

**JURISUTO* COMMENTARY ON IMPORTANT LEGAL PRECEDENTS FOR
2005: TRENDS IN CONSTITUTIONAL LAW CASES****

Teruki Tsunemoto***

Translation by John Donovan, Yuko Funaki, and Jennifer Shimada****

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** Teruki Tsunemoto, *Kenpō Hanrei no Ugoki* [Trends in Japanese Constitutional Law Cases], JURISUTO, June 10, 2006, at 2 (rinji zōkan [extra edition], Heisei 17 Nendo Jūyō Hanrei Kaisetsu [Commentary on Important 2005 Legal Precedents]).

*** Vice Dean & Professor of Law, Hokkaido University School of Law, Sapporo, Japan.

**** J.D. Candidates 2008, William S. Richardson School of Law, University of Hawai'i at Mānoa. Although this is primarily a translation of the original Japanese, in order to tailor this survey to the needs of foreign readers, the translators have added explanatory footnotes to elaborate references to Japanese cases, practices, and procedures that may be unfamiliar to some readers. The translators would like to extend a special thanks to Associate Professor Mark A. Levin for his assistance reviewing this translation.

As with last year, there have been a number of noteworthy constitutional law cases this year. Among others, two Supreme Court Grand Bench¹ decisions are noteworthy: the January 26, 2005 decision on the Tokyo Metropolitan Government's Managerial Personnel Screening Examination, and the September 14, 2005 decision on the voting rights of overseas Japanese citizens. In the first of these decisions the Grand Bench delivered an opinion on an issue that has long been controversial among scholars and the lower courts. The latter decision not only held that the government actions were unconstitutional, but was a landmark decision for its recognition of claims against the government for legislative nonfeasance, an issue recently attracting considerable attention. Since discussions concerning the establishment of a Constitutional Court [as distinct from the existing Supreme Court],² feeling threatened, the Supreme Court has been actively adjudicating constitutional matters. Some believe there may be a proactive campaign by the Court to justify its existence. These decisions may be evidence of this campaign.

In this article I have drawn from cases with substantive constitutional law issues decided during the preceding calendar year. I have attempted to capture court opinions as they were published in Japanese reporters as much as is possible within the confines of these pages.³ Supreme Court opinions included in this article that display only case numbers were unavailable in print as of April 2006. Nonetheless, these opinions are available electronically on the Japanese Supreme Court's official website.⁴

¹ Appeals to the Supreme Court are heard before one of three Petty Benches comprised of five justices each. Percy R. Luney, *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 LAW & CONTEMP. PROBS. 135, 147 (1990). Cases requiring constitutional rulings or establishing new judicial precedents are directed to an en banc Grand Bench comprised of all fifteen justices. *Id.* A quorum of three justices is required for Petty Bench hearings; nine justices are required for Grand Bench proceedings. *Id.* A majority of eight Grand Bench justices are required to declare a law or regulation unconstitutional. *Id.*

² In 2005, a majority of members from the Lower House Research Commission on the Constitution called for revisions to the Constitution to establish a Constitutional Court, separate from the Supreme Court. *See Japan Gears Up for Constitution Overhaul*, MAINICHI DAILY NEWS (Japan), April 15, 2005, at 8. The recommendation has not yet been implemented.

³ *E.g.*, SAIKŌ SAIBANSHO HANREISHŪ [SUPREME COURT REPORTER], SAIBANSHO JIHŌ, HANREI JIHŌ, HANREI TAIMUZU.

⁴ Supreme Court of Japan, <http://www.courts.go.jp>.

I. POLITICS & GOVERNMENT

A. *Pacifism*

In a case before the Kofu District Court, a group of plaintiffs brought an action to suspend deployment of the Self Defense Forces to Iraq.⁵ The plaintiffs prayed for declaratory relief on the grounds that the deployment was constitutionality proscribed and that plaintiffs were entitled to an inherent right to live in peace.⁶ The Kofu District Court dismissed the claim on grounds that the very concept of peace is as inherently subjective as its means of achievement. The court also rejected the plaintiffs' claim that the planned deployment would heighten terrorist threats toward Japan, finding that an actual risk of increased terrorist threats owing to the planned dispatch of forces could not be confirmed. In addition, the court held that the planned deployment did not infringe legally protected individual rights or interests because there is no colorable claim for emotional distress inflicted by national policies contrary to one's personal beliefs. Such emotional distress is the inevitable consequence of policies made under the principle of majority rule.

B. *The Electoral System*

Relatively speaking, the Supreme Court has meaningfully engaged itself with voting rights infringement cases, in contrast to other areas of constitutional law, as demonstrated in several cases where it held apportionment provisions in the election law unconstitutional. Of course we might instead observe that the court has been overly disengaged with these "other areas" of constitutional law. Thus, the Grand Bench's decision on September 14, 2005, which further clarified its stance [in this area], attracted substantial attention.⁷ Prior to 1998, Japanese nationals living abroad were

⁵ Following the historic deployment of 550 Ground Self-Defense Force (GSDF) troops to Iraq in 2004, the Japanese government proposed to construct a replica of its base camp in the southern Iraqi city of Samawah at a training site in Yamanashi Prefecture to train GSDF to defend themselves against insurgent attacks. *See GSDF Drills to Simulate Repelling Attacks in Iraq*, JAPAN TIMES, Apr. 2, 2004, at 1. Four citizens' groups demanded a halt to the construction and stated in a letter to Yamanashi Gov. Takahiko Yamamoto that the project condoned an "unjustifiable" war in Iraq and threatened to make Yamanashi residents vulnerable to terrorist retribution. *Id.*

⁶ 1194 HANREI TAIMUZU 117 (Kofu D. Ct., Oct. 25, 2005).

⁷ [59] 7 MINSHŪ 2087, 1908 HANREI JIHŌ 36, 1191 HANREI TAIMUZU 143 (Sup. Ct., Grand Bench, Sept. 14, 2005).

unable to vote in Japanese elections. After 1998, they remained unable to vote for single-seat House of Representatives (“Lower House”) elections and House of Councillors (“Upper House”) prefecture-district elections.⁸ In the recent Supreme Court decision, the Grand Bench held not only that the voting restriction was unconstitutional, but that the national government was liable for reparations on the basis of legislative nonfeasance. The Court reasoned that the Diet’s failure to establish an overseas voting system for more than a decade, despite the Cabinet’s 1984 bill authorizing overseas voting, amounted to legislative nonfeasance (the 1984 bill died when the Lower House dissolved). As to the latter point, the decision is controversial in that it seems to have opened a door to reparations claims based on legislative actions (or omissions), a door which was effectively closed by the First Petty Bench of the Supreme Court in 1985.⁹ In this regard, Justice Tokuji Izumi’s dissenting

⁸ The national legislature in Japan is comprised of a Lower and Upper House. Of the current 480 Lower House members, 300 were elected from single-seat districts and the remaining 180 from 1 of 11 national, plural electoral blocs (where seats are awarded in proportion to the number of ballots cast for each party). See House of Representatives, Election of Diet Members, http://www.shugiin.go.jp/itdb_english.nsf/html/statics/guide/election.htm (last visited Mar. 17, 2007). The Upper House is currently comprised of 242 members: 146 are elected from 1 of 47 prefectural districts, and 96 are elected from a nationwide district in a proportional representation system. House of Councillors, Electoral System, How Diet Members Are Chosen, http://www.sangiin.go.jp/eng/member/f_d_5.htm (last visited Mar. 17, 2007). In Lower House elections, voters cast two votes: one for an individual candidate in their single-seat district, and the other for their political party in one of eleven regional districts in proportional representation system. See House of Representatives, *supra*. In Upper House elections voters cast a vote for their prefectural representative, and the other for their party or an individual candidate in the nationwide district. See House of Councillors, *supra*. Following amendment to the Public Offices Election Law, overseas voters in the case were eligible to vote in national level elections, but proscribed from participating in district and prefectural elections.

⁹ [39] 7 MINSHŪ 1512 (Sup. Ct., 1st Petty Bench, Nov. 21, 1985) (holding that a legislative act or omission by a member of the Diet does not violate a legal obligation toward a particular citizen that arises in the course of performing their duties in the legislative process in a case where a plaintiff, who was injured in an accident and therefore unable to reach his polling station without assistance, was unable to vote in eight elections after the Diet repealed the At-Home Voting System).

opinion which presents the opposing perspective regarding monetary compensation for such claims should be viewed as essential reading.¹⁰

C. *The Judiciary*

The Third Petty Bench of the Supreme Court dismissed a claim in which plaintiffs sought invalidation of the November 9, 2003 Lower House general election, claiming that the apportionment of representatives to the Lower House in the Public Offices Election Law¹¹ violated Article 14 of the Constitution.¹² Because the Lower House was dissolved during the course of the appeal, the Court rejected the appeal holding that “in accordance with the dissolution [of the Lower House], we must interpret that the election in controversy became ineffective for future purposes, and any legal interest the claims in the instant suit was accordingly lost.” Furthermore, as for oral argument for this case which had annulled the trial court decision (and which had rejected the plaintiffs’ claims on the merits), the Court handed down its rejection of appeal without oral argument,¹³ giving as its reason that the dissolution made the suit moot and the standing to sue was irreparably lost.¹⁴

¹⁰ [59] 7 MINSHŪ 2087, 1908 HANREI JIHŌ 36, 1191 HANREI TAIMUZU 143 (Sup. Ct., Sept. 14, 2005) (Izumi, J., dissenting) (stating that “the appellants’ mental distress is difficult to evaluate in monetary terms and monetary compensation is not suitable for it” and noting that nominal damages are afforded in the U.K. and U.S. when no actual loss occurred due to violation of a constitutional right).

¹¹ 1396 SAIBANSHO JIHŌ 9, 1911 HANREI JIHŌ 96, 1192 HANREI TAIMUZU 247 (Sup. Ct., 3d Petty Bench, Sept. 27, 2005). *See generally* Kōshoku Senkyohō [Public Offices Election Law], Act No. 100 of 1950, art. 21(1) (as amended by Law No. 62 of 2000) (stating that for the time being, the revision to the Public Office Election Law would be applicable only to elections of Lower House members under the proportional representation system and elections of Upper House members under the proportional representation system, thus effectively preventing overseas voters from exercising the right to vote in elections of Lower House members under the single-seat constituency system and elections of Upper House members under the constituency system).

¹² “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.” KENPŌ [JAPAN CONST.], art. 14(1).

¹³ The majority of Supreme Court decisions are granted on the basis of examinations of the written case records (e.g. lower court proceedings, appellate briefs, etc.) and oral arguments before the justices are rare, usually reserved to cases in which the justices believe the lower court should be overturned, capital cases, and review of public security incidents. H. Ito, *The Japanese Supreme Court*:

In another case, the Tokyo High Court¹⁵ overruled a noteworthy decision by the Tokyo District Court¹⁶ that held the partial nondisclosure of minutes of a Supreme Court judicial conference (relating to the Supreme Court's recognition of a promise [by the Prosecutor] not to indict [Lockheed's] Vice Chairman Kotchian in the Lockheed Scandal)¹⁷ unlawful.¹⁸ The High Court stated that:

[J]udicial administration differs from general governmental administration . . . in that it lies in close relation to the exercise of judicial authority. . . . The minutes of Supreme Court conferences are not open to public . . . because it is necessary to make every effort to exclude the risk of unfair prejudice in

Constitutional Policies, in JAPANESE LEGAL SYSTEM 386, 393-94 (Meryll Dean ed., 2002).

¹⁴ In short, the Court rejected and denied the case as moot in a manner that also effectively voided the trial court's ruling for the defense on the merits. While oral argument is ordinarily allowed when a trial court ruling will be rendered null and void, in this case the Court also declined to hear arguments.

¹⁵ There are eight high courts located in Tokyo, Fukuoka, Osaka, Nagoya, Sapporo, Takamatsu, Sendai, and Hiroshima with jurisdiction over appeals from judgments rendered in district and family courts and criminal judgments from summary courts. Luney, *supra* note 1, at 145.

¹⁶ 1917 HANREI JIHŌ 29 (Tokyo D. Ct., June 24, 2004).

¹⁷ In 1972, in a bid to sell its L-1011 TriStar jets to All Nippon Airways (ANA), Lockheed, through its Japanese partner Marubeni, arranged to direct ¥500 million (\$7.53 million) to Prime Minister Tanaka's office for preferential consideration in the bid process. See STEVEN HUNZIKER & IKURO KAMIMURA, *KAKUEI TANAKA: A POLITICAL BIOGRAPHY OF MODERN JAPAN* 109-11 (1996). The bribes were revealed as part of Lockheed President Carl Kotchian's testimony during his 1976 appearance before U.S. Senate Sub-Committee Public Hearings on U.S. Corporations Overseas Operations. *Id.* at 111. Kotchian was deposed by Japanese Prosecutors at the Los Angeles Federal Courthouse in June 1976 and a month later the Japanese Supreme Court took the usual position of allowing prosecutorial immunity for Kotchian in exchange for his testimony. *Id.* at 113. For more than a decade following Kotchian's testimony, Tanaka was the subject of exhaustive investigation and prosecution. *Id.* at 114-16. He was eventually convicted under the Foreign Exchange and Foreign Trade Control Laws in 1983. *Id.* at 117.

¹⁸ 1917 HANREI JIHŌ 29 (Tokyo High Ct., Feb. 9, 2005).

the decision making process . . . and avoid confusion among concerned parties and the public due to unnecessary misunderstandings and speculation caused by disclosure of information which affects or may affect the same or similar future proceedings. . . . [This nondisclosure rule] is not limited to the meeting itself, but also to parts of the minutes which record the meeting process (such as opinions and discussions), and to parts where the meeting process could be inferred.

There is considerable interest in a forthcoming Supreme Court decision on this case, the first to review the disclosure of information from Supreme Court conferences.

II. FUNDAMENTAL HUMAN RIGHTS

A. *The Right to Privacy and Personality*¹⁹

On November 10, 2005, the First Petty Bench of the Supreme Court handed down a decision which stated the factors used in determining what constitutes infringement of the right of portrait.²⁰ In this case, a tabloid publisher was accused of violating the right of portrait when it published a surreptitiously taken courtroom photograph of a criminal defendant wearing handcuffs and

¹⁹ The right to personality is used here as a translation of *jinkaku ken* 人格権. *Jinkaku ken* is a general term for legally protected personal interests including life, liberty and reputation. Professor Mark Levin writes, “*Jinkaku* represents the elements of character and personality that come together to define each person as an individual; more than individuality, it is one's individual-ness.” Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419, 485 (2001).

²⁰ 59 MINSHŪ 9, 1399 SAIBANSHO JIHŌ 15, 1203 HANREI TAIMUZU 74 (Sup. Ct., Nov. 10, 2005).

koshinawa.²¹ The photographed person had been arrested and indicted for murder in the July 1998 Wakayama City curry rice poisoning incident.²² The Court stated that

[T]here are surely cases where photographing a person's face or appearance should be allowed as appropriate for gathering news materials . . . however, whether the act of photographing a person's face or appearance without consent is tortious should be determined based upon an assessment of whether the photographed person's personal interest [in not having their face or appearance photographed without good reason was violated beyond the limits of tolerance]²³

²¹ A *koshinawa* 腰縄 is a leash made of rope and tied about a prisoner's waist.

²² Masumi Hayashi appeared before the Wakayama District Court November 13, 1998 to face charges that she had killed four people and sickened 63 others by adding arsenic to a pot of curry served at a festival near her home in Wakayama in July 1998. See *Masumi Hayashi Faces Arrest in Curry Poisoning*, DAILY YOMIURI, Nov. 13, 1998, at 2; *Hayashi Sues Over Published Photo*, DAILY YOMIURI, Aug. 12, 1999, at 2. Despite being aware that taking photos during a court hearing was banned, Shinchosha Co., publisher of *Focus* magazine, sent a photographer to take candid photos of Hayashi at the November 1998 hearing. *Publisher Rapped Over Court Photo of Accused Curry Killer*, MAINICHI SHIMBUN, Feb. 19, 2002, at 8. *Focus* subsequently published one of the photos in a May 1999 issue. *Id.* When Hayashi sued Shinchosha for publishing the photo, *Focus* carried three illustrations under the heading, "To Masumi Hayashi, Who filed a Suit Against the Magazine. What [Reaction] Do You Have to These Illustrations?" *Supreme Court Rules for 'Curry Poisoner' in Libel Case*, DAILY YOMIURI, Nov. 11, 2005, at 1. The Supreme Court held that only the photograph was illegal and ordered damages in the amount of 2.2 million yen, narrowing a 2002 ruling by the Osaka High Court upholding a Wakayama District Court determination that both the photographs and the illustrations violated Hayashi's right to portrait. *Id.* Following a 3 year, 7 month trial, Hayashi was sentenced to death by the Wakayama District Court in December 2002. See *Hayashi Sentenced to Death*, DAILY YOMIURI, Dec. 12, 2002, at 1. An appeal of her sentence to the Osaka High Court was rejected June 28, 2005. *High Court Rejects Notorious Curry Killer's Death Sentence Appeal*, MAINICHI DAILY NEWS, June 28, 2005, at 8.

²³ Beyond the limits of tolerance (*junin no gendo* 受忍の限度) is a legal standard often used in Japanese jurisprudence.

in ordinary social life, while generally considering various factors such as the photographed person's social status, the photographed activity, the place, purpose, manner, and necessity of photographing.

Moreover, the Court concluded:

It is reasonable to construe that any person also has a personal interest in not having photographs of his/her face or appearance publicized without good reason, and if the act of photographing a person's face or appearance is recognized as illegal, then publicizing those photographs should also be recognized as illegally violating the personal interest of the photographed person.

Infringement of the personal right of portrait has increasingly become an issue with the recent increase of security and surveillance camera installations, not only by public institutions such as the police, but also by private parties in places such as shopping malls and convenience stores, raising issues of right infringement between private parties.²⁴ One noteworthy precedent along these lines is a Nagoya High Court case which engaged the question of whether a convenience store violated a plaintiff's rights of portrait and privacy by providing security camera tapes to the police.²⁵ The court stated that the balance between "privacy protections and the right of portrait arising under Article 13 of the Constitution and security camera videotaping by convenience stores" should be struck by "indirect application²⁷" of the Constitution, or "be considered as a matter of

²⁴ Private-private rights (*min-min kankei de no kenri* 民-民関係での権利), i.e. rights claims between private parties without state action.

²⁵ Unreported case (Nagoya High Ct., no. 763 (*ne*) 2004, Mar. 30, 2005).

²⁷ According to Japanese constitutional jurisprudence, direct application of constitutional provisions are limited to governmental actions, but the

generally applicable provisions concerning private autonomy.” The court noted that in a convenience store one’s rights of portrait and privacy are diminished when compared to a place such as one’s home, where there is a heightened expectation of privacy. Convenience store owners have an institutional need to take necessary measures to ensure the safety of customers and employees, and to protect their property. Furthermore, taking into account that videotaping is not mandatory, the Nagoya High Court decided that the legality of security camera videotaping in convenience stores should be determined not by a rigid standard, but rather that “it is appropriate to decide this by considering the reasonableness of its purpose, the degree of need, and the reasonableness of the methods used, etc.”

As with last year, there have been a number of lower court decisions regarding the constitutionality of the resident register network system (generally known as the “*Jūki Net*” system).²⁶ Noteworthy among these cases is a decision by the Kanazawa District Court, the first decision to recognize the application of relevant provisions of the Residential Registry Law as unconstitutional because the provisions infringed on the right to privacy, and [the first] to enjoin information transfers [from local authorities to the national government].²⁷ The court held that the right to privacy guaranteed under Article 13 of the Constitution should be interpreted to

such provisions are indirectly applicable to disputes between private parties by interpretively projecting the spirit of the Constitution into the general provisions of the Civil Code.

²⁶ Implementation of the resident register network system (*jūmin kihon daichō nettowāku shisutemu* 住民基本台帳ネットワークシステム) began in 2002 with the principle objective of enhancing the efficiency of government administrative procedures by enabling the central and local governments to confirm residents’ identities using personal information from the *Jūki Net*, rather than asking for documents or seals when the residents make official requests.” *National Registry Network To Go Into Full Operation*, DAILY YOMIURI, Aug. 25, 2003, at 2. Every resident throughout the country is assigned an 11-digit resident identification code so that personal data, such as name, address, date of birth and sex, can be transmitted online from local government to central government offices. *Govt Starts Jūki Net System*, DAILY YOMIURI, Aug. 6, 2002, at 1. Critics have charged that the system insufficiently guards against leaks and abuses, facilitates unauthorized snooping by civil servants -- particularly the central government, and dehumanizes citizens by reducing their identity to an 11-digit number. *Fears of an Orwellian Government*, JAPAN TIMES, Aug. 10, 2002. .

²⁷ 1199 HANREI TAIMUZU 87, 269 HANREI CHIH JICHI 10 (Kanazawa D. Ct., May 30, 2005).

“crucially include the right to control information about oneself” in light of the circumstances of the modern information society. This right to control information about oneself no doubt pertains to [government] data used to certify personal identity. Specifically, as to the *Jūki* Net’s resident code and data updates, the court said these have “a relatively high-level need for concealment, . . . because there is a very real danger that individual autonomy will be threatened [through inadvertent disclosure of personal information], the infringement of the right to privacy by the operation of the *Jūki* Net is a rather serious matter.” The court went on to state the two purposes of the *Jūki* Net -- “to benefit residents” and to provide “administrative efficiency” -- then noted that since both the benefit to residents and the right to privacy are personal interests, the choice between the two should be made by each individual. Government administrators cannot impose [the choice] on residents. Allowing the right to privacy to take precedence for plaintiffs seeking to remove their names from the *Jūki* Net system, “administrative efficiency” alone failed as a proper justification and could not prevail over an individual’s right to privacy. Thus, in this case, the Kanazawa District Court concluded that the *Jūki* Net provisions of the Resident Register Law violated Article 13 of the Constitution to the extent it was applied to the plaintiffs.²⁸ Furthermore, because the court found no legal basis to allow personal identification information to be transferred from *Jūki* Net to the government, the court concomitantly enjoined further transfer of personal information and ordered the deletion of the plaintiffs’ personal information from the *Jūki* Net magnetic disk where it was stored. Conversely, the Nagoya District Court and the Fukuoka District Court held that even if personal identification information is subject to the right to privacy, the utility of maintaining personal information in the *Jūki* Net system exceeds the necessity of protecting the confidentiality of such information.²⁹

²⁸ “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.” KENPŌ, art. 13.

²⁹ Unreported case (Nagoya D. Ct., no. 43 (*gyō u*) 2003, Apr. 28, 2005); 1194 HANREI TAIMUZU 108, 269, HANREI CHIH JICHI 45 (Nagoya D. Ct., May 31, 2005); 1916 HANREI JIHŌ 91 (Fukuoka D. Ct., Oct. 14, 2005). The courts remain divided on this issue. In November 2005 the Osaka High Court pointed out that the *Jūki* Net security system was flawed because the law that protects computerized personal data held by administrative organs could be interpreted to allow the government to change the way personal information could be used,

B. Equality Under the Law

While controversy regarding claims by foreigners of a right to work in the public sector, the so-called issue of “natural law of public employment” continues, the Supreme Court’s January 26, 2005 Grand Bench decision concerning the Tokyo Metropolitan Government’s Management Screening Examination³⁰ drew public attention to this issue, especially the newly presented concept of “local government employees exercising public authority.”³¹ It is important to point out that the issue in this case, where the plaintiff was a Korean national³² already serving as a public employee and the possible violation of

without an individual's consent. *Court Overturns Jūki Net Ruling*, YOMIURI SHIMBUN, Dec. 12, 2006, at 2. On December 11, 2006, the Nagoya High Court's Kanazawa branch overturned the Kanazawa District Court ruling of May 30, 2005, dismissing residents' demands to delete their personal data from the *Jūki* Net on grounds that “[v]arious security measures are in place to protect personal information and the system doesn't violate the plaintiffs' rights to privacy, hence it doesn't contravene Article 13 of the Constitution.” *Id.* Appeals to the Supreme Court are pending. *Id.*

³⁰ Chong Hyang Kyun, a South Korean with Special Permanent Resident status in Japan and employed by the Tokyo Metropolitan Government as a public health nurse since 1988, applied in 1994 to take the Tokyo Metropolitan Government Management Screening Examination in order to qualify for a supervisory position. *Top Court to Rule on Nationality, Promotion Test for Public Servant*, YOMIURI SHIMBUN, June 25, 2004, at 3. Her application to take the test was refused in March 1994 by Tokyo Metropolitan Government on the ground that the nationality clause regarding eligibility for the civil service limits examinees to Japanese employees. *Id.* Chong filed a lawsuit in September 1994 with the Tokyo District Court which subsequently dismissed her claim. *Id.* The Tokyo High Court reversed in 1997. *Id.*

³¹ [59] 1 MINSHŪ 128, 1885 HANREI JIHŌ 3, 1174 HANREI TAIMUZU 129 (Sup. Ct., Grand Bench, Jan. 26, 2005).

³² In 1982, in response to Japan’s accession to the Convention Relating to the Status of Refugees, the Immigration Control Act was revised to allow the lineal descendants of aliens of ethnic Koreans who migrated to Japan before 1945 to apply for Special Permanent Residency. Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 HUM. RTS. Q. 131, 150-52 (1986). Of the more than 600,000 Koreans living in Japan today, more than 500,000 are Special Permanent Residents, and although Korean’s numbers as a percentage of the entire foreign population have declined in recent years, they remain the largest component of the more than two million foreigners who now reside in Japan. See Yoshiko Nozaki, et al., *Legal Categories, Demographic Change and Japan’s Korean Residents in the Long Twentieth Century*, <http://www.japanfocus.org/products/details/2220> (last visited Apr. 12, 2007).

equality under the law directly arose as a problem when promotion was conditioned on having Japanese nationality, was not about the right of foreigners to attain public employment, but rather the administrative authority with which local governments may structure their own personnel policies. There was also much interest in Justice Tokiyasu Fujita's concurring opinion and Justice Tokuji Izumi's dissenting opinion regarding their discussions of the status of the Special Permanent Residents.³³

³³ Justice Fujita wrote:

There are no grounds to construe special permanent residents to be distinguished from other foreign nationals and especially given preferential treatment under the existing Japanese laws with respect to appointment as local government employees, and unless such treatment is expressly provided in laws, the question is whether or not it is possible for foreign nationals in general to take office as government employees . . . It cannot be necessarily said that the measure taken by the . . . Tokyo Metropolitan Government to prohibit . . . foreign nationals in general from taking the Examinations for Management Selection is immediately deemed to be beyond the bounds of legally acceptable personnel policy, and it is at least impossible to regard the [government] as having been negligent for taking such measure.

[59] 1 MINSHŪ 128, 1885 HANREI JIHŌ 3, 1174 HANREI TAIMUZU 129 (Sup. Ct., Grand Bench, Jan. 26, 2005) (Fujita, J., concurring); Justice Izumi wrote in dissent:

Taking into consideration the legal status of special permanent residents, the moral right aspect of freedom of choice in occupation, and the rights of special permanent residents as inhabitants, in cases where a local public body restricts, for the purpose of administering and enforcing affairs related to local self-government as appropriate, special permanent residents from being appointed to posts other than those closely related in the process of self-governance, such restriction must be reasonable in more strict sense. . . . [P]rohibit[ing] special permanent residents from taking examinations . . . as a means to accomplish the purpose of appropriately administering and

A May 25, 2005 Osaka District Court opinion is also noteworthy with regard to nationality and the equality principle.³⁴ In that case, the plaintiff, a Korean national, claimed that requiring Japanese nationality to receive national pension benefits under the National Pension Plan Law (prior to the 1981 amendment) violated Article 14, Section 1 of the Constitution and sued for compensatory damages. The court found that “[w]ith regard to laws and ordinances enacted pursuant to Article 25,³⁵ a violation of Article 14 may occur when the limits of eligibility for beneficiaries are based on inappropriate discrimination with no rational basis.” However, the court went on to find that a “nationality requirement [in this context] is not discrimination lacking a rational basis and thus does not violate Article 14, Section 1.”

Jurisuto's 2004 Trends in Constitutional Law Cases commentary introduced a March 2, 2004 case in which the Tokyo District Court held that notating legitimacy or illegitimacy in the relationship column of the Family Registry infringed the right to privacy.³⁶ On appeal, the Tokyo High Court, relying on a July 5, 1995 Supreme Court case,³⁷ held that the requirement to specify one's legitimacy cannot infringe the constitution right of privacy because it

enforcing affairs related to local self-government under the principle of self-governance, does not go beyond the bounds of necessity and reasonability for accomplishing the purpose. Such measure should inevitably be deemed to be an excessively broad restriction and therefore denied reasonability.

Id. (Izumi, J., dissenting).

³⁴ 1898 HANREI JIHŌ 75, 1188 HANREI TAIMUZU 254 (Osaka D. Ct., May 25, 2005).

³⁵ “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.” KENPŌ, art. 25.

³⁶ [51] 3 SOSHO GEPPŌ 549 (Tokyo D. Ct., Mar. 2, 2004).

³⁷ [49] 7 MINSHŪ 1789 (Sup. Ct., Grand Bench., July 5, 1995) (holding that Article 900, subparagraph 4 of the Civil Code which determined that the inheritance share of an illegitimate child to be half that of a legitimate child “cannot be regarded as excessively unreasonable in relation to the reason of enactment, and exceeded the scope of reasonable discretion granted to the legislature.”).

is rational to distinguish between legitimate and illegitimate children.³⁸ The High Court concluded that Civil Code provisions on inheritance that distinguish between legitimate and illegitimate children make the distinction in family registries inevitable.

In another case dealing with the status of illegitimate children, the Tokyo District Court held in an April 13, 2005 opinion that article 3, section 1 of the Nationality Act³⁹ violated Article 14 of the Constitution because it failed to grant citizenship to children illegitimate at birth (except for allowing citizenship of children legitimized subsequently⁴⁰).⁴¹ The court voided the word “legitimate” from the relevant provision of the statute and applied the remaining provision to the case to let the illegitimate child acquire Japanese nationality.⁴²

Among cases regarding discrimination against women, there was the March 28, 2005 Osaka District Court ruling regarding

³⁸ 1899 HANREI JIHŌ 101 (Tokyo High Ct., Mar. 24, 2005).

³⁹ Article 3, section 1 of the Nationality Law states

A child (excluding a child who was once a Japanese national) under twenty years of age who has acquired the status of a legitimate child by reason of the marriage of its father and mother and their recognition, may acquire Japanese nationality by making notification to the Minister of Justice, if the father or mother who has effected the recognition was, at the time of the child's birth, a Japanese national and such father or mother is presently a Japanese national or was, at the time of his or her death, a Japanese national.

Kokuseki hō [The Nationality Law], Law No. 147 of 1950, art. 3(1), *amended by* Law No. 268 of 1952, Law No. 45 of 1984 and Law No. 89 of 1993 (Ministry of Justice, trans.), *available at* <http://www.moj.go.jp/ENGLISH/information/tnl-01.html>).

⁴⁰ *Junsei shi* 準正子 is a child born out of wedlock, legitimized by the mother and the father marrying or the father identifying himself as the child's father before the birth.

⁴¹ 1890 HANREI JIHŌ 27, 1175 HANREI TAIMUZU 106 (Tokyo D. Ct., Apr. 13, 2005).

⁴² The court insisted this was a legitimate interpretation to keep the provision within the constitutional framework, but on appeal the Tokyo High Court quashed the lower court ruling on February 28, 2006, noting that the district court ruling was a virtual encroachment of legislative authority.

performance assessments⁴³ that discriminated between men and women having the same level of skills for entry-level clerical work.⁴⁴ Having different quantitative and qualitative metrics for people within the same skills classification was clearly discriminatory. Pay raises and promotions based on these assessments was irrational sexual discrimination and violated the public policy provision of Article 90 of the Civil Code⁴⁵ taking into account Article 14 of the Constitution; article 1, section 2 of the Civil Code;⁴⁶ and article 3 of the Labor Standards Law.⁴⁷

In another case [concerning gender discrimination], residents of Osaka filed a complaint against their prefectural governor seeking reimbursement of expenses for the Governor's Award at the annual spring Grand Sumo Tournament held in Osaka. The Governor was prevented from directly presenting the award in the sumo ring because she is a woman and the Lieutenant Governor, a man, had to present the award on her behalf. The plaintiffs claimed that because the Governor was well aware that a female governor would not be permitted to enter the sumo ring to present the awards in person, the expenditure of public money on the event was unlawful since it constituted an official endorsement of gender discrimination proscribed by Article 14 of the Constitution. On August 30, 2005 the Osaka District Court held that the Governor did not directly violate

⁴³ There were two tiers of discrimination: (1) discriminatory treatment when conducting "capability assessments," and (2) among the employees who were classified into the same "capability assessment" classification, there was discriminatory treatment regarding "evaluation classification" and "assessment classification."

⁴⁴ 1189 HANREI TAIMUZU 98, 898 RODO HANREI 40 (Osaka D. Ct., Mar. 28, 2005)

⁴⁵ "A Jurisutoic act which has for its purpose such matters as are contrary to public policy or good morals is null and void." MINPŌ [CIVIL CODE], art. 90, *translated in* 2 EHS LAW BULL. SER. no. 2100-01 (1992).

⁴⁶ "The exercise of rights and performance of duties shall be done in faith and accordance with the principles of trust." MINPŌ, art. 1(2), *translated in* 2 EHS LAW BULL. SER. no. 2100-01 (1992).

⁴⁷ "An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker." Rōdō kijun hō [Labor Standards Law], Law No. 49 of 1947, art. 3, *translated by* Japan Institute for Labour Policy and Training (2003), *available at* http://www.jil.go.jp/english/laborinfo/library/documents/llj_law1-rev.pdf.

Article 14 by having the Lieutenant Governor present the Governor's Award on her behalf because it is the role of a governor to act with consideration of the promotion of the sport of sumo, the administrative goals of Osaka (publicity), and the traditions of grand sumo tournaments.⁴⁸

The Tokyo High Court recently issued a ruling on an appeal by a group of disabled students seeking national pension payments.⁴⁹ The appeal was from a March 24, 2005 Tokyo District Court case explained in *Jurisuto's* 2004 Trends in Constitutional Law Cases edition.⁵⁰ The District Court case calls for attention where it recognized that amendments to the National Pension Law in 1985 violated Article 14 of the Constitution because the amendments offered no relief for certain disabled students. (These students had been legally eligible for pension benefits, but were denied payments because they had not enrolled, and thus had not paid premiums, for the National Pension Plan.)⁵¹ The court deemed the omission legislative nonfeasance. The Tokyo High Court reversed, deferring to the legislature's political judgment whether to make such a correction at the time of the amendment, and therefore rejecting the premise that the legislature's resulting failure to include a remedial measure for non-enrolled disabled students violated Article 14 of the Constitution. The Tokyo High Court suggested that the students' low enrollment rate was due to a lack of attention, not any unreasonableness of the system. In this regard, the court noted that fundamentally individuals or their legal guardians should [themselves] take actions necessary to address a loss of earning capacity and from the perspective of offering assistance the state's remediation is social welfare measures. Thus, even if the law somehow treats students differently, that is a policy determination within the legislature's discretion. The Kyoto and

⁴⁸ Unreported case (Osaka D. Ct., no. 40 (*gyō u*) 2004, Aug. 30, 2005).

⁴⁹ 1852 HANREI JIHŌ 3 (Tokyo D. Ct., Mar. 24, 2004).

⁵⁰ 1899 HANREI JIHŌ 46 (Tokyo High Ct., Mar. 25, 2005).

⁵¹ Prior to 1991 it was not compulsory for students to pay into the National Pension Plan. *Court Thwarts Disability Pension Claim for Non-Contributors*, MAINICHI DAILY NEWS, Mar. 25, 2005, at 8. Students were automatically eligible for pension payments if they became disabled before age 20, even if they had not contributed to the National Pension Plan, but students over 20 years old were not eligible to receive the pension if they had not contributed to the scheme. *Id.*

Sapporo District Courts thereafter ruled similarly [with the above Tokyo High Court decision] on this issue, rejecting claims of illegality owing to legislative nonfeasance whereas the Hiroshima District Court had earlier held against the government.⁵² Moreover, the Fukuoka and Tokyo District Courts subsequently invalidated administrative decisions which denied Basic National Pension disability disbursements to students.⁵³ Finally, although the case did not involve students, an Osaka High Court decision rejected a claim against the government asserting constitutional and international human rights violations for denying Basic National Pension disability payments on the basis of nationality.⁵⁴

C. *Intellectual Freedom*

1. Freedom of thought (or idea)

Again this year Japanese courts issued several opinions on the right to abstain from ceremonial protocols vis-à-vis the national anthem. In a case brought to challenge disciplinary actions taken against teachers who disregarded orders to stand during the national anthem at public elementary and intermediate school entrance and graduation ceremonies, the Fukuoka District Court held that a school rule requiring people to stand in unison during the singing of the national anthem “did not wrongfully infringe upon the children’s or students’ intellectual freedom or freedom of thought.”⁵⁵ According to the court, the school principal had discretion, within the ambit of his authority to meet government curriculum guidelines,⁵⁶ to require

⁵² Unreported case (Kyoto D. Ct., no. 21 (*gyō u*) 2001, May 18, 2005); unreported case (Sapporo D. Ct., no. 30 (*gyō u*) 2000, July 4, 2005); 1187 HANREI TAIMUZU 165 (Hiroshima D. Ct., Apr. 22, 2005).

⁵³ Unreported case (Fukuoka D. Ct., no. 18 (*gyō u*) 2001, Apr. 22, 2005); unreported case (Tokyo D. Ct. no. 222 (*gyō u*) 2001, Oct. 27, 2005).

⁵⁴ Unreported case (Osaka High Ct., no. 79 (*gyō ko*) 2003, Oct. 27, 2005).

⁵⁵ Unreported case (Fukuoka D. Ct., no. 22 (*gyō u*) 1996, no. 4 (*gyō u*) 2000, Apr. 26, 2005).

⁵⁶ In 1999, the Liberal Democratic Party successfully campaigned for a law making the *Hinomaru* the national flag (*kokki*) and *Kimigayo* the national anthem (*kokka*) of Japan. Philip Brasor, *Freedom Is Flagging In Japan's Public-School System*, JAPAN TIMES, Mar. 28, 2004. Shortly after the legislation, the Ministry of Education modified the *Gakushu Shido Yoryo*, a set of guidelines for public-school administration that includes a section on school assemblies, to include

everyone to stand in unison during the singing of the national anthem at entrance and graduation ceremonies because:

The point of education is to shape and develop character . . . [and] such a policy is not an unreasonable infringement of children's freedom of thought, even if the policy influences children's thinking, so long as the policy is consistent with reasonable education goals and is reasonable in scope. . . .

. . .
. . . The singing of the national anthem at [school] entrance and graduation ceremonies is an educational activity which does not unduly influence individuals to have a certain type of relationship with the government. . . . Therefore, requiring people to stand during the singing of the national anthem is a reasonable way to cultivate patriotism, an awareness of one's Japanese identity, and a respectful attitude toward the national anthem.

Likewise, Osaka city residents brought a taxpayers' suit against the superintendent of the city's Board of Education claiming he acted illegally when he ordered an investigation of teachers who refused to stand during the national anthem in public elementary and intermediate school entrance ceremonies. Plaintiffs sought damages equivalent to the labor costs required for the investigation. On September 8, 2005 the Osaka District Court ruled that because the investigations were clearly official acts the city suffered no harm.⁵⁷ Besides there being no illegality, the court held the plaintiffs' claims

the *Hinomaru* and *Kimigayo* then followed-up with compliance monitoring to enforce deference to these symbols. *See id.*

⁵⁷ Unreported case (Osaka D. Ct., no. 60 (*gyō u*) 2003, Sep. 8, 2005).

under Article 19 of the Constitution⁵⁸ failed since they were exerting the rights of the investigated teachers who themselves were merely third parties in the case.

2. Freedom of religion and separation of religion and state

Appellate courts handed down two contrasting decisions only a day apart on the issue of visits by the Prime Minister to pay respects at the Yasukuni Shrine.⁵⁹ On September 29, 2005 the Tokyo High Court stated that:

[I]t is difficult to say that the [Prime Minister's] visit to pay respects was made in his official capacity. . . . [R]ather, that visit was either a private religious act founded upon his personal beliefs or a gesture of respect by a private individual.⁶⁰

On the contrary, the Osaka High Court held on September 30, 2005 that to determine whether or not a visit to pay respects at the shrine is official, the courts must look at the totality of the

⁵⁸ “Freedom of thought and conscience shall not be violated.” KENPŌ, art. 19.

⁵⁹ The Yasukuni Shrine, located near the Emperor's palace in central Tokyo was built in 1869 as part of Japan's drive to establish a strong, modern country founded on a nationalistic state religion with a divine emperor at the center and memorializes the 2.5 million people who died in Japan's wars since 1853. Martin Fackler, *Japanese Supreme Court Rejects Lawsuit Challenging Prime Minister's Visits to War Shrine*, N.Y. TIMES, June 24, 2006, at A6. Among those memorialized are fourteen World War II leaders convicted of high-level war crimes and co-located with the shrine is a war museum that denies atrocities by Japanese soldiers during World War II and claims that Japan's military fought to liberate Asia from Western domination. *Id.* Visits to the shrine are seen by Japan's neighbors as symbolically glorifying Japan's imperialist past. *Id.* While he was Prime Minister, Junichiro Koizumi visited the Yasukuni Shrine six times, including a final and particularly controversial visit on August 15, 2005, the 55th anniversary of Japan's surrender at the end of World War II. *Id.*; Norimitsu Onishi, *Koizumi Exits Office as He Arrived: Defiant on War Shrine*, JAPAN TIMES, Aug. 16, 2006.

⁶⁰ Unreported case (Tokyo High Ct., no. 6328 (*ne*) 2004, Sep. 29, 2005).

circumstances, including the outward appearance of the visit as well as circumstances before and after the visit.⁶¹

Even the Prime Minister is entitled to freedom of religion in his capacity as a private citizen. However, the Prime Minister, as a public official, in the context of the separation of religion and state, should make clear to the public whether his visits to pay respects [at the shrine] are private or public acts. . . . In this case, where the Prime Minister did not make clear that he was acting in a private capacity, but from start to finish equivocated his purpose through his speeches and actions, this must inevitably be a factor in deciding whether the visits to pay respects in this case were public acts.

As to the instant visits to pay respects, the court recognized the act as “carried out for the purpose of [the Prime Minister’s public] duties,” and applying the purpose-effect test from the Supreme Court’s *Eihime Tamagushi-ryō* decision,⁶² the court held that the Prime Minister’s

⁶¹ Unreported case (Osaka High Ct., no. 1888 (*ne*) 2004, Sep. 30, 2005).

⁶² [51] 4 MINSHŪ 1673 (Sup. Ct., Grand Bench, Apr. 2, 1997) (declaring the governor of Eihime Prefecture and six other government officials’ use of public funds to make offerings of flowers and sacred *sakaki* evergreen trees at the regional *gokoku* (country-protecting) shrine and at the Yasukuni shrine violated the principle of separation of state and religion enshrined in Articles 20 and 89 of the Constitution); *see also* DAVID M. O’BRIAN, *TO DREAM OF DREAMS* 122 (1996). This was the first Supreme Court decision declaring that the activity of a local authority violated the principle of separation of state and religion. To reach its holding the Court applied the “purpose-effect” test, applying it to Article 89, as well as Article 20(3). The “purpose-effect” test originated in a 1977 Supreme Court case which held that the constitutional principle of separation of religion and state requires that the state be religiously neutral, but does not prohibit all state connection with religion; rather, it prohibits state connection with religion that is determined, when “the purpose and effects of the State activity are taken into account, to exceed a reasonable standard consonant with the fundamental objective of the system.” [31] 4 MINSHŪ 533 (Sup. Ct., Grand Bench, July 13, 1977).

visits to pay respects at the shrine violated the Article 20, Section 3⁶³ of the Constitution.

3. Freedom of speech

On July 14, 2005 the First Petty Bench of the Supreme Court handed down their review of a case in which a public librarian, based on her antipathy toward the Society for Composing a New Textbook on History (the “Society”) and its supporters, removed all books written by the Society and its supporters from the library collection.⁶⁴ The authors of the removed books demanded compensation for damages. The Court held that the authors had personal interests in conveying their thoughts and opinions to the public that fell within the ambit of constitutionally protected free speech, and therefore that the librarian’s inappropriate actions based on [opposition to] the authors’ thoughts and beliefs illegally infringed the authors’ [protected] interests. This is a noteworthy decision, but we must be careful in evaluating its reach. On remand the Tokyo High Court awarded damages of 3,000 yen⁶⁵ for each injured author.⁶⁶ In determining damages, the Tokyo High Court cited the *Zaigai Hōjin* case⁶⁷ where Japanese expatriates who sued for infringement of their right to vote were awarded 5,000 yen⁶⁸ per person for lost voting rights that could not be restored [since the relevant elections had already been completed]. Thus it seems that the Court in the library case, where the majority of the removed books were restored to the library collection, drew upon circumstantial differences with the voting rights case.

As to the [national public education] text book screening system that had been at issue in the well known *Ienaga* text book cases, on December 1, 2005 the First Petty Bench of the Supreme

⁶³ “The State and its organs shall refrain from religious education or any other religious activity.” KENPŌ, art. 20(3).

⁶⁴ [59] 6 MINSHŪ 1569, 1910 HANREI JIHŌ 94, 1191 HANREI TAIMUZU 220 (Sup. Ct., 1st Petty Bench, July 14, 2005).

⁶⁵ 3,000 yen was equal to approximately \$27 at the time of the judgment.

⁶⁶ 1915 HANREI JIHŌ 29, 1197 HANREI TAIMUZU 158 (Tokyo High Ct., Nov. 24, 2005).

⁶⁷ See case citation *supra* note 9.

⁶⁸ 5,000 yen was equal to approximately \$45 at the time of the judgment.

Court issued its decision in the first case to address the constitutionality of the text book screening system which was amended based upon revised government curriculum guidelines promulgated in 1989.⁶⁹ The Court concluded that the system did not violate Articles 21, 26, 23 or 13 of the Constitution, essentially following the Supreme Court's first and third *Ienaga* decisions.⁷⁰

In a case involving a dispute over whether the denial of an application to use a public high school gymnasium for a periodic teachers' union convention violated Article 21 of the Constitution, the Hiroshima District Court held that freedom of assembly is guaranteed so far as there is no interference with school's educational operations.⁷¹ The court rejected the [plaintiffs'] constitutional claims on the grounds that having meetings in school facilities which involve several incendiary and unlawful speeches would invite distrust of public education, and thus would interfere with the school's educational operations.

D. Economic Freedom

The Third Petty Bench of the Supreme Court rejected Article 22⁷² and Article 29⁷³ claims in a case where rice farmers asserted that

⁶⁹ 1401 SAIBANSHO JIHŌ 11, 1922 HANREI JIHŌ 72, 1202 HANREI TAIMUZU 232 (Sup. Ct., 1st Petty Bench, Dec. 1, 2005).

⁷⁰ [47] 5 MINSHŪ 3483 (Sup. Ct., 3d Petty Bench, Mar. 16, 1993) (holding that the screening of textbooks for high schools based upon articles 21 and 51 of the Law on School Education, former Rules on Screening of School Text Books, and the former Standards for the Review of School Text Books did not violate Articles 26, 21, 23 of the Constitution or article 10 of the Fundamental Law on Education where such screening was left to the reasonable discretion of the Minister of Education); [51] 7 MINSHŪ 2921 (Sup. Ct., 3d Petty Bench, Aug. 29, 1997) (holding that the Minister of Education in promulgating non-binding suggestions for changes to the school textbook screening process did not violate the State Redress Law when such suggestions were not formulated as a condition for successful screening, but finding that the Minister of Education's requirement that all textbook publishers delete all descriptions of Unit 731 (a military unit which conducted human experiments while in charge of research and development of chemical weapon during WW II) as a condition of publication was improper).

⁷¹ Unreported case (Hiroshima D. Ct., no. 82 (*wa*) 2003, Feb. 9, 2005).

⁷² "Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare. 2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate." KENPŌ, art. 22.

mandatory participation in the Agricultural Insurance Association, an insurance policy which covers crop failure due to cold-weather or drought, amounted to singling out and imposing an undue burden on a particular occupation.⁷⁴ Responding particularly to the Article 22 claim, the Court explained that the purposes of mandating participation were to ensure a stable supply of staple foods and protect rice farming operations. Citing cases such as the Retail Market Decision of 1972,⁷⁵ the court held that the regulation mandating participation was not exceedingly unreasonable. Prior to this case, there had been a long-standing debate among farmers concerning the mandatory scheme. A 2005 amendment of the Agricultural Disaster Indemnity Law⁷⁶ reflects an effort to improve the flexibility of the system by offering greater choice [in insurance policy options].

E. Constitutional Criminal Procedure

As part of the two laws for crime victim protection enacted in 2000, the legislature introduced measures such as shielding witnesses behind privacy screens [in the courtroom] and allowing remote live-video testimony by sexual assault victims. In the first Supreme Court decision addressing whether such measures violate the principle of public trial and a defendant's right to confront accusers, the First Petty Bench of the Supreme Court held that such measures do not violate Article 82, Section 1⁷⁷ or Article 37, Section 1⁷⁸ and Article

⁷³ “The right to own or to hold property is inviolable. 2) Property rights shall be defined by law, in conformity with the public welfare. 3) Private property may be taken for public use upon just compensation therefor.” KENPŌ, art. 29.

⁷⁴ 1387 SAIBANSHO JIHŌ 3, 1898 HANREI JIHŌ 54, 1182 HANREI TAIMUZU 154 (Sup. Ct., 3d Petty Bench, Apr. 26, 2005).

⁷⁵ [26] 9 KEISHŪ 586 (Sup. Ct., Grand Bench, Nov. 22, 1972).

⁷⁶ The stated purposes of the Agricultural Disaster Indemnity Law are “to ensure stability in agricultural management and strength in agricultural production by absorbing farmers’ losses from unforeseen events.” Nōgyō saigaihoshō hō [Agricultural Disaster Indemnity Law], art. 1.

⁷⁷ “Trials shall be conducted and judgment declared publicly.” KENPŌ, art. 82(1).

⁷⁸ “In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.” KENPŌ, art. 37(1).

37, Section 2⁷⁹ of the Constitution because the trial proceedings remain open to public, the defense attorney retains an unobstructed view of the witness, and the defendant retains the ability to hear and examine the witness himself.⁸⁰

⁷⁹ “He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.” KENPŌ, art. 37(2).

⁸⁰ [59] 3 KEISHŪ 259, 1904 HANREI JIHŌ 150, 1187 HANREI TAIMUZU 147 (Sup. Ct., 1st Petty Bench, Apr. 4, 2005).