

Looking at Flaws in the Henoko Landfill Permit Process from the Standpoint of the Right to Self-determination

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The Governor of Okinawa, Onaga Takeshi, who took office in December 2014 after a landslide victory in the November gubernatorial election, has taken a cautious approach in response to Japanese government action to crush Okinawan opposition to a new Marine base in Henoko Bay. Instead of immediately revoking or cancelling his predecessor's landfill permit to the Japanese government that allowed construction of the much-debated new base to replace the Futenma Air Station in congested Ginowan City, he set up an experts' panel called the "Third-Party Committee," which consists of three lawyers and environmentalists carefully chosen for "impartiality and neutrality." The purpose of the Committee, according to its chair and lawyer Oshiro Hiroshi, is to examine possible legal flaws of former Governor Nakaima's landfill permit, which was approved at the end of 2013 to the dismay of the majority of Okinawans who opposed the new base. Oshiro has announced that the Committee will make recommendation at the end of June, which Governor Onaga will take into consideration in deciding whether or not to revoke or cancel the landfill permit. To lawyer Kumano Katsuyuki, however, legal flaws of the landfill permit are obvious on the basis both of Japan's constitution and international law. He concludes that the existing landfill permit violates anti-discrimination clauses of both the International Covenant on Civil and Political Rights and the Constitution of Japan –

Article 2 and Article 14, respectively, and Clause 2, Article 98 of the Constitution of Japan, which stipulates that the "treaties concluded by Japan and established laws of nations shall be faithfully observed." Many observers fear, moreover, that by June, when the Committee's report is expected, irreparable damage to the environment of Henoko Bay will have been rendered. SN

In the Okinawan gubernatorial election held on 16 November 2014, the 260,000 votes garnered by the incumbent Nakaima Hirokazu fell 100,000 short of the 360,000 votes gained by Onaga Takeshi, who was duly elected for his first term of office. The next day, 17 November, Onaga commented, "Throughout its long history, Okinawans and Ryukyuan have sought to realize the right to self-determination. . . . Today, many Okinawan citizens are uncomfortable with the presence of bases in the prefecture. This is not only because of the terrible battle that was fought here 70 years ago - there is a palpable sense of fear at what the future may bring. With peace at risk, and without the right of self-determination where peace and base issues are concerned, as an Okinawan-born politician I do not think that I am able to take responsibility for shaping the future for our children and grandchildren." At the press conference held on 10 December to mark Onaga's inauguration, he indicated that

he would consider checking to see whether there were flaws in his predecessor's approval process for the reclamation of public seas around the Henoko coastline. (Reported in the Ryukyu Shimpo on 18 November and 10 December).

Given access to the document to be screened for approval by the Prefectural Administrative Information Center, I have found that there are matters regarding the Constitution of Japan and the International Covenant on Civil and Political Rights that should have been taken in consideration, but were not. For this reason I would like to consider the following issues in order to ascertain whether there were flaws in the process.

1. Public Water Reclamation Approval Standards

Standards for approving the reclamation of public bodies of water are stipulated in the Public Water Body Reclamation Act, specifically in Article 4 of that act. The specific standards used on this occasion in the screening process (the specific interpretation of Article 4 of said act) were those issued in the Ministry of Construction Ports and Harbors Bureau Director's circular notice of 14 June 1974. The Ministry of Land, Infrastructure, Transport and Tourism (successor of the Ministry of Construction) explains that the standards outlined in each of the entries in Article 4, Paragraph 1 of the Public Water Body Reclamation Act represent the minimum criteria for approval to be granted. Even if the application meets all of these criteria, it is still possible to not grant the permit, as the screening is to take a comprehensive view of the application, including aspects such as the necessity for reclamation.

Clause 1 of Paragraph 1 requires that the reclamation be "an appropriate and rational use of national land." In order to be "appropriate," the reclamation itself and the use of land thereby created must of course be in accordance with the law, as well as the Constitution and the International Covenant on Civil and Political Rights (ICCPR). Fortunately, both Japan and the United States are signatories to the ICCPR.

2. Relationship between the ICCPR and domestic laws

Since adopting the Meiji Constitution, Japan has employed a legal system in which the ratification of international treaties has seen laws come into effect without the country actually needing to establish a new domestic law. International treaties take precedence over laws, and domestic laws that do not conform to an international treaty are judged invalid. In the case of Japan's ratification of the ICCPR there is no "reservation" specifically excluding Article 1, so it has binding force as a domestic law.

3. Content of the ICCPR

Article 1 of the ICCPR states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Governments are obliged to "promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

In contrast to the other articles, in Article 1 “peoples” are the subject exercising this right, rather than the individual. “Peoples” share history, ethnicity, language and culture, and this refers to groups of people living in appropriate numbers in a certain geographical location, so this applies to the people of Okinawa. In Paragraph 32 of its concluding observations for the 5th report on the Japanese government, issued in 2008, the United Nations Human Rights Committee delivered a stern notice to Tokyo, saying, “The State party should expressly recognize the Ainu and Ryukyu/Okinawa as indigenous peoples in domestic legislation, adopt special measures to protect, preserve and promote their cultural heritage and traditional way of life, and recognize their land rights.”

4. Qualitative differences between the political status of Okinawa and that of Japan’s main islands

Okinawa Prefecture 1) Existed as the Kingdom of the Ryukyus for 450 years between 1429 and 1879; 2) Became Okinawa Prefecture through the Meiji government’s policy of replacing feudal domains with modern prefectures in 1879 (the Ryukyu Disposition); 3) Was sacrificed in order to buy time before what Japan expected to be the final decisive battle with the Allies in 1945; 4) Saw homes destroyed and land seized using “bayonets and bulldozers” under the U.S. military occupation after Japan was defeated in the war; 5) Saw a message conveyed by the Showa Emperor through Imperial Household Agency official Terasaki Hidenari to William Sebald, political adviser to the Supreme Commander for the Allied Powers, expressing a desire that, under the U.S.-Japan bilateral treaty, the United States continue long-term military occupation

of the Ryukyu Islands under a lease retaining Japanese sovereignty (former University of Tsukuba professor Shindo Eiichi, “Divided Territory,” *Sekai*, 1979 April issue; and 2002 Iwanami Gendai monograph of the same title); 6) Was placed under U.S. military administration even after Japan regained independence in 1952, according to Article 3 of the U.S.-Japan Peace Treaty; 7) Remained home to a large number of U.S. military bases even after reversion to the mainland in 1972; 8) Saw even more bases relocated from the mainland, so that for over 40 years, the burden of 74% of bases exclusively for use by the U.S. military in Japan has been borne by just 0.6% of its land mass, so that Okinawans have been unable to use their own land freely, and have been forced to suffer, on a daily basis, the harm and danger of military aircraft crashes, noise pollution, and incidents such as the violent rape of a young girl.

Yanaihara Tadao, a professor in the Faculty of Economics of Tokyo Imperial University before and during the war, who researched and wrote on colonial issues from the perspective of the colonized, visited the University of the Ryukyus in 1957. There he stated, “When a country’s objectives in ruling and utilizing a colony are primarily military and strategic in nature, in academic terms we classify that colony as a military colony” (*Assertions and Essays*, University of Tokyo Press, 1957; pg. 215). In the same year, an article he published in the *Asahi Shimbun* stated, “The Price Report clearly states that the United States’ objectives in ruling Okinawa are based on military necessity. In other words, Okinawa is a military colony” (“Okinawa’s Problems as Seen from the Ground,” January 28).

Yoshida Kensei, former professor in the Faculty of International Studies at Obirin University, quotes Yanaihara on the title page of one of his books and states that when one examines “the

‘Little Americas’ on the other side of the fences surrounding the U.S. military bases on Okinawa; the U.S.-Japan Status of Forces Agreement protecting the U.S. military, members of the military, and their families; the massive ‘sympathy budget’ for the bases provided by Japan; the system in which some Okinawan landowners and municipalities depend on income from the bases; and the way in which the Japanese government has created this situation,” it is not inappropriate to call Okinawa a “military colony” (*Okinawa: Military Colony*, Kobunken, 2007; pg. 7).

Thus, it is clear that the political status of Okinawan residents is definitively lower than that of residents of mainland Japan.

5. Methods of decision-making available to citizens

Because Article 1 of the ICCPR does not specify the methods by which citizens can make decisions or exercise rights on the basis of the right to self-determination, when it is possible to accomplish one’s aims using the country’s legal system, it is preferable to do so. The obligation of state parties to abide by the treaty lies in realizing the people’s rights regardless of method.

6. Will of the Okinawan people

The will of the Okinawan people regarding the political status of Okinawa in light of the construction of a new base after the reclamation of land off the coast of Henoko was clearly demonstrated in two gubernatorial elections, the Nago mayoral election, and the Lower House election, in which this issue

became a primary point of contention. What the Okinawan people want is not to gain political independence from the mainland, nor is it the immediate closure of all military bases. Their desire is the extremely humble wish to be freed from further reinforcement of Okinawa’s status as a “military colony” under the U.S. and Japanese governments. They want to be freed from threats to their lives and ongoing damage inflicted upon their physical and mental health and their economy. They wish that Okinawa’s oceans be maintained and the diverse and rare life forms residing therein be allowed to flourish as a natural wealth deeply tied to Okinawa’s cultural identity. They want to be able to freely use this natural wealth as an important resource for tourism.

7. Obligations of the Japanese and U.S. governments

It is not only the Japanese government that bears an obligation toward the Okinawan people, the U.S. government also has a responsibility. Both governments’ “obligation to promote” the realization of the Okinawan right of self-determination lies in their obligation to close the Futenma base, which is located in an area with high population density and has been called the most dangerous base in the world, in order to begin to ameliorate the status of Okinawa as a military colony. Their “obligation to respect” lies in their obligation to respect the will of the Okinawan people to maintain Henoko’s natural resources and not alter the present situation (in other words, not construct a new base).

8. Obligation to eliminate discrimination

Article 2 of the ICCPR and Article 14 of the constitution require the Japanese government to not differentiate between the people living in its main islands and Okinawa in terms of the burden imposed by the presence of U.S. military bases. If we follow the thrust of the Supreme Court precedents regarding the disparity in the relative weight of one vote, the ratio of 123 to 1 (74 divided by 0.6) can in no way be seen to be a rational division of burden, and as such is a clear violation of the constitution. This overwhelming imbalance needs to be rectified. Even if it is designed to remove the risks posed by Futenma Air Station, the construction of a permanent new base cannot be described as “appropriate and rational use” of national land, and as such this violates Article 2 of the ICCPR, Article 14 and also Article 98, Paragraph 2 of the Constitution which states, “The treaties concluded by Japan and established laws of nations shall be faithfully observed.”

Managing foreign relations is the function of the cabinet, but it goes without saying, as the constitution states, that “no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.” (Article 98, Paragraph 2)

9. Extraneous factors must not be taken into account when exercising discretionary powers

The Ministry of Land, Infrastructure, Transport and Tourism application approval criteria give a prefectural governor broad discretionary powers. With regard to the exercise of those discretionary powers, not taking into consideration what should be considered and taking into consideration other extraneous

factors is forbidden as a type of abuse of those powers. On this matter, the following summarized extract from a verdict given in the Tokyo High Court on 13 July 1973 in the “Nikko Taro-Cedar Case” should be used as a point of reference (Administrative Case Report: Vol. 24. 6-7 pp. 533.)

“While the plaintiff, the Minister of Construction, judges that this project should be acknowledged as appropriate and rational use of land, this judgment reflects an unreasonable and casual disregard for the land in question and its immediate surroundings having immeasurable cultural value and for the protection of the environment, both of which are matters that by rights should have been given the greatest attention. As a result, the plaintiff has failed to make every effort to find a harmonious balance between the requests to protect these trees and the need to widen the road, and has also taken into consideration the forecast increase in traffic on the road due to the holding of the Olympics, which is a matter that by rights should not be considered. Furthermore, the plaintiff places excessive significance on the possibility of trees falling over in strong winds and causing disruption to traffic and the possibility of the trees becoming weakened [and therefore dangerous]. There are flaws in both the method and process by which this judgment has been reached, and had these flaws not been present and if a correct judgment had been made on these points, it is possible that the judgment of the plaintiff, the Minister of Construction, may have been different.”

The approval granted by the previous governor, Nakaima Hirokazu, does not take the comprehensive view required by the 1974 circular notice of the Ministry of Construction of Articles 1 and 2 of the ICCPR, or of Article 14 and Article 98, Paragraph 2 of the

constitution. On the contrary, extraneous factors were taken into consideration with Prime Minister Abe's promise of "historical budget" making for "a good New Year," so the judgment is flawed both in terms of the method and process used in exercising authority, and therefore is illegal.

10. Conclusion

The results of the latest gubernatorial election and the last Lower House election have further highlighted the will of the people of Okinawa. With this, the flaws in an approval of the reclamation that has ignored the will of the people have become that much clearer.

Holding broad powers over the reclamation permit as he does, the prefectural governor's annulling the permit not only represents a totally appropriate use of authority, but will also serve to rectify the fact that both the Japanese and U.S. governments have failed to fulfill their obligations under the International Covenant on Civil and Political Rights, and that the Japanese government has violated its constitution. In his position as a public servant, annulling the reclamation permit will also mean that he should be lauded for fulfilling his responsibility to defend the Constitution and respect Japan's treaty obligations.

(Translated from the weekly "Law Newspaper", Kanagawa Prefecture, Kamakura City, 20 February 2015.)

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