for the state of Japan. Before the Meiji period, Japan called Ezochi (present Hokkaido) “benighted lands outside of imperial influence” and Ainu people “benighted people outside of imperial influence,” that is, areas outside of the influence of the Tokugawa shogunate regime. They were treated as foreign lands and foreign people. “Then why do we have to fall under the purview of the Japanese Constitution all of a sudden?” That is the basic question the plaintiff has.

Question from the floor (Hokkaido Shimbun Newspaper)

But the case is tried by the Japanese judges under the Japanese law based on the Japanese system. Judges are only bound by the Constitution and the laws in fulfilling their duties (Article 76, Paragraph 3 of the Constitution). Can you tell me how you are going to overcome this?

Morihiro Ichikawa, Lead Attorney,
Plaintiff’s Lawyers

Japan should have discussed how it should treat the rights of the Ainu people when it started treating them as Japanese nationals (Note). However, the Japanese Constitution was enacted without ever referring to the rights of the Ainu people. It would be ideal if all the rights can have a Constitutional basis. But the gaps have been created because the people who had been regarded as “benighted people outside of imperial influence” was not properly brought under the purview of the Japanese Constitution. The gaps should be closed by certain legal norms and if there are customary rights that have existed since the Edo period, such rights should be used to close the gaps (in the existing Constitution or laws). Some constitutional scholars may think that a

constitutional basis should be sought [to ensure indigenous rights for the Ainu people], but we can also argue that the rights can be recognized since the Constitution does not deny them. I think it is possible (for the Japanese court) to recognize (the right of the Raporo Ainu Nation to fish salmon in the Tokachi River mouth) as the Constitution does not either refer to or deny them.

Question from the floor (NHK (Japan Broadcasting Corporation))

Are there any rights that have been recognized through lawsuit while not being stipulated in the Constitution or existing laws?

Morihiro Ichikawa, Lead Attorney,
Plaintiff's Lawyers

I cannot think of any. The Japanese court has never judged on the “benighted people outside of imperial influence.” In the Nibutani Dam case, the court based its judgment (1997) on Article 13 of the Constitution, but it was a case over the rights of individuals. There has been no case so far contested over group rights.

Note: The incorporation of the Ainu people into “Japanese people” in both name and reality took place in the process of registering Ainu persons in the Family Register Act promulgated on April 4, 1871 (entered into force on February 1, 1872) as “commoners” (under the law, “subjects” in general were classified into kazoku (the peerage), shizoku (warrior class), sotsu (low-ranking samurais), shikan (priests), soryo (monks) and heimin (commoners)). (source: Susumu, Emori, Ainu minzoku no rekishi (The History of the Ainu People))



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