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by Tanaka Nobumasa

Who enshrines the dead? A widely held international principle, that surviving family members determine the disposition of the dead, including those who die in combat, is being tested anew in Japanese courts. Nearly 50,000 Taiwanese and Korean soldiers who died in Japanese uniforms have been enshrined at Yasukuni Shrine without consultation with family members. On May 13, 2004, the Osaka District Court issued its verdict in one of seven lawsuits filed in response to Prime Minister Koizumi Jun'ichiro's pilgrimages to Yasukuni Shrine. It was the first case to address Japan's oppression of indigenous peoples and their mandatory enshrinement at Yasukuni during the nation's colonial rule of Taiwan (1895-1945). Chief Justice Yoshikawa Shin'ichi not only dismissed the plaintiffs' petition for reparations, but also came up with a novel way of judging whether the Prime Minister's pilgrimages are public or private.

At a courthouse press conference, Ms. Chiwas Ari of the indigenous Atayal people, one of the 236 plaintiffs, denounced the verdict in the strongest terms while, in her dark eyes, a tear welled up that rolled slowly in a line down her cheek. As she spoke facing straight ahead and looking directly at the audience before her, this tear poignantly expressed the rage of indigenous Taiwanese at the court's disregard for the deep wounds that remain today from the painful legacy of Japan's colonial rule.

Rescuing the Prime Minister, Abandoning the Victims

The verdict in the Taiwan Case was the fourth to be handed down among the six Yasukuni litigation cases tried in district courts nationwide between November, 2001 and February, 2003. The Osaka District Court had ruled in February, 2004 on an earlier case which, together with the Taiwan Case, are called the Asia Cases. The judges decided then, and in another case heard in Shikoku in March, that the Prime Minister's pilgrimages to Yasukuni were not unconstitutional. Only in the Yamaguchi Case, heard in Fukuoka, did the judges rule in April that the pilgrimages were unconstitutional. But, in all three cases, the courts dismissed the plaintiffs' claims for reparations.

Along with the constitutionality of the Prime Minister's pilgrimages, the most important issues in the Yasukuni Cases are how to recognize legally the pain and suffering these pilgrimages cause the plaintiffs, and how to provide relief. In particular, litigation in which the plaintiffs are victims of colonialism and aggression tests the capacity of judges to comprehend, from plaintiffs' testimony, how the physical and psychological effects they suffer persist to this day.

It is a principle of individual religious freedom that the manner in which war dead are remembered and mourned, or memorialized in religious observances, should be determined by the values and beliefs of the deceased and their relatives. Before and during the war when Japan was officially a "Shinto nation," the

government used its power to violate this freedom. In order to safeguard this fragile right of individual religious freedom from the power of the state, the postwar constitution included Article XIII (respect for the individual), Article XIX (freedom of belief and conscience), Article XX, Paragraph 1 (freedom of religion), and Paragraph 3 (prohibiting the practice of a state religion).

The plaintiffs in the Taiwan Case maintained that the Prime Minister's pilgrimages violated religious freedom, inflicting legally indemnifiable injury on them. They sought reparations based on Article 1 of the Government Compensation Law and Article 709 of the Civil Code, which, they explained, Yasukuni Shrine had violated as a legally incorporated religious institution by permitting Koizumi to make pilgrimages there.

The verdict gave these reasons for dismissing their petition: (1) the Prime Minister's pilgrimages did not constitute official acts as chief cabinet minister; (2) consequently, there were no grounds for compensation; and (3) since Koizumi's pilgrimages had not brought coercion on the plaintiffs or interfered with their interests, these interests had not been legally infringed upon. The crux of this judgment hinged on whether or not the Prime Minister's pilgrimages are official acts.

Of course, they are generally understood to be pilgrimages of the government's chief cabinet officer. That is why they have sparked international protests and an unprecedented series of lawsuits in several Japanese localities against the current Prime Minister. Yet the judges in the Taiwan Case devised an intermediate category for him which is said to cover those "actions attendant upon the rank of chief cabinet officer," and which supposedly falls somewhere in between the official functions of state and private acts. According to their verdict, this is where Koizumi's pilgrimages belong. The judges avoided ruling

on the issue of constitutionality by claiming to have calculated the degree to which his pilgrimages involve the national government, and to have concluded that they are not official functions. This newly devised concept of "actions attendant upon the rank of chief cabinet officer" recalls political theory and discourse that recognized the emperor's participation in the affairs of state as constitutional, and permitted "the emperor to act as a symbol of the nation." It can only create ambiguity about the official acts of a Prime Minister.

In practical terms, such hairsplitting between what is public and private only increases the danger of concealing the true nature of the Prime Minister's pilgrimages. Urabe Noriho, Professor of Constitutional Law at Nagoya University, warned that "fixating on such hairsplitting distinctions between public and private blinds us to the pilgrimages' true nature. Though he may have used a private car, made monetary offerings from his own pocket, and conducted the ceremony in an informal manner, the Prime Minister's pilgrimage to a religious institution is nothing other than the religious act of a public official." (Asahi Shimbun, April 8, 2004, morning edition) The Osaka verdict was obviously a bit of trickery contrived to rescue Koizumi from the bind the Fukuoka verdict had put him in. This, despite the fact that it is the indigenous people of Taiwan, with deep wounds inflicted by Japan's colonial rule, who should be provided relief.

Judges' Decision Pours Salt in Deep Wounds

"Do all of you know the history of Taiwan's indigenous people?" asked Chiwas Ari at the post-verdict press conference. "Please look at this book of photographs we brought here today." The title of the book was Valley of Silence. The photograph on the page she opened to sent shock waves through the room. A Japanese soldier wielding a military sword had just beheaded a captured Taiwanese

aborigine. "These photographs were taken to show 'meritorious service' in Japan's army. The beheaded man is one of our Atayal ancestors." She paused in silence for a time, then continued. "From 1911 to 1915 the Japanese colonial rulers in Taiwan carried out a policy of 'native control,' killing indigenous people, seizing their possessions, and burning their homes if they did not submit to Japanese rule. Their surviving children were indoctrinated in a program of 'education for native youth' (that is, education to make them Japanese imperial subjects) and, as soon as they were old enough, they were sent to South Pacific battlefields in units called 'Takasago patriot brigades.' Those who died in the fighting were automatically enshrined at Yasukuni. If you ask me, this is genocide spanning two generations."

For most of us at the press conference, knowledge of the indigenous people's history barely extended to the Wushe Incident of October, 1930, their final resistance to Japanese rule. We knew that continuing protests against the Prime Minister's Yasukuni pilgrimages have come from the governments and people in China, South Korea, and elsewhere in Asia, but not from the government or people of Taiwan. Why, we wondered, had the plaintiffs in this case come from Taiwan and filed suit as indigenous people?

Born in 1965, Chiwas Ari is a former singer and actress elected to the Taiwan Legislature (corresponding to Japan's Diet) in December of 2001. "I wanted to work for the restoration of indigenous people's rights." One day a friend who runs a bookstore for old Japanese books showed her two recently purchased albums of photographs taken by the Japanese army. "I remember well the first time I saw the photograph that shows the beheading of an Atayal ancestor. My whole body started shaking and my blood seemed to reverse direction as my tears poured out."

In Taiwan, most of the approximately 450,000

among the twelve groups of indigenous peoples don't know the history of Japan's colonial rule. "This is because their history was stolen from them," says Chiwas Ari. She planned the publication of selected photographs from the two albums as the book *Valley of Silence*, and also arranged a traveling exhibition of the photographs so that indigenous peoples could retrieve this history. Many expressed shock and outrage to learn about it for the first time, which also motivated the plaintiffs in Taiwan to file suit. People came to know the humiliating realities of colonial rule, massacres, thorough indoctrination to be Japanese imperial subjects, dying in a war "for the sake of emperor and nation," and enshrinement as aggressors at Yasukuni, the shrine that glorifies wars of aggression.

"For our ancestors to be enshrined in that place where Prime Minister Koizumi goes to pay homage and thank the war dead for Japan's peace and prosperity--this is an unbearable insult."

In August of 2002, Chiwas Ari traveled with other indigenous people to Yasukuni Shrine and requested the removal of these enshrinements. The brusque refusal of shrine officials could be said to inflict further injury. 27,863 Taiwanese and 21,181 Koreans are enshrined there. For those subjected to Japanese colonial rule, what is unequivocally at issue in the Yasukuni Cases is Japan's wartime and postwar culpability.

Had the judges in the Taiwan Case considered the extensive testimony and overwhelming factual evidence presented to them and understood its implications for the present, surely they would have offered the victims a helping hand. Providing relief for the ravages of colonial rule and wartime aggression is a fundamental postwar responsibility. Instead, they rescued the victimizers and abandoned the victims. At the meeting held on the afternoon of their verdict, Chiwas Ari offered these words

before returning to Taiwan.

"Maybe the judges think Taiwan is still a colony of Japan. But we will continue the fight to realize our modest claims."

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Related cases involving Prime Ministerial visits to Yasukuni and court cases demanding reparations for unresolved World War II issues are discussed in Japan Focus articles by Umehara Takeshi, Tanaka Nobumasa, and Yoshibumi Wakamiya.