

Commentary on Important Legal Precedents for 2006: Trends in Constitutional Law Cases^{*}

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I. INTRODUCTION.....	213
II. POLITICS & GOVERNMENT.....	214
A. <i>The Electoral System</i>	214
B. <i>The Judiciary</i>	216
III. FUNDAMENTAL HUMAN RIGHTS	219
A. <i>The Right to Privacy and Personality</i>	219
B. <i>Equality Under the Law</i>	220
C. <i>Intellectual Freedom</i>	223
1. Freedom of Thought	223
2. Freedom of Religion and Separation of Religion and State	225
3. Freedom of Speech	226
4. Freedom of Assembly	228
D. <i>The Right to Live</i>	228

I. INTRODUCTION

In 2004 and 2005, the references in this column were limited to cases already published in Japanese reporters¹ or available electronically on the official website of the Japanese Supreme Court² at the time of

^{*} Teruki Tsunemoto, *Kenpō Hanrei No Ugoki [Trends in Japanese Constitutional Law Cases]*, JURISUTO, Apr. 10, 2007, at 2 (Rinji Zōkan [Extra Edition], Heisei 18 Nendo Jūyō Hanrei Kaisetsu [Commentary on Important 2006 Legal Precedents]).

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¹ E.g., SAIKŌ SAIBANSHO HANREISHŪ, SAIBANSHO JIHŌ, HANREI JIHŌ, HANREI TAIMUZU.

² Supreme Court of Japan, <http://www.courts.go.jp>.

writing so that the reader could refer to the actual source. There are, however, socially and legally noteworthy cases that are not published in reporters or available electronically. Decisions of the lower courts that held state actions and regulations unconstitutional are examples of this. Even if recorded, the publication of these cases tends to be delayed. Until now, I have entrusted *Hanrei Serekuto*³ (published three months prior to this article) to take note of such cases, but I am now unable to do so because of the recent changes in the publishing dates. Therefore, I have decided to draw from academically and socially relevant unreported cases in addition to reported cases of substantial importance decided between January and October 2006.

On a final note, I would also like to mention that I have decided to publish the English version of this article in the University of Hawai'i School of Law's *Asian-Pacific Law & Policy Journal* with the permission of the JURISUTO editors and the help of Associate Professor Mark Levin. Although Professor Lawrence Beer's series of works provide English translations of Japanese constitutional law cases,⁴ the works do not include the decisions of the lower courts and many of the cases are outdated. My article from 2004, translated as "Trends in Japanese Constitutional Law Cases: *Jurisuto* Commentary on Important Judicial Decisions for 2004," is already posted on the journal's website.⁵ The translation is footnoted with specific explanations, facilitating better understanding by non-Japanese readers. I hope the article provides a means of disseminating better understanding of the present state of Japanese constitutional law.

II. POLITICS & GOVERNMENT

A. *The Electoral System*

In a House of Councillors ("Upper House")⁶ apportionment lawsuit, the Grand Bench⁷ decided that the 1:5.06 maximum apportionment ratio

³ HANREI SEREKUTO is an annual supplement to HÖGAKU KYŌIKU. HANREI SEREKUTO 2006, <http://www.yuhikaku.co.jp/yuhikaku/serekuto2006.html> (providing an index of cases in Japanese).

⁴ E.g., LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970-1990* (1996).

⁵ Teruki Tsunemoto, *Trends in Japanese Constitutional Law Cases: Jurisuto Commentary on Important Judicial Decisions for 2004*, 8 *ASIAN-PAC. L. & POL'Y J.* 138 (Daryl Takeno trans., 2006), <http://www.hawaii.edu/aplpj/> [hereinafter Tsunemoto, *Judicial Decisions for 2004*]. Additionally, Professor Tsunemoto's 2005 article was subsequently translated and published by the Asian Pacific Law & Policy Journal. Teruki Tsunemoto, *Trends in Japanese Constitutional Law Cases: Jurisuto Commentary on Important Judicial Decisions for 2005*, 8 *ASIAN-PAC. L. & POL'Y J.* 431, 433-36 (John Donovan et al. trans., 2007), <http://www.hawaii.edu/aplpj/> [hereinafter Tsunemoto, *Legal Precedents for 2005*].

⁶ The bicameral Japanese Diet is comprised of the Lower House (House of

was constitutional.⁸ Six justices dissented, and of the nine justices who concurred, four noted that the range may be unconstitutional if the ratio is maintained at the same rate for the next election.⁹ The July 2004 election, however, was carried out without correcting the apportionment, and the range expanded to 5.13, drawing attention to the Grand Bench's subsequent response. The Court nevertheless held the apportionment constitutional, reasoning that: (1) there was no major difference in the range which was held constitutional in 2004, (2) the election was held merely six months after the 2004 judgment, and (3) the Upper House had held debates regarding apportionment after the 2004 decision and had amended the law after the election, reducing the maximum range down to 1 to 4.84.¹⁰ Taking such factors into consideration, the court held that the Upper House had not abused its discretion by not amending the law before the 2004 election. Five of the justices added supplementary opinions and five dissented from the majority opinion. Even the majority added that "it would be within the objectives of the Constitution to continue efforts to consider the reduction of the apportionment, including a review of the framework."¹¹ It should be noted that this was the first time the Grand Bench commented in this manner regarding the apportionment of the Upper House.

Representatives) and Upper House (House of Councillors). The Lower House members are elected either from single-seat districts or national, plural electoral blocs, the latter of which are awarded seats in proportion to the number of ballots cast for each party. The Upper House members are elected from prefectural districts or a nationwide district in a proportional representation system. See Tsunemoto, *Legal Precedents for 2005*, *supra* note 5, at 140 n.8 (2007).

⁷ The Supreme Court of Japan is comprised of fifteen justices who serve on the Grand Bench. Percy R. Luney, *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 LAW & CONTEMP. PROBS. 135, 147 (1990). The Grand Bench hears cases on constitutional issues or those establishing new judicial precedent, whereas other issues are heard by one of three Petty Benches composed of five justices. *Id.*

⁸ The difficulty with the apportionment ratio involves the disproportionate number of voters living in urban centers, leaving a shrinking number of voters remaining in the countryside. Thus, there are more representatives per voter in the countryside than in the city; the justices held that each rural vote can carry as much as 5.06 the weight of an urban vote and still be constitutional. See generally James Sterngold, *Japanese Election: Unconstitutional But Valid*, N.Y. TIMES, July 26, 1992, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE0DC1E3DF935A15754C0A964958260> (providing general background information on the apportionment ratio controversy).

⁹ 1 MINSHŪ 56 (Sup. Ct., Jan. 14, 2004); see also Tsunemoto, *Legal Precedents for 2005*, *supra* note 5, at 158-59.

¹⁰ 1229 HANREI TAIMUZU 73 (Sup. Ct., Oct. 4, 2006).

¹¹ *Id.*

B. *The Judiciary*

The First Petty Bench of the Supreme Court dismissed a claim alleging that the government's failure to adopt legal measures providing opportunities for mentally ill people to exercise their voting rights was an unconstitutional failure to act and hence a violation of the National Compensation Law.¹² The court, relying on the Grand Bench's decision concerning voting rights of Japanese nationals living abroad,¹³ held that the failure to act did not violate the National Compensation Law because the Diet had not had an opportunity to address the issue.

Regarding the possibility of judicial review of a [non-governmental] organization's internal matters, a point which has been long debated, the First Petty Bench reversed a lower court's decision which had suspended a bar association's disciplinary action, reasoning that the disciplinary system "reflects the independence and autonomy of the association," and "[d]isciplinary action within the discretionary power of the bar association is only illegal if it either lacks any basis in fact or is seriously inappropriate in light of socially accepted ideas and is thus beyond the scope of discretionary authority or an abuse of discretion."¹⁴

Several decisions have been made in suits brought by citizens against the nation or prefectural governments with regard to the Juki Net System,¹⁵ but in the first case in which a municipality sued the national government, the Tokyo District Court held that the suit "does not fall under 'legal dispute'

¹² 1946 HANREI JIHŌ 41, 1222 HANREI TAIMUZU 135 (Sup. Ct., July 13, 2006).

¹³ 7 MINSHŪ 2087 (Sup. Ct., Sept. 14, 2005); see also Tsunemoto, *Legal Precedents for 2005*, *supra* note 5, at 433-36.

¹⁴ 1255 HANREI TAIMUZU 166 (Sup. Ct., Sept. 14, 2006).

¹⁵ The Basic Resident's Registration Network (*Jūmin Kihon Daichō Nettowāku Shisutemu*, 住民基本台帳ネットワークシステム, hereinafter "Juki Net") is a government collection of personal data of its citizens: "The network, launched in August 2002, stores personal information including names, addresses and dates of birth that is obtained from resident registries held by municipalities and shares such information with the central and local governments." *Juki Net Constitutional, High Court Rules*, THE JAPAN TIMES, Feb. 2, 2007. Under the system, each resident is assigned a resident identification number that serves as a key to information that can be accessed and transmitted online. *Govt Starts Juki Net System*, DAILY YOMIURI, Aug. 6, 2003, at 1. Although government authorities claim that the system is more effective than traditional paperwork, critics claim that the system violates the privacy guarantee in Article 13 of the Constitution. *Juki Net Constitutional, supra*. Concerns about possible dissemination or abuse of personal information have led to multiple lawsuits across the country. *Id.*; see also Tsunemoto, *Legal Precedents for 2005, supra* note 5, at 440-442 (detailing the varied holdings by courts across Japan); Dai Adachi & Atsuko Kinoshita, *Juki Ruling Challenge to Government: It's Unclear if Local Authorities Will Force Residents to Join System*, DAILY YOMIURI, Mar. 8, 2008, available at <http://www.yomiuri.co.jp/dy/national/20080308TDY04304.htm> (reporting subsequent developments and court decisions).

as defined in Court Act article 3, paragraph 1.”¹⁶ The court relied on the Third Petty Bench’s decision that a lawsuit “aiming to correct the legal application or to protect the public welfare” cannot be considered “a legal dispute, because it does not concern the protection of one’s own rights or interests.”¹⁷ The District Court concluded that a lawsuit brought by the municipal government to determine whether the Tokyo government has the obligation to receive personal information of only those who consented is a “lawsuit concerning the authority or the exercise of authority of a local public organization or the government,” and does not “concern the protection of one’s own rights or interests.”¹⁸

In the first case concerning the Supreme Court’s discretion in accepting a petition for final civil appeal¹⁹ pursuant to Code of Civil Procedure 318,²⁰ the Gifu District Court found no violation of Article 32 of the Constitution²¹ because “whichever grounds for appeal will be allowed is an issue to be determined within the appellate system.”²² Thus, even if there is some kind of compelling grounds such as “the Supreme Court’s judgment is needed to protect an individual’s fundamental human rights or to achieve the constitutional principles that carry out the rule of law,” Article 32 should not be read to impose a duty upon the Supreme Court to accept an appeal.²³

[In a case] pertaining to the Japanese Special Measures Law for Humanitarian Aid for Iraq Reconstruction and suspension of the Self-Defense Forces,²⁴ deployment [to the region], a plaintiff had claimed that

¹⁶ 1938 HANREI JIHŌ 37, 278 HANREI JICHI 19 (Tokyo D. Ct., Mar. 24, 2006). “Courts shall, except as specifically provided for in the Constitution of Japan, decide all legal disputes, and have such other powers as are specifically provided for by law.” Saibansho Hō [Court Act], Law No. 59, April 16, 1947, art. 3, para. 1, *available at* <http://www.cas.go.jp/jp/seisaku/hourei/data2.html>.

¹⁷ 6 MINSHŪ 1134 (Sup. Ct., July 9, 2002).

¹⁸ *Id.*

¹⁹ The Supreme Court exercises appellate jurisdiction over appeals to the court of last resort, referred to as *jōkoku* (上告) appeals.

²⁰ MINSŌHŌ [CODE OF CIVIL PROCEDURE], art. 318. “Article 318 gives the Supreme Court a *certiorari* type jurisdiction, allowing the Court to accept appeals at its discretion.” Carl F. Goodman, *Japan’s New Civil Procedure Code: Has it Fostered a Rule of Law Dispute Resolution Mechanism?*, 29 BROOK. J. INT’L L. 511, at n.170 (2004).

²¹ “No person shall be denied the right of access to the courts.” KENPŌ [JAPAN CONST.], art. 32.

²² 1928 HANREI JIHŌ 113 (Gifu D. Ct., Jan. 25, 2006).

²³ *Id.*

²⁴ The existence of the Japanese Self-Defense Forces is rife with controversy. The language of the Constitution arguably prohibits the maintenance of such forces:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the

the “Article 32’s ‘Right of Access to the Courts’ 25 should be considered . . . a procedural right that gives whole constitutional rights and liberties characters of cause of action and makes them substantive rights to make claims.”²⁶ The plaintiff further asserted, based on German idea of “fundamental rights litigation” that when there is an infringement of fundamental rights and relief is necessary, courts should consider creating new types of lawsuits or remedies. The Nagoya District Court, however, rejected the claim, arguing that “[Article 32] guarantees a right to court’s decision on the merits to those who have a legal interest to receive a decision by the court concerning the rights relating to the purpose of the lawsuit, but it does not necessarily provide all claimants a guarantee of a right to have a decision on the merits.”²⁷

C. Principle of Taxation by Law²⁸

Regarding whether the principle of taxation by law in Article 84 of the Constitution²⁹ applies to the insurance fee of the National Health Insurance system, the Supreme Court noted that

if the national government or a local public entity, exercising its right to tax, imposes a monetary obligation upon anyone who meets specified requirements for the purpose raising general public funds and not as a special kind of payment that will itself be returned as compensation, then regardless of the form of that payment

nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

KENPŌ, art. 9. The Diet’s decision to dispatch SDF forces in 2004 to non-combat roles in Iraq was met with resistance by pacifist groups, and the troops eventually pulled out in mid-2007. Watanabe Hirota, *Japan Dispatches the SDF to Iraq (2004)*, JAPAN ECHO, <http://www.japanecho.co.jp/sum/2004/310103.html>; Keizo Nabeshima, *Iraq Pullout is Not the End*, JAPAN TIMES, June 27, 2006, available at <http://search.japantimes.co.jp/cgi-bin/eo20060627kn.html>; see also Prime Minister of Japan and His Cabinet, Measures for Restruction [sic] Assistance in Iraq, http://www.kantei.go.jp/foreign/kikikanri/iraq/index_e.html (last visited Mar. 28, 2008) (providing links to various laws, resolutions, speeches, and press statements regarding reconstruction assistance in Iraq).

²⁵ KENPŌ, art. 32.

²⁶ Unreported case (Nagoya D. Ct., no. 695, 1458, 2632, 4887, 2956 (*wa*) 2004, April 14, 2006).

²⁷ *Id.*

²⁸ *Sozei Horitsu Shugi* (租税法律主義).

²⁹ “No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.” KENPŌ, art. 84.

obligation, it falls within the meaning of “taxes” under Article 84.³⁰

Accordingly, National Health Insurance premiums differ from taxation because they are treated as compensation, the Court held that Article 84 cannot be directly applied.

The Supreme Court also held that public impositions other than taxation are also considered a “tax” under Article 84 if they share similarities with taxation such as their ability to levy taxes. The Third Petty Bench applied this decision to the Agricultural Disaster Reparations Law, holding that because mutual aid premiums share similarities with tax such as that their collection is obligatory, they fall under the definition of Article 84.³¹ The Court noted, however, that the type of regulations imposed by law upon the premium should be decided by taking into account the degree of compulsion, the purpose of the system, special circumstances, etc., thus affirming the rationality of the Agricultural Disaster Reparations Law.³²

III. FUNDAMENTAL HUMAN RIGHTS

A. *The Right to Privacy and Personality*

As with last year, there were several cases concerning the constitutionality of the Juki Net system,³³ but both the Osaka and Chiba District Courts dismissed requests for deletion of personal information.³⁴

In an incident where a TV personality’s image taken by a security camera was published in a weekly magazine, the Tokyo District Court held that, based on the principle of individual dignity, “individuals have the right to hold private (from a third party) their individual sphere formed by their own autonomy, which establishes the basis for one’s rights to privacy.”³⁵ [Moreover,] when the right to privacy is understood as one’s right to control personal information, it becomes difficult to distinguish such rights and publicity rights if it concerns a well-known individual, and if the individual purposefully publicizes his own information, such an act would not be considered an infringement on privacy because there is no need to conceal such information. Thus, in this case, the court held that the publication did not amount to an invasion of privacy. The Court acknowledged, however, that even when an individual cannot be identified

³⁰ 2 MINSHŪ 587, 1923 HANREI JIHŌ 11, 1205 HANREI TAIMUZU 76 (Sup. Ct., Mar. 1, 2006).

³¹ 1930 HANREI JIHŌ 83, 1208 HANREI TAIMUZU 76 (Sup. Ct., Mar. 28, 2006).

³² *Id.*

³³ *See supra* note 15.

³⁴ 1952 HANREI JIHŌ 127, 1207 HANREI TAIMUZU 91 (Osaka D. Ct., Feb. 9, 2006). Unreported case (Chiba D. Ct., no. 2427 (*wa*) 2002, Mar. 20, 2006).

³⁵ 1209 HANREI TAIMUZU 60 (Tokyo D. Ct., Mar. 31, 2006).

from just the photograph, if an individual can be identified when read together with an explanatory note, “such an act should be considered an infringement on one’s personality similarly to instances where one’s right to image was invaded directly by photography, because such disclosures may cause discomfort such as humiliation and disturbance.” The District Court concluded that the publication tortiously infringed upon “an interest in the right to one’s personality which approximates one’s right to his own image.”³⁶

B. *Equality Under the Law*

In an appellate hearing in which it was debated whether the practice of limiting the use of communal village resources³⁷ to males who were also heads of households³⁸ constituted gender discrimination, the Second Petty Bench ruled that limiting admission to the heads of households was not irrational, but the requirement that the applicant be male constituted discrimination based on sex and “went against the basic principles of the Japanese Constitution, which holds all sexes equal.”³⁹

³⁶ *Jinkaku* translates as “personality,” “character,” or “individuality,” and *jinkaku-ken* (人格権) is the right to personality. The right to personality is distinguishable from the right to privacy and encompasses legally protected personal interests including life, liberty, and reputation. 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).

³⁷ *Iriai buraku* (入会部落) is a traditional village institution for sustainable use of communal natural resources such as land, water, and forest resources. See Daisaku Shimada, *The Changes and Challenges of Traditional Commons in Current Japan: A Case Study on Iriai Forests in Yamaguni District, Kyoto-City*, https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIPF63&paper_id=94 (last visited April 3, 2008) (providing an introduction to the concept of *iriai* and case study of *iriai* in Kyoto).

³⁸ The Japanese *koseki* (戸籍) family registration system mandates that the family choose a single head of household, which is almost always the husband. Taimie L. Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 U.C.L.A. L. REV. 109, 111-14 (1991). As Professor Levin writes: “[T]his intensely bureaucratic and facially neutral system disguises a mechanism for subjugation not only based upon nationality, but also harmfully constructing gender, ethnicity, and numerous other notions of otherness.” Levin, *supra* note 34, at 482 n.215; see also Tsunemoto, *Legal Precedents for 2005*, *supra* note 5, at 445. The family registry system has been described as the most complete registration system in the world. Yukiko Matsushima, *Japan: Reforming Family Law*, 32 U. LOUISVILLE J. FAM. L. 359, 362 (1994); see also MERYLL DEAN, *JAPANESE LEGAL SYSTEM* 118-120 (2d ed., 2002) (providing the historical background of the traditional Japanese household).

³⁹ 3 MINSHŪ 773, 1931 HANREI JIHŌ 29, 1209 HANREI TAIMUZU 76 (Sup. Ct., Mar. 17, 2006). Article 14 of the Constitution states that “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, art. 14.

The court held that the requirement was invalid based on Civil Code article 90.⁴⁰

In a series of cases regarding student disability pension lawsuits which occurred in many regions of Japan, the Tokyo, Niigata, and Hiroshima District Courts affirmed the system's unconstitutionality. Conversely, however, district courts in Kyoto, Sapporo, Okayama, and Osaka—following the decision of the Tokyo High Court which dismissed the decision of the Tokyo District Court—all found against the plaintiffs.⁴¹ The Hiroshima High Court decision is especially noteworthy as a further precedent in this line of cases.⁴²

In a case in which a child born out of wedlock to a Japanese father and a non-Japanese mother could not acquire Japanese nationality through legitimation because of the father's failure to acknowledge paternity before the child's birth,⁴³ the Tokyo District Court held that "parents' marriage" as provided in article 3, paragraph 1 of the Japanese Nationality Law⁴⁴ included de facto marriage. Based on this interpretation, the court

⁴⁰ Article 90 states that "A juristic act with any purpose which is against public policy is void." MINPŌ [CIVIL CODE], art. 90.

⁴¹ See Tsunemoto, *Legal Precedents for 2005*, supra note 5, at 447 n.51 (providing detailed background regarding these cases); see also *Court Thwarts Disability Pension Claim for Non-Contributor*, MAINICHI SHIMBUN, Mar. 25, 2005.

⁴² 1208 HANREI TAIMUZU 104 (Hiroshima High Ct., Feb. 22, 2006).

⁴³ The Nationality Law has historically denied Japanese citizenship to thousands of foreign residents in Japan and places strict restrictions on dual nationality:

the Japanese Nationality Law was consciously designed and has been consistently applied to support and promote *Wajin* notions of mono-ethnicity. Besides blind indifference to the presence of Japanese national minorities, [the] . . . inaccurate perception of a natural mono-ethnic order could only have come to pass because the Japanese Nationality Law de-nationalized Japanese citizenship and disfranchised hundreds of thousands of Koreans and Taiwanese persons resident in Japan who had been brought to imperial Japanese as a colonial workforce. Japan also maintains a highly restrictive approach to dual nationality that . . . [is] rooted in "notions of loyalty in Japan's culturally homogenous society."

Mark A. Levin, *The Wajin's Whiteness: Law and Race Privilege in Japan* 10-11 (Aug. 26, 2007) (unpublished manuscript, on file with the University of Hawai'i Asian Pacific Law & Policy Journal).

⁴⁴ 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

declared the element in the statute requiring that such a child be born in wedlock void and affirmed, by applying the rest of the statute, that the child acquired nationality by the filing of a notification of marriage.⁴⁵ On appeal, however, the Tokyo High Court overturned the lower court's decision, holding that the legislature's intent is clearly indicated by the language of article 3, paragraph 1. Therefore, "including de facto marriage within [the meaning of] 'the parents' marriage' would represent an analogous or expansive interpretation that creates and extraneous requirement not otherwise prescribed by the Nationality Law."⁴⁶

The Tokyo District Court had emphasized de facto marriage as a substantial factor in 2005, but in a similar case in 2006, the same court held that the core point of article 3, paragraph 1 of the Japanese Nationality Act is to expand the boundaries of nationalities that can be acquired based on the principal of the parents' bloodlines.⁴⁷ In the court's interpretation, the requirements for legitimation are not within this core element [of the statute] but are merely supplementary. Voiding the statute's requirements of "the parents' marriage" and "born in wedlock," as being in direct contravention of the Constitution, the court applied [article 3, paragraph 1] and upheld as valid the [plaintiff's] application for nationality.

Recently, cases where foreigners have been denied rental housing have been publicized, and in one such case,⁴⁸ the Osaka High Court held

death, a Japanese national.

Kokuseki Hō [Nationality Law], Law No. 147 of 1950, amended by Law No. 268 of 1952, Law No. 45 of 1984, and Law No. 89 of 1993, art. 3, para. 1.

⁴⁵ 1890 HANREI JIHŌ 27, 1175 HANREI TAIMUZU 106 (Tokyo D. Ct., April 13, 2005).

⁴⁶ 6 KASAI GEPPŌ 47 (Tokyo High Ct., Feb. 28, 2006). This is a legislative act and a court is not constitutionally permitted to exercise a power inherently vested in the Diet.

⁴⁷ 1932 HANREI JIHŌ 51, 1221 HANREI TAIMUZU 87 (Tokyo D. Ct., Mar. 29, 2006).

⁴⁸ Discrimination against foreigners, including disparate treatment of people born and raised in Japan but non-citizens by virtue of their ethnicity or race, is a persistent issue in Japan. *See, e.g.,* Debito Arudou, *Twisted Legal Logic Deals Blow to Foreigners*, JAPAN TIMES, Feb. 7, 2006, available at <http://search.japantimes.co.jp/cgi-bin/fl20060207zg.html> (reporting that the Osaka District Court rejected an African-American's claim of discrimination when he was denied entry into a store, even though the defendant admitted that the refusal was in due in part to his "'thing' about black people."); Canon Pence, *Japanese Only: Xenophobic Exclusion in Japan's Private Sphere*, 20 N.Y. INT'L L. REV. 101 (2007) (detailing various forms of discrimination by private citizens and businesses, including the expulsion of a Chinese woman from an *onsen* hot springs.); *see also* Tsunemoto, *Legal Precedents for 2005*, *supra* note 5, at 442-45 (discussing other cases of foreigner discrimination). Recently, two cases have highlighted the courts' increasingly receptive responses to foreigner discrimination in Japan. First, in *Bortz v. Suzuki*, 1718 Hanrei Jihō 92 (Shizuoka D. Ct., Oct. 12, 1999), a

that a landlord's refusal to sign a lease agreement based merely on the tenant's Korean ancestry is "discrimination based on nationality which goes against the principles of Article 14, Paragraph 1,"⁴⁹ and as such, it is unlawful for exceeding the limits of social tolerance."⁵⁰

C. Intellectual Freedom

1. Freedom of Thought

There were many cases involving the national flag and anthem.⁵¹ One case evaluated whether the actions of a former municipal high school teacher who told parents not to stand up during a performance of the Japanese anthem constituted forcible obstruction of duties.⁵² The Tokyo District Court found the teacher guilty, acknowledging that "although

Brazilian woman recovered 1.5 million yen (\$12,500) after being expelled from a jewelry store on account of her nationality. Timothy Webster, Translation, *Bortz v. Suzuki*, Judgment of October 12, 1999, Hamamatsu Branch, Shizuoka District Court, 16 PAC. RIM. L. & POL'Y J. 631 (2007). Second, in *Arudou v. Earth Cure*, unpublished decision, (Sapporo High Ct., Sept. 16, 2004), a foreign-looking, naturalized Japanese citizen was refused entry into a bathhouse and successfully sued the bathhouse for one million yen. Timothy Webster, Translation, *Translation of Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. (forthcoming May 2008).

⁴⁹ "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, art. 14.

⁵⁰ Unreported case (Osaka High Ct., no. 485 (*ne*) Oct. 5, 2006).

⁵¹ The song *Kimigayo* and the *Hinomaru* flag were officially recognized as the official Japanese anthem (*kokki*) and flag (*kokka*), respectively, in 1999. *Kokki Oyobi Kokka ni Kansuru Hōritsu* [Law Concerning the National Flag and National Anthem], Law No. 127 of 1999; *Flag, Anthem Now Official*, JAPAN TIMES, Aug. 9, 1999, available at <http://search.japantimes.co.jp/cgi-bin/nn19990809a1.html>. However, there is long-standing controversy regarding the symbolism of the anthem and flag, as both are associated with the country's imperialistic and militaristic past. *Id.* *Kimigayo* translates as "His Majesty's Reign" and the lyrics translate unofficially as "Thousands of years of happy reign be thine/ Rule on, my lord, till what are pebbles now/ By ages united to mighty rocks shall grow/ Whose venerable sides the moss doth line." *Id.* The *Hinomaru* is a red sun in the middle of a white background and is said to have originated over 1,000 years ago, but was commonly used as a military flag by warlords in the 15th and 16th centuries. Jun Hongo, *Hinomaru, 'Kimigayo' Express Conflicts Both Past and Future*, JAPAN TIMES, July 17, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070717i1.html>. Critics claim that forced reverence for the symbols, especially in the school setting, violates Article 19 of the Constitution, which grants freedom of conscience. *Id.* As of July 2007, according to the Organization of Reprimanded Teachers for the Retraction of the Unjust Punishment Involving Hinomaru & Kimigayo, 388 teachers have been reprimanded in Tokyo since 2003. *Id.*; see also Tsunemoto, *Legal Precedents for 2005*, *supra* note 5, at 448-51 (detailing past cases involving the Japanese anthem and flag).

⁵² *Iryoku gyōmu bōgai* (威力業務妨害)

some forms of expression are protected by the freedom of speech, this does not justify the interference in other people's duties."⁵³ Another case involved a public elementary school teacher who was disciplined for violating his occupational duties by attending [the school's] graduation ceremony with a ribbon stating his views against compulsory reverence for the national flag. The Tokyo District Court held that because the disciplinary action was in response to the teacher expressing his thoughts through a message-bearing ribbon, and not because of his thoughts against the national flag, it did not constitute an infringement on the freedom of thought.⁵⁴ Assuming *arguendo* that it limited his freedom of speech, the restriction was merely incidental and was appropriate considering the publicity of his occupation [as a public school teacher]. A contradictory case that attracted attention involved municipal high school teachers' requests for an injunction against the school on the basis of infringement on freedom of thought.⁵⁵ In that case, the Tokyo Board of Education had issued a notification obliging teachers to stand up in front of the national flag and sing the national anthem at school entrance ceremonies and the like. The Tokyo District Court granted the plaintiffs' claims, holding that the notification fell under the definition of "inappropriate control" of article 10, paragraph 1 of the Fundamental Law of Education.⁵⁶ The infringement of the right to not stand in front of the flag or sing the national anthem could not be justified from a public welfare perspective. This was the first such decision among many cases arising from the [flag and anthem] statute.

⁵³ Unreported case (Tokyo D. Ct., no. 5086 (*wa*) 2004, May 30, 2006).

⁵⁴ Unreported case (Tokyo D. Ct., no. 3156 (*wa*) 2006, July 26, 2006).

⁵⁵ 1952 HANREI JIHŌ 44, 1228 HANREI TAIMUZU 88, 1950 RŌKEISOKU 3 (Tokyo D. Ct., Sept. 21, 2006). Specifically, the court held that

1) Teachers have no obligation to stand, sing, or play piano at ceremonies; 2) punishments for teachers who do not stand are unacceptable; and 3) the Tokyo Metropolitan Government must pay each plaintiff 30,000 yen in compensation. . . . Undeterred, the Tokyo Board of Education has appealed to the Supreme Court. A decision is not expected until 2010. The school board continues to harass and punish educators who do not bend to the dictates of bureaucrats.

John Spiri, *Sitting Out But Standing Tall: Tokyo Teachers Fight an Uphill Battle Against Nationalism and Coercion*, JAPAN FOCUS, April 1, 2008, <http://japanfocus.org/products/details/2703>.

⁵⁶ "Education shall not be subject to improper control, but shall be directly responsible to the whole people." Kyōiku Kihon Hō [The Fundamental Law of Education], Law No. 25 of 1947, art. 10, para. 1.

2. Freedom of Religion and Separation of Religion and State

There have been twelve decisions since 2006 regarding former Prime Minister Junichiro Koizumi's⁵⁷ visits to Yasukuni Shrine,⁵⁸ but the Second Petty Bench [recently] issued the first Supreme Court decision concerning the issue.⁵⁹ The court rejected the plaintiffs' claim on the grounds that the act of visiting a shrine does not coerce or influence other people's religious beliefs. Even if people are made uncomfortable by such acts, they could not receive compensation for damages. The fact that it was the prime minister visiting the shrine did not change this conclusion. Justice Shigeo Takii's concurring opinion is noteworthy. He wrote that when a government official interferes with an individual's efforts to pay respects to a particular person, or conversely [when a government official] forces an individual to pay their respects in a manner contradictory to that individual's religious beliefs, legal protection is necessary regardless of whether the [government official] uses coercion. But Justice Takii held that this did not apply to the case at hand. The Matsuyama District Court similarly dismissed claims regarding worshipping at Yasukuni Shrine based on freedom of religion.⁶⁰

[In a case] concerning the separation of religion and state, the Sapporo District Court ruled that the act of leasing city property to a shrine rent-free constitutes a "religious activity" under Constitution Article 20, Paragraph 3⁶¹ according to the objective-effect standard and is a

⁵⁷ Prime Minister Junichiro Koizumi was the leader of the Liberal Democratic Party and Prime Minister between 2001-2006.

⁵⁸ Yasukuni Shrine, located in central Tokyo, was founded in 1896 as a Shinto shrine and honors the country's 2.5 million war dead. Canon Pence, Comment, *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, 32 N.C. INT'L L. & COM. REG. 335, 346-52 (2006). The shrine also houses the spirits of fourteen Class A war criminals who were executed at the Tokyo Trials in 1948, whose "spirits are inseparable from the other spirits and cannot be excluded from worship." *Id.* at 346. Although previous prime ministers have visited the shrine, Prime Minister Koizumi provoked international controversy when he insisted on visiting the shrine without clarifying whether the visits were made in an official or private capacity. He made six trips to the shrine during his term as prime minister. *Id.* at 347-48. Although he acknowledged the presence of the fourteen war criminals, he stated that his visits were "not to beautify the history, but to pay tribute to those forced to be in the war and swear that Japan should not bring on war again." *Id.* at 347. Conversely, countries such as China viewed his visits as a "grave provocation to the Chinese people" that glorified Japan's imperial past. *Id.*; see also Tsunemoto, *Legal Precedents for 2005*, *supra* note 5, at 450 n.59.

⁵⁹ 1940 HANREI JIHŌ 122, 1218 HANREI TAIMUZU 183 (Sup. Ct., June 23, 2006).

⁶⁰ Unreported case (Matsuyama D. Ct., no. 435 (*wa*) 2004, Mar. 5, 2006).

⁶¹ "The State and its organs shall refrain from religious education or any other religious activity." KENPŌ, art. 20, para. 3.

violation of Article 89⁶² because it involves using public assets for the purpose of maintaining a religious facility.⁶³

3. Freedom of Speech

A Tokyo District Court's decision regarding Article 21⁶⁴ drew attention as it was the first case in thirty-seven years since the "Sarufutsu Incident"⁶⁵ that dealt with the violation of article 102, paragraph 1 of the National Public Service Act,⁶⁶ which restricts the political activities of governmental workers. In this case, the court held that the act of a national governmental worker delivering brochures issued by a political organization on his days off was in violation of the law. The court found the defendant guilty using a rationality standard and recognizing that "the Sarufutsu case decision is still good law."⁶⁷ The decision was unusual, however, in that it allowed for suspended sentence of the monetary penalty, which may have been the court's attempt to balance its decision.

On the other hand, the Tokyo District Court held that "a social consensus has not yet been reached that entering the premises (i.e., the hallways and the stairs) of an apartment building for a short period during the day to distribute flyers at each unit's mailbox clearly constitutes trespass" [in a case] regarding whether the distribution of political flyers at an apartment building constituted trespass.⁶⁸ Furthermore, the court noted that although it is generally agreed that [unauthorized] entry into the common areas of an apartment building, even for the purposes of distributing political flyers, is [not permissible], [since] management made no substantive efforts [to exclude the entrants] the entry was not a trespass. The court only went as far to hold that "although the distribution of political flyers is protected by Article 21, the residents of an apartment complex have

⁶² "No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority." KENPŌ, art. 89.

⁶³ Unreported case (Sapporo D. Ct., no. 8 (*u*) 2006, Mar. 3, 2006).

⁶⁴ "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated." KENPŌ, art. 21.

⁶⁵ 9 KEISHŪ 393 (Sup Ct., Nov. 6, 1974) (involving conviction of a postal worker for putting up political posters on a public bulletin board during his off-work hours); see Tsunemoto, *Judicial Decisions for 2004*, *supra* note 5, at 155 n.69.

⁶⁶ "Officials shall not solicit, or receive, or be in any manner concerned in soliciting or receiving any subscription or other benefit for any political party or political purpose, or engage in any political acts as provided for by rules of the National Personnel Authority other than to exercise his/her right to vote." Kokka Kōmuin Hō [National Public Service Act], Law No. 120 of 1947 as amended by Law No. 54 of 1995, art. 102, para. 1.

⁶⁷ Unreported case (Tokyo D. Ct., June 29, 2006).

⁶⁸ Unreported case (Tokyo D. Ct., no. 61 (*wa*) 2005, Aug. 28, 2006).

no obligation to have to listen to others express their political views in the common areas of their private dwelling Such acts are not automatically justified by Article 21.”⁶⁹

In the incident where an NHK⁷⁰ reporter refused to testify about his information sources during witness examination for a civil lawsuit regarding an assessment of a tax penalty on a U.S. corporation’s Japanese entity, the Third Petty Bench held that considering the fact that the freedom of the press is warranted under Article 21 and that the freedom of collecting information also deserves the same respect under the same article, protecting the sources of information amounts to a great social value. “Thus, the witness, as a general rule, has the right to refuse to disclose any information.”⁷¹ This was the first Supreme Court decision to acknowledge the right to refuse to testify on the grounds of privacy of sources of information.

Many precedents exist regarding inmates’ freedom of speech, starting from the Supreme Court’s decision in the Yodo-go Hijacking Newspaper Article Erasure Incident.⁷² [In a case] considering whether a warden’s prohibition of correspondence pursuant to article 46, paragraph 2 of the Prison Law⁷³ violates Article 21 of the Constitution,⁷⁴ the First Petty Bench for the first time ruled that taking the Yodo-go Hijacking Case decision into account, the substantial probability standard should also be applied to the exchange of letters between an inmate and a non-family member. Thus, the constitutionality of article 46, paragraph 2 of the Prison Law, which permits exchanges only in cases of special necessity, should be construed *prima facie*. There is room for debate, however, as to whether this restrictive construction is within the limits of statutory interpretation. This reading should be assessed in the context of the amendment of the Prison Law then proceeding through the Diet.⁷⁵ Other

⁶⁹ *Id.*

⁷⁰ Nippon Hōsō Kyōkai (日本放送協会), Japan Broadcasting Association.

⁷¹ 1954 HANREI JIHŌ 34, 1228 HANREI TAIMUZU 114 (Sup. Ct., Oct. 3, 2006).

⁷² “Yodo-go” refers to a Japan Airlines airplane that was hijacked by nine members of the Japanese Communist League-Red Army Faction in 1970. National Police Agency, *Movements of the Japanese Red Army and the “Yodo-go” Group*, <http://www.npa.go.jp/keibi/kokutero1/english/pdf/sec03.pdf>. In the Yodo-go Newspaper Article Erasure Case the Supreme Court dismissed an appeal by members of the Japanese Red Army challenging an order preventing them from reading any newspaper or books regarding the hijacking while in detention and awaiting judgment. Tsunemoto, *Judicial Decisions for 2004*, *supra* note 5, at 155 n.69.

⁷³ Kangoku Hō [Prison Law], Law No. 28 of 1908, art. 6.

⁷⁴ “Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.” KENPŌ, art. 21.

⁷⁵ 1929 HANREI JIHŌ 37, 1208 HANREI TAIMUZU 72 (Sup. Ct., Mar. 23, 2006).

cases which used the substantial overall probability standard include a decision by the Nagoya District Court, which held a warden's disposal of a letter unconstitutional.⁷⁶

4. Freedom of Assembly

In both the Third Petty Bench's decision regarding Izumisano City's Community Center⁷⁷ as well as the Second Petty Bench's decision regarding the Ageo City Welfare Center incident,⁷⁸ the panels held that the risk of opponents' obstruction would justify restricting the use of public facilities only in special circumstances where disorder could not be prevented by police intervention or similar means. But in a case where a prefectural teachers association's application to use middle school facilities for an educational research meeting was rejected by the city board of education owing to the risk of right-wing organizations' interference, the Third Petty Bench recognized that where permission to use school facilities for extracurricular purposes was required pursuant to article 238, section 4, paragraph 4 of the Local Autonomy Law,⁷⁹ it was a matter to be determined under the board's discretion.⁸⁰ The court determined a standard, expanding the meaning of "obstruction to educational activities" listed in the grounds to deny use which are provided for in article 85 of the School Education Law to include negative effects on the students' emotional well-being or the recognition of a clear risk of harm to future student well-being, and that the board would be in violation of the law only if its decisions lack factual basis or are invalid as going against social morals.⁸¹ With this legal framing, in the present case, the court nevertheless held that the committee's rejection of the application had exceeded its discretion and recognized the [plaintiff] association's request for compensatory damages from the state.⁸²

D. *The Right to Live*

In a case concerning whether the Municipal Nursing Care Insurance Ordinance violated Article 25 of the Constitution⁸³ because it

⁷⁶ 1933 HANREI JIHŌ 102 (Nagoya D. Ct., Jan. 27, 2006).

⁷⁷ 3 MINSHŪ 687 (Sup. Ct., Mar. 7, 1995).

⁷⁸ 3 MINSHŪ 549 (Sup. Ct., Mar. 15, 1996).

⁷⁹ Chihōjichi Hō [Local Autonomy Law], Law No. 68 of 1948, art 238 sec. 4 para. 4.

⁸⁰ 2 MINSHŪ 401, 1936 HANREI JIHŌ 63, 1213 HANREI TAIMUZU 106 (Sup. Ct., Feb. 7, 2006).

⁸¹ *Id.*

⁸² *Id.*

⁸³ "All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for

lacked provisions exempting full payment of premium to those primary-level pensioners⁸⁴ who are exempt from paying municipal tax pursuant to article 6, paragraph 2 of the Public Assistance Law⁸⁵ and because it kept back premiums from pensions, the Third Petty Bench used the Supreme Court's decision in the Horiki case.⁸⁶ It held that the fact the Municipal Nursing Care Insurance Ordinance lacks tax exemptions for premiums and adopts the "deduction in advance" system does not make it overly irrational; there are regulations which allow the issuance of the actual expense of the premium to welfare recipients, and the law reflects the principles of cooperation and fellowship among the nation's people.⁸⁷

the promotion and extension of social welfare and security, and of public health." KENPŌ, art. 25.

⁸⁴ Daiichigō hokensha (第一号保険者) are pensioners enrolled in the national insurance program who are over sixty-five years old. Those aged forty to sixty-four are in the dainigō hokensha (第二号保険者) secondary level. LOUISE PICON SHIMIZU ET AL., JAPAN HEALTH HANDBOOK 78 (1998).

⁸⁵ Seikatsu Hogō Hō [Public Assistance Law], Law No. 144 of 1950, art. 6, para. 2.

⁸⁶ 7 MINSHŪ 1235 (Sup. Ct., July 7, 1982). Mrs. Horiki, a blind woman living on public assistance, sought child support assistance to raise her son. The court denied her request and held that Article 25

does not oblige the State to assume any concrete and actual obligations toward individual citizens. Instead, the right to such a life is realized through creative and expansive social legislation:

[T]he concept of "minimum standards of wholesome and cultural living" . . . is extremely abstract and relative. . . . When considering implementation of the about provisions through legislation, the State must not overlook the nation's financial conditions. . . . Selection of specific concrete legislative measures . . . is left to the legislature's broad discretion and is not suitable for judicial review except in cases of gross unreasonableness and clear abuse of discretion.

Fritz Snyder, *The Fundamental Human Rights*, 14 INT'L LEGAL PERSP. 30, 46-47 (2004). The court "established for the first time a doctrine on the relationship between Article 25's guarantee of the right to wholesome living and the provisions of the welfare law." Hidenori Tomatsu, *Equal Protection of the Law*, in JAPANESE CONSTITUTIONAL LAW 187, 198-99 (Peter R. Luney, Jr. & Kazuyuki Takahashi, eds., 1993).

⁸⁷ 1930 HANREI JIHŌ 80, 1208 HANREI TAIMUZU 78 (Sup. Ct., Mar. 28, 2006).