

Commentary on Important Legal Precedents for 2007: Trends in Constitutional Law Cases

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I. INTRODUCTION

As in the past, I have drawn only from cases dealing with substantive constitutional law issues decided during the preceding calendar year. The cases featured in this article have either been published in Japanese reporters or are available on the official website of the Japanese Supreme Court, so readers can refer back to the original

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material.^{1,2} Please note that unlike in past years, this article examines cases decided between November 2006 and October 2007.³ As of February 2008, court opinions that display only case numbers were unavailable in the printed reporters listed below.⁴ Nonetheless, these opinions are available electronically and can be accessed by going to the Japanese Supreme Court's official website and entering the case numbers into the appropriate search engine.⁵

As introduced in this column last year, I 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 Juristo editors and the help of Associate Professor of Law Mark Levin. The English versions from 2004 through 2006 are already posted on the journal's website, and translation for 2007 is now in progress.⁶

II. POLITICS AND GOVERNMENT

A. *The Judiciary*

Under the prevailing view among scholars and existing Supreme Court precedent,⁷ the final authority over the results of nationally administered academic or technical examinations rests with the testing agency whose determinations are not subject to judicial review.⁸

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

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

³ In previous years, the author examined cases decided between January and October.

⁴ Some of these decisions have been issued in print in the interim between Professor Tsunemoto's deadline and publication of this translation.

⁵ In order to access these precedents, English speaking readers may go to the website, click on "English," then click on the "Judgments of the Supreme Court" link, and enter the case number or date of the decision into the search engine. Some but not all of the cases are available in translation there.

⁶ See Teruki Tsunemoto, *Trends in Japanese Constitutional Law Cases: Juristo Commentary on Important Judicial Decisions for 2004*, 8 ASIAN-PAC. L. & POL'Y J. 138 (Daryl Takeno trans., 2006), [hereinafter Tsunemoto *Judicial Decisions for 2004*]; see also Teruki Tsunemoto, *Trends in Japanese Constitutional Law Cases: Juristo Commentary on Important Judicial Decisions for 2005*, 8 ASIAN-PAC. L. & POL'Y J. 431 (John Donovan et al. trans., 2007), [hereinafter Tsunemoto, *Judicial Decisions for 2005*]; see also Teruki Tsunemoto, *Commentary on Important Legal Precedents for 2006: Trends in Constitutional Law Cases*, 9 ASIAN-PAC. L. & POL'Y J. 213 (Asami Miyazawa and Angela Thompson trans., 2008), [hereinafter Tsunemoto, *Legal Precedents for 2006*]. All are available at <http://www.hawaii.edu/aplpj>.

⁷ [20] 2 MINSHŪ 196 (Sup. Ct., Feb. 8, 1966) (a case concerning nationally administered licensing examination of Professional Engineers).

⁸ "Often referred to as the 'center test,' it is made up of standardized exams that are required for applicants to the 82 national universities and 74 municipal universities as the first stage of the screening process." *'Exam Hell' Now Not So Hot: Student-starved*

Nonetheless, the Tokyo High Court drawing from the prevailing view and precedent, and the fact that national universities are publicly owned and managed entities held that the courts can intervene when national universities base their admission decisions on criteria that are clearly without foundation by law, regulation or constitutionality.^{9, 10, 11} The court reasoned that these universities are public institutions and thus bound by constitutional principles when exercising their discretionary power. The Court found that whether a university was acting appropriately when making an admission decision is an issue that the courts can review applying concrete principles of law.

There have been new developments concerning the “legal principle of constituent society.” Under this principle, conflicts arising out of internal matters of autonomous [nongovernmental] organizations, such as religious associations, labor unions, bar associations, political parties, etc., are not subject to judicial review as long as these organizations have their own self-governing regulations and the conflicts do not directly affect the general public order under law. The Osaka District Court relied on this principle when deciding a case challenging the validity of the [local] judicial scrivener association’s advisory warning to a member by examining whether the measure would affect the plaintiff’s rights and

schools lower the bar as pool of applicants dries up, JAPAN TIMES, Jan. 29, 2009, available at <http://search.japantimes.co.jp/cgi-bin/nn20090120i1.html> [hereinafter ‘Exam Hell’ Now Not So Hot]. Nowadays, many private universities also require the exam. *Id.* Applicants are tested on five subjects, including Japanese language, social studies (Japanese history, world history, geography and civics), foreign language (English, French, German, Chinese and Korean), science (biology, physics and chemistry) and mathematics. *Id.* The tests are multiple choice, but the English portion of the exam, which is taken by a majority of applicants, includes a listening comprehension component. *Id.* According to the National Center for University Entrance Examinations, which administers the exams, “the center test ‘primarily aims to measure the basic academic achievement of prospective students upon concluding their high school education.’” *Id.*

⁹ There are eight high courts located in Tokyo, Fukuoka, Osaka, Nagoya, Sapporo, Takamatsu, Sendai, and Hiroshima with appellate jurisdiction over judgments from district and family courts and criminal judgments from summary courts. See Tsunemoto *Judicial Decisions for 2005*, *supra*, note 6 n.15 (2007) (citing Percy R. Luney, *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 LAW & CONTEMP. PROBS. 135, 147 (1990)).

¹⁰ After receiving their center test scores, examinees apply to take the individual examinations offered by public [or private] universities. See ‘Exam Hell’ Now Not So Hot, *supra* note 8 (2009). The total score of the center test is important because many universities set the minimum points required to take their individual exams. *Id.* The individual tests are not merely multiple choice but can also include essay and interview portions. *Id.* Admission decisions are “based on the combined score of the center tests and the exams from the universities. *Id.*

¹¹ 179 HANREI JIHŌ 70 (Tokyo High Ct., Mar. 29, 2007).

interests as a citizen.^{12, 13} The court found that the measure itself was meant only to draw the member's attention and advise them to take necessary actions and thus there had been no affect upon the plaintiff's rights and interests as a citizen. However, the court concluded that the appropriateness of this advisory warning was subject to judicial review because it in fact directly affected the member's rights and interests in the general public order under law. This was because when an advisory warning is issued, notice is also given to the Japan Federation of Judicial Scriveners' Association, a higher level organization,¹⁴ and to the chief administrator of the Legal Affairs Bureau [of the Ministry of Justice], who has the authority to take disciplinary action [against the member]. Therefore, receiving an advisory warning is not only an internal affair but could be an obstacle to that person's status in their professional community and future practice.

Recently, law suits seeking reparations against the national government for legislative omissions have drawn some attention. One such case was resolved by the Otsu District Court, which followed an earlier Grand Bench decision which had outlined criteria for determining whether an omission violates the National Compensation Law.^{15, 16} In the

¹² Judicial scriveners, known as *shiho-shoshi* (司法書士), might be best described as free standing licensed paralegals with specifically designated, limited practice areas. They are authorized to represent their clients in real estate registrations, incorporation matters, preparation of court documents and filings with the legal affairs bureau, but are not authorized to represent their clients in front of district courts or in more advanced stages of litigation. See Japan Federation of Solicitor Associations, English Information, <http://web.archive.org/web/20080106180843/http://www.shiho-shoshi.or.jp/web/en/englishi-info.html> (last visited Apr. 6, 2009).

¹³ 1978 HANREI JIHŌ 32, 1249 HANREI TAIMUZU 285 (Osaka D. Ct., Jan. 30, 2007).

¹⁴ See, generally Japan Federation of Shiho-Shoshi Lawyer's Association, <http://www.shiho-shoshi.or.jp/english> (last visited Apr. 6, 2009).

¹⁵ The Supreme Court of Japan is comprised of a Grand Bench upon which all 15 justices serve, and three Petty Benches upon which five justices each serve. The Grand Bench predominantly hears constitutional law cases or cases establishing new judicial precedent. Other issues on appeal to the Supreme Court are heard by one of the three Petty Benches. Grand Bench proceedings require a quorum of nine justices, while Petty Bench hearings require at least three justices. A majority of eight justices are required to declare a law or regulation unconstitutional in a Grand Bench proceeding. See Percy R. Luney, *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 LAW & CONTEMP. PROBS. 135, 147 (1990). However, "[i]f key parts of the Constitution rests in the hands of the executive, not the judiciary, as is the case with the pacifism provision of Article 9, then the meaning of the Constitution can change with shifting political coalitions, as it does now." COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 182 (Kenneth L. Port & Gerald Paul McAlinn eds., 2003) [hereinafter *Law and the Legal Process in Japan*].

¹⁶ [59] 7 MINSHŪ 2087 (Sup. Ct., Sept. 14, 2005) (examining a provision of the Public Offices Election Law that prevented Japanese citizens living abroad from voting

Otsu District Court decision, the court dismissed a claim for reparations arising from a provision of the Welfare Pension Insurance Act that categorically prohibits judicial attachment of employee pension benefits.¹⁷ Plaintiffs had alleged that the provision was both unconstitutional and that the Japanese Parliament and its members' failure to adopt legal measures to correct the provision constituted legislative nonfeasance. The court reasoned that the objective of the challenged provision was to add stability to the beneficiaries' lives and improve their welfare by preventing anyone but the beneficiary from receiving the pension. Accordingly, the court held that the challenged provision was constitutional because prohibiting attachment of entitlement to pension benefits without exception is both rational and necessary to achieving this objective, and thus the Parliament's failure to act did not violate the National Compensation Law.

B. *Pacifism*

In a case seeking to effectuate rights to individuality which entitled plaintiffs' to have "a conscience that wishes for peace" as one element of the inherent right to live in peace derived from articles 9, 13 and 19 as well as from the Preamble of the Constitution,¹⁸ the Kyoto District Court dismissed plaintiffs' demands for injunctions seeking withdrawal of Self Defense Forces from Iraq and barring the government from sending any more troops abroad in the future.¹⁹ The court first found that "the dispatch of Self-Defense Forces to Iraq and elsewhere under the Special Measures Law for Humanitarian Aid and Iraq Reconstruction is understood to be

for individual candidates). "[T]he 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." Tsunemoto *Judicial Decisions for 2005, supra*, note 6, at 433 (2007). "The court ordered the government to pay 5,000 yen in compensation to each plaintiff, saying it is liable for damages if the Diet doesn't enact laws in a timely manner essential for citizens to exercise their rights. The decision was reached by a majority of 12 of the 14 top court justices involved in the case." *Supreme Court Rules that Expats' right to vote violated*, JAPAN TIMES, Sept. 15, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20050915a1.html>.

¹⁷ 1989 HANREI JIHŌ 97 (Otsu D. Ct., Aug. 23, 2007).

¹⁸ "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes." KENPŌ [JAPAN CONST.], art. 9, available at <http://hourei.hounavi.jp/sonota/constitutionofjapan.php#1>. "The history of Article 9 is imbedded in the history of the Pacific War (*Taiheyo Senso*), Japan's portion of World War II." See *Law and the Legal Process in Japan, supra* note 15, at 213. As noted in the 2006 version of this article, the very existence of the Japanese Self-Defense forces has been rife with controversy. See Tsunemoto *Legal Precedents for 2006, supra*, note 6, at 217-18 n.24 (2007). The Constitution reads in relevant part: "land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerence of the state will not be recognized." KENPŌ, art. 9.

¹⁹ Unreported case (Kyoto D. Ct., no. 691 (*wa*) 2005, Mar. 23, 2007).

essentially an exercise of public power, therefore the claim for injunctive relief in the instant case implies a claim that would invalidate an exercise of administrative authority and the activity which resulted.” Accordingly, the court rejected the plaintiffs’ claims for injunctive relief against the government “because as the plaintiffs would have no right to seek damages under private law, they have no claim for injunctive relief in the instant litigation.” The court also rejected the plaintiffs’ damages claims based upon violations of their “consciences that wish for peace” reasoning [first] that the Preamble and article 9 of the Constitution do not represent guarantees of concrete rights and [second] “in light of the fact that peace is itself ambiguous and an idea that is nothing more than an abstract concept towards a goal, . . . the mere notion of ‘consciences that wish for peace’ similarly does not create any concrete rights nor any interests that warrant legal protection.”²⁰

C. *The Electoral System*

In a case challenging the apportionment ratio for the September 2005 election of members of the House of Representatives,²¹ the Grand Bench once again reviewed and upheld the constitutionality of voter districting regulations defining single-seat electoral districts under the Public Office Election Law.²² This was the first decision by the Court handed down since zoning districts had been redefined in 2002. Although the maximum apportionment ratio [at the time of the 2002 redistricting] had been 1: 2.064 based upon the 2000 national census data, the ratio was 1: 2.171 on election day. The Court found that this did not constitute such a disparity that it infringed on the equality of value per vote required by the Constitution. The fact that the Court upheld the ratio in this case had been expected as the Grand Bench had previously upheld a maximum

²⁰ However, in a more recent case, “[t]he Nagoya High Court . . . ruled that the Air Self-Defense Force’s mission in Iraq includes activities that violate the war renouncing Constitution.” *Major Ruling on SDF’s Iraq Mission*, JAPAN TIMES, Apr. 20, 2008, available at <http://search.japantimes.co.jp/cgi-bin/ed20080420a1.html>.

²¹ The Japanese Parliament is a bicameral body, which is comprised of the Lower House (House of Representatives) and Upper House (House of Councillors). Members of the Lower House are elected either by single-seat districts or national, plural electoral blocs, which are awarded seats proportionately to the number of ballots cast for each part. Members of the Upper House are elected from prefectural districts or a nationwide district in a proportional representation system. See Tsunemoto *Judicial Decisions for 2005*, *supra*, note 6, at 140 n.8 (2007). “Malapportionment arises when it takes more raw votes to get elected in populous districts . . . than it does in districts with relatively far fewer people. . . . This situation raises constitutional questions regarding the doctrine of ‘one person one vote.’” See *Law and the Legal Process in Japan*, *supra* note 15, at 188.

²² [61] 4 MINSHŪ 1617, 1977 HANREI JIHŌ 54, 1247 HANREI TAIMUZU 111 (Sup. Ct., Jun. 13, 2007).

ratio of 1: 2.309 for the 1994 single seat districting regulations,²³ but it is worth noting that support for the legal principles that the majority opinions have traditionally taken [in these cases] seems to be gradually decreasing. Moreover, as in a similar case decided by the Grand Bench on October 4, 2006,²⁴ Justice Nasu issued a concurring opinion, arguing that it is necessary to consider single seat electoral districts and proportional representation districts as a unit when assessing the constitutionality of voting apportionment schemes. However, as was the case in the 2006 decision, only Justice Tsuno joined this opinion.

III. FUNDAMENTAL HUMAN RIGHTS

A. *The Right to Privacy*²⁵

This term, there continued to be a number of cases [challenging the constitutionality] of the Juki Net system.²⁶ The Osaka High Court drew attention when it became the first court to declare the Juki Net system unconstitutional at the high court level.²⁷ The court began by finding that

²³ [53] 8 MINSHŪ 1441 (Sup. Ct., Nov. 10, 1999).

²⁴ [60] 8 MINSHŪ 2696 (Sup. Ct., Oct. 4, 2006).

²⁵ “The right to privacy (*purai bashii no kenri*) was first recognized in Japanese law in a 1964 district court decision involving Yukio Mishima’s *After the Banquet* (*Utage no ato*) a ‘model novel’ mixing fact and fiction in its depiction of the marital affairs of Hachiro Arita, a noted Tokyo Politician.” See *Law and the Legal Process in Japan*, *supra* note 15, at 275.

²⁶ The Basic Resident’s Registration Network (*Jūmin Kihon Daichō Nettowāku*, 住民基本台帳ネットワーク) is a government collection of personal data about its citizens. Tsunemoto, *Legal Precedents for 2006*, *supra*, note 6, at 216 n.15 (2008). “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, available at <http://search.japantimes.co.jp/cgi-bin/nn20070202a5.html>. Under the Juki Net system, residents are assigned an identification number which government administrators can use to access and transmit personal data online. *Govt Starts Juki Net System*, DAILY YOMIURI, Aug. 6, 2003, at 1. Concerns about inadvertent disclosure or potential government abuse of personal information have led to numerous lawsuits across the country. See Tsunemoto, *Judicial Decisions for 2005*, *supra*, note 5, at 440-442 (2007) (detailing the various decisions of courts across Japan); see also DAILY YOMIURI, MAR. 8, 2008, available at <http://www.yomiuri.co.jp/dy/national/20080308TDY04304.htm> (reporting subsequent developments and court decisions).

²⁷ 1962 HANREI JIHŌ 11 (Osaka High Ct., Nov. 30, 2006). “The high court, acting on a suit filed by 16 residents in Osaka Prefecture, ordered three city governments to delete resident registry codes and data on four of the plaintiffs.” *High Court Backs Foes of Juki Net Registration*, JAPAN TIMES, Dec. 1, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20061201b3.html>. However, the court turned down the plaintiffs’ damages claims. *Id.*

in an information society, “the interest in being able to control one’s private information (*i.e.*, the right to control over one’s own information) is an important component of the right to privacy and personal autonomy guaranteed under the Constitution.” The court continued: “among the information which is considered private, there is information (*i.e.*, essential information) that is valued for its direct affect on one’s personal autonomy, such as [information about] one’s thoughts, beliefs, or religions, for which people generally demand a higher level of concealment. Then there is all other private information (*i.e.*, ancillary information), where it is unclear how much concealment is demanded and even what most people would include in this category. . . . Even though the bounds of those matters are presently unclear, the right to control over one’s own information should not be interpreted as being undeserving of recognition.”

The court then clarified its position by noting how Article 13’s guarantee of the right to control over one’s own information is based on cogent scholarly doctrines of constitutional interpretation. The court continued: “it can be acknowledged that under the Juki Net system, there is a considerable danger that the private information about many residents in government agencies’ possession could be used against any individual in an unpredictable context or at an unforeseeable time. We assess that risk as being beyond abstract, so as to be in fact concrete. . . . Therefore, it must be said that the Juki Net lacks rationality as a measure for achieving its administrative purposes. Moreover, as to the appellants and others who have never consented to the Juki Net system, the operation of the Juki Net system . . . poses a grave threat to their individual autonomy. And even if we were to take into account the validity of the Juki Net system’s administrative purpose and its necessity, we can not avoid concluding that the system violates the Constitution’s Article 13 because of the grave harm to the appellants’ and others’ privacy rights (*i.e.*, right to control over one’s own information).”

Finally, the court concluded that because there is a risk of irreparable harm in the government’s continuing to operate the system as to appellants and others, their demand for an injunction against the operation of the Juki Net system should be acknowledged and in concrete terms ordered the Governor to delete the appellants’ resident card codes.

On the other hand, in a similar case decided less than two weeks after the Osaka High Court’s decision, the Nagoya High Court upheld the constitutionality of the Juki Net system.²⁸ This decision overturned a

²⁸ 1962 HANREI JIHŌ 11 (Nagoya High Ct., Dec. 11, 2007). “The decision reverses the ruling made against the Ishikawa Prefectural Government by the Kanazawa District Court in May 2005 and comes 11 days after the Osaka High Court overrode a ruling rejecting a similar suit by plaintiffs in Osaka.” *High Court Voids Juki Net Ruling*, JAPAN TIMES, Dec. 12, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20061212a2.html> [hereinafter “*High Court Voids Juki Net Ruling*”].

judgment of the Kanazawa District Court, which followed the same reasoning as the Osaka High Court opinion [outlined above].²⁹ In sum, the Nagoya High Court issued three main holdings. First, the court held that the data used to certify personal identity under the Juki Net system is not likely to be disclosed indiscriminately or used for any purpose other than as prescribed by the Basic Registration Law, and therefore the handling of personal information under the Juki Net system is not a violation of Article 13 of the Constitution. Second, the court refused to acknowledge there being any tangible danger of personal information being leaked out or otherwise emerging from the Juki Net system. Third, the court could not find any concrete danger that the government assumes centralized control over personal information derived from the Juki Net system with a substantially unrestrained purpose.

With the High Courts split over the constitutionality of the Juki Net system, the Supreme Court's 2008 ruling on the issue has since drawn attention. The First Petty Bench reversed the Osaka High Court decision employing similar reasoning as the Nagoya High Court outlined above.³⁰ The court held that the Juki Net system does not infringe upon the freedom from having personal information being indiscriminately disclosed which is one of the freedoms concerning one's personal life guaranteed under Article 13 of the Constitution.³¹

Additionally, this term the Saitama District Court issued a similar ruling as the Nagoya High Court decision outlined above.³² The court held that the Juki Net system does not infringe upon "an interest in being referred to by one's proper name" as a part of the right to personality guaranteed under Article 13 of the Constitution.³³ Similarly, the Oita

²⁹ 1934 HANREI JIHŌ 3 (Kanazawa D. Ct., May 30, 2005). "Of the 11 Juki Net cases that have been handled by district courts so far, the Kanazawa case is the only one residents have won." See *High Court Voids Juki Net Ruling*, *supra* note 28.

³⁰ Unreported case (Sup. Ct., no. 403 (o) 2007, Mar. 6, 2008).

³¹ For an editorial critiquing the Supreme Court's decision, see *Privacy v. Juki Net*, THE JAPAN TIMES, Mar. 18, 2008, available at <http://search.japantimes.co.jp/cgi-bin/ed20080318a2.html>. The paper's editors criticize the Court for "fail[ing] to mention the risk of registry information being accidentally uploaded to the Internet by a worker." *Id.* They highlight the need for local governments to adequately secure the system and train administrators who will be responsible for the vast amounts of personal data. The piece concludes by noting: "[t]he central government should not assume that the court ruling now gives it a green light to enlarge the scope of information to be stored on the network." *Id.*

³² Unreported case (Saitama D. Ct., no. 2240 (wa) 2002, Feb. 16, 2007). "The Saitama District Court turned down a suit . . . filed by six citizens who were demanding that their personal data be struck from the Juki Net public database on citizen identification, saying the data were needed for administrative purposes." *Juki Net Doesn't Violate Privacy: Saitama Court*, THE JAPAN TIMES, Feb. 17, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070217a2.html>.

³³ The right to personality is used here as a translation of *jinkaku ken* 人格権.

District Court rejected a suit seeking to invalidate the administrative act of assigning a resident's identification number as an invalid exercise of public power.³⁴

B. *Equality under the Law*

It is well known that upon ratification of the Convention Relating to the Status of Refugees in 1981,³⁵ the [Japanese] Government abolished the nationality requirement in the National Pension Law and related acts. However, in abolishing the nationality requirement, the government did not provide transitional or remedial measures to foreign residents who had been denied pension benefits. At the time the change in the law occurred, persons had to be between the ages of twenty and sixty to be eligible for pension benefits, and those who did not meet the necessary age requirements were ineligible. Even foreign residents who fell into the necessary age range still faced the problem of not being entitled to the full pension amount, because, before the change in the law, they could not contribute to the pension. In response [to this perceived injustice], five Korean residents filed a suit claiming this was an illegal act under the National Compensation Law, and arguing that the failure to adopt transitional aid measures for foreign residents violated both of the international human rights covenants³⁶ as well as Article 14, paragraph 1 of the Constitution.³⁷ However, the Kyoto District Court dismissed their claim, holding that “the Japanese Government’s failure to provide remedies for these foreign residents does not violate the Constitution.”³⁸

Jinkaku ken is a broad term used to describe legally protected personal interests, such as life, liberty, and reputation. See Tsunemoto, *Judicial Decisions for 2005*, *supra* note 6, at 437 n.19 (2007). 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).

³⁴ Unreported case (Oita D. Ct., no. 2 (*gyo u*) 2004, May 21, 2007).

³⁵ Convention Relating to the Status of Refugees (1981), *available at* http://www.unhchr.ch/html/menu3/b/o_c_ref.htm.

³⁶ Namely, the International Covenant on Civil and Political Rights, arts. 2-2 and 26, *available at* <http://www2.ohchr.org/english/law/ccpr.htm>; and the International Covenant on Economic, Social and Cultural Rights, arts. 2-2 and 9, *available at* <http://www2.ohchr.org/english/law/cescr.htm>.

³⁷ “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.

³⁸ Unreported case (Kyoto D. Ct., no. 3420 (*wa*) 2004, Feb. 23, 2007). “The lawsuit focused on whether it is constitutional for the state to exclude the plaintiffs from the pension system because of nationality and whether it is appropriate for authorities not

The pension is a limited fund and thus giving preference to Japanese nationals is permissible. The government's primary responsibility is to the social security of its own citizens, and thus it is not required to provide transitional or remedial measures to foreign residents."

Briefly noting other noteworthy cases dealing with issues of equality under the law—in one such case, the Third Petty Bench of the Supreme Court rejected the final appeal of a person whose parent had been afflicted with Hansen's disease.³⁹ The appellant had failed to file a suit for parental acknowledgement within the limitations period prescribed by the Civil Code. The court rejected the appeal, holding that the applicable proviso in Article 787 of the Civil Code did not violate Article 13, Article 14, paragraph 1, or Article 24, paragraph 2 of the Constitution.^{40, 41}

Although not decided on constitutional grounds, the Tokyo High Court sustained a damages claim brought by a woman who had suffered wage discrimination during her tenure as an employee and the Kyoto District Court held the owner of a rental unit liable for damages for refusing to finalize a rental agreement because a prospective tenant lacked Japanese nationality.^{42, 43}

Lastly, the Otsu District Court held there was no violation of Article 14 of the Constitution, where the government treated the special purchase redemption of government bonds distributed to the bereaved widow of a fallen soldier as income resulting in the loss of plaintiff's

to pay compensation." *Court Dismisses Korean over Denial of Pension*, THE JAPAN TIMES, Feb. 17, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070224a7.html>.

³⁹ Unreported case (Sup. Ct., no. 799 (o) 2006, Dec. 19, 2006). "Citing a 1955 Supreme Court precedent, [the Court] dismissed the woman's argument that the time limit violates constitutional guarantees of equality under the law and respect for individual dignity." *Suit by Daughter of Hansen's Patient Nixed*, JAPAN TIMES Oct. 26, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20061220a5.html>. While this case dealt with a Japanese citizen, the Supreme Court is divided on the issue of whether the Japanese government owes compensation to the relatives of its former colonists. See Masami Ito, *Court Splits Hansen's Compensation: Taiwanese win while Koreans are denied*, JAPAN TIMES Oct. 26, 2005, available at <http://search.japantimes.co.jp/cgi-bin/nn20051026a1.html>.

⁴⁰ "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.

⁴¹ "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes." KENPŌ, art. 24, para. 2.

⁴² 1981 HANREI JIHŌ 101 (Tokyo High Ct., Jun. 28, 2007).

⁴³ Unreported case (Kyoto D. Ct., no. 156 (wa) 2006, Oct. 2, 2007).

welfare protection.⁴⁴ The court found it rational and constitutional under Article 14 for the government to treat a single payment redemption as income, whereas uniform redemption over ten years was not treated as such.

C. Intellectual Freedom

1. Freedom of Thought⁴⁵

There continued to be a number of cases concerning the national anthem this term.⁴⁶ For the first time, however, the Supreme Court drew attention when its Third Petty Bench handed down an explicit opinion on the issue.⁴⁷ The case concerned a music teacher at a municipal elementary school who brought an action against the school to rescind the formal reprimand she received for refusing to follow the school principal's official order to perform the piano accompaniment to the national anthem at the school's entrance ceremony. She alleged that the order violated [her freedom of thought and conscience guaranteed under] Article 19 of the Constitution.^{48, 49, 50} The Supreme Court wrestled with the issue of

⁴⁴ 292 HANREI JIHŌ 60 (Otsu D. Ct., Jan. 15, 2007).

⁴⁵ "Freedom of thought and conscience shall not be violated." KENPŌ, art. 19.

⁴⁶ In 1999, the Liberal Democratic Party successfully pushed through the Diet legislation making the *Hinomaru* 日の丸 the national flag (*kokki* 国旗) and *Kimigayo* 君が代 the national anthem (*kokka* 国歌) of Japan. See Tsunemoto, *Judicial Decisions for 2005*, *supra*, note 6, at 448 n.56 (2007) (citing Philip Brasor, *Freedom Is Flagging In Japan's Public School System*, JAPAN TIMES, Mar. 28, 2004). Shortly after the legislation took effect, the Ministry of Education amended the *Gakushu Shido Yoryo*, a set of guidelines for public-school administration that includes a section on school assemblies, to include the *Hinomaru* and *Kimigayo*. *Id.* Moreover, the Ministry conducted compliance monitoring to enforce deference to these symbols. *Id.* This led to deepening controversy over the symbolism of the anthem and flag, as both are associated with Japan's imperialistic and militaristic history. See Tsunemoto, *Legal Precedents for 2006*, *supra* note 6, at 223 n.51 (2008) (citing *Flag, Anthem Now Official*, JAPAN TIMES, Aug. 9, 1999, available at <http://search.japantimes.co.jp/co.jp/cgi-bin/nn19990809a1.html>). "*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* represents a red sun against 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." *Id.* (citing Jun Hongo, *Hinomaru, 'Kimigayo' Express Conflicts Both Past and Future*, JAPAN TIMES, July 17, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070717il.html>).

⁴⁷ [61] 1 MINSHŪ 291, 1962 HANREI JIHŌ 3, 1236 HANREI TAIMUZU 109 (Sup. Ct., Feb. 27, 2007). "The top court's decision is its first in a series of lawsuits in connection with teachers who were punished for failing to follow orders to observe the national anthem and the *Hinomaru* national flag at school ceremonies." *'Kimigayo' Observance a Teacher Duty, Top Court Says*, JAPAN TIMES, Feb. 28, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070228a1.html>.

whether a compulsory action external to oneself but contrary to one's inner thoughts can become a violation of the freedom of thought. The Court determined that there would be a violation of the freedom of thought in cases where holding a particular thought is compelled or where holding a particular thought is banned or where disclosure of whether or not one holds a particular thought is compelled. However, the Court concluded that none of these circumstances arose in the instant case.

The Supreme Court's ruling above immediately established a [jurisprudential] framework for lower courts [on this issue]. [In a case decided very shortly afterwards] the Osaka District Court decided a case pertaining to a mandate issued by the local school board that the principals of every municipal elementary and junior high school order school employees to stand for the national anthem during school entrance ceremonies for the 2002 school year.⁵¹ The Board's mandate further directed the principals to investigate the names of all school employees who refused to stand and their justifications for doing so. At issue was whether the Board's mandate violated either Article 19 of the Constitution or a city ordinance ensuring the protection of personal information.

Following the Supreme Court's reasoning in the above case, the Osaka District Court stated:

The action of standing up during the national anthem is [one of the] commonly assumed duties of junior high school and elementary school teachers. Therefore, we can not objectively hold that such action constitutes an expression of one's specific thoughts or beliefs to the outside world, nor [can we say] that it is a denial of plaintiffs' innermost spiritual practices, or an enforcement of spiritual practice in violation of plaintiffs' thoughts or beliefs. Moreover, standing up during the singing of the national anthem as part of a [school] ritual is not directly connected to the plaintiffs' world view, philosophy, or religious beliefs. [In sum,] because the direction to stand during the national anthem is a matter of school policy, we do not assess that the plaintiffs' acts outwardly express any

⁴⁸ School entrance ceremonies have tremendous significance in Japan's academic social culture, perhaps even comparable to the role that graduation ceremonies play in the United States.

⁴⁹ According to a study conducted by the Organization of Reprimanded Teachers for the Retraction of the Unjust Punishment Involving Hinomaru & Kimigayo, 388 teachers had been reprimanded as of 2007. *See* Tsunemoto, *Judicial Decisions for 2005*, *supra*, note 6, at 448-51) (2007) (detailing past cases concerning the Japanese anthem and flag).

⁵⁰ "Freedom of thought and conscience shall not be violated." KENPŌ, art. 19.

⁵¹ Unreported case (Osaka D. Ct., no. 21 (*gyo u*) 2005, Apr. 26, 2007).

particular thoughts or beliefs held by the plaintiffs.

However, the court ruled that the school board's collection of personal information [regarding school employees who refused to stand during the singing of the national anthem] violated section 8 of the city ordinance protecting personal information. The court reasoned that if the school board wanted to collect such information it must disclose its purpose for doing so, provide a clear record of the information it was collecting, and collect the information directly from the persons in question. In this case, the school board had collected the information through the school principals. Therefore, the court found illegality on this point and granted the plaintiffs' reparations claims.

The next case concerned public high school teachers who did not stand for or join in the singing of the national anthem played at a graduation ceremony. Although they had already been notified of having passed the screening process to be nominated for reemployment, they were later advised that they had failed to meet the standards for reemployment and their successful completion was voided. The Tokyo District Court held that this was a legitimate exercise of personnel authority, reasoning: "voiding the approvals [for reemployment] in the instant case resulted from the plaintiffs' failure to stand during the national anthem and not because of the plaintiffs' thoughts or consciences."⁵² The court concluded that it is difficult to deny that the plaintiffs' violation of a work order by failing to stand during the national anthem would weigh negatively in the appraisal of their work performance. Accordingly, it was not unreasonable that the school board's consideration of [the teacher's actions] resulted in a failure to satisfy the conditions for passing their [overall] work performance review.

2. Separation of Religion and State⁵³

On June 26, 2007, the Sapporo High Court addressed the constitutionality of the installment of a small shrine in the hall of a neighborhood association which stood on city land.⁵⁴ At the entrance of the hall stood a *torii* gate (or "sacred arch"), and [a sign] displaying the word *jinjya* (or "shrine"). The court held that the shrine violated the

⁵² Unreported case (Tokyo D. Ct., no. 12896 (*wa*) 2004, no. 15415 (*wa*) 2005, Jun. 20, 2007).

⁵³ "[T]he state (in the form of the Emperor) and the religion (in the form of national Shinto) essentially became one under the Meiji Constitution . . . [which] was in effect in Japan for over 55 years. As such, some have argued that separation of state and religion in Japan is 'impossible and, by definition, a contradiction in terms.'" See *Law and the Legal Process in Japan*, *supra* note 15, at 284 (quoting *Comment: Noah Berlin, Constitutional Conflict with the Japanese Imperial Role: Accession, Yasukuni Shrine, and Obligatory Reformation*, 1. U. PA. J. CONST. L. 383, 387 (1998)

⁵⁴ Unreported case (Sapporo High Ct., no. 4 (*gyo ko*) 2006, Jun. 26, 2007).

principle of separation of religion and state prescribed under Article 20, paragraph 3 of the Constitution,⁵⁵ because the city provided the land upon which the shrine stood free of charge to the neighborhood association, and thus was [impermissibly] promoting the Shinto religion. Because the neighborhood association that owned the hall was neither a religious institution nor a religious association, the court found a violation of the “spirit” of the principle of separation of religion and state embodied in Article 89 of the Constitution.^{56, 57}

3. Freedom of Speech and Assembly⁵⁸

The Third Petty Bench decided a case challenging a Hiroshima City ordinance regulating motorcycle gangs as being impermissibly vague and broad and thus a violation of Article 21, paragraph 1, and Article 31 of the Constitution.^{59, 60, 61} The ordinance banned motorcycle gangs from occupying city squares, parks, and other public places and flaunting their

⁵⁵ “The State and its organs shall refrain from religious education or any other religious activity.” KEMPŌ, art. 20, para. 3.

⁵⁶ “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.” KEMPŌ, art. 89.

⁵⁷ The Grand Bench of the Supreme Court eventually upheld the Sapporo High Court’s finding of unconstitutionality. *See Free land for shrine found unconstitutional*, JAPAN TIMES, Jan. 21, 2010, available at <http://search.japantimes.co.jp/print/nn20100121a3.html>. In particular, the Grand Bench stated “[i]t is inevitable that the general public would believe that the local government supports a specific religion if it provides specific benefits to it.” *Id.* This decision is the Supreme Court’s second finding of unconstitutionality in cases regarding the separation of religion and state. *Id.* In 1997, the Supreme Court determined “it was unconstitutional for the Ehime Prefectural Government to use taxpayer money for offerings to Shinto shrines, including Yasukuni Shrine in Tokyo.” *Id.*

⁵⁸ “The competitiveness and nonindividualism of Japan’s sociopolitics seem to make the freedoms of assembly and association particularly critical to the nation’s constitutional democracy.” *See Law and the Legal Process in Japan*, *supra* note 15, at 271.

⁵⁹ [61] 6 MINSHŪ 601, 1987 HANREI JIHŌ 150, 1252 HANREI TAIMUZU 100 (Sup. Ct., Sept. 18, 2007). “A municipal ordinance in Hiroshima that bans assemblies by those who ‘wear unusual clothes, mask their faces and gather in a huddle’ in public places without approval from authorities was declared constitutional by the Supreme Court on Tuesday.” *‘Bosozoku’ Law Constitutional*, JAPAN TIMES, Feb. 28, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070919a9.html>, [hereinafter “*‘Bosozoku’ Law Constitutional*”].

⁶⁰ “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.” KEMPŌ, art. 21.

⁶¹ “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.” KEMPŌ, art. 31.

power causing city residents and tourists to feel threatened.⁶² The court acknowledged that the scope of the ordinance was not properly defined and thus there was a potential problem of being over broad in relation to Article 21, paragraph 1, and Article 31 of the Constitution. However, the court upheld the constitutionality of the ordinance. Viewing the ordinance in its entirety, including the detailed enforcement regulations, the court reasoned that it could be interpreted as regulating a limited and clear [range of activities]. The court considered three factors in assessing whether the ordinance was within the limits [of vagueness and over breadth] allowed for under Article 21, paragraph 1, and Article 31 of the Constitution. First, the court held that preventing the negative effects associated with motorcycle gangs is a legitimate purpose for regulation. Second, the court held that the ordinance is a rational means of preventing these undesirable effects. Third, the court held that the advantages of the ordinance outweighed its disadvantages. Therefore, the court concluded that the ordinance violated neither Article 21, paragraph 1, nor Article 31 of the Constitution.⁶³

In the decision, not only did Justices Fujita and Tahara dissent, but two other justices filed concurrences opposing the dissenters' views. This gives us reason to surmise that there had been a sharp division of views in the Petty Bench not only on the constitutionality of the ordinance but on the availability of strict statutory interpretation to avoid constitutional issues. In any case, the very fact that the concurring opinion referred to "the more practical interest in being able to prevent harm from motorcycle gangs" may indicate that this was a significant case as to the application of restrictive statutory interpretation.

The Osaka District Court decided a case involving a free lance journalist whose request to sit in on a city council committee meeting was denied.⁶⁴ The case challenged the approval system under a city ordinance for sitting in on committee sessions as well as city council practice of only granting permission [using the approval system] to members of the municipal press club. The journalist filed suit to invalidate the decision against the city in Osaka District Court, arguing that both the ordinance and the practice violated the Constitution's [guarantee of freedom of the

⁶² "The City of Hiroshima debuted an ordinance in April [2002] that could subject motorcycle gang members or their associates, including former bikers, who assemble to imprisonment. The first arrest came in November, when former biker gang members gathered in a city park." *Hiroshima Takes Aim at Bosozoku*, JAPAN TIMES, Dec. 18, 2002, available at <http://search.japantimes.co.jp/cgi-bin/nn20021218a9.html>.

⁶³ "Presiding Justice Yukio Horigome ruled the ordinance is inadequate, as it could possibly cover a broad range of meetings if it is applied literally, 'but it can be interpreted from its context that it mainly aims at cracking down on members of motorcycle gangs.'" See *'Bosozoku' Law Constitutional*, *supra* note 59.

⁶⁴ 1986 HANREI JIHŌ 91, 1250 HANREI TAIMUZU 87 (Osaka D. Ct., Feb. 16, 2007).

press under] Article 21, paragraph 1 and [the preference given to municipal press club members violated the Constitution's principle of equality under] Article 14, paragraph 1, as well as for reparations against the city for illegality in the committee chair's ruling denying the journalist permission to attend sessions.^{65,66} The court upheld the constitutionality of the approval process and city council practice. The court reasoned that committees of local municipal councils are internal bodies charged with carrying out specialized and technical deliberations. It is unavoidable that the freedom of residents to sit in and of the media to gather news be limited in order for the committees to freely and candidly carry out their discussions and thoroughly engage in their investigations. Municipal press clubs ensure the accuracy of news by members' collective self-regulation and cooperatively gather information according to standardized values and rules. Moreover, they are generally supported by public opinion. Therefore, the court concluded that the operation of the approval process to only allow members of the municipal press club to attend committee meetings did not violate either Article 21, paragraph 1, or Article 14, paragraph 1 of the Constitution. As today's trends seem to be overwhelmingly moving toward greater information disclosure and a greater variety of "places for free and lively debate" being guaranteed, it will be interesting to see whether this decision becomes a leading case on the subject.

Many municipal ordinances stipulate that a potential "breach of the peace" or "obstruction of administrative affairs" provides cause for denying permission to use a public place, such as a civic center, or rescinding permission after it has been given. However, problems have arisen where permission has been denied or rescinded based on the anticipation that *opponents* of those seeking permission will cause such breach or obstruction through their protest activities.⁶⁷ Both the Third Petty Bench of the Supreme Court [in the Izumisano case]⁶⁸ and the

⁶⁵ "Due in part to the vigor, freedom, and power of the mass media, a wide range of issues affecting their rights and responsibilities has been raised in social debate and in courts. Freedom lives and is moderated in the interplay of formal law, politics, and social culture in daily life." See *Law and the Legal Process in Japan*, *supra* note 15, at 274.

⁶⁶ "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.

⁶⁷ "Since 1948, the content or application of Public Safety Ordinances (*koan jorei*) has been at issue in much of the litigation involving freedom of assembly. Sixty such city and prefectural ordinances establish local public safety commissions (*koan unkai*) . . . fifty-three ordinances require a permit, and the remaining ordinances require prior notification." See *Law and the Legal Process in Japan*, *supra* note 15, at 271. Permits are rarely denied. However, "conditions have often been attached regarding the time, place, and manner of a public gathering, parade, or demonstration under both permit and notification systems." *Id.*

⁶⁸ [49] 3 MINSHŪ 687 (Sup. Ct., Mar. 7, 1995).

Second Petty Bench of the Supreme Court [in the Ageo City case]⁶⁹ have addressed this problem.⁷⁰ These decisions indicate that regulation of the affected group should be limited to cases where “it is clearly foreseeable that a specific danger is imminent” or “special cases where the potential for obstruction of administrative duties is obviously foreseeable in light of objective facts and it would be impossible for police to control the obstruction.” However, circumstances reveal that the problem has not yet been completely resolved.

In August of 2007, the Sendai High Court decided a case where the city government rescinded permission that it granted to a Korean opera troupe to perform a stage performance, including singing, dancing and instrumental accompaniment, at a civic center based upon the expectation that there would be protests from right wing organizations.⁷¹ The city government’s actions were based upon a similar regulation as the one discussed above. The district court had declared the city’s rescission void and enjoined its execution based upon the Administrative Case Litigation Act, Article 25-4 (as amended in 2004).⁷² On appeal, the Sendai High Court addressed two arguments. First, the court held that cancellation of permission [to use the civic center] would render the performance impossible. Accordingly, the opera troupe would lose its very reason for existence, which therefore equates to a violation of the constitutional guarantees of freedom of speech and assembly. The court reasoned that it was clear that a final decision could not be handed down by the scheduled date of the performance and therefore “the urgent need to avoid serious damage” prescribed by Article 25-2 of the Administrative Case Litigation Act applied to this case. Second, the court addressed whether Article 25-4 of the same act, regarding “when there appears to be no reason for the administrative action under review,” applied to the “risk of obstruction of administrative affairs” provision that the city had relied upon in justifying its rescission under its ordinance. The court quoted the Ageo City case⁷³ for its standard of review and pointed out that, considering the opera troupe had just performed in Sendai the previous year and in Tokyo in 2007, it was difficult to accept the position that there would be such a level of disorder that the police would be prevented from doing their work. Moreover, the court noted that the residents living in rental units in a

⁶⁹ [50] 3 MINSHŪ 549 (Sup. Ct., Mar. 15, 1996).

⁷⁰ “In both cases, 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.” See Tsunemoto, *Legal Precedents for 2006 supra* note 6, at 228 (2008).

⁷¹ 1256 HANREI TAIMUZU 107 (Sendai High Ct., Aug. 7, 2007).

⁷² Article 25 of the Administrative Case Litigation Act.

⁷³ [50] 3 MINSHŪ 549 (Sup. Ct., Mar. 15, 1996).

portion of the civic center should be able to put up with some noise, as should those living nearby in the city center. Lastly, the court noted that even right wing organizations are entitled to freedom of expression. Then, taking all of these factors into account, the court [upheld the injunction and] concluded that the petition in the instant case could not be characterized as one “where there appears to be no reason for the administrative action under review.”⁷⁴

The next case involved a candidate in an Upper House election and his campaign support group suing a TV station for damages. The plaintiffs alleged that the station violated their freedom to engage in campaign activities by secretly video taping their campaign offices during the election. The Nagaoka Branch of the Niigata District Court held:

the freedom to engage in campaign activities, one of the fundamental rights essential to maintain the proper functioning of a parliamentary democracy, is protected by the Constitution.⁷⁵ Therefore, it is a matter of course that the candidate in this case was guaranteed the freedom to engage in campaign activities. Moreover, it is generally understood that a constitutional right guaranteed to individuals should be applied to organizations – including unincorporated associations such as the campaign support group – to the extent the character of the right permits. The plaintiff group was formed to provide support and assistance to the candidate in his political activities. Because the unincorporated association lacking rights entitlement will act as necessary to achieve its purposes, the freedom to engage in campaign activities should also be guaranteed to the campaign support group.

The court further noted “with regards to the defendant news organization, we find that it has a greater awareness of the distinctive nature of campaign activities than the average citizen does and therefore in choosing its news gathering and filming methods it should decide upon careful

⁷⁴ The double-negative verbiage here derives from Article 25-4 of the Administrative Case Litigation Act, quoted in the text here, which stipulates that a court cannot issue a temporary injunction when there appears to be no possibility for a plaintiff to win on the merits. In this case, the Sendai High Court noted that the plaintiff’s possible success on the merits was determined, among other things, by whether there was a risk of obstruction of the management of the hall as stipulated in the city ordinance.

⁷⁵ 1984 HANREI JIHŌ 71 (Niigata D. Ct., Feb. 7, 2007). “Fuji Television Network Inc. was hit with a court order Wednesday to pay 360,000 yen in damages to House of Councilors member Naoki Tanaka and his support group for placing a hidden camera outside the entrance of his 2004 campaign headquarters.” *Fuji TV Must Pay Tanaka over Hidden Camera*, JAPAN TIMES, Dec. 18, 2002, available at <http://search.japantimes.co.jp/cgi-bin/nn20070208a7.html>.

consideration the effect its filming will have on those involved in the campaign.” Finding it inappropriate for the news agency to be “secretly filming” the campaign offices, the court allowed the plaintiffs’ damages claims.

4. Academic Freedom and University Autonomy

Researchers [including, professors, lecturers, research assistants, and university faculty] are the caretakers of the guarantee of university autonomy under the Constitution. The view that the organizational entities of faculty assemblies have the central role in these issues is traditionally strong in [constitutional law] scholarship. Article 59 of the Education Act, which stipulates “universities must form faculty assemblies to deliberate on important matters,” is understood to be derived from the spirit of the Constitution and accordingly these faculty assemblies have come to be regarded as wielding substantial influence over faculty personnel decisions and educational matters. However, practically speaking, the inevitable result has been that “because nothing is prescribed to define what constitutes an ‘important matter’ for the purposes of these faculty assemblies’ decision making, in the case of private universities that determination [of what constitutes an important matter] is itself understood to be an autonomous matter for the university entities.”⁷⁶ On July 13, 2007, the Second Petty Bench of the Supreme Court decided a case where a university entity formally reprimanded a professor, that is to say an individual who works to operate and carry out the university’s affairs [as a member of the faculty assembly] for remarks given to a newspaper.⁷⁷ The court took the stance that the faculty assembly’s authority [to make such determinations] is based exclusively on the administrative regulations of the corporate institution. Because the Act for the Establishment of National Universities was abolished and the Special Regulations Concerning Educational Public Service is no longer applicable,⁷⁸ it appears likely that the [recently incorporated] national

⁷⁶ See, e.g., 991 HANREI TAIMUZU 182 (Kobe D. Ct., Mar. 27, 1998).

⁷⁷ 1982 HANREI JIHŌ 152, 1251 HANREI TAIMUZU 133 (Sup. Ct., Jul. 13, 2007) (ruling in favor of the professor).

⁷⁸ For a long time, Japan’s national universities had “been steeped in lukewarm water . . . subject to the control of the state on the one hand while enjoying its protection on the other. *State University Autonomy*, JAPAN TIMES, Oct. 19, 2001, available at <http://search.japantimes.co.jp/cgi-bin/ed20011029a1.html>. In June of 2003, however, the Diet passed legislation conferring upon Japan’s national universities corporate status as “independent administrative agencies.” *Incorporation of State Universities*, JAPAN TIMES, Jul. 21, 2003, available at <http://search.japantimes.co.jp/cgi-bin/ed20030721a1.html>. Before the change, there were 99 nationally established colleges and universities across the nation. With incorporation that number was reduced to 89 and 123,000 teachers and employees on government payroll lost their status as civil servants. *Id.* Moreover, the administrative powers of university presidents were greatly strengthened, and “[t]o establish an efficient ‘top-down’ decision making process, each school . . . [was required]

universities will also be able to regulate their faculty assemblies according to their internal regulations.⁷⁹

D. *Economic Freedom*

The Second Petty Bench of the Supreme Court heard an appeal from a series of cases where admitted students to private universities had demanded a refund of their tuition deposits after opting not to attend the schools.⁸⁰ At issue was the constitutionality of Article 9, paragraph 1 of the Consumer Contracts Act, which limits the validity of liquidated damages [or penalty] clauses in consumer contracts.⁸¹ In reaching a conclusion, the court quoted a previous Grand Bench decision which provided a basis for determining the constitutionality of property rights restrictions: “[constitutionality] should be determined after balancing the purpose, necessity, and substance of the restriction, with the type or traits of the restricted property right, and the extent of the restriction.” The Court upheld the constitutionality of the statute recognizing the appropriateness of the legislative purpose for Article 9, paragraph 1 of the Consumer Contracts Law as well as the necessity and rationality of the measures imposed by the law.⁸²

to set up an executive committee comprising the president and directors.” *Id.* However, “there is real concern that major reform will not eventuate in national universities.” Luke Nottage, *Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, 2 *ASIAN-PAC. L. & POL’Y J.* 16, 29-30 (2001) (citing Professor Nakatani’s concerns regarding the proposed legislation to incorporate Japan’s national universities).

⁷⁹ In sum, given that these former national universities have been quasi-privatized, this same autonomy will likely be given to the former national universities as well.

⁸⁰ 1958 HANREI JIHO 61, 1232 HANREI TAIMUZU 82 (Sup. Ct., Nov. 27, 2006). Finding for the students, the High Court decisions had ordered the universities to refund tuition and related expenses based on the Consumer Contracts Act. The University appealed arguing that the Act contravened Article 29 of the Constitution, but the Supreme Court upheld the constitutionality of the Act. *Id.*

⁸¹ “As to a clause which stipulates the amount of liquidated damages in case of a cancellation or fixes the penalty, when the total amount of liquidated damages and the penalty exceeds the normal amount of damages to be caused by the cancellation of a contract of the same kind to the business operator in accordance with the reason, the time of the cancellation and such other things, the part that exceeds the normal amount.” Consumer Contracts Act, art. 9, para. 1, *available at* <http://www.japaneselawtranslation.go.jp/law>.

⁸² In a similar case, the Supreme Court upheld requests for tuition refunds by former students of the popular English language school Nova. *The Case Against Mr. Sahashi*, *JAPAN TIMES*, Jun. 28, 2008, *available at* <http://search.japantimes.co.jp/cgi-bin/ed20080628a2.html>. The litigation leading up to the suit caused the school to file for bankruptcy and led to the arrest of its former president. *Id.*

E. *Social Rights*

1. The Right to Live

In a series of cases reviewing failed attempts by disabled students to receive national pension benefits, the Tokyo, Niigata and Hiroshima District Courts had held the pension system to be unconstitutional. After the Tokyo High Court quashed the decision of the Tokyo District Court,⁸³ courts have upheld the constitutionality of the pension system so that, as noted in the 2006 version of this commentary, the Tokyo High Court decision represented a turning point. The Sapporo High Court's decision this past term continued this trend.⁸⁴

Another tendency that can be noted from this series of cases is the contrast between the earlier lower court decisions which based a finding of unconstitutionality solely upon violation of Article 14's principle of equality under the law versus the cases at the high court level which aligned Article 14 with a recognition of a broad scope of legislative discretion under Article 25.^{85, 86} Furthermore, when the Second Petty Bench of the Supreme Court upheld the judgment of the Tokyo High Court,⁸⁷ it quoted the Grand Bench's decision in the Horiki Case to rely upon Article 25 as its pivot point: "[the pension system] does not violate either Article 25 or paragraph 2 of Article 14 of the Constitution."⁸⁸ Reviewing a similar appeal from the Hiroshima High Court, the Third

⁸³ 1899 HANREI JIHŌ 46 (Tokyo High Ct., Mar. 25, 2005).

⁸⁴ Unreported case (Sapporo High Ct., no. 12 (gyo ko) 2005, Mar. 30, 2007).

⁸⁵ "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 the promotion and extension of social welfare and security, and of public health." KENPŌ, art. 25.

⁸⁶ "The Diet possesses especially broad discretionary power to regulate economic activities under the public welfare clauses of Articles 22 and 29. In cases where economic regulations have been challenged as unconstitutional, courts have repeatedly deferred to legislative judgment. Thus, economic regulations have been subject to the most lenient judicial review." *See Law and the Legal Process in Japan*, *supra* note 15, at 313.

⁸⁷ 1445 SAIBANSHŌ JIHŌ 1 (Sup. Ct., Sept. 28, 2007).

⁸⁸ [36] 28 MINSHŪ 1235 (Sup. Ct., Jul. 7, 1982). Mrs. Horiki was a blind woman living on public assistance, who sought child support assistance from the government to raise her son. The court denied her claim, holding 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. *See Tsunemoto Legal Precedents for 2006*, *supra*, note 6, at 229 n. 86 (2008) (quoting 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).

Petty Bench issued an almost identical decision, including a concurring opinion by Justice Tahara concerning legislative nonfeasance.⁸⁹ In order to overcome the broad legislative discretion allowed for under Article 25 of the Constitution, many scholars have advocated for placing greater emphasis on Article 14 and several district courts have issued decisions reflecting that approach. However, these two Petty Bench decisions upholding the constitutionality of the pension system recognize the primacy of broad legislative discretion under Article 25, and incorporate the Article 14 problem, thus apparently confirming the Supreme Court's stance.

Finally, among the cases concerning disabled students being denied national pension benefits, the Sendai High Court affirmed a district court judgment that had voided the original denial of pension benefits.⁹⁰ However, the court decided the case based on an interpretation of the conditions prescribed by Article 30-4 of the National Pension Law because the student had first sought treatment before turning 20 years old and the court avoided any consideration of constitutional grounds.

2. Basic Rights of Workers

Recently, there have been a number of lawsuits challenging the reduction in wages for local public officers due to the economic crisis. The Chiba District Court rejected a suit claiming, *inter alia*, that a prefectural ordinance requiring a decrease in the monthly salaries of government officials violated Article 28 of the Constitution.^{91,92} The court reasoned: "as for the employment conditions for local government officials, their basic rights as workers are set out not only by the system of the Personnel Commission and the Equalization Commission but also by a set of other mechanisms including ones which are counter-balancing [to those Commissions' actions]. Decisions of the local assembly which are the result of democratic processes are one of these [counter-balancing mechanisms]. Certainly, we recognize the system of the Personnel Commission and the Equalization Commission and especially the crucial role of the table of wages recommended by the Personnel Commission. But nonetheless, this too is at most a balancing measure and so we cannot find a direct violation of Article 28 of the Constitution when the process in the local legislature, whereby conditions for employment of local government officials were decided, did not apply the rates set out in the published table of wages." Accordingly, the court found no violation of

⁸⁹ 1445 SAIBANSHŌ JIHŌ 4 (Sup. Ct., Oct. 9, 2007).

⁹⁰ 1248 HANREI TAIMUZU 130 (Sendai High Ct., Feb. 26, 2007).

⁹¹ "The right of workers to organize and to bargain collectively is guaranteed." KEMPŌ, art. 28.

⁹² Unreported case, (Chiba D. Ct., no. 794 (wa) 2006, Jun. 21, 2007).

Article 28 despite that in the enactment of the ordinance, the Personnel Commission's role was limited to receiving opinions.