
MAJOR LEGISLATION

Jan. — Dec., 1997

1. Constitutional and Administrative Law

a. Constitutional Law

An Act to encourage the Ainu culture and spread and enlighten the knowledge of the tradition of the Ainu, etc. Law No. 52. Promulgated on May 14, 1997. Effective as of July 1, 1997.

[Background]

Ainu is indigenous people of Hokkaido, Karafuto (Sakhalin), Chishima (Kuril) Islands. Now its population is about 25,000. They lived on hunting, fishing, and gathering. Since 15th century, Japanese invaded southern Hokkaido to monopolize the profit of trading. After Shakushine's revolt (1669), they were completely subjected to privileged merchants of Matsumae clan. In 19th century, Hokkaido and other islands became important for the central government as the border between Russia and Japan. After Chishima-Karafuto Exchange Treaty (1875), Karafuto Ainu was forced to move to Hokkaido. Chishima Ainu was forced to move to Shikotan Island, and was finally extinct. (In Russia, it is said that some of Ainu people were assim-

lated by the Nivkh and the Itel'meny in Amur basin and Kamuchatka.)

The Meiji Restoration was the first step in making Japan a modern nation-state. The Empire of Japan set as its primary goals "modernization" and "civilization", and it reproduced the wildness of modernity which the modern Western world had generated. When Ezochi became Hokkaido, the Ainu people were included as subjects of the Emperor, and were made peripheral, for modernization wholly contradicted their way of life, especially how to use land. The modern concept of property right denied their right to pick the fruits from the land and their right to hunt animals, primarily salmon. The Hokkaido Former Aborigines Protection Act was enacted to "protect" Ainu people facing the danger of extinction. This act defined them as "former aborigines", granted some land to them, and imposed broad restrictions on their disposing of the land because they had no understanding of the concept of property. It was intended to encourage (or compel) them to live an agricultural life and to provide support for their welfare and education. Judging from the fact that it forced them into agriculture and inculcated Japanese culture and language in the "Ainu School" founded under provisions of this Act, the aim of the statute was to cause them to be assimilated as Japanese. This statute is said to have imitated the Dawes Act (1877) in the U.S., the aim of which was assimilation or integration of the Native Americans into the dominant culture of the United States.

The Ainu people and Native Americans are very similar. Both were deprived of their means of livelihood and their ethnic cultures, including their languages, and were forced into assimilation and marginalized by modern nation-states. But in the U.S., the policy of assimilation was abandoned, at least formally, while such a change of policy did not occur in Japan at all, so the Ainu people have been facing the danger of loss of identity as an ethnic group and have concurrently suffered from social and cultural discrimination. Hokkaido, as a local government, created welfare programs for their social and cultural independence, which were autonomous from the central government. Yet we cannot be sure that those programs are adequate for the Ainu people to be able to choose a way of life which enables them to be respected and to have pride in their being members of the Ainu

people. The fact that the Ainu Association of Hokkaido, an organization for the purpose of improving the social and economic position of the Ainu people, refused to abolish the 1899 Act, though the phrase “former aborigines” had a discriminatory tone, reflects the severe circumstances they were facing. They feared that the abolition of the Act might make their helpless situation much worse. In 1984, the Association changed its policy and decided on a new objective for the movement. It called for the abolition of the 1899 Act and the enactment of a new statute to protect the rights of the Ainu people. The bill it devised had the following contents: as basic concepts, it declared the aim of the statute was the recognition of the Ainu people with its own distinct culture, respect for ethnic pride and the guarantee of basic rights. It called for the complete elimination of racial discrimination (Article 1), seats for the representatives of the Ainu people in the Diet (Article 2), the promotion of Ainu culture and education (Article 3), the assurance of employment (Article 4), a fund to support the independence of the Ainu people and an institution to promote measures for the resolution of the Ainu problem (Article 5). The bill was discussed at the Ainu Affairs Meeting, a private advisory committee of the Governor of Hokkaido. In 1988, the committee put forward a report recommending the passage of the bill except for the demand for ethnic seats in the Diet, out of fear of violating the clause concerning representation of the whole nation, Article 43 of the Constitution of Japan. After that, political conditions were unfavorable to the recommendations in this report, but the formation of a coalition Cabinet in which the Social Democratic Party of Japan participated, and the election of the first Ainu Diet member, Shigeru Kayano, changed the mood. An advisory commission of the Chief Cabinet Secretary was set up to address this problem and issued a report, which supported the passage of this Act.

[Main Provisions]

The purpose of “An Act to encourage the Ainu culture and spread and enlighten the knowledge of the tradition of the Ainu, etc. (the new Act for the Ainu)”, stipulated in Article 1 is: “To realize a society where the Ainu people can live with their pride as a people fully

respected, by achieving plans for the promotion of Ainu culture and for the enlightenment and spread of knowledge to the Japanese people about Ainu traditions and other matters, taking into consideration the circumstances in which Ainu traditions and culture, the source of their pride, are placed, and to contribute to the development of various cultures in Japan". For that purpose, the Government and self-governing bodies must cooperate to enforce those plans (Article 3), "considering that their own will and their dignity as a people may be respected" (Article 4). Specifically, the Prime Minister is to create a basic guideline (Article 5), and the Hokkaido government is to create a basic plan (Article 6). A corporation is to be chosen to carry out those plans and to undertake work such as the training of successors, dissemination and education, research and study, of Ainu traditions and culture, according to guidelines and plans (Articles 7–13).

This statute has supplementary resolutions. In Resolution 4, it was admitted as an historical fact that the Ainu people are the indigenous people of Hokkaido. The Act of 1899 was abolished.

[Comment]

Since the end of the Cold War, the framework of the modern nation-state as an "imagined community" (by Benedict R.O'G. Anderson) has been declining in light of the processes of internationalization and decentralization. In this age, it is asserted that the nation-state should be restructured as a place where various groups with their own cultures can coexist. This proposition is sometimes called "multiculturalism". It acknowledges the existence of ethnic minority groups, which modern nation-states had virtually disregarded, and intends to affirmatively protect the identities of individuals in such groups.

Such notions, however, may be in conflict with traditional concepts in modern constitutions, such as those of "a nation" or "an individual". The modern legal fiction of the "individual" emancipated a concrete person who lived in a real society as a liberal and equal entity for the first time in the history of the human race. This emancipation was carried out by the nation-state, which was also a legal fiction. Those experiments in the Western world have not yet lost their historical meaning, and they have been important to the people in the non-Western

world who have not undergone such a process in the actual sense or in a radical way. At the same time, we cannot forget there is another issue arising from this process, which is that the modern nation-state has generated ethnic problems. If the concepts of “a nation” or “an individual” don’t work as effective means to resolve problems, but instead operate as obstacles, we may have to rethink the legitimacy of those modern ideas.

The question that remains is: To what degree should we carry out this task? We must say that no clear answer has been put forward. We can agree in a moderate way that we should maintain those concepts and correct them by adding reasonable revisions so long as such revisions contribute to further development of the fundamental values of a modern constitution, i.e. liberty and equality.

The new Act for the Ainu abolished the 1889 Act that characterized the Ainu people as “former aborigines”, and aimed to preserve and promote their culture. We can recognize this Act as an endeavour to deal with such new circumstances as we have described. Historically, the Ainu people have been in Hokkaido. The Japanese had conquered them through several wars since the 15th century and had begun to settle there after the Meiji Restoration. The problem is in the historical fact that the newcomers exploited and appropriated from the former occupants. Therefore, the Japanese should feel sorry for the Ainu as well as for the people from the former colonies of the Empire of Japan, who were made to live in Japan. In this sense, the Ainu, as well as the Koreans and the Chinese in Japan, are victims of our particular ethnic problem. Regrettably, in spite of these facts, we can’t say the Japanese government has recognized the ethnic problems as its own and carried out plans which affirmatively demonstrate sympathy for the minority groups. Thus, this statute is epoch-making in the following ways: first, it clearly acknowledges for the first time that the Ainu is a minority people with its own culture; secondly, the Japan government finally comes to recognize that this state is comprised of various peoples.

We can, however, point out defects in this statute. To begin with, the most important fact, that the Ainu is the indigenous people of Hokkaido, is not stipulated in it. In this respect, a recent decision of a

district court attracts our attention. In the Nibutani Dam case (1997), the construction of a dam at an Ainu sacred place was challenged. In that case, the Sapporo District Court acknowledged the Ainu as the “indigenous people” and held that Article 27 of the International Covenant on Civil and Political Rights and Article 13 of the Constitution protect the right of individuals “to enjoy their own culture”. This decision acknowledged that one’s commitment to his/her ethnicity is a factor in the autonomy of an individual, and suggested an approach to how we should recognize the existence of minority people and protect their rights, while maintaining such modern concepts as “a nation” or “an individual”. We agree that this decision takes a step forward in that it gives Ainu culture constitutional recognition, and shows a way leading to the resolution of our ethnic problems.

Secondly, we are afraid that this statute lacks a clause to resolve the issues of social and cultural discrimination and assurance of employment the Ainu Association has demanded to have addressed. It is true that the Diet added a resolution for the protection and promotion of fundamental rights of the Ainu, but we think that those demands should have been incorporated into this Act if the Diet had taken their claims and their social and historical conditions seriously into consideration.

With respect to the issues above, we can’t help but wonder to what degree this statute reflects the Nibutani Dam case, which clearly held that Ainu culture “must be given utmost consideration” as an indigenous people’s culture. Nevertheless, we can agree that this act is epoch-making since it is the first step in resolving our ethnic problems. We hope its aim will be realized and the development of various cultures will be supported by ensuring the conditions for minority groups to maintain and develop their own cultures. Then self-realization of an individual and democracy will be more fully achieved.

**Prof. AKIRA OSUKA
TAKATO NARISAWA**