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## Constitutional Protection of Indigenous Minorities\*

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### Introduction

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### Introduction

In this paper, I would like to take up the issue of the constitutional protection of the rights of indigenous peoples. Many discussions can be found these days regarding the protection and realization of indigenous rights which are explicitly guaranteed by constitutions or treaties, such as those in Canada, the United States and New Zealand<sup>(1)</sup>. But how might one protect the rights and interests of indigenous peoples in a country where no such provisions can be found in a nation's constitution or by treaty? I would

like to consider this problem using a recent Japanese judicial decision that seems to afford a clue. I assume the following argument has some relevance in countries where there are special treaties or constitutional provisions for indigenous peoples as well.

## 1 Various Types of Legal Protection of Indigenous Rights

Certainly, specific constitutional provisions or special treaties are the most desirable means to preserve the rights of indigenous peoples. Examples include Canada's 1982 Constitution and the treaties with First Nations and the Waitangi treaty in New Zealand. The Indian commerce clause of the United States Constitution and the individual treaties with Indian tribes may be included as well. As the tragic evidence relating to American Indians show, the treaties do not always afford adequate protection. However, the treaties provide a bridgehead for asserting the unique status of indigenous peoples.

General human rights provisions in a constitution, such as the freedom of speech and religion clauses of the U.S. Constitution's First Amendment and the equal protection clause of the Fourteenth Amendment may work to safeguard certain aspects of indigenous people's rights as well. Quite a few instances of this kind of protection can be found in jurisprudence in both the U.S. and elsewhere. In the U.S., a recent example is the 1988 Supreme Court case, *Lyng v. Northwest Indian Cemetery Protective Association*<sup>(2)</sup>, in which American Indian tribes, employing the Free Exercise clause of the First Amendment, unsuccessfully sought to enjoin the construction of a road through a forest that was traditionally used for their religious practices. Moreover, a successful example of equal protection analysis can be seen in the Australian High Court's 1985 decision, *Gerhardy v. Brown*<sup>(3)</sup> where a state law vesting title in the Aboriginal people to a large tract of land in South Australia was justified as a temporary affirmative action measure to protect ethnic minorities.

Mainstream society may be more receptive to a broad-based human rights approach than to methods which specifically focus on indigenous peoples. However, a more general methodology applies to only limited aspects of indigenous rights and suffers from the fundamentally unjust flaw of forcing the subject minorities to fight for their cause in a forum where all the conditions have been set down by the majority.

Furthermore, affirmative action is generally perceived as a temporary measure that is suited to ethnic minorities who would choose to be integrated into the mainstream society. Immigrants, as a matter of law at least, might be counted among these minorities, but indigenous peoples' wishes are most certainly different.

These deficits of domestic law may be covered by international human rights law<sup>(4)</sup>. For example, article 27 of the International Covenant of Civil and Political Rights<sup>(5)</sup> was successfully employed in a 1981 case before the United Nation's Human Rights Committee, *Lovelace v. Canada*<sup>(6)</sup>, to preserve a native woman's right to reside on a tribal reserve. In the same fashion, the famous *Mabo v. Queensland*<sup>(7)</sup> decision by the High Court of Australia referred to the *Advisory Opinion on Western Sahara* by the International Court of Justice<sup>(8)</sup> in criticizing the theory of *terra nullius*.

In this context, a 1997 Japanese decision that dealt with the indigenous Ainu people is significant because it suggested an approach to preserve the distinct rights of indigenous people without diluting the issue into a matter of general human rights law and without employing the vulnerable logic of affirmative action rhetoric.

I would like to examine the reasoning of that Japanese decision and look into the possibility of its development into a valuable precedent for courts worldwide.

## 2 Ainu People and the Nibutani Dam decision

### (1) Ainu People and the Legal Status

The Ainu are the indigenous people who have traditionally inhabited the northern parts of Japan, most notably throughout Japan's northernmost major island, Hokkaido. In recent times, the Ainu people were prohibited from living according to their distinct cultural tradition by the Japanese government after it unilaterally asserted political control over Ainu territory in 19th century without any treaties or formal agreements with the Ainu. An important part of this history includes the Japanese government's 1899 enactment of the "Hokkaido Former Aborigines Protection Law" ostensibly to help the Ainu by granting them small plots of land in an effort to assimilate them by turning them into farmers. This law was heavily influenced by the infamous Dawes Act or the General Allotment Act in the 19th century United States<sup>(9)</sup>.

The Ainu people have no reserved lands or self-governing body. Most have been assimilated into mainstream Japanese society and are scattered in cities and towns mainly in Hokkaido. About 24,000 people presently identify themselves as Ainu in Hokkaido, less than 0.02 % of the total population of Japan. After years of subjugation and discrimination, Ainu have come to face difficult living conditions. For example, according to a 1993 poll, the number of Ainu receiving welfare benefits is 2.4 times that of non-Ainu residents of the same area.

The Ainu people began to reclaim their status as an indigenous people in 1980s, but this political movement was obstructed largely by the insensibility of the ethnic Japanese public who, for the most part, consciously or unconsciously believed in a myth of Japan's ethnic and cultural homogeneity.

More recently, a new "Ainu Culture Promotion Law (Law for the promotion of Ainu culture, the spread of knowledge relevant to Ainu traditions, and an education campaign)" was enacted in 1997 to replace the 1899 law. This new law aims to realize a society where the pride of the Ainu as a people is respected, and to contribute to the development of cultural diversity by promoting Ainu culture and enlightening mainstream Japanese<sup>(10)</sup>.

While Ainu "indigenesness" was not explicitly acknowledged in the statutory text of the 1997 law, the statute's legislative history meaningfully advances the Ainu people's status in Japan. During parliamentary deliberations, the government affirmatively recognized that the Ainu are a minority people with a distinct culture and that they are indigenous to Hokkaido. On the other hand, in that discussion, the Government declined to endorse any special indigenous rights for the Ainu people. At any rate, the law is the first on the books acknowledging the existence of an ethnic minority in Japan.

## **(2) Nibutani Dam decision**

This brings our discussion to the Nibutani Dam decision<sup>(11)</sup>, which was handed down by the Sapporo District Court in Hokkaido's principal city a few weeks prior to the enactment of the 1997 Ainu Culture Promotion Law. There, the Court explicitly recognized the Ainu people as an indigenous minority people whose right to their

distinct culture is protected by law.

In that decision, the Court ruled that the Japanese government had acted illegally by expropriating Ainu sacred lands to build a dam without sufficiently considering the cultural significance of that land to the Ainu. The Court, however, refused to reverse the expropriation because the dam had already been completed and dismantling it would harm the public interest. Despite the fact that the dam still stands and the subject lands lie submerged, the decision is viewed as an important victory for the Ainu owing to the several key holdings included in the Court's ruling:

1) The Ainu people have a right to enjoy the ethnic minority group's distinct culture that is guaranteed by article 27 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) which the Japanese Government is constitutionally obliged to respect in good faith.

2) Article 13 of the Japanese Constitution<sup>(12)</sup>, which protects individual liberty and dignity generally, implicitly guarantees protection for the cultural rights of a person belonging to an ethnic minority. This is true not only because the culture of a minority people is essential to preserve the ethnic character of that people, but also because that culture is essential for individuals who belong to a minority people to build their own character and identity.

3) The Ainu people can be regarded as an indigenous people in Japan because, even after the appropriation of their territorial homeland into the Japanese national boundaries, the Ainu have constantly maintained their distinct identity as an ethnic group. The Court declined to proclaim that indigenesness *per se* generated any new or special rights for the Ainu people, but accepted instead that indigenesness entitled the Ainu people to "enhanced consideration" of whatever rights they would otherwise already enjoy as an ethnic minority.

Thus, it should be reiterated that the Court construed both the ICCPR and the Japanese Constitution as protecting the cultural rights of a member of a minority people generally, not pertaining to any particular status as an indigenous people. In principle, the cultural rights under the ICCPR and the Japanese Constitution apply to members of all ethnic groups including immigrants. But the Court found that a minority's indigenous character entitled that people to "enhanced consideration" of their culture by the government because the indigenous people had been non-consensually forced to

Article

live under the rule of the nation's majority.

Accordingly, we can see that the Court expressly avoided considering whether an indigenous people would have any special rights to self-determination regarding land, resources, and political matters. Presumably, this approach was adopted mainly because recognition of such rights would have generated serious controversy and the finding of an enhanced level for the cultural rights was sufficient to resolve the case before them.

Incidentally, neither party appealed the decision, and the District Court decision became final under Japanese law.

### **3 Constitutional Status of Indigenous Rights**

#### **(1) Constitution and International Human Rights Law**

One might ask why should we bother to be concerned with constitutional cultural rights when a relatively solid basis for protecting cultural rights can be found in the ICCPR. The answer is not the simple response that two bases are better than one, but rather that a restriction on appellate jurisdiction arising under Japanese law makes the constitutional basis essential. The Japanese Supreme Court has long maintained that the mere encroachment of treaty rights does not constitute sufficient legal grounds for appeal to the Supreme Court. Moreover, a constitutional rationale is also critical because Japanese courts interpret a limit on the content of international human rights guarantees to not exceed constitutional guarantees because the Constitution is superior to a treaty in terms of legal hierarchy<sup>(13)</sup>. Thus, even aside from rights that may be guaranteed by the ICCPR, good reasons do exist for asserting these rights on constitutional grounds in Japan.

#### **(2) Constitutional Basis for Cultural Rights**

As mentioned earlier, the Japanese Constitution does not include any explicit guarantee of the cultural rights for indigenous peoples. Rather, the Nibutani Dam decision took advantage of the broadly inclusive language of Article 13's guarantee of individual liberty and dignity; in this regard, the Court's reasoning was unfortunately

brief and simple. We must look for a substantial argument that links the constitutional conception of individual liberty and dignity and the individual right to enjoy culture of his or her people.

The recently propounded theories of Will Kymlicka, a Canadian political philosopher<sup>(14)</sup>, and of Joseph Raz of Oxford University<sup>(15)</sup> seem to be relevant here. I understand these scholars claim that freedom involves making choices among various options; our societal culture not only provides these options, but also makes them meaningful to us. In other words, cultural membership provides an intelligible context for choice and a secure sense of identity and belonging that we call upon in confronting questions about personal values and projects. This analysis reveals that the protection of minority cultures is not only passively consistent with individual autonomy, but an affirmative means for promoting the value. In so far as this is so, every individual belonging to a cultural minority should be guaranteed the right to enjoy culture of his or her people under constitutional provisions that demand meaningful, not superficial, respect for individuals and the differences arising between them.

Kymlicka also points out that it is unjust and morally arbitrary that the members of the minority cultures would not have the same ability to live and work in their own language and culture that the members of majority cultures take for granted. It is the fundamental assumption of liberalism, as Ronald Dworkin and John Rawls argue, that every individual must be treated with equal respect.

These arguments are fortified by the value commonly known as cultural diversity. Cultural diversity is important both because it creates a more interesting world and because other cultures contain alternative models of social organization that may be useful in adapting to new circumstances. This latter point is often made with respect to indigenous peoples, whose traditional lifestyles are believed to provide a model of sustainable relationship to the environment. Notably, this argument is attractive because it allows us to avoid relying solely on the interests of the affected minority and to instead focus on benefits enjoyed by the larger society from the protection of minority culture<sup>(16)</sup>. It must be noted, however, that the benefits to the majority of such diversity are spread thinly and widely, and this rationale is justifiable only to the extent that the costs of the diversity that might be born by particular members of the majority is not disproportionately high.



### **(3) Indigenous Peoples and Other Ethnic Minorities: Consent to Government**

Certainly, every individual belonging to an ethnic minority is entitled to a right to enjoy his or her people's culture. But in the Nibutani Dam decision, the Court claimed that the right became much weightier when asserted by a member of an indigenous minority people who had not given consent to rule by the majority. This was an ingenious jurisprudential technique by the Court in light of the fact that the Japanese Constitution does not explicitly recognize the existence of the indigenous peoples.

To wit, the conventional argument has looked for the constitutional basis of the indigenous rights *per se*. But this seems implausible in the Japanese context, and the Nibutani court took a twofold approach instead. First it recognized the cultural right of an ethnic minority in general that can relatively easily be found in positive law, namely article 27 of ICCPR and article 13 of the Japanese Constitution. And then the Court gave "enhancement" of the right especially to indigenous people who had never given consent to the rule of the Japanese government. Thus the Court effectively succeeded in giving special constitutional protection to an indigenous people notwithstanding the lack of any explicit constitutional provision and the Court managed this in a fashion that arguably escapes criticism as inappropriate judicial activism.

This "indigenous-people-gave-no-consent" rationale may be used to enhance other human rights as well, even in countries where special treaties or a constitutional provision concerning indigenous peoples already exist. For example, in a case like *Lyng v. Northwest Indians* that I mentioned earlier, it seems that the U.S. government should be obligated to pay more respect to the freedom of religion of Native Americans who have never freely given consent to be governed by the United States than to that of mainstream Americans.

### **(4) Indigenous Rights as Group Rights**

In the Nibutani Dam decision, the Court endorsed only the cultural right under the Japanese Constitution of an individual who belongs to a minority group. Of course, the next question quite obviously follows: what rights exist for the indigenous group as a whole? As a matter of fact, this question has relevance not only in Japan but for all

liberal democracies with indigenous peoples.

We face at least two sets of problems to answer this question. The first are theoretical problems arising from the challenge in recognizing group rights under a liberal constitution which is widely believed to embrace only such rights that are consistent with respect for the freedom or autonomy of individuals. An extreme example of this proposition can be found in the 1995 U. S. Supreme Court Case, *Adarand Constructors v. Peña*<sup>(17)</sup>, which declared that “the Constitution protects persons, not groups.” Here again Kymlicka’s theory may be helpful. Kymlicka asserts that protection of a minority’s culture is necessary to enable meaningful choice for an individual who is a member of the minority. And the minority group needs to have certain special rights to help reduce its vulnerability to the economic pressures and political decisions of the dominant society<sup>(18)</sup>. Therefore, group rights that protect minority cultures can be seen as consistent with the liberalism that serves as the foundational principle for our constitutions. Moreover, a government that ignores group differences in the name of colorblindness or impartiality inevitably makes choices and distributes resources in a way that favors the majority and concomitantly disenfranchises and alienates the minority.

Other problems are pragmatic and force us to consider whether the circumstances actually faced by any particular indigenous people makes group rights necessary and/or whether the group would in fact be able to exercise such rights. These problems pose especially difficult matters for a minority like the Ainu who have been assimilated to a remarkable degree and who do not live as a group on a traditional land base but have been scattered around the mainstream society. I personally continue to search for a convincing answer here, but at least one point does seem clear: in this context, self-determination is essential. It must be up to the members of the minority group to decide for themselves the necessity and appropriateness of their rights.

In other words, so long as a potentiality of cultural restoration remains extant, it is up to the minority members to decide whether or not to integrate into the mainstream society. Consequently, it is unjust for the majority, who in the Japanese context has long tried to destroy the Ainu minority culture, to judge unilaterally the necessity of these rights. It is not solely for people outside the minority group to decide if and when the minority culture may have become too weak to warrant maintaining.

## Concluding Remark

Finally, I continually strive to consider our role as scholars of constitutional jurisprudence looking at these questions. As long as the flame of a minority's culture continues to burn, the potentiality of that culture's existence remains. And therefore we must, I believe, pursue the theoretical possibility for constitutional protection of these rights so that, should the minority choose to move in that direction, the path will have been cleared.

## NOTES

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- (1) See generally David Getches, Charles Wilkinson & Robert Williams, Jr., *Federal Indian Law* (4th ed., 1998), Ethnicity and Group Rights (Ian Shapiro & Will Kymlicka eds., 1997), Augie Fleras & Jean Leonard Elliot, 'The Nations Within': Aboriginal-State Relations in Canada, the United States, and New Zealand (1992).
- (2) 485 U.S. 439 (1988).
- (3) 57 A.L.R. 472 (1985).
- (4) See S. James Anaya, *Indigenous Peoples in International Law* (1996).
- (5) Article 27 reads, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their religion, or to use their own language."
- (6) UN Doc. A/36/40 (1981).
- (7) 107 A.L.R. 1 (1992).
- (8) 1 I.C.J.R. 12 (1975).
- (9) For detailed historical accounts of the Ainu, see Richard Siddle, *Race, Resistance and The Ainu of Japan* (1996).
- (10) English text of the new Ainu culture law can be found online at

- <[http://www.frpc.or.jp/english/e\\_index.html](http://www.frpc.or.jp/english/e_index.html)>(last visited May 2, 2000).
- (11) 1598 Hanrei Jiho 33 (Sapporo Dist. Ct., Mar. 27, 1997). A complete annotated English translation can be found at *Kayano et al. v. Hokkaido Expropriation Committee*, 38 I.L.M. 397 (Mark A. Levin trans., 1999), which is preceded by a careful case summary by Professor Levin, 38 I.L.M. 394 (1999). This summary with key excerpts from the decision is available online at <<http://www.asil.org/malevin.htm>>(last visited May 2, 2000).
  - (12) Article 13 reads, "All the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."
  - (13) See Yuji Iwasawa, *International Law, Human Rights, and Japanese Law* (1998).
  - (14) Will Kymlicka, *Multicultural Citizenship* (1995); do., *Finding Our Way* (1998); do., *Human Rights and Ethnocultural Justice*, 4 Rev. Const. St. 213 (1998).
  - (15) Joseph Raz, *Multiculturalism: A Liberal Perspective*, in *Ethics in the Public Domain* (1994).
  - (16) See Richard Falk, *The Rights of Peoples (in Particular Indigenous Peoples)*, in *The Rights of Peoples* (James Crawford ed., 1988).
  - (17) 515 U.S. 200 (1995).
  - (18) Such minority group rights could include the right to request special language programs, the right to communal control of land, and the right to special political representation.