

[Article]

## Asura's Three Faces?<sup>(1)</sup>

—Nation State, Multicultural State and Sovereign State in Japan— (1)

Towa Niimura\*

### Contents

Introduction: Asura with Three Faces

I. Three Acts

I-1. The Hate Speech Act of 2016

I-2. The Immigration Act of 2019

I-3. The Ainu Act of 2019

II. Three Foreigners

II-1. Legal Foreign Residents

II-2. Foreign Workers

II-3. Ainu People

III. Three Tenses

III-1. Past

III-2. Future?

III-3. Present

IV. Three Rights of Foreigners

IV-1. Equality

IV-2. Cultural Rights

IV-3. Citizenship

(Until this part in the No. 93  
Seikei Hôgaku)

V. Three Autonomies

VI. Three State Theories

VII. Three Acts Again

Conclusion: Asura Again



Picture1:  
Asura Statute at Kôfukuji Temple,  
Nara, Japan, a national treasure

---

\* Professor of Constitutional Law at Seikei University Law School, Tokyo, Japan.

## Introduction: Asura with Three Faces

Asura is originally seen in Indian mythology, such as the Vedas, and related to Hinduism. Buddhism takes the basic idea of the Asura from Hinduism but has a few distinctive myths, which are only found in Buddhist texts. The Asuras of Buddhism mostly represent the mental state of humans obsessed with force and violence, always looking for an excuse to get into a fight, angry with everyone and unable to remain calm or solve problems peacefully.

In Japan, Buddhism is very popular. Many of the Asura statues are enshrined in Japanese Temples. The Asuras are usually described as having three faces each and either four or six arms.

The Asura statue at Kōfukuji Temple in Nara Prefecture, is one of the Japanese national treasures<sup>(2)</sup>. Picture 1 shows the whole body, and picture 2 is the upper half<sup>(3)</sup>. This statue has three faces and six arms. It

---

(1) This is the revised text of a presentation delivered at Melbourne University Law School on 22 October 2019, as part of the Lecture Series of Asian Law Centre (ALC), where the author stayed as a visiting scholar in 2019. I would like to express my heartfelt gratitude to my host Professor Stacey Steele, who has given me fruitful research environment during my stay in Melbourne and many thought-provoking suggestions. Her coincidental but destined guidance led me to this research subject. In this text, footnotes are added and some revisions are provided to the original text based on some changes in the legal and social situation, as well as my reconsideration through some stimulating questions and hints from the attendance of the lecture. I am grateful to the Asian Law Centre (ALC) for this opportunity and to all staff at ALC for the excellent support. I owe my learning results not only to the academic community of ALC but also to many scholastic friends from all over the world, who I met through that research stay. I have learned and thought about many more legal issues in Asia than I expected. I acknowledge the financial support and assignment of an overseas research opportunity for one year by Seikei University. This paper is an outcome of this research support.

(2) Many books have been published about the Asura statue at Kōfukuji Temple. See, Kōfukuji ed. *Asura o kiwameru* [Penetrate into the Asura] 2000.



Picture 2

is said that each face and arm has a meaning based on the teachings of Buddha.

Using the three faces of the Asura as a metaphor, I'll refer to the number "three" repeatedly in this paper.

## I. Three Acts

First, let us consider "three" acts.

Three controversial legal acts have recently been enacted in Japan: The Hate Speech Act of 2016 (I-1.), the Immigration Act of 2019 (I-2.) and the Ainu Act of 2019 (I-3.). Each of these names is abbreviated for

---

(3) Each picture is made from a photo in author's possession, with the permission for use in this paper by the Kôfukuji Temple office.

this paper. Subsequently, the formal names are provided with explanation.

### I-1. The Hate Speech Act of 2016

The formal name of the Hate Speech Act is “Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behaviour against Persons Originating from Outside Japan”<sup>(4)</sup>.

The term “hate speech” is widely used throughout the world. It is not easy to define this word, and the meaning is changeable in each context. I'll choose a relative broad definition, such as “any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor<sup>(5)</sup>”. Usually, this involves some form of discrimination based on race, religion, ethnicity, nationality, sex, disability, sexual orientation, or gender identity.

Laws against hate speech in the world can be generally divided into two types: those intended to preserve public order and those intended to protect human dignity.

The Japanese Hate Speech Act of 2016 could be said to have both characters: the idea of preserving public order and the idea of protecting human dignity.

This act deals with hate speech, including death threats and extreme insults, to prevent such behaviour. Unlike most other countries, this act is less powerful because it does not ban hate speech and provides no penalty for committing it. The act simply promotes both central and local

---

(4) Act No. 68 of 2016, *Honpō gai shusshinsha ni taisuru futō na sabetsuteki gendō no kaishō ni muketa torikumi no suishin ni kansuru hōritsu*. The English translation of the name of this Act No. 68 of 2016 is provisionally given by author.

(5) See, UN Strategy and Plan of Action on Hate Speech, in; <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>

government measures to reduce such behaviour<sup>(6)</sup>. The reason why there is no punishment provision in the act is that there is a claim that prohibiting such speech could conflict with the right to freedom of expression, which is guaranteed by Article 21 of the Japanese Constitution (JC)<sup>(7)</sup>. This kind of discussion is also seen in the USA, and this point is a peculiarity of the act<sup>(8)</sup>.

There is another interesting peculiarity: the intended target of protection by this act.

According to the words in the name and provisions, this act concerns hate speech, especially against those with foreign origins living lawfully in Japan. That means it “does not apply to hate speech against general groups of people”. Therefore, if a remark such as “go back to your country!” is uttered to a foreigner living illegally in Japan, or if something like “women are inferior to men” is said to a female, this act is of no help. The targets of the act are Korean residents in Japan. To understand the reason, we must look at what was happening in Japan before the Hate Speech Act came into force.

Let’s look back more than 20 years. In 1995, Japan became a member of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 1969 (CERD)<sup>(9)</sup>. Article 4 of the Convention sets provisions calling for the criminalisation of hate speech<sup>(10)</sup>. But the Japanese government has so far suspended the

(6) See, provisions from Art. 4 to Art. 8 of the Act.

(7) Article 21 of JC. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

(8) About this issue, see, Junko Kotani, Proceed with Caution: Hate Speech Regulation in Japan, *Hastings Constitutional Law Quarterly*, Vol. 45:3 pp. 603, p.607.

(9) This convention was originally adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 and entry into force 4 January 1969.

(10) In Article 4 of CERD, states condemn all propaganda and organizations

provisions, saying that racial discrimination is not an extensive enough issue to make legal action necessary. Even after some UN recommendations were issued, the Foreign Ministry kept saying that this assessment remains unchanged for a long time.

In May 2013, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) warned the Japanese government that it needs to take measures to restrict hate speech against so-called comfort women<sup>(11)</sup>. The committee's recommendation called for the Japanese government to better educate Japanese society on the plight of women who were forced into sexual slavery to prevent hate speech, stigmatisation, and to take necessary measures to repair the lasting effects of exploitation, including addressing their right to compensation<sup>(12)</sup>.

I wonder why such wild movements happened suddenly at this time, the same year in 2013, demonstrations, parades, and comments posted on the internet threatening violence against foreign residents of Japan, especially against Koreans by some people, mainly an anti-Korean group, called "*Zaitokukai*"<sup>(13)</sup> are widely seen. There were serious concerns that

---

based on ideas of racial superiority. States undertake to act to eradicate all incitement to discrimination and shall prohibit dissemination of ideas based on racial superiority and acts of violence or incitement to violence against any race.

(11) See UN Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations on the 3rd periodic report of Japan, adopted by the Committee at its 50th session, 29 April-17 May 2013; Committee on Economic, Social and Cultural Rights, 10 June 2013, E/C.12/JPN/CO/3, available at <https://www.refworld.org/docid/52d54b6f4.html>. Under the Title C. "Principal subjects of concern and recommendations" on No. 26, we can see the phrases about "comfort women" as below.

(12) Between the previous South Korean government of President Park Geun-hye and the Japanese government, the agreement about establishing a foundation for reconciliation ended up in December 2015 to support former comfort women and their families. 1 billion Yen (9,563,430USD) was provided by Japanese Government. But after the regime change to the administration of President Moon Jae-in, the anti-foundation movement intensified, and the foundation was formally closed in July 2019.

hate speech was a growing problem in Japan. Then-Prime Minister Shinzô Abe has expressed his concerns about the increase in hate speech, saying that it “goes completely against the nation’s dignity”<sup>(14)</sup>.

An opposition movement against such malicious behaviours occurred in September 2013. Around 2,000 people participated in the “March on Tokyo for Freedom”, campaigning against recent hate speech marches. Participants called on the Japanese government to “sincerely adhere” to the CERD.

There was also judicial support to eliminate hate speech. On 7th October 2013, in a rare ruling on racial discrimination against ethnic Koreans, Kyoto District Court ordered “*Zaitokukai*” to stop “hate speech” protests against a Korean school in Kyoto and to pay the school about 12 million yen<sup>(15)</sup> in compensation for protests that took place in 2009 and 2010<sup>(16)</sup>.

A United Nations panel also urged Japan to ban hate speech after these events and, in May 2016, the Japanese Diet passed this Hate Speech Act<sup>(17)</sup>.

Through this process, the implied target of this act is now clear.

---

(13) The word “*Zaitokukai*” is an abbreviation of the name of a citizen’s group *Zainichi tokken o yurusanai shimin no kai*, [citizens association that does not allow Korean residents to enjoy privileges]. This association was founded in 2006 in Japan and is understood by many as an ultra-nationalist and far-right extremist political organization. Cf. Their official website: <https://www.zaitoku814.com>.

(14) As practical study about “hate speech” including of the survey of those rallies, see, Public interest incorporated foundation center for Human Rights Education and Training, *Heito supîchi ni kansuru jittai chôsa hôkokusho* [Fact-finding report about hate speech]. 2016. This report is seen in; <http://www.moj.go.jp/content/001201158.pdf>

(15) That costs approximately 126,400 USD.

(16) Judgement of Kyoto District Court of 7th October 2013 (2010 [wa] 2655).

(17) The process of this legislature and the possibility to eliminate hate speech through the existing laws are studied in Kotani, FN (8).

## I-2. The Immigration Act of 2019

Second, let's move to the Immigration Act. Its formal name is "Partial revised Act for both of the Immigration Control and Refugee Recognition Act and of the Ministry of Justice Establishment Act"<sup>(18)</sup>. As this formal name shows, this act is enacted by revising an already existing act: "Immigration Control and Refugee Recognition Act"<sup>(19)</sup>. Nevertheless, the already existing act is well known and abbreviated as "Immigration Control Act [*Shutsunyūkoku kanri hō*]". After revision of this act, another abbreviation, namely "Immigration Act [*Imin hō*]", became popular and is now widely used in Japan. This new abbreviation could be very problematic and at the same time ironically suggestive, as we will see below.

The revised act introduced new residence statuses to gain foreign workers over the next five years, seeking to fill gaps in the country's rapidly shrinking and ageing workforce. The new residence status is called "Specified Skill"<sup>(20)</sup> and is between two previous statuses for foreign workers, namely "Highly Skilled Professional"<sup>(21)</sup> and "Technical Intern Training"<sup>(22)</sup> in Article 2-2 of the act<sup>(23)</sup>, which provides residence status

---

(18) Act No. 102 of 2019. *Shutsunyūkoku kanri oyobi nanmin nintei hō oyobi hōmushō secchihō no ichibu o kaisei suru hōritsu*.

(19) Cabinet Order No. 319 of October 4, 1951. *Shutsu nyūkoku kanri hō oyobi nanmin nintei hō*.

(20) *Tokutei Ginō*

(21) *Kōdo Senmon shoku*

(22) *Ginō Jisshū*

(23) Article 2-2 (1) Except as otherwise provided in the Immigration Control and Refugee Recognition Act and other laws, a Foreign National is to reside in Japan under the status of residence (in the case of the status of residence of "Highly Skilled Professional", including the category of item (i), sub-items (a) through (c) or item (ii) listed in the right-hand column under "Highly Skilled Professional" of Appended Table I (2); in the case of the status of residence of "Specified Skill", including the category of item (i) and item (ii) listed in the right-hand column under "Specified Skill" of the same table; in the case of the status of residence of "Technical Intern Training", including the category of item (i), sub-item (a) or (b), item (ii), sub-item (a) or



and period of stay.

The nature of this “Specified Skill” is not clear enough in the act. There are two types of “Specified Skill” – namely “Type 1 Specified Skill” and “Type 2 Specified Skill” – and the latter needs higher-level skills. What kind of working sector, where “Specified Skilled” workers can work, is provided by the ordinance of the Ministry of Justice in the right-hand column of the act. For “Specified Skill, 14 working sector categories have been decided by the Ministerial ordinance, such as construction, agriculture, fishing, hotels and restaurants<sup>(24)</sup>.

What kinds of differences are given in terms of the grant of the visa, for instance? Visas for workers with Type 1 specified skills are granted only to trainees or workers themselves. Their spouses and children are ineligible. Visas for their family members are granted only to those with higher-level “Type 2 Specified Skills”. Type 2 visas can be renewed sine die and allow workers to bring their spouses and children to Japan. This means that they could stay for more than 10 years, the period for

---

(b) or item (iii), sub-item (a) or (b) listed in the right-hand column under “Technical Intern Training” of the same table; the same applies hereinafter) associated with that Foreign National’s permission for landing, under the status of residence that the Foreign National has acquired, or under the status of residence following a change to either of these.

We can find official translation for some Japanese Acts by MOFA. This underlined translation above has not officially translated – just by Niimura. See, the last version of this translation for the amendment of the Act No. 88 of 2016: <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&x=59&y=8&co=01&ia=03&ja=04&ky=%E5%87%BA%E5%85%A5%E5%9B%BD%E7%AE%A1%E7%90%86%E5%8F%8A%E3%81%B3%E9%9B%A3%E6%B0%91%E8%AA%8D%E5%AE%9A%E6%B3%95&page=16>

- (24) These 14 categories are comprised of care worker, building cleaning management, machine parts & tooling industries, industrial machinery industry, electric, electronics and information industries, construction industry, shipbuilding and ship machinery industry, automobile repair and maintenance, aviation industry, accommodation industry, agriculture, fishery & aquaculture, manufacture of food and beverages, and food service industry. See, <https://www.mofa.go.jp/files/000459527.pdf>.

acquiring permanent resident status in Japan. Currently, only workers in construction and shipbuilding are eligible for Type 2 visas.

It is clear from the working category of this new residential visa that Japan is formally starting to accept blue-collar workers from overseas, which could be a turning point in Japanese immigration policy. Before the enactment of this act, Japan had a strict stance against accepting blue-collar workers from abroad.

For a better understanding of the introduction of such an act, bringing a possible big change into Japanese society, we should examine the background of the enactment and the problems of this act.

The number of working foreigners was about 1.46 million in October 2018, which was 2% of all workers in Japan. Compared to 680,000 foreign workers in 2012, the number more than doubled in six years. According to the Cabinet Office, Japan has a shortage of about 1,300,000 workers for the upcoming five years, mainly in labour-intensive sectors, such as construction, agriculture, fishing, hotels and restaurants. That's why the Japanese government plans to grant specified skills visas to around 340,000 blue-collar workers over the next five years, through the new act.

In the previous Immigration Control Act, there was no chance of hiring foreign blue-collar workers. Of course, not all the 1.46 million foreign workers were "Highly Skilled Professionals". Recently, many foreigners have worked in restaurants and convenience stores in Japan. The visas of such foreign workers are mostly spousal or permanent resident, but some students are working with restrictions up to 28 hours per week in the condition of the "Permission for Other Activity". It has also been reported that "Technical Intern Trainees" are misused by supplying workers into such labour-shortage categories. Those hired as "trainees" mostly from Asia often served as low-cost workers in practice<sup>(25)</sup>. The act is designed to address problems with the existing "technical trainee programme", a stopgap measure meant to mitigate the country's chronic labour shortage.

---

(25) Japan accepted some 480,000 trainees between 2013 and 2017.

I argue next about the problems with this act. First, the protection of the rights of foreign workers should be well planned – not only regarding working conditions but also assistance settling in Japan: opening bank accounts; learning the language, rules, and customs; and finding accommodations and medical services obliged by employers. Second, the problems of missing workers and illegal job brokers should be properly solved by suitable actors<sup>(26)</sup>. Third, the problems of such direct substantial protection for foreign workers and the protection of public order are urgent issues. By keeping a safe and healthy society, the rights of all residents, including the foreign workforce, are guaranteed in the end. To avoid the deterioration of public order or social division, which were discussed in the Diet during the process of the enactment, dualistic attempts for mutual understanding between foreign workers and Japanese citizens are necessary. One glance at the Internet communication, it could envision a big fear of foreigners in Japanese society.

The ironical meaning of the abbreviated name of this act, i.e. Immigration Act, shows that Japanese society has been accepting immigrants widely and becoming an “immigration state”.

### I-3. The Ainu Act of 2019

The third act we are going to examine is the Ainu Act.

The Japanese Diet replaced the earlier Ainu Culture Promotion Act<sup>(27)</sup> with this act that promises to “realise a society that will respect the pride of the Ainu” (Art. 1). It is formally named the “Act on Promotion of Measures to Realise a Society that Respects the Pride of the Ainu People”<sup>(28)</sup>, which was enforced on 24th May 2019.

---

(26) These are important issues to be argued, but in this text, these problems are just mentioned as such.

(27) Act No. 52 of 14 May 1997, *Ainu bunka no shinkô narabini Ainu no dentô tō ni kansuru chishiki no fukyū oyobi keihatsu ni kansuru hōritsu* [Act on the Promotion of Ainu Culture, and Dissemination and Enlightenment of Knowledge about Ainu Tradition, etc.].

(28) Act No. 16 of 26 April 2019, *Ainu no hitobito no hokori ga sonchō sareru*

Article 1 of this act wrote the word “the indigenous people”, which first legally recognised the Ainu as an indigenous people of Japan, and obligates the government to adopt policies to facilitate people’s understanding of the traditions and the culture of the Ainu and the importance of diversity, supporting the idea that ethnic groups contribute to society. Both the central and local governments must also adopt measures to eliminate discrimination against the Ainu<sup>(29)</sup>.

While this is the first time the Japanese government passed a law recognising the Ainu as indigenous people, it does not guarantee any rights included in the UN Declaration on the Rights of Indigenous Peoples. Authorities have put forward the difficulty of recognising whether people are indigenous and the unsuitability of measures taken in various other countries as reasons not to follow the UN declaration. However, this insistence on crafting a “Japanese-style” approach to the policies on indigenous people is merely an excuse. Collective rights, particularly self-determination and land rights, are crucial to the identity of indigenous people, but the government shows no intention of granting them.

The Ainu people of Japan consist of a minority group originally from the northernmost areas of Japanese land. The official Japanese government estimate of the population was about 13,000<sup>(30)</sup> in 2017, though this number has been disputed with unofficial estimates insisting more.

For nearly a hundred years, the Japanese government displaced Ainu people and subjected them to several discriminatory practices by controlling Ainu land and education standards.

Discussion of a new Ainu law first began in 1984 when the predecessor to today’s Ainu Association of Hokkaido pressed for the adoption of legislation it had drafted. At the time, the Former Aborigines Protection Act

---

*shakai o jitsugen suru tame no sesaku no suishin ni kansuru hōritsu.*

(29) See, Art. 4 and Art. 5 of the Ainu Act of 2019.

(30) Hokkaido Kankyo Seikatsu-bu, “*Hokkaido Ainu seikatsu jittai chōsa hōkokusho* [An report of the survey about actual condition of Ainu People’s life in Hokkaido], p.3.

of 1899<sup>(31)</sup>, a discriminatory law promoting enforced assimilation and including the offensive term “*kyû dojin*” [former aborigines] in its title, was still in effect. The proposed legislation looked to replace the outdated act and added rights for the Ainu people, such as a self-support fund and seats in the legislature based on ethnicity.

Meanwhile, the protection for Ainu’s cultural rights has become a hot issue with the judicial process opposing the Nibutani Dam at Saru in Hokkaido, which is a sanctuary having great importance for the Ainu’s cultural inheritance. The judgement of Sapporo District Court<sup>(32)</sup> drew big attention, especially because it was the first judicial recognition of the Indigenous people and their cultural rights<sup>(33)</sup>.

About two months after this decision, when the Cultural Protection Act finally passed in May 1997<sup>(34)</sup>, it had been considerably altered to narrowly focus on the promotion of Ainu culture, sparking criticism for its lack of indigenous rights<sup>(35)</sup>.

In 2007, a debate about the matter gathered momentum with Japanese support for the Declaration on the Rights of Indigenous Peoples that the United Nations adopted. The following year, the Japanese Diet passed a resolution urging the administration to recognise the Ainu as indigenous, and the government established an advisory panel to consider Ainu policy<sup>(36)</sup>. After submitting its report in 2009, the Cabinet Office set up a group to develop a policy that same year. This produced the recently

---

(31) Act No. 27 of 1899, *Hokkaido kyû dojin hogo hô*

(32) Judgement of the Sapporo District Court of 27th March 1997 (1993 [Gyo-U] 9)

(33) Hiroshi Murayama, Ainu Landowner’s Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan, *International Community Law Review* 14, 2012, pp. 63-80, dwells on the process.

(34) Act No. 52 of 1997.

(35) Richard Siddle, An epoch-making event? The 1997 Ainu Cultural Promotion Act and its impact. *Japan Forum* 14 (3) 2002, pp. 405-423, p. 408.

(36) About this process, Crystal Porter, After the Ainu Shinpo: The United Nations and the Indigenous People of Japan, *New Voices*, Vol. 2, 2008, pp. 201-219. pp. 203.

passed Ainu Act of 2019.

Before the law, the government decided to establish the National Ainu Museum and Park in Hokkaido. Set to open in Spring 2020, the site is to host exhibitions, research, cultural learning, workshops, and information sharing events and will also include a park and an area for memorial services<sup>(37)</sup> in addition to the terms of the existing culture promotion act. These are concerned with promoting tourism. It is true that tourism is important, but there is no need to pass a new law for this alone. Some are simply suspicious that the plan for the National Ainu Museum and Park has been linked to the Tokyo Olympics in 2020 and was likely just an attempt by the government to win popularity<sup>(38)</sup>.

As we have seen, each act has a distinctive purpose and subject, as if there is no superficial relation. Each act has been discussed from different perspectives, as constitutional and legal issues related to freedom of expression, discrimination, human rights of foreigners, equality for foreign workers, cultural rights, and rights of indigenous people. However, I would like to explore a possible common denominator between the three acts, which aims to lead Japanese society in a certain direction.

## **II. Three Foreigners**

To seek a common denominator from each of these three acts, I will show you three kinds of “Foreigners”.

### **II-1. Legal Foreign Residents**

The target of protection by the Hate Speech Act is legal foreign

---

(37) This National Ainu Museum and Park named “Upopoy” opened in July 2019. Cf. Their official HP, <https://ainu-upopoy.jp>.

(38) <https://www.nippon.com/en/in-depth/d00479/no-rights-no-regret-new-ainu-legislation-short-on-substance.html>

residents. It is clear that Korean residents, who are called “*Zainichi*”, are assumed to be the target group.

## II-2. Foreign Workers

In the Immigration Act, we can easily find the “foreign” workers from all over the world.

For reference, statistics by the Ministry of Health, Labour and Welfare (MHLW) on foreign workers in Japan in October 2018<sup>(39)</sup> shows the number and proportion of each nationality. Among the 1,460,000 workers, 390,000 are Chinese (27%), 320,000 (22%) were Vietnamese, with most of those working as trainees, and 140,000 (11%) were Filipino.

## II-3. Ainu People

The Ainu Act contains no foreigners because the Ainu have Japanese nationality and citizenship. However, does the recognition of the Ainu as “indigenous people” by the act create a difference between the Ainu people and other Japanese nationals? I would like to raise the question of whether the idea to see indigenous people as some sort of “foreigner” is helpful. It’s with this thought that, in Japan, the concept of “foreigner” is strongly connected with that of “citizenship”.

Now, let’s have a look at the next “three” faces regarding citizenship.

## III. Three Tenses

I will deal with “Foreigners” in each act regarding citizenship based on time, that is, past, future and present.

---

(39) These data were current when the presentation was held on 22nd October 2019. Latest data are found on MHLW’s site ([https://www.mhlw.go.jp/stf/newpage\\_09109.html](https://www.mhlw.go.jp/stf/newpage_09109.html)). According to this site, the number of foreign workers in October 2019 was about 1,660,000 (up 200,000 and 13.6% from last year). From the top three other nations: China: 418,000 (25.2%), Vietnam: 401,000 (24.2%) and the Philippines 180,000 (12.5%).

### III-1. Past

In the past, I think of the Hate Speech Act in the context of citizenship. As we've already seen, notwithstanding the vague definition, the target of the act is Korean residents.

Now explore history to see the relationship between Korea and Japan. Korea, or "*Joseon*", was annexed by Japan from 1910 to 1945. Most "*Zainichi*" or their ancestors came to Japan from Korea under Japanese rule during this period. A large proportion of this immigration is said to be the result of Korean landowners and workers losing their land and livelihood due to Japanese land and production confiscation initiatives and migrating to Japan for work. According to the calculation of a scholar<sup>(40)</sup>, a total of 5.4 million Koreans were conscripted into forced labour and shipped throughout the Japanese Empire.

It is not well known, but people with Korean origin who lived in mainland Japan had citizenship during this period because such people with Korean origin had granted Japanese nationalities. When the first universal election was held in 1925, some candidates with Korean origins were elected<sup>(41)</sup>. After World War II, due to the Japanese defeat and its forfeiture of the sovereignty, 2 million Koreans living in Japan were granted temporary Joseon nationality under the US military government, because there was no government in Korea then.

In this meaning, we may say "Past Citizenship" belongs to the current "*Zainichi*".

### III-2. Future?

It's just a hypothetical story, but if more foreign workers come to Japan in the future, we can't contradict the possibility that such

---

(40) Rudolph Rummel, *Statistics of Democide: Genocide and Mass Murder Since 1900*, 1998, p. 33.

(41) See, You Hirayama, *Nihon shihaika Chōsenjin no sanseiken ni tsuite* [For the right to vote of Koreans who were dominated by Japan], <https://blechmu.sik.xii.jp/d/hirayama/for-the-right-to-vote-of-Koreans-who-were-dominated-by-Japan-ebook-version/>



foreigners would get a sort of citizenship.

“Future Citizenship” applies to the foreign workers whom the Immigration Act applies to.

For such a hypothesis, the experiences of immigration policy in other states like Australia or Germany that have had a similar problem of shortage of labour force in the past could be instructive.

### **III-3. Present**

Now, the last one is easy to imagine. The people who presently have citizenship in Japan are the Ainu, those who were first recognised as indigenous people according to the Ainu Act of 2019.

However, whether their citizenship is effectively implied is difficult to evaluate because the Ainu population is too small to exert their influence in the Diet or the local assembly.

## **IV. Three Rights of Foreigners**

After seeing the existence of “foreigners” in each of the three acts, I would like to see the conditions of the rights of foreigners.

In the context of this paper related to three new acts, the human rights of foreigners should consider, namely, Equality (IV-1.), i.e. Equal treatment under the law, Cultural rights (IV-2.) and Citizenship (IV-3.). I would like to study these three rights with an emphasis on citizenship.

Before we consider these three rights, I provide a succinct account of the human rights enshrined in the JC and the classification of human rights in comparison with international law.

An elaborate Bill of Rights is provided in the JC, and human rights are enshrined in articles 10 to 40 in Chapter III. According to their nature, human rights are divided into three types: 1) rights of freedom, 2) social rights, and 3) citizenship rights. The classification was originally made by Japanese scholar, Toshiyoshi Miyazawa<sup>(42)</sup>, based on a classification by German scholar, George Jellinek<sup>(43)</sup>. This Human Rights classification in

JC is very relative and sometimes the types overlap. For instance, "Freedom of Expression (Art. 21 JC)" is usually classified as a right of freedom, but if a speech contains a political argument, this political speech is also categorised as a right of citizenship.

In the international context, the most common categorisation of human rights is to split them into civil and political rights and economic, social and cultural rights, which are seen as civil and political rights in articles 3 to 21 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Economic, social and cultural rights are enshrined in articles 22 to 28 of the UDHR and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Regarding the human rights of foreigners in JC, the Japanese Supreme Court issued a judgement in 1978 concerning a renewal of the sojourn period. The appellant, who was a US national, applied for a renewal of the period of sojourn for one year. The appellee, i.e. the Foreign Minister, rendered a rejection due to the job changing without permission and the political activities of the appellant during his stay in Japan<sup>(44)</sup>.

In this Supreme Court judgement, we can see this famous statement: "It should be understood that the guarantee of fundamental rights included in Chapter Three of the Constitution extends also to foreign nationals staying in Japan except for those rights, which by their nature, are understood to address Japanese nationals only<sup>(45)</sup>. This applies to political activities, except for those activities which are considered to be

---

(42) See, e.g. Toshiyoshi Miyazawa, *Kenpō* [Constitutional Law] II, 1971, pp.84-95.

(43) Jellinek's classification of the human rights are seen for instance in, Georg Jellinek, *System der subjekten öffentlichen Rechte*, 2. Aufl. 1905. S. 86f. S. 104. S. 160f.

(44) Judgement of the Japanese Supreme Court of 4th October 1978 (1975 [Gyo-Tsu] 120). See, English translation of this judgement in Homepage of Japanese Supreme Court. [https://www.courts.go.jp/app/hanrei\\_en/detail?id=56](https://www.courts.go.jp/app/hanrei_en/detail?id=56)

(45) Underlined by author. The same hereinafter.

inappropriate by taking into account the status of the person as a foreign national, such as activities which have influence on the political decision-making and its implementation in Japan.<sup>(46)</sup>

Based on this decision, foreigners are entitled to constitutional protection in Japan. These protections are entitled to foreigners staying in Japan except for the rights, which address Japanese nationals only by their nature. Let's see three types of rights related to the subject of this paper below.

#### IV-1. Equality

Article 14 (1) of the JC grants equal protection under the law<sup>(47)</sup>. By nature, the dignity of the individual is guaranteed to everyone, including foreigners, without any distinction between Japanese citizens and foreigners. Activities or speech that infringe on the human dignity of any person are to be strictly banned based on the JC. This thought must apply to each act we are concerning in this paper.

#### IV-2. Cultural Right

To “culture” or “cultural rights”, the JC could probably have been and still be indifferent. Only Article 25 of the JC provides that “[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living<sup>(48)</sup>”. In the description of “cultured living”, there was insufficient meaning of “cultural rights” for protecting indigenous people in an international context until recently. The reason is supposed to be deeply linked with the peculiarity of Japanese history and the long-

---

(46) Judgment of FN (44).

(47) Article 14 of JC, All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

(48) Article 25 of JC, All people shall have the right to maintain the minimum standards of wholesome and cultured living.

(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

accepted nation theory. A provisional inquiry of this thought, I would like to address later in this paper.

### IV-3. Citizenship

As seen above, according to the SC's judgement, foreign nationals can enjoy their fundamental human rights, yet some rights do not extend to them, such as the right to vote because they could influence fundamental national political decision-making – this is to be left only to Japanese citizens under the principle of people's sovereignty.

As for voting rights, there are three types of election: at the central governmental level, the election of the members of the Diet (Art. 15<sup>(49)</sup>); at the local governmental level, the election of the members of the local assembly; and the head of the local government (Art. 93<sup>(50)</sup>). Every voting right is not granted to foreigners. However, the SC has held the possibility of voting rights in local elections based on the different nature of the local government from the central government.

In 1995, the SC held a judgement about the right to vote in local elections by Korean national permanent residents who claimed to put their name on the voter list for the election.

“...the ultimate power of electing and dismissing public officials lies with the people based upon the principle of people's sovereignty. Judging from

---

(49) Article 15. The people have the inalienable right to choose their public officials and to dismiss them.

(2) All public officials are servants of the whole community and not of any group thereof.

(3) Universal adult suffrage is guaranteed with regard to the election of public officials.

(4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

(50) Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

(2) The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.

the preface and Article 1 of the Constitution that declares that sovereignty lies with 'Japanese nationals', it is obvious that 'people' in 'people's sovereignty means' Japanese nationals, i.e. those with Japanese citizenship. Therefore, it is reasonable to conclude that Article 15, para.1 which guarantees the right to elect and dismiss public officials, by its nature, addresses Japanese nationals only and that the guarantee of this provision does not extend to foreign nationals on sojourn in Japan.”

The SC also held:

“However, in the light of the significance of the local self government in a democratic society, provisions on local self government accommodated in Chapter Eight of the Constitution are designed, to institutionally guarantee a political system in which public administration closely related to the day-to-day life of the inhabitants is handled by the local self-government of the territory based upon the will of the inhabitants. Therefore, as regards foreign nationals on a sojourn in Japan, it is reasonable to understand that the Constitution does not prohibit taking measures to grant voting rights to those permanent residents and others who have come to have an especially close relationship with the local self-government in the area of residence in elections for the chief executive of the local self government, members of the local assembly, and other officials by law<sup>(51)</sup>.”

When I heard this judgement at first, I regarded it as the epoch-making decision. I will explain why after the topics of the three autonomies regarding the levels of governance related to autonomie.

After this SC decision, some political campaigns promoting voting rights for permanent residents in local elections occurred, but none succeeded until now<sup>(52)</sup>.

---

(51) Judgement of the Japanese Supreme Court of 28th February 1995 (1993 [Gyo-Tsu] 163), [https://www.courts.go.jp/app/hanrei\\_en/detail?id=201](https://www.courts.go.jp/app/hanrei_en/detail?id=201)

(52) In October 1998, the Democratic Party of Japan “*Minshu tō*” and then New Party Peace “*Shintō heiwa*” (now New *Komeitō*) submitted a draft to Parliament that permanent resident status holders should be entitled to voting rights in local government elections. After the failure of these bills,

From the comparative perspective, seeing other countries entertaining voting rights for foreigners is insightful. For instance, in South Korea, a provision that grants the right to vote in local elections to foreign residents has already been introduced in the Public Official Election Act on Article 15 (2)<sup>(53)</sup>. The first local election with foreign resident votes was conducted in 2005. Interestingly, it is said that one of the reasons for the introduction of the provision is to influence Japan, where such foreigners' voting rights are not easily legislated. Perhaps, in terms of the principle of reciprocity in international relations, this contrast between Japan and South Korea could be an interesting aspect.

[To be continued]

---

other trials bringing such bills have continued, but all efforts have fallen through.

(53) For English translation of the Act, see, [https://www.nec.go.kr/engvote\\_2013/05\\_resourcecenter/02\\_01.jsp](https://www.nec.go.kr/engvote_2013/05_resourcecenter/02_01.jsp). I am very grateful to my South Korean College, Prof. Yun Jeong-In, for her kind suggestions on this topic.