
CASE NOTE

Ogawa v. Hokkaido (Governor), the Ainu Communal Property (Trust Assets) Litigation

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The Ainu communal property case of Ogawa v. Hokkaido (Governor)¹ is an attempt by the Ainu people to hold the Japanese state accountable for its policies of assimilation and mismanagement of their communal property under the paternalistic Former Natives Protection Act. By introducing and providing comment on the recent appeal decision in this Japanese case, it is hoped this case note will make information regarding one of the main litigation struggles currently being undertaken by the Ainu people accessible to a wider English-speaking readership, while at the same time highlighting the similarities in the history and present legal issues faced by Indigenous groups around the world. Government management of Aboriginal assets and the legal remnants of colonization, both issues that arise in this case, are problems that affect Indigenous groups in many countries. However, the Japanese judiciary has not been sympathetic to the Indigenous aspects of the case. The recent appeal decision by the Sapporo High Court upheld the

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1. Judgment of the Sapporo District Court, 15 July 1999, Heisei 11 (Gyou U) No. 13, and on appeal, judgment of the Sapporo High Court, 27 May 2004, Heisei 14 (Gyou Ko) No. 6. Like many other court decisions in Japan, the case is referred to based on its content rather than the plaintiffs' and defendants' names, and is generally known as the "*Ainu Communal Property Litigation*" (*Ainu kyōyū zaisan soshō* in Japanese). The case (in the first instance) has also been referred to as the "*Ainu Trust Assets Litigation*"—see M. Levin & T. Tsunemoto, "A Comment on the Ainu Trust Assets Litigation in Japan" (2003) 39 Tulsa L. Rev. 399.

lower Court's findings that the procedure for restitution of Ainu communal property as provided for in the Cultural Promotion Act and carried out by the Hokkaido government was neither invalid, nor void. The Court found the defendant did not know the management details and whereabouts of some of the designated communal property that had been under its control since 1899. Nonetheless, the Court interpreted the restitution provisions of the Cultural Promotion Act narrowly to find the government had met its duty, which was only to return the US\$13,600 of communal property "actually managed" by the governor when the Cultural Promotion Act came into force in 1997.

The decision handed down by the Sapporo High Court on 27 May 2004 in the appeal of the *Ainu Communal Property Litigation* is a modern day reminder of the recent history of the annexation and colonization of Ainu Moshir (Hokkaido) by Japan, and attempts to assimilate the Indigenous Ainu.² As such, the following outline of the facts surrounding this case and the appeal Court's decision serves, to a certain extent, to demonstrate to an audience who may not be familiar with this history the nature of both the past and present interaction between Ainu and the Japanese state and legal system, and the problems encountered by the Ainu in having their needs and legal claims addressed therein.³ This case centres around attempts to return the communal property of Ainu people that was managed by the secretary of the Hokkaido Government Agency and later the governor of Hokkaido under the *Hokkaido Former Natives Protection Act* of 1899.⁴ The *FNPA* was a paternalistic and assimilationist *Act*, representative of policy toward Indigenous peoples generally in many countries at the time. While it recognized and attempted to address the loss of livelihood and poverty imposed on Ainu since Japan claimed Hokkaido for itself in 1869, the *Act*

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2. For an outline of the history and activism of the Ainu people and the policies of the Japanese state towards them, see R. Siddle, "Ainu: Japan's Indigenous People" in M. Weiner, ed., *Japan's Minorities: The Illusion of Homogeneity* (London: Routledge, 1997). For a comprehensive examination of this history, see R. Siddle, *Race, Resistance and the Ainu of Japan* (London: Routledge, 1996) [*Race and Resistance*].
 3. The case is described by Ainu woman and activist Yuuki Hasegawa as "a vital court case in the history of the Ainu, in order to open a new chapter in the development of policy for the Ainu as [I]ndigenous peoples." This is said to be because of the historical juncture at which this litigation has occurred; the repeal of the *Hokkaido Former Natives Protection Act*, *infra* note 4, means clear evidence of discriminatory policies against the Ainu no longer exists. And yet, the new law that Ainu activists sought (see note 7, below), which would guarantee them Indigenous rights, has not been enacted to take the place of this former law. See Y. Hasegawa, "Social Insecurity and Minority Rights in the Information Age" (2004) 2 *Asia Rights J.*, online: <http://rspas.anu.edu.au/asiarightsjournal/Yuuki_Hasegawa.pdf> at 6.
 4. *Hokkaidō kyūdojin hogohō, Meiji sanjūningen hōritsu dainijūnanagō* [Law No. 27, 1 March 1899] [*FNPA*]. For an English translation of this law see *Race and Resistance*, *supra* note 2 at Appendix 1. The word used for "Native" in Japanese, "*dojin*," means literally "person of the dirt/soil" and is no longer used because of its derogatory connotations.

also assumed that the devastation of Ainu life and culture was “an irresistible course of nature” given that “the superior get the better of the inferior.”⁵ In addition to the provision of some land for farming and the equivalent of basic education and welfare expenses, Article 10 of the *FNPA* placed the management of the communal property of “former [N]atives” in the hands of the secretary of the new colonial Hokkaido Government Agency, on the assumption that Ainu could not capably manage this property themselves.

Some 100 years later in 1997, the *FNPA*, though largely inactive, was still in force. Perhaps keen to put such an embarrassing anachronism behind them, with Japan having recently signed the *International Convention on the Elimination of all forms of Racial Discrimination*⁶, the new *Cultural Promotion Act*⁷ enacted by the government in 1997 included supplemental provisions providing for the repeal of the old *FNPA*. These supplemental provisions also provided for the return of any remaining communal property still managed by the Hokkaido governor under the old *Act* to the legal successors of the original communal owners.

While the *Cultural Promotion Act* was not the legislation Ainu leaders had been actively campaigning for since 1984 (there was no mention of the Indigenous rights, a self-reliance fund or other guarantees originally sought⁸), its enactment did involve a formal hearing with the Hokkaido Ainu Association and informal liaison with then sitting Diet Upper House member and Ainu elder Shigeru Kayano.⁹ The supplemental provisions of the *Act*, which provide the procedure for the return of communal property, were,

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5. “Reasons for the Introduction of the *Former Natives Protection Act*”, in Hokkaido Utari Kyōkai, *kokusai kaigi shiryō shū, 1987-2000* [Ainu Association of Hokkaido, *Compilation of Materials from International Conferences, 1987-2000*] at 16.
 6. GA Res. 2106 (XX), Annex 20, UN GAOR Supp. No. 14, UN Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 Jan 1969) [*ICERD*].
 7. *Act for the Promotion of Ainu Culture, the Spread of Knowledge Relevant to Ainu Traditions and Education Campaign* [Law No. 52, 1997] [*Cultural Promotion Act*]. For an unofficial English translation, see online: Foundation for Research and Promotion of Ainu Culture <http://www.frpac.or.jp/eng/e_prf/profile06.html>; or University of Hawaii (trans. M. Yoshida Hitchingham) <<http://www.hawaii.edu/aplpj/pdfs/11-masako.pdf>>.
 8. The *Draft Law Regarding the Ainu People*, which the Ainu Association of Hokkaido had sought to have enacted since 1984, was comprehensive and addressed the elimination of discrimination; special seats in local and national legislative assemblies; the establishment of an Ainu independence fund and an Ainu consultative body; policies to support and promote Ainu primary industries and employment opportunities, and return Ainu fishing rights; and policy to address Ainu education issues, introduce Ainu language, culture and history into syllabuses, and develop a national Ainu research institute, with an active role assured for Ainu people. For an English translation, see *Race and Resistance*, *supra* note 2 at Appendix 2. The *Cultural Promotion Act* that was ultimately enacted addressed only the last (educational and cultural) of the above demands.
 9. On the Japanese domestic political and legal background to the consideration and drafting of the *Ainu Cultural Promotion Act*, and a critical evaluation of the new law, see R. Siddle, “An Epoch-Making Event? The 1997 *Ainu Cultural Promotion Act* and its Impact” (2002) 14:3 *Japan Forum* 405.

however, an afterthought, largely overlooked and little debated either in the national Diet or with the Ainu Association itself. Whilst the Ainu Association agreed to the repeal of the old *FNPA* and provided its qualified support for the *Cultural Promotion Act*¹⁰ (and for this reason originally would not be involved in the *Ainu Communal Property Litigation*¹¹), there was no detailed discussion with them or other Ainu groups regarding how any remaining communal property managed by the government should be dealt with on the *Act*'s repeal.

The supplemental provisions providing for the property restitution were, therefore, drafted by government bureaucrats in the relevant government ministries without any consultation with the Ainu. These provisions set out that all communal property managed by the governor of Hokkaido under the *FNPA* at the time of its repeal in 1997 was to be publicly advertised. The original communal owners or their descendants would then be given one year from the date of advertisement to make an application, supported by evidence of their entitlement, for restitution of any communal property held. The communal property would then be returned by being distributed among the successful claimants, and any communal property remaining after the completion of this restitution procedure was to revert to the foundation established to carry out the aims of the new *Cultural Promotion Act*.

Ainu communal property originally comprised profits from state-run Ainu fishing guilds, funds bequeathed by the Emperor, communal land, and remaining surplus from alms and educational subsidies.¹² After nearly 100 years of managing this property, the total sum of communal property listed by the Hokkaido government in its notice of 5 September 1997 was some 26 items of cash valued at just 1,468,338 yen or approximately US\$13,600. This comprised 18 items of designated communal property and 8 items of non-designated communal property held by the governor in 1997.¹³ This sum

10. *Ibid.* See also *Ainu kanren shisaku kankei shōchō renraku kaigi ni okeru iken chinjyutsu, Hokkaidō Utari Kyōkai rijichō*, Heisei 8nen 7gatsu 25nichi. [Statement of Executive Director of the Ainu Association of Hokkaido to the Liaison Conference of Government Ministries Involved in Policy Relating to the Ainu, 25 July 1996]

11. See e.g., N. Ogasawara, *Ainu kyōyū zaisan saiban: koishi hitotsu jiyū ni narazu* [*The Ainu Communal Property Case: Not Even a Pebble's Worth of Freedom*] (Tokyo: Ryokufū Shuppan, 2004) at 48-51; *Ainu minzoku kyōyūzaisan saiban wo shien suru zenkoku renrakukai, Ainu minzoku kyōyūzaisan kankei shiryōshū* [National Network in Support of the Ainu Communal Property Case, *Compilation of Documents Related to Ainu Communal Property*], (Sapporo: 1998) [*Documents Related to Ainu*].

12. *Ainu Communal Property Litigation*, *supra* note 1 at 4; Ogasawara, *ibid.*, at 21-23.

13. Some property had been managed by the governor on behalf of the Ainu people, without ever being officially "designated" as communal property, in accordance with the procedure set out under the provisions of Article 10(3) of the *FNPA*. The 1997 restitution thus also included the advertisement and return of non-designated communal property held by the governor, under the same procedure as that for designated property. The existence of such non-designated property is one example of the irregular nature of the management of Ainu communal property by the governor of Hokkaido under the *FNPA*.

seemed rather low, considering the amount and present-day value of the communal property managed by the governor in the preceding 100 years. For example, the governor had managed, sold and transferred over 181 acres (74 hectares) of communal land allotments in Asahikawa, and yet the sum of money held in trust in 1997 as a result of this sale was only US \$7,100. The advertised communal property was also later found by the Sapporo High Court in the appeal decision in *Ogawa v. Hokkaido (Governor)* not to include all of the items that were designated “communal property” under Article 10(3) of the *FNPA*. Specifically, it was found that five items of real property that had been officially designated as communal property and under the management of the Hokkaido government had not been advertised in 1997: a plot of land with facilities for drying seaweed in Makubetsu (previously run by a combined Ainu and Japanese fishing guild), and four fields of uncultivated land in the town of Ikeda. This property was admittedly no longer in government hands, and yet the Sapporo High Court also acknowledged that the Governor himself was not cognizant of how, when or to whom the rights in respect of this property had been transferred, and did not hold any documentation clarifying or recording any such transfer.¹⁴ This finding of fact by the Court confirms that, at the very least, the defendant had failed to maintain comprehensive records of its management of Ainu communal property, and as a result did not in fact know what had become of some of the property previously under its management.

Under Article 3(3) of the supplemental provisions of the *Cultural Promotion Act*, those wishing to claim rights to the restitution of the property that was actually advertised (all cash) were given one year to submit documents proving their entitlement as legal successors of the original communal owners. If not claimed, this property would vest in the foundation established to carry out the aims of the *Act*.¹⁵

A number of Ainu were unhappy with the lack of explanation regarding how the amount and value of the communal property listed in the government notice had been reached, and what had happened to communal property not listed there. They were also dissatisfied with the failure to consult Ainu people regarding the procedure and means for distributing their own property, and the failure of the Hokkaido government in 100 years of management to report even once to the communal owners on the management of these assets. Lobbying the government for answers and explanations did not prove fruitful,¹⁶ and so, 23 Ainu, coordinated by Ryukichi Ogawa (now representative for the group of 18 appellants) applied for restitution of the property that had been advertised on 5 September in

14. Judgment of the Sapporo High Court, 27 May 2004, Heisei 14 (Gyou Ko) No. 6 at 10.

15. *Cultural Promotion Act*, *supra* note 7 at Article 3(5).

16. Ogasawara, *supra* note 11 at 42.

accordance with the procedures as outlined, so that it would not vest in the foundation established under the *Cultural Promotion Act*. At the same time, based upon a sense that the sum total communal property advertised in 1997 was unreasonably low, these Ainu individuals and their supporters continued to question the government and demand answers. Their enquiries included specific questions, amongst other things, concerning what had become of communal land allotments in Asahikawa and other real property no longer managed by the defendant, and the price and circumstances under which it had been transferred.¹⁷ With little or no documentation or information with which to confirm their suspicions regarding the valuation, management and inclusiveness of the advertised communal property, the Ainu applicants also focused their requests to the government on the disclosure of documents and information to clarify the circumstances of creation, place of creation, history of management, and any reasons for changes in the monetary value of the property advertised in the notice of 5 September 1997.

In respect of the circumstances and place of creation of the items of communal property listed, the Hokkaido Government (*Hokkaidōchō*) indicated that, due to the passage of time, its obligation to store these old documents had passed, and, as a result, the original documents no longer existed and could not be provided. An application under the *Hokkaido Freedom of Information Ordinance*¹⁸ resulted in a decision to provide disclosure and access to certain parts of the remaining documents sought pertaining to the history of management and changes in the monetary value of the communal property. From the documents disclosed, it became clear that proper documentation regarding communal property existed only from 1980 onwards, soon after all such property was converted into cash in term deposits and bank credit. Documentation in the years prior to this was sporadic with large gaps.¹⁹ Despite these gaps in property management records, the Governor of Hokkaido announced in the regional assembly in 1998, “Because of the very lengthy period of time which has passed, I believe a further investigation of communal property would be extremely difficult,”²⁰ and thus further investigation of potential records in existence was not undertaken. Dissatisfied with these responses by the Hokkaido government and the lack of documentation, the applicants applied for restitution of the advertised property, feeling there were few other avenues left to them. Twenty-three of these applications were successful, while three were rejected for lack of proof of entitlement. Both the successful and

17. *Documents Related to Ainu*, *supra* note 11.

18. *Hokkaidō jyōhō kōkai jyōrei*, *Hokkaidō jyōrei dai28gō*, Heisei 10nen 3gatsu 31nichi [Hokkaido Ordinance No. 28, 31 March 1998].

19. Ogasawara, *supra* note 11 at 40.

20. National Network in Support of the Ainu Communal Property Case, *National Network News on the Ainu Communal Property Case*, Annex 1, (15 May 2004) [on file with author] [*National Network News*].

unsuccessful applicants then brought an action in the Sapporo District Court against the Governor of Hokkaido, challenging the legal validity of this restitution procedure.

With all documentation regarding the creation, existence and management of communal property held by the Hokkaido government, and with attempts to have the government disclose this documentation only partially successful, the Ainu applicants were left unable to prove exactly what communal property had been omitted from the September 1997 notice, or whether, and if so why, the monetary value of the property cited was undervalued. This made bringing a civil code action based upon violation of property rights very difficult, as without adequate documentation indicating what communal property had existed and what had become of it, the applicants were unable to prove the specific existence or whereabouts of items of property in respect of which their rights had been violated, or what damage they had suffered as a result.²¹

Thus, litigation of this case was, ironically, made difficult from the outset precisely for the very reasons for which it was brought: faulty or careless management made the Hokkaido government either reticent or unable to provide the Ainu applicants with full documentation regarding the communal property they had managed for 100 years. As a result, when these Ainu felt they were left with no option but to litigate to uncover the history of the management and whereabouts of their communal property, it was difficult for them to pursue the normal civil code avenues of litigation based on the violation of property rights.²²

A further option of an action seeking damages for the negligence of state officials in the management of the applicants' property under the *State Damages Act* (*kokka baishō hō*)²³ was also considered inappropriate, as reliance on this law, which was enacted in 1947 and is non-retroactive, would mean that none of the actions or negligence of state officials in the designation and management of communal property in the vital pre-World War II period (from enactment of the *FNPA* in 1899 until 1947) could be challenged.²⁴ It was during this period that not only the creation and designation of communal property occurred, but also many problems with its management that the plaintiffs wished to highlight. There was, for example, a 32-year gap in record keeping between when Ainu assets were transferred from previous Wajin (non-Ainu Japanese) property "supervisors" to the governor of Hokkaido on enactment of the *FNPA* in 1899, and when this

21. Interview with appellants' attorneys, Mr. Fusagawa, Mr. Muramatsu and Mr. Satō (6 July 2004) ["Interview"].

22. *National Network News*, *supra* note 20.

23. Showa 22nen, 10gatsu 27nichi [*State Damages Act*, Law No. 125, 27 October 1947].

24. "Interview", *supra* note 21, and confirmation interview with Mr. Fusagawa (15 February 2005). The *FNPA* was most actively used in the pre-World War II period prior to enactment of the current Japanese *Constitution* of 1946.

property was finally officially “designated” communal property by the governor under Article 10 of that *Act* in 1931.²⁵

As a result, with the above forms of litigation unfeasible, the plaintiffs’ attorneys were left with the difficult task of bringing an administrative law action arguing the illegality of the restitution procedure and the supplemental provisions of the *Cultural Promotion Act*. The plaintiffs thus brought an action seeking a finding that the administrative measure (*shobun*) purporting to return property to applicants was either void (*mukō*) or invalid (*torikeshi*) due to the illegality or unconstitutionality of the procedure by which the restitution was carried out. In the alternative, they argued that Article 3 of the supplemental provisions (which set this procedure out) was void or invalid because the provision was illegal or unconstitutional on its face.

It proved difficult to achieve the plaintiffs’ aims using this type of administrative law claim, however. This difficulty arose from the fact that the administrative law action focused on the legality of the *Act* and process of restitution, whilst the plaintiffs actually wished to hold the government accountable for the sloppy and careless mismanagement of their property over the 90-odd years *preceding* the restitution in question. Thus, the very acts that the plaintiffs wished to shed light upon—including a lack of documentation, a failure to have managed or adjusted the value of the property for inflation, and the failure to account for all the property originally designated or placed under the government’s management²⁶—all preceded the restitution procedure actually in question in this case.

One solicitor who joined the plaintiffs’ legal team after the action had already commenced indicated, when asked after the Sapporo District and the appeal High Court had handed down their decisions, that he may not personally have chosen to litigate using this administrative law action ahead of all other litigation possibilities.²⁷ It seems, however, that at the time the action was brought, the prevailing view among the plaintiffs’ legal team was that no better litigation option existed. The plaintiffs themselves felt that it was important to bring this issue and alleged injustice into the public spotlight, and continue to seek answers from the governor. They thus pursued the litigation despite its difficulty and these obstacles. They felt to do otherwise would simply let the matter, and 100 years of history, be “swept under the carpet.”

25. Despite enactment of the *FNPA*, this property was not designated “Ainu Communal Property” under Article 10 of the *FNPA* until many years later in 1931, and records regarding the property were also not kept until the same year. The management of the property in the interim period is unclear: “Interview”, *supra* note 21.

26. *National Network News*, *supra* note 20.

27. Attorney Satō in “Interview”, *supra* note 21. Mr. Satō felt there was still some potential for the use of an action based upon the *State Damages Act*, *supra* note 23.

The plaintiffs' arguments regarding the unconstitutionality of the restitution procedure were based on alleged breaches of Article 31 (due procedure), Article 29 (property rights) and Article 13 (respect for the individual and the pursuit of happiness) of the Japanese *Constitution*. The plaintiffs argued that the property rights guaranteed under Article 29(1) of the *Constitution* were violated because the defendant had failed to fulfil its duty of honest and careful management of the property under the *FNPA* and the *Cultural Promotion Act*. This breach of duty was said to arise due to the defendant's: (1) failure to inform the communal property holders or restitution applicants of how non-monetary forms of communal property had been disposed of; (2) failure to clarify for the communal owners the details of the management and administration of their property; or (3) failure to adequately clarify how the advertised sum of communal property had been reached, or to show that the calculation of this sum was correct; and finally (4) failure to contact and return communal property to all communal owners, placing the burden instead on the communal owners to submit applications in order to have their property returned.²⁸

With respect to the due process claim, Article 31's due process guarantees also apply to administrative procedures. On this basis, the claimed breach of Article 31 was argued to arise from the defendant's (1) failure to clarify the basis upon which the sum of communal property to be returned had been calculated; (2) failure to actively investigate or contact the true communal owners of the property, requiring them instead to be aware of their inheritance rights to communal property, and apply for restitution themselves; (3) failure to confirm whether the procedure enacted, which returned communal property only to those who applied for it, and only if they applied within a limited one-year period, was in conformity with the wishes of the true communal owners (the Ainu people); and (4) failure to carry out an "appropriate" (*tekisei*) or "due" process, because the defendant failed to involve the Ainu people.²⁹

Finally, it was argued that the spirit of Article 13 of the Japanese *Constitution* (respect for the individual) demanded respect for the Ainu as an Indigenous people, in accordance with the Sapporo District Court finding in the 1997 *Nibutani Dam* case³⁰ that this article guaranteed Ainu the right to

28. Judgment of the Sapporo District Court, 15 July 1999, Heisei 11 (Gyou U) No. 13 at 10.

29. *Ibid.* at 11.

30. Judgment of the Sapporo District Court, 27 March 1997, *Hanrei Jihō* 1598 at 33 [*Nibutani Dam*]. For the English translation of this case by M. Levin, see *Kayano v. Hokkaido Expropriation Committee* (1997), 38 I.L.R. 394, online: University of Hawaii <<http://www.hawaii.edu/law/faculty/publications/nibutani.pdf>>. For articles discussing this case, see e.g., Toshiaki Sonohara, "Toward a Genuine Redress for an Unjust Past: The Nibutani Dam Case" (1997) 4:2 E Law, online: <<http://www.murdoch.edu.au/elaw/issues/v4n2/sonoha42.html>>; and G. Stevens, "The Ainu and Human Rights: Domestic and International Legal Protections" (2001) 2 Asia Pac. J. H.R. & L. 110.

enjoy their own distinct Indigenous minority culture, and required due regard for this culture when implementing policies that may affect its enjoyment. It was argued, as a result, that Article 13 of the *Constitution*, read together with Article 4 of the *Cultural Promotion Act*³¹ (respect for Ainu autonomous spirit and ethnic pride), required that the provisions of the new *Cultural Promotion Act* be both interpreted and implemented in a manner which respected Ainu ethnic pride, recognized Ainu Indigenousness and took into consideration the autonomous spirit of the Ainu people. Supplemental Article 3 of the *Cultural Promotion Act* was also argued to be in breach of both Article 13 of the *Constitution* and Article 27 (minority language, culture and religion rights) of the *International Covenant on Civil and Political Rights*,³² as none of the above factors of Ainu Indigenousness or cultural enjoyment rights had been considered in the enactment of the restitution procedure contained in this supplemental article, the consent of the Ainu people to this procedure had not been sought, and, it was argued, Ainu people had not been involved in the establishment of this procedure.³³

The decision in the first instance by the Sapporo District Court dismissed the plaintiffs' claims outright. The Court found, in respect of the 23 plaintiff applicants who had communal property returned to them, that the restitution was a beneficial administrative measure, whereby the plaintiffs were awarded the communal property they had applied for. For this reason, it was found that they had not suffered any loss or violation of their legal interests that would entitle them to seek to have the restitution found void or invalid.

Thus, the Court found that the plaintiffs could not argue they had suffered any loss due to the defendant's failure to adjust communal property monetary values for inflation whilst managing it, as the restitution decision had awarded them the sums they claimed, at the values advertised. Nor, according to the Court, did the 23 plaintiffs have a legal interest that entitled them to have the restitution procedure found void or invalid due to a violation of Ainu procedural rights. Even if the Ainu people, as a minority, had a procedural right to participate in the decision making surrounding the restitution of their communal property, and even if this right had been violated, the plaintiffs had not suffered any loss that required legal remedy

31. Article 4 of the *Ainu Cultural Promotion Act*, *supra* note 7, states "national and local governments should respect the autonomous spirit and ethnic pride of the Ainu people in the implementation of the measures to promote Ainu culture."

32. 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [*ICCPR*]. The *ICCPR* came into force in Japan in September 1978, and is generally understood to be self-executing and therefore have direct applicability in Japanese domestic law: Y. Iwasawa, *International Law, Human Rights, and Japanese Law* (Oxford: Clarendon Press, 1998). Article 27 of the covenant was applied directly to the situation of the Ainu in Japanese law by the Sapporo District Court in *Nibutani Dam*, *supra* note 30; see also Stevens, *supra* note 30.

33. Judgment of the Sapporo District Court, 15 July 1999, Heisei 11 (Gyou U) No. 13 at 11-12.

as a result; even if the present restitution procedure was found void and ordered to be repeated with Ainu participation, nonetheless, it would not be possible to make a decision more beneficial to the plaintiffs than the present one, which awarded them exactly what they had claimed. Nor, the Court found, did it matter that the plaintiffs had only applied for this communal property so that it would not vest in the Foundation for Research and Promotion of Ainu Culture (“FRPAC”)—the defendant had fulfilled its duty and was not required to enquire into applicants’ motives in applying for restitution.

As a general rule, and from a purely black letter law perspective, it is not difficult to understand why the Court would make this latter finding; it would not be logical or reasonable to impose a duty on governmental administrative agencies to inquire into the motives behind each administrative application they receive. But for the Ainu plaintiffs, given the way the *Cultural Promotion Act* supplemental provisions were drafted, this left them in a catch-22 bind. If they did not apply for restitution, the communal property as advertised would vest in FRPAC, and that would be the end of the matter. Failing to apply for restitution would leave them with no legal relationship and, therefore, no legal standing to question the amount and nature of the communal property advertised, or its method of restitution. When they did apply for restitution, however, they were granted the property they applied for, as advertised, and thus the measure was seen as entirely beneficial to them. In this manner, with the defendant not required to inquire into their motive for seeking restitution, or the adequacy of that restitution, the legal result of the Court’s formalist reasoning was that whichever action the plaintiffs took, they inadvertently thwarted their own aims.

The Court also dismissed the plaintiffs’ arguments that they had suffered a loss because they could not claim communal property that should have been advertised in the 5 September notice, but that had, for whatever reason, been omitted. Again, this was because even if, as the plaintiffs claimed, the defendant had not included all designated communal property in existence in its public notice, this situation could not be altered by finding the decision to return or not return advertised communal property to the plaintiffs void. The Court held that the present restitution decisions made no determination in respect of, and therefore had no legal effect in regard to, property that was not advertised and, therefore, not the subject of a restitution decision in this case. Any loss the plaintiffs suffered, if existent, was caused by a failure to include property in the public notice of 5 September 1997, and not by the restitution decisions that they challenged. And yet, it had not been possible for the Ainu plaintiffs to bring an action challenging any omissions in the notice of 5 September itself, due to precisely the very circumstances which precipitated their decision to litigate; their lack of access to sufficient documentation, held by the governor, meant

they were unable to lead evidence that might prove exactly which items of communal property had not been advertised.

Thus, as the plaintiffs had been granted the property they sought, the Court found that they had no legal interest violated, upon which they could base their application for relief, such as a finding that the restitution decision was invalid or void.³⁴ The Court achieved this result by focusing only on the very last step in the restitution procedure, which awarded property to the plaintiffs, and disregarding everything that preceded it. The Court did not address the background to this restitution decision itself, including the history of the management (or mismanagement) of Ainu communal property; the lack of, or failure to disclose, management documents; or whether, in fact, a full survey of all the communal property in existence was carried out before the restitution procedure was begun.

Three Ainu plaintiffs had their application for the return of communal property rejected by the defendant, and their arguments regarding the illegality and unconstitutionality of this procedure were the same as those of the other 23 plaintiffs, cited above. In the case of these three unsuccessful plaintiffs, however, the Court could not dismiss their claims outright on the basis that they had received exactly what they had applied for in the restitution procedure. It thus examined the merit of their claims in more detail. The Court nonetheless held that the arguments of these plaintiffs regarding Articles 29, 31 and 13 of the *Constitution*, Article 27 of the *ICCPR* and Article 4 of the *Cultural Promotion Act* were general, abstract arguments regarding the illegality of the restitution procedure as a whole, and not arguments addressed specifically to the illegality of the decision rejecting their application for property. The generality of these arguments was said to be manifest in the fact that their arguments did not differ from those of the above plaintiffs who *had* in fact been awarded communal property. These arguments were held, on this basis, to be without reason. The Court held further, and in any event, that first, finding Article 3 of the supplemental provisions of the *Cultural Promotion Act* unconstitutional and thus void, as the plaintiffs sought, would not obviate their situation. Rather, if this provision was void, that would leave the plaintiffs without a legal provision upon which to claim the return of communal property from the defendant at all.³⁵ Second, the plaintiffs' claim that the lack of involvement

34. *Ibid.* at 17-18.

35. On this aspect of the case, see Levin & Tsunemoto, *supra* note 1. This case comment cites the amount of the trust assets as "approximately US\$200,000." It is not clear where this sum originates from, but it may be the estimated true value of the communal property in question. Alternatively, it may be based upon the "damages" sum cited in *Ainu Communal Property Litigation* court documents, for administrative purposes. In cases such as this, where the remedy sought is a finding that a government measure is void or invalid, there are not actually any monetary damages sought. However, a nominal damages sum of approximately \$10,000 per plaintiff is assigned to administrative law cases for the purposes of calculating court

of Ainu people in the decision-making process made the non-restitution decision procedurally invalid was rejected. It was held that the defendant had reflected the views of Ainu by including one Ainu member from each of two of the larger local Ainu associations in the review committee that determined whether applicants qualified to receive the communal property they claimed from that advertised.³⁶

Again, the Court avoided the plaintiffs' main arguments by focusing solely on the process and effect surrounding the final administrative decision concerning whether applicants received the communal property they applied for or not. It thus neatly avoided any examination of whether the Ainu had been involved in the decision-making process regarding the manner of restitution itself (as opposed to simply who qualified to have property returned to them), whether Article 3 of the supplemental provisions or its method of implementation were illegal or unconstitutional, or whether the defendant had carried out a sufficient survey of the communal property still in existence before advertising it as available for restitution.

Given the nature of the action brought, and past judicial decisions in similar cases, this result was perhaps not particularly unusual. It is said that only around 10 per cent of all plaintiffs are successful in administrative lawsuits brought to challenge the acts of state administrative organs in Japan.³⁷ Further, in this case, if only the narrow "act in question" is focused on, that of restitution to the plaintiffs by the Hokkaido Government of the property they had applied for, the case is a cut and dry instance of the plaintiffs receiving the benefits they had applied for, or, alternatively, not receiving these benefits based on perfectly reasonable bases (that they could not satisfactorily prove they were descendants of the communal owners). Such a formalist finding also enables the Court to deal with the case briefly and succinctly without the need to address the majority of the plaintiffs' arguments. It might even be said that in order to find otherwise than that the restitution procedure itself was valid in the current Japanese legal environment, the Court would have to have given special consideration to

processing fees, which are a percentage of the estimated litigation damages in Japan. The sum of \$200,000 may originate from a reference to this nominal damages sum for the 23 plaintiffs. The value of the communal property actually discovered, advertised and returned to the Ainu people by the Hokkaido government and litigated in this case was approximately US\$13,600, although the plaintiffs' assertion was that this was undervalued and under-inclusive.

36. These arguments by the plaintiffs appear to refer to the Ainu people's right to effective participation in decisions which affect them under Article 27 of the *ICCPR*, *supra* note 32. For an examination of this aspect of the decision in the first instance, and of the right of effective participation of the Ainu people in general, see S. Kawashima, "The Right to Effective Participation and the Ainu People" (2004) 11 *Int'l J. of Minority and Group Rts.* 21.
37. *Shihōseido kaikaku shingikai, daigokai gijiroku (Kurayama Tsunesuke, Sendai shimin onbuzuman jimukyokuchō)*, Heisei 11nen 10gatsu 26nichi [Minutes of the 5th meeting of the Justice System Reform Council (Statement of Tsunesuke Kurayama, Managing Director of Sendai Citizens Ombudsman Office), 26 October 1999], online (in Japanese): <<http://www.kantei.go.jp/jp/sihouseido/991118gijiroku5.html>>.

either Ainu Indigenesness, or the history of Ainu assimilation and subjugation which formed the backdrop to the *FNPA*, and management of Ainu property by the state and ultimately the present restitution procedure. This was something the Court chose not to do, in a judgment perhaps typical of the judicial conservatism of Japanese courts.

In this respect, however, the present decision stands in stark contrast to the perhaps unusually innovative decision of the Sapporo District Court in the *Nibutani Dam* case.³⁸ In that judgment, the Court examined the history of Ainu assimilation and subjugation by the Japanese state at length, finding that this history obliged Japanese state organs to give special consideration to Ainu enjoyment of their minority culture under Article 27 of the *ICCPR* and Article 13 of the *Constitution*, when carrying out policies which may affect these rights.³⁹ It also stated that “the greatest degree of consideration” was warranted before land issued to the Ainu plaintiffs under the *FNPA*, which “force[d] them into an agricultural lifestyle ... representing a significant factor in the deterioration of their ethnicity,” was now confiscated to pursue development projects in the public good.⁴⁰ Although not entirely necessary to determine the case, the Court also found, for the purposes of the decision (leaving aside the question of whether this finding entitled the Ainu to Indigenous rights such as self-determination), that the Ainu were an Indigenous people.⁴¹ For this reason, as a minority who did not consent to majority rule (unlike some other immigrant minority groups), the Court found that the Indigenous culture of the Ainu required greater consideration by the state than that of other non-Indigenous minorities.⁴² It was open to the Court to make a similar finding, building on the jurisprudence of the *Nibutani Dam* case, in the *Ainu Communal Property Litigation*. In particular, the *Former Natives Protection Act* by its very name—and its provisions on Ainu communal property that formed the centre of this case by their very nature—single out Ainu from other minorities, as “former Natives” (*i.e.*,

38. *Supra* note 30.

39. *Ibid.* See M. Levin translation, online: The University of Hawaii <<http://www.hawaii.edu/law/faculty/publications/nibutani.pdf>> at 27, 28, 32-34, 36.

40. *Ibid.* at 36-37.

41. *Ibid.* at 32.

42. *Ibid.* at 28-29. On the similarities between this aspect of the Court’s reasoning and the theories of Will Kymlicka, see T. Tsunemoto, “*kenpō no saizensen arui wa saienpen—senjyū/shōsūminzoku no kenri*” [“The Constitutional Front Line, or the Reaches of the Constitution Redefined: The Rights of Indigenous/Minority Peoples”], in M. Kamiya, ed., *Nihonkokukenpō wo yominaosu [Re-Reading the Japanese Constitution]* (Japan: Nihon Keizai Shinbunsha, 2000).

Indigenous peoples) in need of paternalistic care from the government.⁴³ In this instance however, the Court chose to ignore these aspects of the case and deal with it narrowly, like it would any other administrative law case.⁴⁴

In the *Ainu Communal Property Litigation*, the plaintiffs appealed the decision of the Court of first instance, resulting in the judgment of the Sapporo High Court in May of 2004, which upheld the findings of the lower Court. However, by the time of the appeal hearing, the plaintiffs' support network had found amongst the management documents discovered by the defendant evidence of specific items of designated communal property that had been under the management of the respondent (defendant), but had not been included in the government notice of 5 September 1997. Thus, on appeal, to avoid the Court once again focusing narrowly on only the final decision in the restitution process, and now armed with this evidence indicating the under-inclusiveness of the communal property in the government notice, the plaintiffs also stressed the illegality of the government notice advertising what communal property was available for restitution. This alleged illegality was said to taint the entire restitution process, based upon the following legal arguments: First, the plaintiffs argued that the respondent's (defendant's) duty under Article 3(1) of the supplemental rules of the *Cultural Promotion Act* should be interpreted as a duty to advertise and return *all* communal property designated under Article 10(3) of the *FNPA* that had not been legally disposed of by the time the defendant's management duties were terminated with the repeal of the *FNPA* in 1997. Second, the plaintiffs argued that supplemental Article 3 of

43. On this point, if it had chosen to, the Court could, for example, have made reference to a previous Sapporo District Court decision regarding the constitutionality of the *FNPA*, which noted that the *FNPA* had established a racial category, of a race whose abilities it indicated were considerably inferior to the Japanese (this forming the basis for the need for governmental care for the dwindling numbers of this race). This former decision, while finding that the *FNPA* did not violate the provisions of Article 14 of the Japanese *Constitution* (equality before the law), nonetheless noted that the *FNPA* had been enacted from considerations of the need to care for "former Natives," due to their "being an ignorant and uncivilized race." These references could thus have been employed by the Court in the *Ainu Communal Property Litigation*, if it wished, to support a finding that the legislative intent behind the *FNPA* (to care for Ainu rights and interests) justified these interests and their protection being given the utmost priority in the present case concerning the return of Ainu property managed by the government under the *FNPA*. The somewhat derogatory reference to the Ainu "being an ignorant and uncivilized race" as the justification for this special legislation and state paternalism may, however, have made the court wary of employing this former precedent or reasoning. It could, nonetheless, have been employed, as in *Nibutani Dam* (see page 236 above), for this very reason—as proof of past discriminatory state policies against the Ainu, which result in a present day obligation on the part of state organs to give special consideration to Ainu rights and interests when carrying out administrative measures which may affect those rights. On this previous decision, see T. Tsunemoto, *Ainu minzoku wo meguru hō no hensen [Legal Transitions Concerning the Ainu People]* (Sapporo: Jiyū Gakkō, 2000) at 15-17.

44. On these issues, see the comments of Professor Teruki Tsunemoto discussed below, at the text accompanying note 55.

the *Cultural Promotion Act* should be interpreted as providing for only one, rather than multiple public notices and restitution procedures, as the supplemental provisions do not provide for the respondent's powers of management in respect of communal property not returned following the restitution procedure set out in supplemental Article 3. Third, a prerequisite of the respondent fulfilling this duty to advertise communal property for restitution was an investigation and confirmation of the details of management of all designated communal property currently or previously under its control, before issuing the public notice in question. Fourth, the respondent's survey of all existing communal property was clearly insufficient. This allegation was demonstrated by examples of property that had been publicly designated communal, but that were, nonetheless, not included in the respondent's 1997 public notice, despite the fact that there were no records of the property's sale or disposal by the respondent in the intervening years. Examples of such property given by the appellants included residential land, a warehouse and other buildings, public bonds and shares, fishing rights in respect of three salmon fishing grounds in the Tokachi region, and money listed in communal property accounting books in 1935, which had disappeared from these records by 1942, despite the fact there was no entry regarding the money's expenditure or use.⁴⁵ Fifth, the appellants argued that, therefore, the respondent had failed in its duty of honest and careful management of the property (Article 644, Japanese *Civil Code*), their duty to manage accounting records for the communal property (Article 645, Japanese *Civil Code*), and their duty to investigate and confirm the management history of communal property under their control before issuing the 1997 public notice. For these reasons, the appellants asserted, the notice issued by the respondent in 1997 was an unlawful advertisement of only those sums of money from communal property they were aware of at the time.⁴⁶

The appellants then argued that the respondent's defective public notice was only one part of the communal property restitution procedure, which thus rendered this entire administrative measure unlawful. Alternatively, if the public notice constituted a separate administrative measure from the restitution decisions altogether, its illegality was argued to succeed to the subsequent restitution decisions (*ihōsei no shōkei*), which were based upon the defective notice.

Finally, the appellants argued that if the public notice was held to be invalid or void, the respondent would be bound by this decision under Article 33 of the *Administrative Procedure Act*,⁴⁷ and would therefore be

45. Judgment of the Sapporo High Court, 27 May 2004, Heisei 14 (Gyou Ko) No. 6 at 6-7.

46. See the appellant's arguments, *ibid.* at 4-8.

47. *Gyōsei jiken soshō hō, hōritsu dai139gō*, Shōwa 37nen 5gatsu 16 nichi [Law No. 139, 16 May 1962].

required, based upon the above-mentioned management duties (see fifth argument above), to carry out a new public notice including all designated communal property not legally disposed of by the time the *FNPA* was repealed. As a result, a new more inclusive public notice would have to be issued including all communal property the respondent had not legally disposed of. This, in turn, would result in an administrative measure more beneficial to the defendants, in the form of new restitution decisions that included items of communal property not advertised or returned under the current procedure. For this reason, it was argued that the 23 appellants who had had communal property returned to them nonetheless had legal standing and a legal entitlement to bring the present action seeking to have the restitution procedure found void or invalid.

In respect of the three appellants who had been refused the restitution of communal property they applied for, it was argued on appeal that the burden of proof should be on the respondent to prove that these three applicants were *not* communal owners, rather than placing the burden on the applicants to prove their entitlement. This burden of proof was said to be based upon several grounds: first, the historical background surrounding management of Ainu communal property by the respondent; second, the rights of Indigenous peoples; and third, the respondent's duty of honest and careful management, whereby the respondent should, on the termination of its management of communal property, investigate the true owners of this property and return it to them.

The appellants also argued at the High Court that the wording of Article 3 of the supplemental provisions, which sets out the restitution procedure, should be interpreted in their favour in light of the spirit and purpose of the *Cultural Promotion Act* (aimed at the realization of a "society in which the ethnic pride of the Ainu people is respected"). The wording of Article 3(1) states that the Hokkaido governor must advertise and return communal property "actually managed" at the time of enactment of the *Cultural Promotion Act*.⁴⁸ The argument made was that the word "actually" in this provision should not be read to mean communal property the governor was "actually aware of" but rather the communal property which "should actually have existed" under the governor's management in 1997.⁴⁹ That is, it was argued that, based on the history of the *FNPA*, the current international trend towards recognition of the rights of Indigenous peoples and the spirit of this *Act*, the governor's duty under this provision should not be interpreted narrowly as a duty to return only the property she was aware of and actually currently managed in 1997. Rather, the wording of supplemental Article 3 could and should be interpreted to mean the

48. For a translation of the wording of this article, see note 51 below.

49. Judgment of the Sapporo High Court, 27 May 2004, Heisei 14 (Gyou Ko) No. 6 at 5 (appellant's arguments).

respondent had a duty to return “all communal property designated under Article 10(3) of the *FNPA*, the management of which had not been legally terminated by the time of the government’s public announcement” on 5 September 1997.⁵⁰ Such an interpretation, if adopted, would have required the defendant to investigate and clarify what had happened to all the communal property put under her management by the *FNPA*, prior to advertising the property available for restitution.

The Sapporo High Court, however, chose instead to take a narrow and formal interpretation of the wording of Article 3 of the supplemental provisions. The appellate Court found that Article 3(1) of the supplemental provisions *only* provided for the advertisement and restitution of property “actually managed by the Hokkaido Governor at the time of the enactment of the *Cultural Promotion Act*.”⁵¹ Importantly, based on evidence led by the appellants’ witnesses, the appellate Court did find that there was indeed some designated communal property the management and disposal of which was unclear and unknown even by the defendant at the time the public notice was made in 1997.⁵² This represented progress from the decision in the first instance, where the Court had dismissed the plaintiffs’ claims on the basis that the restitution decisions were beneficial administrative measures in their favour, without even examining the nature of the defendant’s management of the communal property prior to restitution. Nonetheless, because of the High Court’s narrow interpretation of supplemental Article 3(1), any communal property not actually managed in 1997 (even if it was unclear how or even if it had been legally disposed of) was found to be outside the scope of the restitution procedure provided for under supplemental Article 3. Thus, the Court held that even if it were to find the restitution procedure or the defendant’s public notice to be void or invalid, this could not change the

50. *Ibid.* This argument was also made in the original trial, although the plaintiffs were unable to prove conclusively at that stage that the defendant’s public notice did not include all designated communal property not proven to be legally disposed of: Judgment of the Sapporo District Court, *supra* note 33 at 7.

51. Judgment of the Sapporo High Court, 27 May 2004, Heisei 14 (Gyou Ko) No. 6 at 10. This subtle nuance of the wording of what is a very lengthy text in Article 3(1) of the supplemental provisions is not reflected in either of the English translations of the *Cultural Promotion Act*, found in the sources cited *supra* note 7. Translated in a way that reflects this aspect of the Japanese, Article 3(1) states

The Governor of Hokkaido shall retain management of all Hokkaido former Natives’ communal property actually managed, under Article 10(1) of the *FNPA* prior to its repeal by the previous article, at the time of the enforcement of this law, until it is restored to the communal owners as provided for in provisions of sections 2 to 4 of this article, or reverts to the Appointed Juridical Person or the Government of Hokkaido.

The Court focused upon the wording (communal property) “actually managed ... at the time of the enforcement of this law” to find that the Governor only had to return communal property she managed in 1997 when the *Cultural Promotion Act* came into force.

52. *Supra* note 49 at 10.

fact that supplemental Article 3 did not require the restitution of any communal property other than that actually managed in 1997. This decision effectively left the plaintiffs with no means to question what had happened to any property managed by the governor that had been lost, misplaced or mismanaged before 1997.

The High Court also found that even if communal property actually under the management of the governor in 1997 existed but had not been announced in the public notice, this property could be returned (when and if discovered) by the carrying out of further public notice and restitution procedures under the same supplemental Article 3. That is, any property “actually managed” in 1997 and missed by the respondent in its first public notice could be returned without the need to find Article 3 of the supplemental provisions or the procedure under it void, as the plaintiffs sought. However, the Court failed to indicate that the respondent was required to carry out a further survey of other possible communal property in existence, leaving this entirely in the discretion of the Hokkaido government. The Court indicated only that such property could be returned under the *Cultural Promotion Act* provision *should* it be discovered.

The respondent Governor of Hokkaido indicated soon after this judgment was handed down, however, that having returned all the communal property “actually ... under [her] management” in 1997, she had fulfilled her duties under supplemental Article 3 as indicated by the Court, and thus had no intention of carrying out a further survey of communal property possibly in existence.⁵³ With all documents regarding the creation and management of communal property held by the respondent Hokkaido Government, it is thus unlikely, without a further survey by them, that any other existent communal property yet to be returned to its communal owners will be discovered. The likelihood that further restitutions of the kind referred to by the appellate Court will actually be realized is therefore low.

Thus, by use of a formalistic interpretation of the wording of the restitution procedure under the *Cultural Promotion Act*, the Court was able to find the defendant’s public notice and restitution procedure legal. In so doing, it avoided examination of any possible mismanagement of Ainu communal property by the Hokkaido government over the course of the last 100 years, and how this might have affected the validity of the restitution procedure.

This stance by the Court also ignores the social and historical context behind the management of Ainu communal property by the state, and the historical context of the relationship between the Japanese state and the Indigenous plaintiffs. As constitutional law professor Teruki Tsunemoto

53. Formal written response from Hokkaido Governor Harumi Takahashi to questions from appellant representative Ryukichi Ogawa, 29 June 2004 [on file with author]. See also *Hokkaido Shinbun* [*Hokkaido News*], (2 July 2004) at 30.

noted following the handing down of the appeal judgment, whilst the Court had suggested the management and survey of communal property by the defendant may have been insufficient, it was regrettable that this finding was not reflected in its subsequent legal analysis.

He noted, for example, that the Court could possibly have created or worked from a presumption that the provisions of the *Cultural Promotion Act* should be interpreted in favour of the Indigenous plaintiffs the law was intended to benefit, as has occurred in American jurisprudence on legislation regarding Native Americans. Alternatively, the Court could have worked from the presumption either that the provisions of the *Cultural Promotion Act* were intended to be, or should be, interpreted as far as possible in conformity with international human rights treaties ratified by Japan, which address the rights of minority Indigenous groups.⁵⁴ If the Court had taken such a stance, Professor Tsunemoto notes, a different decision may have been possible in respect of not only the interpretation of the wording “actually managed” in supplemental Article 3, but also the finding that it was correct to place the burden of proof upon Ainu applicants to demonstrate they were communal owners before they were entitled to have communal property returned to them.⁵⁵

With the courts failing to look at these background and contextual issues, the litigation became a question simply of whether the government restitution complied with the (narrowly interpreted) wording of the *Cultural Promotion Act* requiring the return of communal property “actually managed” in 1997. The Court’s response to this question was, “Yes.”

For the Ainu plaintiffs who have brought this case, however, it is about much more—150 years of assimilation, poverty and discrimination, and paternalism by the state without even due accountability for the “protection” it supposedly provided to the “legally incompetent” Ainu by managing their property for them. The procedure employed by the government represents an attempt to close the door on this past, without any inquiry into this history, or examination of the accountability of the government. This is what appears to rancour the Ainu plaintiffs most: the fact that even in 1997, and even with the enactment of a law purportedly aiming to realize a “society in which the ethnic pride of the Ainu people is respected,”⁵⁶ the bureaucracy has utilized

54. This is presumably a reference to covenants such as the *ICCPR*, *supra* note 32, and *ICERD*, *supra* note 6, to which Japan is a party.

55. Comments of Teruki Tsunemoto quoted in *Hokkaido Shinbun* [*Hokkaido News*], (28 May 2004) at 35. Teruki Tsunemoto is one of the few constitutional scholars to have examined the constitutional aspects of Ainu legal claims. See T. Tsunemoto, “Constitutional and Legal Status of the Ainu in Japan: A National Report” (XVIth Congress of the International Academy of Comparative Law, Brisbane, Australia, July 2002), online: XVIth Congress of the International Academy of Comparative Law <<http://courseweb.edteched.uottawa.ca/IACLindigenousminorityrights/JapanTsunemoto.htm>>.

56. *Cultural Promotion Act*, *supra* note 7 at Article 1 (purpose).

the opportunity to quietly and unilaterally absolve itself of any liability for a century of sloppy mismanagement of Ainu communal property. What rankles them too, is that Ainu have once again been left out of the consideration and determination of legal measures that directly affect their property rights and interests.

While the judicature has not been sympathetic to the historical or Indigenous aspects of this case, and while the chances of success may be slim, the litigation of this case remains important for two reasons: (1) the publicity it draws to the facts of Japan's historical treatment of the Ainu and the mismanagement by the government of Ainu property; and (2) for its symbolism as a statement by the Ainu people that they will not let their history or these acts go unacknowledged, unaccounted for, and largely unknown by the majority of Japanese society any longer. The appellants have filed both an appeal and application for leave to appeal the High Court's decision to the Supreme Court of Japan.⁵⁷

57. The appellants filed three documents: an application for leave to appeal, an appeal and the reasons for appeal with the Supreme Court on 4 August 2004. Receipt of these documents was officially acknowledged by the Supreme Court on 13 September 2004. Under new amendments to the *Japanese Civil Procedure Act (minji soshōhō)* enacted in 1996, the absolute right of appeal to the Supreme Court where violation of the *Constitution* is alleged is retained (Article 312(1), (2)). However, a new provision has also been added, requiring an application to the court for leave to appeal in respect of non-constitutional legal issues (Article 318). For this reason the appellants have filed both an appeal, citing violation of Articles 13, 29 and 31 of the *Constitution*, and an application for leave to appeal in respect of the non-constitutional arguments. It is not known when a decision regarding either application can be expected from the Supreme Court.