The Rights of Nature in Japan: Bringing the Alternative View to Fruition

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I. Introduction

Surrounded by ocean and adorned with lakes and rivers, respect for nature has always been part of Japanese culture. Thousands of mountains and forests have been considered to be gods incarnate since antiquity; numerous animals, including foxes, deer, and monkeys, have been enshrined and are worshipped across the country. In the city of Nara, the ancient capital, the primeval forest of Mount Kasuga, covering some 298 hectares [approximately 736 acres], sits barely touched by humans, as hunting and logging have been forbidden since the Emperor Ninmyo designated the entire mountain as a sacred area in the ninth century. Roughly sixty kilometers off the northern coast of Kyushu lies an island named Okinoshima, a UNESCO World Heritage site, which rises sheer from the sea and where no one is allowed to set foot without the permission of the landowner Munakata Taisha, a Shinto shrine. Nothing, not even a leaf of grass, may be removed from this pristine island where gods are said to dwell. Similar examples abound.

The roots of these intrinsic and fundamental beliefs in nature, in somewhat of a contrast to the adopted Western legal system, may be fertile enough to allow the concept of the Rights of Nature to bear fruit in the near future. Yet at present, one may think of it as cultivating the seeds which are just beginning to sprout. Although various creative legal theories have been crafted and asserted, the Japanese judiciary, generally disinclined to take independent innovative action, has so far adhered to a traditional formalistic approach in dealing with litigation involving environmental issues. As a result, the Rights of Nature are not currently recognized in the Japanese legal system; however, one can point to a few small but notable developments relevant thereto.

II. Toshogu v. Minister of Construction[1]

Although there have been a few instances where judicial decisions placing emphasis on the interest of the general public in enjoying fine landscapes led to the withholding of bridge or building construction, probably the only successfully-litigated Japanese case to this day which approaches the concept of the Rights of Nature in substance, if not in form, is one involving the giant cedar tree named ‘Taro’ in the precincts of Toshogu, the location where Ieyasu Tokugawa, the founder of the Tokugawa Shogunate [the Edo period], is enshrined. It is a case, during an era of rampant environmental destruction, decided by the court of first instance in 1969 and affirmed by the Tokyo High Court in 1972.

In 1964, the Governor of Tochigi Prefecture applied to the Minister of Construction for certification of a business plan to broaden a national highway, which the Minister issued shortly thereafter, in order to accommodate the increase in tourists during the first Tokyo Olympics. The Governor then asked for a judgment of the regional administrative commission, a quasi-judicial body, to acquire a piece of land owned by Toshogu, a religious organization registered as a corporation. The commission approved the acquisition as proposed by the Governor. This public construction project was scheduled to be conducted

[1] Judgment of July 13, 1972, Tokyo Koto Saibansho [Tokyo High Court] (Japan).

pursuant to the Expropriation of Land Act.[2] However, Toshogu immediately challenged the widening of the highway in question because the work involved the logging of fifteen cedar trees, including Taro, estimated to be over five hundred years old. The plaintiff Toshogu sought revocation of the ministerial certification, maintaining that it would be unlawful to lumber these trees.

The focus of the litigation was on whether the development plan was such that it would contribute to "appropriate and reasonable use of land" as provided in the Expropriation of Land Act. The court of first instance, the Utsunomiya District Court, held that it would not, pointing out that the necessity of widening the highway was highly questionable regarding the damage to the scenic, religious, and historical value of Toshogu, which is located in the protected Nikko National Park. The cultural value of the land concerned was irreplaceable in the sense that, once it was lost, it would be impossible to restore. The intended construction project, on the other hand, was one of four possible plans to inexpensively cope with expected traffic congestion; this need could equally be met by any of the other plans, all of which the Governor himself had drawn up and examined before reaching the conclusion that the adopted plan involving the logging of Taro and other trees would be easiest to carry out. Expropriating the land and damaging its cultural value for the purpose of road widening, when in fact there were other options, could not be seen as contributing to "appropriate and reasonable use of land," the District Court concluded.

The Tokyo High Court [subordinate only to the Supreme Court of Japan] unanimously affirmed this, stating that, even when the government has discretion in making an administrative decision such as land appropriation, the exercise of its discretion is unlawful if there is an error in the decision-making process. This applies, for example, when the government disregards the most significant matters and takes into consideration inconsequential ones. Here, this was clearly the case because the Minister had unduly made light of the irreplaceable cultural value of the land in question and the preservation of the surrounding environment, while he had overestimated the importance of widening the road in dealing with the surging traffic during the Tokyo Olympics. With words of stern reproof for the Minister's inadequate decision-making, the High Court invalidated his certification of the business plan and also overturned the administrative commission's judgment allowing the acquisition to move forward, effectively sparing Taro and the other cedar trees from destruction. Due to this appellate court's unequivocal decision, the case was not taken to the Supreme Court.

III. Amami Black Rabbits v. Governor of Kagoshima Prefecture[3]

Toshogu v. Minister of Construction discussed above, with all its practical importance, was, of course, not a case recognizing the Rights of Nature. The dispute being between the landowner Toshogu and the government, there was no discussion as to whether Taro should be granted legal personhood. Neither the district court nor the appellate court made any suggestion that the cedar trees could possess inherent rights distinct from those of the property owner. This was because the idea that an ecosystem or part thereof could be a holder of rights on its own, capable of suing for its own preservation, was almost unknown in legal circles at that time.

In the 1970s, however, the efforts of environmentally minded citizens and organizations started to take shape. One of the most symbolic developments was the foundation of the National Union for Conservation of Nature, a network of over seventy environmental organizations from across Japan. The Union's management was administered by the secretariats of two major conservation groups; the Nature

[2] Law No. 219 of 1951.
[3] Judgment of January 22, 2001, Kagoshima Chiho Saibansho [Kagoshima District Court] (Japan).

Conservation Society of Japan, incorporated in 1960 as the first of its kind in the nation, and the Wild Bird Society of Japan, formed in 1934 by ornithologists. The inaugural meeting of the Union in 1971 was attended by the Secretary of the Environment Agency, also created that same year [a precursor to the Ministry of Environment]. Since its inception the Union has been a zealous advocate for the Rights of Nature, raising people's awareness about the criticality of environmental conservation. Although the coalition of politically diverse groups disbanded shortly thereafter, numerous entities previously or currently under the umbrella of the Union have continued to take action to prevent nature-destructive business and government activities for the past several decades. For instance, the Nature Conservation Society of Japan held the Beech Symposium in 1985 to protect the virgin forest biosphere of the Shirakami mountain range, following which citizens' letters calling for the halt of the forest road construction therein flooded the office of the Governor of Aomori Prefecture, who ultimately decided to suspend the construction in 1987; the Shirakami Mountains were later designated as one of Japan's first UNESCO World Heritage sites in 1993. To take another example, the Nature Conservation Society of Japan has recently met with the Ministries of Environment and Defense to discuss the construction of a United States Marine Corps base in Henoko, Okinawa, which might interfere with the presence of rare marine life, discussed further in Part IV below.

Researchers in various fields began to investigate the concept of the Rights of Nature as well, put forward most notably by an American philosopher Christopher Stone, whose article, "Should Trees Have Standing?--Toward Legal Rights for Natural Objects,"[4] influenced Justice William O. Douglas to dissent in *Sierra Club v. Morton*,[5] decided by the United States Supreme Court in 1972, in which he argued for the right of "environmental objects to sue for their own preservation." Both of their arguments have been frequently cited by Japanese commentators exploring ways to overcome technical legal barriers to achieve conservationist goals. Takemichi Hatakeyama, who has pioneered the field of comparative environmental law, proposed that, in view of the effective judicial control over unbridled development as well as the high level of public participation in forest management in the United States, Japan should urgently establish procedures to incorporate "diverse voices" into environmental law and politics.[6] On a similar but different note, Hitoshi Aoki, an animal law specialist, elaborated on Jean-Pierre Marguénaud's thesis, "La personalité juridique des animaux," in which the French law professor had suggested that animals be treated as legal persons, and concluded that it is, in fact, theoretically possible to extend the concept of personhood to animals under Japanese law, although arduous to put into practice.[7]

It is then little wonder that lawsuits began to be filed by grassroots organizations on behalf of environmental proxies such as endangered species over the following decades. By far the most well-known Japanese case relating to the Rights of Nature, which was decided by the District Court in 2001 but still reflects the state of Japanese law today, is *Amami Black Rabbits v. Governor of Kagoshima Prefecture*, usually referred to as the Amami Black Rabbits case. There, environmental protection groups and local residents sued the Governor over a planned construction of two golf courses on Amami Oshima, the largest island in the Amami Archipelago in southwestern Japan, alleging that the right to life of Amami black rabbits, as well as that of Amami thrushes, Lidth's jays, and Amami woodcocks, all threatened or near threatened officially protected species native to Amami Oshima, would be infringed by the construction. The plaintiffs sought revocation of the prefectural permission to develop the parcels

[4] 45 S. CAL. L. REV. 450 (1972).
[5] 405 U.S. 727 (1972).
[6] TAKEMICHI HATAKEYAMA, AMERIKA NO KANKYO HOGO HO 309 (Hokkaido University Press, 1992).
[7] HITOSHI AOKI, DOBUTSU NO HIKAKU HO BUNKA 268 (Yuhikaku Publishing Co., 2002).

of land in question, originally in the name of these animals, but following the dismissal of the first complaint as not in compliance with the court order to enter the name and address of a specific individual or corporation, subsequently filed in their own names on behalf of the animals. They did so on the grounds that, according to the Japanese Forest Law,[8] if the development significantly degrades the environment in the area, the Governor is not authorized to accept the development application.

The Kagoshima District Court dismissed the suit, holding that the plaintiffs had no legal interest and therefore no standing to sue under the Administrative Case Litigation Act,[9] as their rights or otherwise legally protected interests were not infringed upon or on the verge of being so. Seeing the threshold question to be whether those conducting nature observation, conservation, or recreation activities on the planned golf course sites had standing to challenge the Governor's approval of the forest land development, the District Court noted that, even if the plaintiffs had interests in such activities, they could be freely conducted by any member of the public, and therefore the plaintiffs were not in any special legal relationship to the forest concerned; they were thus not in any position to contest the Governor's decision. Accordingly, the lawsuit was terminated without any examination as to the legality of the development permit for the golf course construction.

In the final statement, however, the three judges of the District Court highlighted the significance of the Rights of Nature. They admitted that the Japanese legal system limited the subjects of rights to individuals and corporations, meaning that nature itself, or animals and plants, which the plaintiffs claimed were valuable and precious to humankind, could only be the objects of rights, and reiterated that the plaintiffs were not entitled to bring this lawsuit in accordance with the existing legislation. Having said that, however, the judges clearly pointed out that the concept of the Rights of Nature raised by the plaintiffs "has presented an extremely difficult but inescapable question of whether it will continue to be acceptable to adhere to the current legal framework, which is focusing on remedies for invasions of personal and corporate interests."

This case attracted extensive media attention, particularly due to the plaintiffs' attempt to bring a lawsuit on behalf of endangered native animals. As major newspapers picked up the story, the public began to understand the momentousness of this unusual litigation. Bipartisan support began to emerge among politicians, who put pressure on the Ministry of the Environment and the Agency for Cultural Affairs. In response to all this groundswell, the Agency for Cultural Affairs ordered a reexamination of the tracts of land in question on the basis of the Law for the Protection of Cultural Properties,[10] which revealed the existence of significantly more burrows inhabited by Amami black rabbits than previously thought. Due to vehement public opposition, the development of golf courses was halted; "we have practically prevailed," commented Takaaki Kagohashi, the executive director of the plaintiffs' legal team.[11] Kagohashi emphasizes that, despite technically a defeat, the litigation was meaningful, as it played the role of a rallying point facilitating sympathizers from around the nation to gather under the flag of protecting indigenous animals.

At the same time, however, the Amami Black Rabbits case exposed the limits of Japanese law: The threshold that a plaintiff must satisfy in order to be granted standing in administrative disputes is set at a higher level than in many other countries. This has been noted by academics and practicing attorneys specializing in environmental law. Suggestions have been made to graft the American theory of standing, under which a number of threatened or endangered species have been accorded de facto standing to sue

[8] Law No. 249 of 1951.
[9] Law No. 139 of 1962.
[10] Law No. 214 of 1950.
[11] *Amami no Kuro Usagi, Henoko Dugong*, https://www.bengo4.com/c_1017/n_11754/.

in their own right, onto the existing Japanese legal system, but they have been unsuccessful so far. Numerous lawsuits have been brought by animals and plants, including pikas [whistling hares], flying squirrels, goshawks, sea turtles, sweetfish, mudskippers, fiddler crabs, and great burnets [herbs of the rose family], as well as by Isahaya Bay in western Japan, but the courts have dismissed every one of them on the grounds that the current law does not confer animals and plants, or nature itself, the capacity to be a party in court proceedings. In other words, they can neither sue nor be sued. Additionally, conservation groups and residents of areas affected by development projects have been generally denied standing to pursue relief in court because of the lack of legally cognizable interests.

Bean Geese v. Governor of Ibaraki Prefecture[12] is another district court decision illuminating this point. When a construction plan for a new highway connecting the outskirts of Tokyo came up in the 1990s, the population of bean geese, migratory birds that arrived on the southern coast of Lake Kasumigaura in Ibaraki Prefecture, was a meager fifty. In a lawsuit brought by bean geese, local residents, and a non-profit association, it was maintained that the Governor was unreasonable not to designate the bean geese destination as a wildlife sanctuary. The Mito District Court dismissed the bean geese's complaint as they did not have the requisite capacity to be a party to a court proceeding, while also dismissing the claims of the other plaintiffs, stating that the Governor's failure to designate the area as a wildlife sanctuary was not extremely unreasonable or unlawful. The Tokyo High Court affirmed.

However, the manner the environmental assessment was conducted in this case was found by the District Court to have "lacked adequacy," in light of the fact that a biologist, who had cautioned that bean geese would be unlikely to use alternative sites as foraging and resting areas, was refused an opportunity to be heard at the prefectural urban planning council. In addition, the District Court stressed the importance of preserving the flocks in question, pointing out that biodiversity is better ensured by maintaining local animal populations and ecosystems as a whole, rather than just looking at each individual species.

The judiciary's reluctant approval of land development affecting wildlife habitats not only vividly reveals that there remain serious technical hurdles to be crossed before the Rights of Nature can be protected in Japan, such as amending rules and procedures governing litigation practice, but also shows that a growing number of judges are skeptical of traditional legal theory which falls short of acknowledging that nature and natural objects have inherent standing to assert their rights. Reflecting on the Amami Black Rabbits case and the Bean Geese case, Tadashi Otsuka, one of the foremost authorities on Japanese environmental law, concludes that granting *locus standi*, or the capacity to bring an action to court, to nature or natural objects is almost impossible under the current law of Japan, although he hastens to add that awareness of the concept of the Rights of Nature may be strategically effective in the long run by helping environmental groups persuasively assert standing to sue, while acting as a catalyst for new environmental protection legislation.[13]

IV. Center for Biological Diversity v. Esper[14]

In 2008, the Japanese parliament enacted the Basic Act on Biodiversity.[15] Sponsored by a cross-party group of lawmakers, the bill passed both Houses unanimously. Although there is no reference to the Rights of Nature, it is a landmark piece of legislation in that it is the first comprehensive statute

[12] Judgment of March 28, 2000, Mito Chiho Saibansho [Mito District Court] (Japan).
[13] TADASHI OTSUKA, ENVIRONMENTAL LAW 64-65 (3d ed., Yuhikaku Publishing Co., 2010).
[14] 958 F.3d 895 (9th Cir. 2020).
[15] Law No. 58 of 2008.

aimed at conserving biodiversity including wildlife, their habitats, and their connections to a variety of ecosystems. It has provisions promoting public participation both in the design and evaluation stages of environmental policies, as well as those directing the government to implement strategic environmental assessments [SEA] from the planning phase of potentially harmful development projects, earlier than in preceding environmental assessments, based on the proposals of various NGOs.

More specifically, the Basic Act on Biodiversity can serve as a vehicle to strengthen the enforcement of numerous already existing laws related to conservation, such as the Wildlife Protection and Hunting Management Law,[16] the Law for the Conservation of Endangered Species of Wild Fauna and Flora,[17] and the Invasive Alien Species Act,[18] providing citizens and organizations with a basis for requesting their revision to the government when necessary. It provides for the sustainable use of natural resources and highlights the importance of precautionary solutions before environment-threatening projects are initiated as well. Through ensuring that public opinion is taken into account, this act increases the chances of effective implementation of important policies that are widely practiced internationally but have not yet been introduced in Japan; it may well be an essential first step towards the realization of the Rights of Nature. Despite this, the Basic Act on Biodiversity remains a declaration of principles, with the exception that it obligates the national government to take measures to formulate a "National Biodiversity Strategy" and local governments to make efforts to prepare "Regional Biodiversity Strategies."

Marine life habitat destruction also illustrates the inadequacy of the present legal framework, strongly indicating that many more legislative efforts are needed before the Rights of Nature paradigm can be embraced. The circumstances are as follows: Japan's coastal ecosystems have been severely damaged by land reclamation and other development activities over the past several decades. The loss of seaweed beds and coral reefs has deprived aquatic organisms of their habitats and resources necessary for survival, reducing the self-cleansing capacity of marine environments. The Aichi Targets, agreed to at the Conference of the Parties to the Convention on Biological Diversity held in Nagoya, Japan, in 2010 and attended by 180 countries, included a commitment to minimize anthropogenic pressures on coral reefs and other vulnerable ecosystems affected by climate change or ocean acidification, but this has not yet been fully achieved, at least not in Japan.

Against this background, pursuant to a decision jointly made with the United States Department of Defense, the Japanese government is presently carrying out reclamation work on roughly 160 hectares [approximately 395 acres] in Henoko Oura Bay in Okinawa Prefecture in order to build a replacement facility for the aging U.S. Marine Corps base. Located on the coast of a subtropical island, the bay is known to be home to over 5,300 species, including 262 endangered species, one of which, the dugong, a herbivorous marine mammal similar to a manatee, is critically endangered. The reclamation plan has therefore been strongly opposed from the beginning by citizens, environmental groups, and numerous academic societies.

Amidst Japan's uninspiring judicial climate described in Part III above, conservation-minded individuals and organizations filed a unique case in the United States District Court for the Northern District of California in 2003, apparently driven by hope that American courts might be more likely to listen to their claims with open ears. They challenged the construction of aircraft runways on landfill in Henoko Oura Bay, which was likely to damage or even destroy feeding grounds and habitat for the dugong. The plaintiffs sought declaratory and injunctive reliefs based on a provision in the National

[16] Law No. 88 of 2002.
[17] Law No. 75 of 1992.
[18] Law No. 78 of 2004.

Historic Preservation Act [NHPA],[19] a U.S. statute stipulating that, prior to the approval of any federal undertaking outside the United States that may adversely affect a protected property, the head of the federal agency having jurisdiction over the undertaking must "take into account" any adverse effect on the property.

The plaintiffs' expectation turned out to be not baseless: the first stage of their litigation was a success, because, after a lengthy process involving a court order in 2008 directing the Department of Defense to comply with the NHPA and the Department of Defense's eventual report in 2014 specifying that it had discharged its NHPA obligations, the United States Court of Appeals for the Ninth Circuit, the intermediate appellate court, ultimately sided with the plaintiffs as to the justiciability of their claims. The Court of Appeals held that the plaintiffs indeed did have standing to pursue declaratory and injunctive claims and that the issues were not political questions outside the realm of judicial review. This means that they were adjudged to have met the threshold to move on to the merits, which was a result that would have been unlikely to be achieved in a Japanese court. The citizens' and organizations' wishes were fulfilled up to this point.

The plaintiffs, however, ultimately lost the case because the Department of Defense's action was judged to be within the bounds of discretion. Instead of focusing on technical procedural issues, the United States District Court proceeded to address the merits, but ruled for the Department of Defense in 2018, finding that the Department of Defense had complied with the procedural requirement to "take into account" the potential adverse effects of its proposed action on a historic property, the dugong, and that its decision was not arbitrary or capricious as there was sufficient evidence that the presence of the dugong in the area was sporadic. The Court of Appeals upheld the District Court's conclusion that the Department of Defense had adequately taken into account the environmental impact of the reclamation and runway construction project in question. According to the Court of Appeals, the Department of Defense's decision to consult with the Japanese national government, but not with the plaintiffs and local community members, was not unreasonable, as the NHPA delegates to federal agencies "the specific decisions of which organizations, individuals, and/or entities to consult (or not consult) and the manner in which such consultation occurs."

Numerous lawsuits have been filed in Japanese courts as well over the relocation of this U.S. military base, raising various issues such as whether the approval of the landfill work by the Governor of Okinawa Prefecture was duly granted or revocable by succeeding governors, but all have so far been dismissed. As of 2022, more than five years after the project began, only about thirty percent of the planned landfill area has been reclaimed. Furthermore, the discovery of soft ground on the seafloor having necessitated large-scale soil stabilization, the construction period has now been re-estimated to be twelve years instead of the original eight. The protection of dugong habitat in Henoko Oura Bay is expected to continue to be a major point of contention in every local election in Okinawa for the foreseeable future.

V. Conclusion: Toward a Breakaway from Fossilized Jurisprudence

Let one return to the story of the Amami black rabbit, a relict species that arrived and settled in Japan millions of years ago, when it was part of the Eurasian continent. This living fossil now only lives on Japan's Amami Islands, long after its closely related species died out in mainland Asia. A phenomenon similar to this occasionally takes place in the world of law as well.

[19] 54 U.S.C.S. §307101(e) (2022).

The idea that only humans and entities with legal personhood can be subjects of rights was imported from Western jurisdictions when Japan embarked on its modernization drive in the 1860s. Also, transplanted continental doctrines that confer broad discretion to public authorities to approve or disapprove development plans, as well as related complex litigation procedures, seem to be remnants of an industrial past, embodying the essence of nineteenth-century legal formalism, disconnected from the traditional Japanese outlook on nature. It may very well be the case that the useful life of those rules and doctrines has long since passed.

In light of the recent trend that more and more countries around the world are beginning to respect the Rights of Nature, it appears to be high time for Japanese lawyers and legislators to squarely face the "inescapable question" of whether or not to continue to adhere to the existing legal framework as noted by the judges in *Amami Black Rabbits v. Governor of Kagoshima Prefecture*, for otherwise Japanese law may soon be a specimen of the archaic mindset that is becoming extinct in other jurisdictions, characterized by an inflexible dichotomy between humans and nature. Fortunately, the various litigation attempts of private individuals and organizations examined in this report seem to provide a strong indication that the underlying legal consciousness of the Japanese general public is developing towards an understanding of the Rights of Nature. There is, therefore, hope that courts will begin to entertain lawsuits brought by nature or natural objects in the not too distant future.

However, in order to actually realize the Rights of Nature, including the right to life of endangered species, the Japanese legal system should not be so outdated that it may be perceived as "relict" in the world of comparative law. A legal system that is not able to protect living fossils, let alone nature as a whole, is a system that itself must remain a living fossil.