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Contents

Editorial

Full Recognition

State recognition of sections of the population as indigenous peoples is an important first step. And yet, such recognition is in bad faith if it is not based on the historical fact that such people have been living on their ancestral land since time immemorial. Such recognition is discriminatory if it means assimilation to the larger non-indigenous society.

From a human rights perspective, recognition as indigenous peoples is not a matter of state granting rights to such peoples. Recognition should mean an acceptance by the state of the indigenous peoples' rights as their inherent rights.

Necessarily, recognition in this case means protecting the rights of indigenous peoples to their ancestral land, culture, language, social systems and economic activities. The state has the obligation to protect the indigenous peoples from displacement from their ancestral land and other abuses, in addition to its obligation to provide whatever is available to secure their welfare (health, education, etc.).

Full recognition as indigenous peoples restores the rights and opportunities that they have been deprived of.

Indigenous peoples have rights deserving protection and fulfillment, as much as respect from the government and society as a whole.

Update on Indigenous Peoples of Malaysia*

SUHAKAM

The Indigenous Peoples (IP) of Malaysia are collectively called the *Orang Asal*.[1] They are composed of the aborigines (*Orang Asli*) of Peninsular Malaysia and the natives of Sabah and Sarawak. Together, the *Orang Asal* makes up 13.8 percent of the total population of Malaysia.[2]

By virtue of Articles 73,[3] 74(1),[4] and 74(2)[5] of the Federal Constitution of Malaysia, both the Federal and State legislatures have jurisdiction over the administration of the *Orang Asal* in Malaysia, whereby, depending on the subject matter, the administration of the *Orang Asal* could either fall under the Federal or State jurisdiction, or could form the matter under both the Federal and State legislatures concurrently. The Federal Constitution's Ninth Schedule provides several lists that enumerate the matters which are either under the separate or shared jurisdiction of the Federal and State legislatures.[6]

Good Practices in Promoting and Protecting the Rights of the *Orang Asal* in Malaysia

i. Establishment of the Legitimate/Special Interests of the *Orang Asal* in Malaysia and their Protection

The foremost important piece of legislation that establishes and protects the special interests of the *Orang Asal* in Malaysia is the Federal Constitution of Malaysia. The Federal Constitution, while underscoring that all persons are equal before the law, has a few exceptions for the *Orang Asal*, in that it allows for affirmative action for the protection and advancement of the special interests of *Orang Asli* in Peninsular Malaysia and natives of Sabah and Sarawak.

In the context of the *Orang Asli* in Peninsular Malaysia, while the Federal Constitution generally proscribes discrimination,[7] Article 8(5)(c) states that those anti-discrimination provisions do not prohibit "any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service."[8]

Further, the Federal Constitution affords the special position and protection to the natives of Sabah and Sarawak. Article 153(1) of the Federal Constitution provides that "it shall be the responsibility of the *Yang di-Pertuan Agong* [King] to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article."[9] Article 153 goes on to specify the approaches in order to protect those legitimate interests, such as establishing quotas for entry into the civil service, as well as for the attainment of public scholarships and education.[10]

With respect to native land in Sabah and Sarawak, Article 161A(5) of the Federal Constitution has excluded the application of Article 8 concerning equality and non-discrimination to any State law that seeks to reserve or alienate land for their natives, or for giving the natives preferential treatment for the alienation of land by the State.[11]

ii. Representation of the *Orang Asal* in the Government

In Malaysia, representation of the *Orang Asal* and their interests in the Government is guaranteed by the Federal Constitution. In the context of the *Orang Asal*'s representation in the Senate, Article 45(2) of the Federal Constitution, which provides the composition of the Malaysian Senate, states the following:[12]

> The members to be appointed by the *Yang di-Pertuan Agong* shall be persons who in his opinion have rendered distinguished public service or have achieved distinction in the

professions, commerce, industry, agriculture, cultural activities or social service or are representative of racial minorities or are capable of representing the interests of the aborigines.

With respect to the *Orang Asal*'s representation in the public service, Article 8(5)(c) of the Federal Constitution allows for the reservation of a reasonable proportion of suitable positions in the public service especially for the *Orang Asli* in Peninsular Malaysia.[13] Additionally, Article 153(2) provides that the *Yang di-Pertuan Agong* shall exercise his function under the Constitution and federal law to reserve for, among others, the natives of Sabah and Sarawak, reasonable proportions of positions in public service (other than the public service of a State).[14]

iii. Native Court

The Native Court Enactment 1992[15] provides for a three-tier native court system in Sabah including a Native Court of Appeal, a District Native Court and a Native Court,[16] whereas in Sarawak, there is a six-level court system including a Native Court of Appeal, a Resident Native Court, a District Native Court, a Chief's Superior Court, a Chief's Court, and a Headman's Court.[17]

Generally, both Native Courts in Sabah and Sarawak have jurisdiction to preside over:[18]

- cases arising from a breach of native law or custom where all the parties are natives;
- cases involving native law, custom relating to:
  - betrothal, marriage, divorce, nullity of marriage and judicial separation;
  - adoption, guardianship or custody of infants, maintenance of dependants and legitimacy;
  - gifts or succession testate or interstate; and
- other cases of which jurisdiction is conferred upon the Courts by the Enactment or any written law.[19]

On the other hand, the operation of the Native Courts is not without challenges. Some of the stumbling blocks that impede effective execution of legal practice in the court system include:

- The lack of jurisdiction of Native Courts in respect of any cause or matter within the jurisdiction of the Civil or *Syari'ah* Courts;[20]
- Lack of staff in the Native Courts. Native Courts staff are normally seconded from district offices, which may at times lead to conflict of interest, in particular cases against the government or its officials;
- The involvement of political powers in the appointment of District Chief, Native Chief and village chiefs who are key Native Courts personnel;[21]
- Lack of financial resources to ensure effective operation of the courts; and
- Awareness and practice of customs and *Adat* by current younger leaders as the future preservation and adherence of customs heavily depend on their actual practice.[22]

Despite the above challenges, the Native Court in Malaysia is an important institution as it empowers the natives in Sabah and Sarawak to realize their right to maintain their juridical system. At the same time, this institution is able to preserve the adherence to the *Adat* among the natives. The Native Court is also a cheaper alternative for those who wish to bring their matter to court, in comparison to the Civil and *Syari'ah* Courts.[23]

The following section highlights some of the contemporary and persisting issues that impede the promotion and protection of the rights of the IP in Malaysia.

Challenges

i. Customary Land rights

The IP have a special bond with their customary land, which is part of their identity. Customary land constitutes an integral element of their culture and way of life. Through their deep understanding of, and connection with the land, indigenous communities have been able to manage their resources for generations.

The Federal Constitution of Malaysia gives a certain level of protection for the natives of Sabah and Sarawak to continue their special relationship with their land, including spelling out the fiduciary obligation of the Federal and State Governments that ensures the respect, recognition and protection of customary land rights. However, the *Orang Asli* in Peninsular Malaysia is left out in this specific provision.

Mainstream development and forest conservation have greatly infringed the IP's claim to their customary land. This often means that their livelihood and future are seriously threatened. Many indigenous communities continue to be expelled from their territories under the pretext of the establishment of protected areas, including forest reserves and national parks. Forced displacement of the IP from their traditional lands as a result of laws and policies that favor the interests of commercial companies and the Government are major factors in the impoverishment of these communities.

Over the years of conducting various studies and receiving complaints from the IP, SUHAKAM has found that many issues exist with regard to native customary right (NCR) to land, such as:

- Lack of or non-recognition of NCR to land by the Government;
- Differing perspectives of NCR to land between the Government and the IP;
- The refusal by the Government to accept indigenous perspectives to NCR to land as affirmed by Federal Court decision;
- Slow processing of native land claims and gazetting of IP reserve lands;
- Inadequate compensation;
- Transactions on ownership of land that do not follow proper procedures;
- Encroachment into and/or dispossession of native land through development aggressions; and
- NCR land gazetted into parks and other protected areas.

The violations against the IP's land rights continue to affect not only their livelihood, but also their cultural and traditional practices as well as identity. In addition, many development projects have negative repercussions towards the ecosystem, affecting the IP's right to clean environment, which, according to Article 29[24] of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), must be respected.

Various development projects by the Government have negatively affected indigenous communities especially their NCR to land. Among these projects are:

(a) Bakun Dam, Sarawak

The construction of the Bakun Dam, one of the largest dams in Asia, has forced thousands of indigenous communities to be relocated. This is clearly inconsistent with Article 10[25] of UNDRIP.

(b) Tasik Chini, Pahang

Logging, clearing of land for agriculture and unstructured mining activities at the vicinity of Lake Chini in Pekan, Pahang, have affected eleven indigenous villages around the Lake. Pollution and forest deterioration have resulted in lower income, social conflict and threats on those advocating for their rights among affected indigenous communities.

Land issues do not only affect IP's rights to life, to own property, to practice their culture, traditions and to preserve their identity, but also affect the whole ecosystem and their right to clean environment, which according to Article 29 of UNDRIP, must be respected.

(ii) Free, Prior and Informed Consent (FPIC)

During the Public Hearings of SUHAKAM's NI on the Land Rights of Indigenous Peoples, SUHAKAM received numerous complaints from the IP regarding the non-application of

the principle of Free, Prior and Informed Consent (FPIC) for development projects affecting them. Indigenous communities have the right to decide whether they will agree to the project or not once they have a full and accurate understanding of the implications of the project on them and their customary land.

However in Malaysia, the respect towards the FPIC principle is nearly non-existent, and as such, violates the international standard. Numerous reports and complaints show that the Social and Environmental Impact Assessments (SEIA/EIA) that are required before certain projects commence were not conducted in a proper manner and that communities were often not consulted.

(iii) Education

Education of indigenous children is at a worrying level. Many indigenous children fail to master the 3M skills (reading, writing, arithmetic). In addition, the number of indigenous children who drop out from schools before Standard Six is alarming.[26] As a result, indigenous students fail to master core subjects, including the Malay language, English, Mathematics and Science. For example, almost 50 percent of indigenous children at Kampung Kolam Air Pantai, Seremban in Negeri Sembilan have been reported to be uninterested in going to school,[27] while a higher number of indigenous children were reported to have dropped out in Sabah and Sarawak.[28]

Most of *Orang Asli* students claim that the main reasons for the high percentage of school dropouts among them are due to:[29]

- Low socioeconomic level - many choose not to go to school in order to earn a living;
- Poor transportation facilities to bring indigenous children to schools;
- Lack of awareness on the importance of formal education;
- Lack of motivation;
- Poor health; and
- Lukewarm attitude of parents towards truancy problems.

The academic achievement of *Orang Asli* students in school is still very low compared to other Malaysians.[30]

(iv) Economic development

The IP in Malaysia are sadly, often associated with poverty and low income. It was estimated in 1999 that 50.9 percent of the *Orang Asli* falls below the poverty line, while 15.4 percent falls under the hardcore poor category.[31] Indigenous economic system is characterized by small but diverse economic activities, placing great importance on land resources, economic self-sufficiency, social support and barter trade.[32]

The IP have varied occupations and ways of life. *Orang Asli* communities such as the Orang Laut, *Orang Seletar* and *Mah Meri*, for example, live close to the coast and are mainly fishermen. Some Temuan, Jakun and Semai people have taken to permanent agriculture and now manage their own rubber, oil palm or cocoa farms. About 40 percent of the *Orang Asli* population - including *Semai*, *Temiar*, *Che Wong*, *Jahut*, *Semelai* and *Semoq Beri* - however, live close to, or within forested areas. Here they engage in hill rice cultivation and do some hunting and gathering. These communities also trade in *petai* (a type of bean), durian, rattan and resins to make their ends meet. A very small number of these indigenous communities, especially among the Negrito groups (such as *Jahai* and *Lanoh*) are still semi-nomadic, preferring to take advantage of the seasonal bounties of the forest. A fair number also live in urban areas and are engaged in both waged and salaried jobs.[33]

Among the issues that impede economic development and growth for the IP in Malaysia are large-scale land development programs, non-recognition of indigenous subsistence economic activities and lack of opportunities.

(v) Legal system

IP possess their own traditional judicial system, which covers legal aspects including customary laws, conflict resolution and arbitration and their traditional institution that implements and monitors its legal system.

In the states of Sabah and Sarawak, native courts for the IP had been formalized by the British colonial rulers in recognition of the traditional legal systems. These courts, play an important role in resolving disputes within the indigenous

communities. However, such courts do not exist in Peninsular Malaysia for the *Orang Asli*. In this regard, many advocates of the rights of the IP are calling for the establishment of native courts in Peninsular Malaysia. Native Courts serve as a crucial mechanism in recognizing the indigenous legal system.[34]

Conclusion

While there are still many issues concerning the rights of the IP in Malaysia that need to be looked into and addressed, efforts have been made by various stakeholders to find measures that may mitigate if not resolve these issues. Some of these measures have proven to be effective and some can even be considered as good practices.

In addressing the rights of the IP, it is crucial to take cognizance of some of the main concerns, which are as follows:

i. Restitution of customary lands that have not been given such recognition, redress mechanisms for the loss of the land, review compensation payment made on land taken for development and enhancement of the capacity of land departments;

ii. Adoption by government bodies of the human rights-based approach to development with the application of the Free, Prior and Informed Consent principle;

iii. Promotion of sustainable development models with active involvement and participation of the IP in Forest Management and other areas, which do not have an adverse effect on the indigenous communities; and

iv. Immediate implementation of corrective measures on indigenous issues especially in relation to health, education, economic development, civil and political reformation, laws and policies as well as social and cultural heritage.

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Endnotes

1 Human Rights Commission of Malaysia (SUHAKAM), *Report of the National Inquiry into the Land Rights of Indigenous Peoples*, (SUHAKAM, 2013).
2 Ibid.
3 Federal Constitution of Malaysia, (*n. 11*), Article 73.
4 Ibid., Article 74.
5 Ibid., Article 74(2).
6 Ibid., Ninth Schedule.
7 Ibid., Article 8(1), 8(2), 8(3), 8(4).
8 Ibid., Article 8(5)(c).
9 Ibid., Article 153 (1).
10 Ibid., Article 153(2), 153(3), 153(4), 153(8A).
11 Ibid., Article 161A(5).
12 Ibid., Article 45(2).
13 Ibid., Article 8(5)(c).
14 Ibid., Article 153(2).
15 Native Court Enactment, 1992 [En. No. 3/1992]; Native Courts Ordinance, 1992 [Ord. No. 9/92].
16 Native Court Enactment, 1922 (n 51).
17 Native Court Enactment, 1922 [En. No. 3/1992]; Native Courts Ordinance, 1992 [Ord. No. 9/92].
18 Laws of Malaysia. Interpretation Ordinance (Definition of Native) Cap 64 [10 December 1952], Section 2; Native Court Enactment (n. 51); Native Courts Ordinance, 1992 (n 51).
19 Ibid.
20 Native Court Enactment (n. 51), Section 9.
21 Ramy Bulan, "Indigenous Peoples and the Right to Participate in Decision Making in Malaysia" in *International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making*, Chiang Mai, Thailand, 20-22 January 2010, <www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/UniversityMalaya.doc> accessed 16 September 2014; Native Court Rules 1993; Native Courts Ordinance, 1992 (n 51); Native Court Enactment (n. 51).
22 Ramy Bulan (n 56) 10.
23 Nancy Lai, "Upko fully backs proposed Native Judicial Dept." Borneo Post Online (Penampang, 12 July 2010) <www.theborneopost.com/2010/07/12/upko-fully-backs-proposed-native-judicial-dept/> accessed 29 October 2014.
24 UNDRIP (n 48), Article 29.

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A Critique on the New Ainu Policy: How Japan's Politics of Recognition Fails to Fulfill the Ainu's Indigenous Rights

Leni Charbonneau and Hiroshi Maruyama

On 19 April 2019, the Japanese parliament (Diet) passed the New Ainu Policy (NAP) that replaced the 1997 Ainu Cultural Promotion Act (ACPA). When the NAP bill was proposed on 15 February 2019, news of the bill was swiftly picked up by both the Japanese and international media. The majority of the news reports depicted the bill as a positive measure and inferred that it would serve as Japan's long overdue recognition of the Ainu as Indigenous Peoples. This is a pattern that has reemerged and continued with the news of the Japanese Diet's passing of the bill into law, as widespread praise continues to resonate through the media circuit over Japan's recognition of the Ainu.

This recognition is in many ways a culmination of generations of Ainu struggle against the colonial Japanese government and, to echo the sentiment of many other commentators on the matter, can be seen as a step forward.[1] This article, however, will shed light on the misguided perception of Japan's NAP by the media, and will voice caution on the implications of the supposed recognition of the Ainu embedded within the policy. We argue that the NAP is a continuation of the colonial domination to which the Ainu have been subjected to for generations under the Japanese state. This stance has two critical dimensions. First, the operation of the politics of recognition in the Japanese colonial context preserves the exploitation of marginalized communities like the Ainu. Second, the Japanese government through the NAP merely reinforces its constraints over Ainu self-determination and autonomy. In doing so, we demonstrate that the media, in promoting these recent movements by the Japanese government, can be complicit in the reproduction of an exploitative colonial order when it fails to critically assess the motivations steering Japan's "recognition" of the Ainu. This approach is based on a distinction between genuinely transformative action and affirmative operations, the latter works only to support the status quo. True transformative action, we argue, is found both in the critical voices of the Ainu, which the government is continuing to obscure through symbolic facades like the "recognition" offered by the NAP, and a genuine confrontation with colonial history.

Media Praise of "Recognition"

The first news report of the proposed bill in English was published by the Asahi Shimbun Press on 6 February 2019,[2] following a joint meeting of representatives from the ruling Liberal Democratic Party. The article is titled, "Bill Finally Recognizes the Ainu as Indigenous People of Japan." The favorable word choice of "finally" suggests a forward momentum, depicting the bill as a progressive deed on the part of the Japanese state. *The Asahi Shimbun* perhaps set a precedent with this tone in its reporting, as several media outlets followed in applauding this assumed paradigm shift for Japan and its stance towards its Indigenous inhabitants.[3] Since the passing of the bill into law on 19 April 2019 the reception by the media has overwhelmingly been the same, with Japan's "recognition" given priority in headlines.[4]

Despite the insinuation that this recognition of the Ainu represents a significant shift in Japan's attitude towards its Indigenous (as well as minoritized) civilians, it (recognition) should be seen as a strategic tool to maintain a certain colonial order which has been the status quo in the country for generations. To see this point, we must consider what is at stake in the recognition that Japan is depicted as "giving" to the Ainu.

Recognition has long been problematized by voices within

Protest against the new Ainu Policy by the Citizens' Alliance on the Examination of Ainu Policy, 3 March 2019, Sapporo

the colonized and minoritized classes, perhaps most notably by Martinique-born Frantz Fanon, who was critically engaged in struggles against French colonial exploits in Africa and who was instrumental in accelerating a post-colonial discourse in the 20th century. Drawing on Hegel's master/slave dialectic, Fanon assessed the colonial context as one in which the colonizer grants recognition to its colonial subject in an effort to construe a relationship of dependence, and therefore domination.[5] The very acknowledgement of existence of a colonial subject becomes marked by the colonizers' recognition and therefore, legitimation of the colonial subject in the eyes of the colonizer. In recognizing the colonial subject as such, the colonizer subjugates the Indigenous person to a set of terms delimiting their possibilities of existence. In other words, when Indigenous status is *recognized by a colonizer* in the form currently underway in Japan, what is recognized is indigeneity as seen *by the colonizer*, instead of that which is freely determined by the Indigenous people themselves.

The NAP embodies this point in that it takes a prescriptive approach to Ainu culture and Ainu indigeneity. An examination of the contents of NAP makes this clear. The reference to the Ainu indigeneity is only found in the first line of Article 1, which states the objectives of the policy. This line describes the Ainu as the original inhabitants of Hokkaido, and does so without any admission to Japanese colonial history. In other articles of the NAP, the Ainu are referenced in terms of ethnicity, which paves a sly deviation from Indigenous rights and works to reproduce colonial policy and attitudes towards them. To fully understand this point, it is useful to first outline what it is that the NAP is purported to replace to fully see how the new policy is simply a continuation of colonial policy.

Ainu Exploitation

Exploitation of Ainu people and lands has been ongoing for centuries, though the colonial era was solidified with the establishment of the Meiji government in 1868 and the formal incorporation of the island of Hokkaido into the Japanese empire. In 1899, the colonial government passed the Hokkaido Former Aborigines Protection Act, which simultaneously worked to deny the contemporaneous existence of an aboriginal population while aggressively assimilating those identified as Ainu into the Japanese culture. This act was in effect until 1997 when the Japanese government passed the ACPA, which primarily regulated and constrained what was allowed as "Ainu culture" in the eyes of the Japanese state. The NAP claims as its mission the "realization of a society in which the Ainu can live with their ethnic pride," as is stated in Article 1 of the policy. Article 2 elaborates on the sentiment, by narrowly relegating the sources of Ainu ethnic pride to cultural products such as traditional way of life, music, dance, and cultural artifacts.

The language of the policy is erroneous in multiple respects. First, the NAP and media reports combine indigeneity with ethnicity. NAP stresses the ethnic pride of the Ainu, which is drastically different from their identity and entitlements as Indigenous peoples. While rights and representation as a minority group are essential for

the Ainu and all minority communities,[6] NAP does not contain the rights of the Ainu as original inhabitants of Hokkaido. The United Nations Declaration on the Rights of Indigenous People (UNDRIP), which Japan voted for, affirms the right of Indigenous peoples to self-determination, which is the right to freely determine and develop their political status and to freely pursue their economic, social, and cultural development.[7] Also, the NAP follows the ACPA by obstructing the Ainu's ability to develop their culture on their own terms by prescribing what is considered as "Ainu culture." The NAP's impediment to Ainu self-determination also infringes upon other international agreements to which Japan is party. The International Covenant on Economic, Social, and Cultural Rights (ICESCR), defines Indigenous cultures as those with indispensable communal ties to traditional lands and resources.[8] It outlines the states' obligations on this basis:

> States parties must therefore take measures to recognize and protect the rights of Indigenous peoples to own, develop, control, and use their communal lands, territories, and resources, and where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

The NAP does not contain provisions regarding reparations, which would be in line with genuine recognition of Indigenous citizens and their rights and entitlements on those grounds. Rather, the recognition in the case of the NAP is not about facilitating the Ainu's realization of their rights but about the manipulation of the terms of recognition so that it benefits the Japanese government, and its own motivations. This can be understood in the context of ongoing developments in Japan.

Ainu Culture and Economic Gain

In 2020, in preparation for the hosting of the summer Olympics in Tokyo, Japan is pursuing a development program that would stimulate tourist-based revenue throughout the entire country. Hokkaido is one place that has been the target of these economic aspirations, and the Ainu community has been pulled into the scheme. One particular locus is the town of Shiraoi, which is currently seeing large-scale reconstruction of an Ainu cultural theme park. Of note in the park is the so-called Symbolic Space for Ethnic Harmony, a mausoleum where the ancestral remains currently held in research institutions across the country[9] will be consolidated despite decades of protest by Ainu activists for the return of their families' remains to their places of origin. The culture park is expected to draw many tourists in coordination with the upcoming Olympics. These projects have fostered concerns about how Japan will face pressure from the international community to reconcile its colonial past with the Ainu, which has provided some impetus for its recognition of the Ainu. However, Japan's recognition and its passing of the NAP should be read as a facade which facilitates continued exploitation of the Ainu - in this case for economic gain. This was even made explicit by Chief Cabinet Secretary Yoshihide Suga in the aforementioned Asahi Shimbun Press article, who was instrumental in drafting the NAP and was quoted, "Having the world understand the splendid aspects of Ainu culture will contribute to international goodwill and lead to *promotion of tourism*."[10] [emphasis ours] Thus, the motivations of the Japanese government in its recent moves with the Ainu legislation and its "recognition" are clearly an attempt to extract more use-value out of the Ainu, their culture, and their land, for the benefit of the state. Such a relationship based on exploitation is a textbook example of colonizing tactics. Yet, the NAP and the supposed "recognition" of the Ainu have been able to maintain a guise of progress. A majority of the media has fallen for this trap and in its misguided representation of the implications of the NAP has contributed to a perpetuation of the colonization of the Ainu.

Under-represented Ainu

The fact that the self-determination of the Ainu is compromised with the NAP is a direct reflection of the structures which created the policy. Ainu representation in the drafting process of the NAP has been severely kept to a minimum. Two primary advisory councils are responsible for drafting the NAP: The Advisory Council for Future Ainu Policy and The

Council for Ainu Policy Promotion. The objectives for the NAP were established in 2009[11] by the former group in its final report of that year, and the Council for Ainu Policy Promotion drafted the 2019 bill in accordance with those outlined objectives. On both advisory councils, Ainu members are a minority. The Advisory Council for Future Ainu Policy, for example, has only one Ainu member among the body of eight members. Furthermore, there has not been any observable effort to obtain remarks and consensus from the diverse voices and interests of the Ainu community, such as the double-minoritized groups as the Karafuto[12] Ainu Association or the Ainu Women's Association. The lack of overall representation or attempts at diversity demonstrates the tendency of government elites to inaccurately homogenize the Ainu, despite their vast differences across geographical locations and interests. The NAP then acts as a prescriptivist document, which dictates possibilities for the Ainu based on inaccurate and impersonal assumptions, and without seeking adequate input from the very people of concern. In this way, the NAP is authoritative and does not impart any self-determination or Ainu autonomy. By its very nature, the NAP does not transform a colonial relationship but rather affirms it. It furthermore lacks a foundation of recognition of colonial history, which would be a genuinely progressive form of recognition.

In conclusion, the media's reception of the NAP and its fixation on recognition are complicit with government schemes, which are ultimately working to perpetuate the exploitation of the Ainu. The passing of the NAP should present an opportunity to critique the Japanese government and its failure to acknowledge its legacies of dispossession, as opposed to a blind, uncritical wave of support for an empty and manipulative form of recognition.

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Endnotes

1 The bill for a New Ainu Policy was described as such by Ainu activist Shiro Kayano in an Asahi Shimbun Press article in February 2019. Shiro is the son of Shigeru Kayano, a renowned Ainu activist and the first Ainu member of the Japanese Diet from 1994-1998. The New Ainu Policy was described in a similar manner by Mark John Winchester, a scholar of Indigenous studies, in a CNN article dated 20 April 2019.

2 *The Asahi Shimbun*, "Bill finally recognizes Ainu as indigenous people of Japan," 6 February 2019, www.asahi.com/ajw/articles/AJ201902060037.html.

3 Notable articles are:
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5 For an excellent treatment of Fanon's theory of recognition in the colonial context see: Coulthard, G.S., "Subjects of empire: Indigenous peoples and the 'politics of recognition' in Canada," 2007.

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New Asian Declaration on Human Rights

Praveen Kumar Yadav

The Asian Human Rights Commission (AHRC) and the Gwangju-based May 18 Memorial Foundation presented the Asian Declaration on 18 May 2019 during the 39th anniversary of the Gwangju Uprising. The Declaration has three major components: right to justice, right to peace and right to culture.[1]

The Asian Declaration was adopted in 2018 on the occasion of the 20th anniversary of Asian Human Rights Charter: A People's Charter. It supplements the 1987 Asian Human Rights Charter, which was also jointly launched in Gwangju city by the AHRC and May 18 Memorial Foundation on 17 May 1987. The Asian Charter drew inspiration from the great struggles for freedom in Asia, including the struggle of the Gwangju citizens in 1980.

Need for a New Declaration

Over the past twenty years, the AHRC, the May 18 Memorial Foundation and other human rights activists and organizations promoted the Asian Human Rights Charter by raising human rights issues with governments and the peoples in Asia and urging them to recognize these problems and find ways to effectively resolve them.[2]

However, not much progress has been achieved over the past two decades. Extrajudicial killings, torture and enforced disappearances that used to occur twenty years ago are still taking place in Asian countries. Extrajudicial killings have taken place allegedly under the leadership of President Rodrigo Duterte in the Philippines, while they may take the form of "enforced disappearances" in Bangladesh, Pakistan, Sri Lanka and many other countries as well.

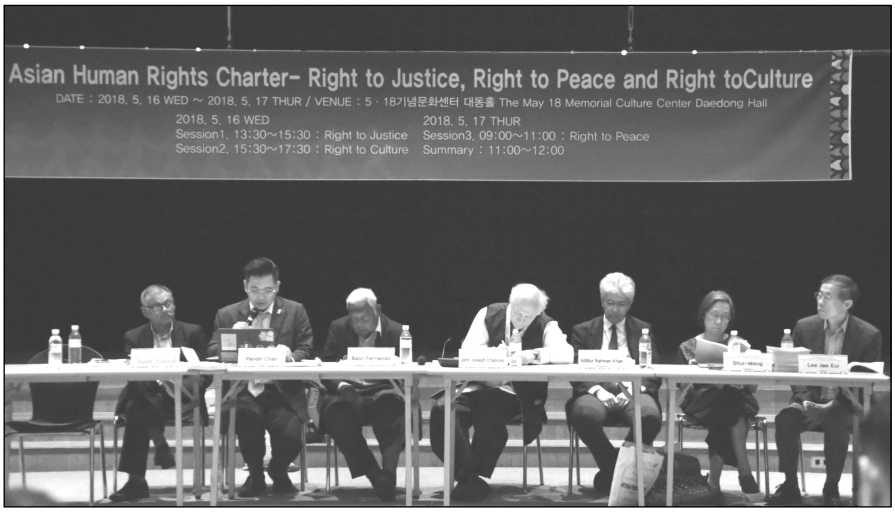
The implementation of ratified United Nations human rights conventions has been limited in many countries in Asia. Existing national mechanisms to address human rights violations and provide remedy and reparation are seen as ineffective; while other Asian countries do not have such mechanisms.

On the other hand, violence and internal and inter-state conflicts are rampant in Asia.

In light of the situation in Asia, three issues were considered as needing more emphasis in human rights work: justice, peace and culture.

Consultation Process

During a period of almost two years from 2017, the AHRC and May 18 Memorial Foundation held subregional consultation workshops in South and Southeast Asia (and one consultation workshop in Geneva) with human rights activists and defenders on the drafting of documents that would supplement the Asian Human Rights Charter. In these workshops, participants discussed the human rights situation (specifically relating to the right to justice, right to peace and right to culture) in their respective countries.



Gwangju Asia Forum 2018

On 17-21 February 2018, a final consultation workshop was held in Kathmandu attended by human rights experts, lawyers and academicians from different Asian countries. The final draft of the Asian Declaration was prepared in this workshop.

The final draft of the declaration was further discussed with a panel of experts and participants during the Gwangju Asia Forum 2018 held in Gwangju city. On 16 May 2018, Mr John Joseph Clancey spoke on the right to justice, Mr Sanjeewa Liyanage spoke on the right to culture, and Ms Sriprapha Petcharamesree, PhD, spoke on the right to peace. Mr. Basil Fernando, Policy and Program Director at the AHRC, chaired this panel discussion.[3]

Highlights of the Asian Declaration

The Asian Declaration reaffirms the right to effective remedy in Article 2 of the International Covenant on Civil and Political Rights (ICCPR) in declaring the "Right to Justice." The "Right to Justice" is meant to stress the need for remedy to human rights violations committed by the state.

The "Right to Peace" addresses the existence of violence and conflicts in the region. The "Right to Culture" recognizes the diversities existing within and among societies in Asia.[4]

The Asian Declaration calls on State, civil society organizations and other organs of the society to fulfil their obligation to promote peace education and education for peace. It encourages further promotion of the right to cultural diversity by adjusting to changing realities. The Declaration states:[5]

> Cultural diversity is best protected when all other human rights are respected. Culture should not be used as a tool to infringe on the human rights of certain individuals, especially that of women. Cultural identity is important for the well-being and dignity of individuals and communities. No one should be denied rights on the grounds of cultural differences.

The Asian Declaration encourages discussion of the issues regarding justice, peace and culture. Human rights defenders and those interested in the cause of human rights are urged to use the Declaration as guidelines in generating wider discussion of the issues.

The AHRC and the May 18 Memorial Foundation plan to integrate the Asian Declaration into the existing Asian Human Rights Charter: A People's Charter.

Dissemination

The AHRC and the May 18 Memorial Foundation have organized subregional workshops in Sri Lanka[6] and Indonesia[7] to discuss the rights to justice, peace and culture. Other workshops and events for the discussion of the Asian Declaration, in addition to the annual Gwangju Asia Forum and the May 18 Academy both organized by the May 18 Memorial Foundation, are planned.

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Endnotes

1 "Asian Declaration," *Mayzine*, volume 12, April 2019, www.518.org/Mayzine/201904/subpage/sub0101.php.
See Basil Fernando's keynote address delivered on 16 May 2018 at the Gwangju Human Rights Forum, "WORLD: Asian Human Rights Charter represents the spirit of the Gwangju uprising," 23 May 2018, www.ahrchk.org/ruleoflawasia.net/news.php?id=AHRC-STM-026-2018.

3 Asian Human Rights Commission, "SOUTH KOREA/HONG KONG: Gwangju Asia Forum 2018," www.humanrights.asia/news/ahrc-news/AHRC-ANM-022-2018/.

4 "Asian Declaration," op. cit.

5 "Asian Declaration," ibid.

6 "Activists from South Asia Discuss on Gwangju Declarations in Sri Lanka," Foundation News, *Mayzine*, volume 10, October 2018, http://518.org/Mayzine/201810/subpage/sub0302.php.

7 "Foundation, AHRC kicks off Asian Human Rights Charter workshop in Indonesia," *Mayzine*, volume 11, December 2018, www.518.org/Mayzine/201811/subpage/sub0501.php.

News in Asia-Pacific

Women's Right to Worship in Sabarimala Temple Upheld

HURIGHTS OSAKA

The Supreme Court of India ruled in 2018 that the prohibition of women between the ages of ten and fifty from worshipping at the Sabarimala Temple, a famous pilgrim temple in the state of Kerala, was unconstitutional. The prohibition is provided in the 1965 Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules. These rules implement the 1965 Kerala Hindu Places of Public Worship (Authorisation of Entry) Act.

The Sabarimala Temple is dedicated to the Hindu deity Sree Ayyappa, and worshippers are required to practice abstinence for forty-one days before entering the temple.

2006 Petition

In 2006, the Indian Young Lawyers Association and other parties filed a petition[1] with the Supreme Court of India seeking to declare the rule (Rule 3[b] of the Kerala Hindu Places of Public Worship [Authorisation of Entry] Rules) prohibiting women from worshipping at the Sabarimala temple as unconstitutional. On 28 September 2018, the Supreme Court through the Chief Justice (Dipak Misra) and another Justice (A.M. Khanwilkar) ruled that

> (iii) The exclusionary practice being followed at the Sabrimala temple by virtue of Rule 3(b) of the 1965 Rules violates the right of Hindu women to freely practise their religion and exhibit their devotion towards Lord Ayyappa. This denial denudes them of their right to worship. The right to practise religion under Article 25(1) is equally available to both men and women of all age groups professing the same religion.

After the ruling came out, several groups filed review petitions seeking its reversal.[2] Many worshippers of the temple also protested the Supreme Court ruling.[3]

Court Rationale

The Supreme Court decision discusses the question of equality in relation to practicing spiritual beliefs. It explains:

> There is inequality on the path of approach to understand the divinity. The attribute of devotion to divinity cannot be subjected to the rigidity and stereotypes of gender. The dualism that persists in religion by glorifying and venerating women as goddesses on one hand and by imposing rigorous sanctions on the other hand in matters of devotion has to be

Sabarimala Temple[4]

> abandoned. Such a dualistic approach and an entrenched mindset results in indignity to women and degradation of their status. The society has to undergo a perceptual shift from being the propagator of hegemonic patriarchal notions of demanding more exacting standards of purity and chastity solely from women to be the cultivator of equality where the woman is in no way considered frailer, lesser or inferior to man. The law and the society are bestowed with the Herculean task to act as levellers in this regard...

The court further states:

> The subversion and repression of women under the garb of biological or physiological factors cannot be given the seal of legitimacy. Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality.

This view addresses the stance of the Kerala government and temple worshippers on the supposed unclean condition of women who are menstruating, and thus girls and women from age ten to fifty are not allowed to enter the temple and its precincts.

In this light, the court states:

> (vi) The notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple.
>
> (xii) The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act clearly indicate that custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and incrementally impair the fundamental right to practise religion guaranteed under Article 25(1). Therefore, we hold that Rule 3(b) of the 1965 Rules is ultra vires the 1965 Act.

Current Situation

The Supreme Court of India has not yet acted on the petitions for review filed by several groups to overturn its ruling on the issue. And the Kerala government's tourism promotion of the Sabarimala temple maintains the prohibition. One website accessed on 14 June 2019 has the following statement:[5]

> People of all castes and creeds are permitted into the temple. However, entry is not allowed to women between 10 and 50 years of age.

A final Supreme Court decision affirming the right of all women to enter the Sabarimala temple can lead to a review of other religious practices in India that discriminate against women.

Endnotes

1 Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., Supreme Court of India, Writ Petition (Civil) No. 373 of 2006.

2 Satya Prasoon, "Review Petitions in Sabarimala," Supreme Court Observer, 17 October 2018, http://scobserver.clpr.org.in/beyond-the-court/review-petitions-in-sabarimala.

3 BBC News, "Sabarimala: The Indian god who bars women from his temple," 19 October 2018, https://www.bbc.com/news/world-asia-india-45901014.

4 Photo from *Times Headline*, "51 Women Below 50 Have Entered Sabarimala, Kerala Tells Supreme Court," www.timesheadline.com/india/kerala/51-women-below-50-have-entered-sabarimala-kerala-tells-supreme-court-28520.html.

5 See Kerala Tourism, www.keralatourism.org/destination/sabarimala-temple/47.

Update on Indigenous Peoples of Malaysia

(Continued from page 6)

25 UNDRIP (n 48), Article 10.
26 Johari Talibet al., "Bagaimana kanak-kanak Orang Asli gagal di sekolah?," *MALIM: Jurnal Pengajian Umum Asia Tenggara* 8, 2007, 51-76, <http://journalarticle.ukm.my/1142/1/1.pdf>.
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29 Based on a research by University Utara Malaysia entitled "*Children of the Orang Asli Minority in Malaysia: Achieving the Malay Language Literacy*" carried out by Abdul Sukor Shaari, Nuraini Yusoff, Mohd Izam Ghazali and Mohd Hasani Dali in 2011.
30 Toh Kit Siang, *Pendidikan Orang Asli: Projek Sarjana Muda*, Universiti Kebangsaan Malaysia, Bangi. 2008.
31 Prof. Madya Dr. Mohd Fauzi Mohd Harun et al., "Analisis Faktor Kemiskinan Orang Asli: Aplikasi Model Multinomial Logit," in *Technical Report*, Institute of Research, Development and Commercialization (Universiti Teknologi MARA, 2010) <http://eprints.uitm.edu.my/3304/1/LP_MOHD_FAUZI_MOHD_HARUN_10_24.pdf>.
32 Jannie Lasimbang, "Prinsip Sistem Ekonomi dan Teknologi Orang Asal" in World Indigenous Peoples Day, held in Sabah, 8 August 2011.
33 Colin Nicholas, "The Orang Asli of Peninsular Malaysia," Magic River, 1997, www.magickriver.net/oa.htm, accessed on 8 August 2012.
34 Jannie Lasimbang, '*Sistem Perundangan Orang Asli di Malaysia'* in Round Table Discussion on Indigenous Legal System, held on 18 May 2012.

A Critique on the New Ainu Policy

(Continued from page 10)

6 The term *wajin* refers to the majority Japanese ethnic group, and any other group is considered a minority. This would include populations with extended histories in Japan such as the Zainichi Koreans and other migrant groups. This also includes the Indigenous inhabitants of Okinawa, who have yet to receive acknowledgement of their Indigenous status as the Ainu have.
7 *Indigenous Peoples and the United Nations Human Rights System*, Fact Sheet No. 9, www.ohchr.org/documents/publicationslivepage.apple.co.jp/fs9rev.2.pdf
8 International Covenant on Economic, Social and Cultural Rights, United Nations, www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
9 There are currently over 1600 Ainu remains being held hostage, with over 1000 of these being stored at Hokkaido University. Ainu activists have been fighting for the return of these remains to their villages of origin for decade, as many of them were taken without free, prior, and informed consent from their respective Ainu relatives.
10 *The Asahi Shimbun*, op. cit.
11 See the Final Report: https://www.kantei.go.jp/jp/singi/ainu/dai10/siryou1_en.pdf
12 The Karafuto (Sakhalin) Ainu were forcibly relocated to Hokkaido as a result of Japan's geopolitical contentions with Russia.

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